STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T16-0023**
	:	**16302501348**
M. L.	**:**	

DECISION

PER CURIAM: Before this Panel on December 14, 2016—Magistrate Abbate (Chair), Magistrate DiSandro, III, and Magistrate Goulart, sitting—is M.L.'s[1] (Appellant) appeal from the decision of Associate Judge Parker (Trial Judge) of the Rhode Island Traffic Tribunal, denying Appellant's motion to suppress evidence and affirming Appellant's charged violation of G.L. 1956 § 21-28-4.01, "Possession of marijuana, one ounce or less, 18 years or older." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 21-28-4.01(c)(3) and G.L. 1956 § 31-41.1-8.

I

Facts and Travel

On July 28, 2016, at approximately 10:52 p.m., Sergeant Andrew Barth (Sgt. Barth) of the Middletown Police Department issued Appellant a citation in connection with the aforementioned violation of § 21-28-4.01. *See* Summons. No. 16302501348. Thereafter, Appellant was arraigned on the charged violation and a trial date was scheduled for September 21, 2016. Appellant subsequently filed a motion to suppress evidence found during a search of

[1] Rhode Island law prohibits this Panel from revealing to the public, any personally identifiable information of an individual accused or found to be in violation of "possession of marijuana, one ounce or less, 18 years or older." Sec. 21-28-4.01(c)(2)(ix); *see* G.L. 1956 § 8-8.2-21. Instead, the initial's "M.L." will be used in reference to Appellant.

her vehicle. On September 21, 2016, the Trial Judge heard Appellant's motion to suppress and conducted a trial on the merits.

At trial, Sgt. Barth testified that on July 28, 2016, he pulled into the Wyatt Soccer Field in Middletown while on patrol that evening. (Tr. at 3, 5.) Upon arriving, Sgt. Barth observed three parked vehicles located near the soccer fields and across from a maintenance shed. *Id.* at 5. After positioning his vehicle behind the parked cars, Sgt. Barth "noticed in [his] rearview mirror multiple juveniles run[ning] out of the maintenance shed." *Id.* at 5-6. Sgt. Barth testified that he knew the maintenance shed was locked at that time and that no one was supposed to be there. *Id.* at 6. He then requested that additional police officers respond to the location to assist in searching the area. *Id.* Once other officers arrived, Sgt. Barth approached the maintenance shed and noticed that "there was a strong odor of marijuana coming from inside . . . ." *Id.*

At that time, Sgt. Barth began investigating the suspected breaking and entering of the maintenance shed. *Id.* During the investigation, Sgt. Barth learned that officers identified the registered owners of the three parked vehicles. *Id.* In speaking with the owners of the vehicles, Sgt. Barth came to suspect that the vehicles were owned by the parents of the juveniles he had observed running from the maintenance shed. *Id.*

Shortly thereafter, the juveniles' parents met with the police at the soccer field, and agreed to assist the officers by contacting the juveniles. *Id.* The father of a juvenile suspected to be involved in the breaking and entering contacted his son, R. B.[2] *Id.* The father informed Sgt. Barth that R.B. was with his girlfriend, the appellant in this matter, and that the two had agreed to meet with the police. *Id.*

[2] For the reason previously stated with respect to the identity of Appellant, this Panel is also prohibited from disclosing the identities of other individuals involved in the investigation. *See* § 21-28-4.01(C)(2)(ix); § 8-8.2-21. Therefore, this Panel will refer to the second individual as "R.B."

After some time, Appellant and R.B. arrived at the Wyatt Soccer Field in Appellant's vehicle. *Id.* Sgt. Barth began questioning Appellant about the breaking and entering. *Id.* While speaking with Appellant, Sgt. Barth asked if she knew where R.B. had been that evening, and if she knew anything about the events that transpired at the maintenance shed. *Id.*

Sgt. Barth testified that while he was speaking with Appellant, he detected a "strong odor of marijuana coming from inside of [Appellant's] vehicle." *Id.* at 7. When he asked Appellant whether "there was anything inside the vehicle that [he] needed to know about," Appellant indicated that there was nothing. *Id.* At that time, Sgt. Barth removed Appellant from her vehicle and had her searched by a female officer. *Id.* The officer found nothing during her search of Appellant. *Id.* Sgt. Barth then conducted a search of Appellant's vehicle. *Id.* During the search, Sgt. Barth located a "small amount of marijuana along with drug paraphernalia," in a handbag that belonged to Appellant on the floor in front of the passenger's seat. *Id.* at 7, 12. Sgt. Barth subsequently issued Appellant the abovementioned citation for a violation of § 21-28-4.01.

After hearing arguments regarding Appellant's motion to suppress, the Trial Judge denied the motion and sustained the charged violation. *Id.* at 20, 23. Appellant filed a timely appeal of the Trial Judge's decision. Forthwith is this Panel's decision.

II

Standard of Review

Pursuant to § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides, in pertinent part:

> "The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of

> fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the judge's findings, inferences, conclusions or decisions are:
>
> > "(1) In violation of constitutional or statutory provisions;
> > "(2) In excess of the statutory authority of the judge or magistrate;
> > "(3) Made upon unlawful procedure;
> > "(4) Affected by other error of law;
> > "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> > "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In reviewing a hearing judge or magistrate's decision pursuant to § 31-41.1-8, this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact." *Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993) (citing *Liberty Mutual Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [or magistrate's] decision is supported by legally competent evidence or is affected by an error of law." *Id.* (citing *Envtl. Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." *Id.* Otherwise, it must affirm the hearing judge's [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

III

Analysis

On appeal, Appellant contends that the Trial Judge's decision to deny the motion to suppress the marijuana found in Appellant's handbag was made "[i]n violation of constitutional or statutory provisions" and "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Sec. 31-41.1-8(f)(1), (5). Specifically, Appellant argues that the marijuana evidence was the product of an illegal search, since Sgt. Barth did not have probable cause to search the vehicle.

In 2012, the Rhode Island General Assembly passed an amendment to § 21-28-4.01 of the Uniform Controlled Substance Act, effective April 1, 2013. *See* § 21-28-4.01. As amended, § 21-28-4.01 states, in relevant part:

> "[T]he possession of one ounce (1 oz.) or less of marijuana by a person who is eighteen (18) years of age or older . . . shall constitute a civil offense, rendering the offender liable to a civil penalty in the amount of one hundred fifty dollars ($150) and forfeiture of the marijuana, but not to any other form of criminal or civil punishment or disqualification." Sec. 21-28-4.01(c)(2)(iii).

The General Assembly also granted exclusive jurisdiction of all cases involving violations of § 21-28-4.01(c)(2)(iii) to the Rhode Island Traffic Tribunal. *See* § 21-28-4.01(c)(3) ("Any and all violations of (c)(2)(iii) and (c)(2)(iv) shall be the exclusive jurisdiction of the Rhode Island traffic tribunal. All money associated with the civil fine issued under (c)(2)(iii) or (c)(2)(iv) shall be payable to the Rhode Island traffic tribunal"). Consequently, this Panel must determine whether the Trail Judge's decision to allow the admission of the marijuana evidence was made in accordance with state and federal constitutional provisions.

It is well established that "the Fourth Amendment to the United States Constitution, as well as article I, section 6, of the Rhode Island Constitution, protects '[t]he right of the people to

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Werner*, 615 A.2d 1010, 1011 (R.I. 1992). The United States Supreme Court has held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One of the exceptions to the warrant requirement is the automobile exception. *See Carroll v. United States*, 267 U.S. 132, 153 (1925) (holding that automobiles do not necessarily require a warrant if a law enforcement officer reasonably believes that a crime has or soon will be committed).

With respect to the automobile exception, the Rhode Island Supreme Court has held that "as long as the police have probable cause to believe that an automobile, or a container located therein, holds contraband or evidence of a crime, then police may conduct a warrantless search of the vehicle or container, even if the vehicle has lost its mobility and is in police custody." *Werner*, 615 A.2d at 1013–14; *see also State v. Santos*, 64 A.3d 314, 319 (R.I. 2013). Probable cause exists when "'the facts and circumstances within [an officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *State v. DeLaurier*, 533 A.2d 1167, 1170 (R.I. 1987) (citing *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

Our Supreme Court has stated that courts "must evaluate whether probable cause exists by a careful examination of the totality of the circumstances that confronted the officer on the scene." *State v. Flores*, 996 A.2d 156, 161 (R.I. 2010). Moreover, the court adopted the United States Supreme Court's sentiments that "probable cause is a fluid concept—turning on the

assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 230, 232 (1983)); *see also In re Armand*, 454 A.2d 1216, 1218 (R.I. 1983) (explaining that probable cause should be examined as a "mosaic of facts and circumstances . . . as through the eyes of a reasonable and cautious police officer on the scene, guided by his or her experience and training").

It is undisputed that Sgt. Barth conducted a search of Appellant's vehicle. *See* Tr. at 3; *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989) (stating that obtaining and examining physical evidence may be a search, if doing so "infringes an expectation of privacy that society is prepared to recognize as reasonable"); *State v. Bertram*, 591 A.2d 14, 19 (R.I. 1991) (noting that "[c]ourts have long recognized that constitutionally protected privacy interests do exist in automobiles"). Thus it is clear that Appellant has a well-established privacy interest in her automobile as well as any containers therein. *Bertram*, 591 A.2d at 19. Moreover, it is uncontested that Sgt. Barth seized the marijuana from Appellant's handbag, which was located inside of the vehicle on the floor in front of the front passenger's seat. (Tr. at 7, 12.) This Panel must, therefore, assess whether Sgt. Barth had probable cause to conduct the search.

As mentioned, this Panel considers the totality of the circumstances when making a determination regarding the existence of probable cause. *Flores*, 996 A.2d at 161. In his testimony, Sgt. Barth asserted that he relied on two key facts in his probable cause assessment. First, Sgt. Barth stated that he detected a "strong odor of marijuana coming from inside [Appellant's] vehicle." (Tr. at 7.) Second, Sgt. Barth testified that he believed Appellant had been present during "a felony [breaking] and [entering], where there was marijuana being used inside of the . . . maintenance shed." *Id.* at 9.

This Panel pauses to note that some courts with similar non-criminal marijuana civil sanctions have held that the smell of marijuana alone is not enough to support a finding of probable cause to conduct a search. *See* Com. v. Cruz, 459 Mass. 459, 476, 945 N.E.2d 899, 913 (2011) (holding that in light of the statute changing the status of possessing one ounce or less of marijuana from a crime to a civil violation, without at least some other additional fact to bolster a reasonable suspicion of actual criminal, the odor of burnt marijuana alone cannot meet even the reasonable suspicion standard); *see also Com. v. Overmyer*, 469 Mass. 16, 23, 11 N.E.3d 1054, 1059-60 (2014) (finding that a warrantless search is not justified based solely on the smell of marijuana, whether burnt or unburnt). As this Panel is aware that a violation of § 21-28-4.01(c)(2)(iii) is a civil offense, the appending issues involving probable cause to search based on the smell of marijuana alone, should not be overlooked. However, such issues need not be addressed in this case.

Here, although Sgt. Barth testified that he could smell the odor of marijuana emanating from Appellant's vehicle, the record does not provide evidence of any training and experience that Sgt. Barth may have relied upon to form that opinion. *See id.* at 7; *see also* Traffic Trib. R. P. 15(b); *Flores*, 996 A.2d at 161. Rule 15(b) of the Traffic Tribunal Rules of Procedure requires that "[i]n all adjudications of civil violations before the traffic tribunal and the municipal courts, the Rhode Island Rules of Evidence shall apply."

In accordance with the Rhode Island Rule of Evidence, a witness may either testify as a lay witness, or as an expert witness. *See* R.I. R. Evid. 701, 702. Rhode Island Rule of Evidence 701 states:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to

> a clear understanding of the witness' testimony or the determination of a fact in issue."

"This rule is buttressed by [the] caveat that the lay witness must have 'had an opportunity to observe the person and to give the concrete details on which the inference or description is founded.'" *State v. Gomes*, 604 A.2d 1249, 1259 (R.I. 1992) (quoting *State v. Fogarty*, 433 A.2d 972, 976 (R.I. 1986)); *see also In re Emilee K.*, 153 A.3d 487, 494 (R.I. 2017) (explaining that the lay-witness opinion testimony was admissible since the witness described her observations from a period of several months and her rational opinion drawn from those extensive observations). In contrast, Rhode Island Rule of Evidence 702 instructs on the testimony of an expert witness. *See* R.I. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion").

More specifically, the United States Supreme Court has long held that a police officer may testify to the presence of odors from a controlled substance if the court "finds the [officer] qualified to know the odor, and [the odor] is one sufficiently distinctive to identify a forbidden substance." *Johnson v. United States*, 333 U.S. 10, 13, 68 S. Ct. 367, 369, L. Ed. 436 (1948); *see* also *Flores*, 996 A.2d at 162 ("The Court has long recognized that a police officer's training and experience may specially qualify him to identify narcotics from observations that would not necessarily be significant to a layperson"). Moreover, the Rhode Island Traffic Tribunal Appeals Panel has also held that a police officer may rely on his or her training and experience identifying marijuana to establish probable cause. *See State of Rhode Island v. Daniel Delano***,** C.A. No. T13-0055 (2013) (affirming the Trial Judge's finding that the State Trooper had sufficient probable cause to seize a jar containing a green, leafy, substance after hearing the

Trooper testify that he believed the substance was marijuana based on his training and experience in narcotics crimes).

Here, Sgt. Barth testified that he relied on what he recognized as the odor of marijuana, coming from inside Appellant's vehicle, to establish probable cause for the search. (Tr. at 7.) Although Sgt. Barth testified to the fact that he had "eight years of service with the Middletown Police Department," there is no evidence contained within the record that Sgt. Barth has had training or experience as a police officer, related to marijuana. *Id.* at 3.

Based on the record, it is clear that Sgt. Barth testified as a lay witness since he offered no "scientific, technical, or other specialized knowledge" in his testimony to qualify him as an expert. R.I. R. Evid. 702. As this is the case, Sgt. Barth's testimony presented no evidence of the knowledge, training, or experience that he depended on in inferring that the odor was marijuana, as required by our Supreme Court's interpretation Rule 701. R.I. R. Evid. 701; *Gomes*, 604 A.2d at 1259. Without testifying as to his training and experience with marijuana, the Trial Judge improperly considered Sgt. Barth's testimony in his probable cause determination.

Additionally, even though a police officer may "identify narcotics from observations that would not necessarily be significant to a lay person," an officer testifying to such identifications must be qualified to do so, based upon his or her training and experience. *See Flores*, 996 A.2d at 162. Given that the record is devoid of any indication that Sgt. Barth has had training or experience detecting the presence of marijuana based on its smell, there is no evidentiary foundation, contained within the record, to support Sgt. Barth's opinion as an experienced police officer. *Id.*; *see also Delano***,** C.A. No. T13-0055 (2013).

As a result, the Trial Judge improperly considered Sgt. Barth's testimony regarding the odor when determining whether he had probable cause to search Appellant's vehicle. Sgt. Barth's identification of the odor was not properly supported by concrete details evidencing a foundation for his opinion. *See* R.I. R. Evid. 701; *Gomes*, 604 A.2d at 1259. Nor was there any evidence of the fact that Sgt. Barth was familiar with and could recognize the smell of marijuana based on his training and experience as a police officer. *See Flores,* 996 A.2d at 161.

Furthermore, Sgt. Barth also testified that he relied on the totality of the circumstances in his probable cause determination. (Tr. at 9.) Sgt. Barth offered "the fact that [Appellant] had just come from a felony [breaking] and [entering], where there was marijuana being used inside of the . . . maintenance shed" in support of his assessment of the totality of the circumstances that gave rise to probable cause for the search of Appellant's vehicle. *Id.* However, Sgt. Barth revealed that at the time of the search, he did not know whether Appellant was one of the individuals he observed running from the maintenance shed earlier that evening. *Id.* The Appellant's mere participation in bringing R.B., who was a suspect in the breaking and entering, back to the scene "does not, by itself, establish probable cause to arrest or search" her. *In re John N.*, 463 A.2d 174, 178 (R.I. 1983) (internal citations omitted) (holding that a police officer did not have a reasonable belief to search defendant because he was in another defendant's vehicle). In light of Sgt. Barth's testimony, this Panel finds that Appellant's mere presence at the Wyatt Soccer Field—prompted by her facilitating R.B.'s return to the scene—was insufficient to establish probable cause to search her vehicle and, more importantly, the contents of her vehicle such as the handbag where the marijuana was found. *See id.*

After a thorough review of the record, this Panel finds that the evidence presented was insufficient to support the Trial Judge's conclusion that Sgt. Barth had probable cause to search

Appellant's vehicle. *See Flores*, 996 A.2d 156 at 161; *Werner*, 615 A.2d 1013-14. It is important to note that in evaluating Sgt. Barth's testimony, this Panel is not assessing Sgt. Barth's credibility as a witness. *Link*, 633 A.2d at 1348. Moreover, this Appeals Panel is not substituting its own judgment for that of the Trial Judge's "concerning the weight of evidence on questions of fact." *Id.* Instead, this Panel finds that the Trial Judge made an error of law in denying Appellant's motion to suppress, since the record lacks sufficient evidence to support a finding of probable cause. *Id.* (citing *Envtl. Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)).

IV

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the Trial Judge's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and affected by error of law. The substantial rights of the Appellant have been prejudiced. Accordingly, Appellant's appeal is granted, and the charged violations are dismissed.

ENTERED:

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Magistrate Joseph A. Abbate (Chair)

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Magistrate Domenic A. DiSandro III

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Magistrate Alan R. Goulart

DATE: _____