STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF RICHMOND	:	
	:	
v.	:	**C.A. No. T14-0027**
	:	**13505500345**
S. M.	:	

DECISION

PER CURIAM: Before this Panel on September 17, 2014—Chief Magistrate Guglietta (Chair), Judge Almeida, and Magistrate Noonan, sitting—is the Town of Richmond's (Appellant) appeal from a decision of Magistrate Abbate (trial magistrate), dismissing the charged violation of G.L. 1956 § 21-28-4.01(c)(2)(III), "Possession of marijuana, one ounce or less, 18 years or older." The Appellee appeared before this Panel represented by counsel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

Corporal William Litterio of the Richmond Police Department (Corporal) testified that on September 5, 2013, at approximately 11:30 P.M., he was in his cruiser, exiting the parking lot of the Richmond Police Station, when he observed a vehicle pass him with construction cones in the back seat. (Tr. at 9-13.) The Corporal testified that he was aware that there was construction to paint the center lines on nearby Route 91 and Switch Road. (Tr. at 14.) Thus, he initiated an investigatory stop of the driver's vehicle. (Tr. at 16.)

As a result of the stop, S.M. (Appellee) was charged with the aforementioned violation. The Appellee contested the charge, and the matter proceeded to trial on October 15, 2013. (Tr.

at 4.) The matter was appealed on February 12, 2014, and remanded. Id. The matter then proceeded to trial again on April 15, 2014.

At the second trial, the Corporal testified that there were three females in the vehicle, and he identified the Appellee as the passenger. (Tr. at 19-20.) Thereafter, the Corporal testified that he approached the driver's side of the vehicle and asked the operator of the vehicle for her license, registration, and proof of insurance, which the driver provided to the Corporal. (Tr. at 22.) The Corporal testified that he asked the operator of the vehicle where they had gotten the cones, and the operator responded that they took the cones from Route 91. Id.

Next, the Corporal testified that he could smell the moderate odor of burnt marijuana emanating from the vehicle, so the Corporal asked the occupants to exit the vehicle. (Tr. at 25.) The Corporal testified that he looked into the vehicle, and again that he could smell a moderate odor of burnt marijuana. (Tr. at 29.) At that point, the Corporal received identification from the driver and the back seat passenger. (Tr. at 32.) The Appellee did not have identification on her, but was identified by her name and date of birth. Id. The Corporal observed that the Appellee was visibly intoxicated, which she acknowledged. (Tr. at 33-35.)

Thereafter, the Corporal testified that he pat searched the females to make sure no one had weapons on them. (Tr. at 36.) Next, he searched the vehicle for other possible stolen merchandise. Id. As he searched the vehicle, the Corporal testified that he found a pink woman's makeup bag on the passenger seat. Id. He opened the bag, which revealed a clear glassine baggie with a small amount of a green leafy substance. Id. Subsequently, the makeup bag was identified at trial and entered as an exhibit. (Tr. at 50.) Thereafter, the Corporal testified that the bag was on the passenger seat, against the seat belt lock, to the left of where the passenger would sit. (Tr. at 67.) He never noticed anyone handling the bag. (Tr. at 69.) The

Corporal further testified that the contents of the bag tested positive for marijuana in a field test. (Tr. at 70.)

After the completion of the Corporal's direct testimony, the Appellee was allowed to cross-examine the Corporal. (Tr. at 72.) The Corporal testified that Appellee never had the bag on her; the Corporal never saw Appellee handle the bag; and that the bag was found on the seat. (Tr. at 76-79.) Furthermore, the Corporal testified that the bag was zipped closed when he found it, and it was not opaque. (Tr. at 80-82.) The Corporal testified that no one in the car claimed possession of the bag. (Tr. at 83.)

Thereafter, Appellee asked the Corporal what he meant when he observed Appellee was intoxicated. (Tr. at 98.) The Corporal confirmed that he meant Appellee was intoxicated on alcohol, and that Appellee was 21 or older at the time. (Tr. at 97-98.) Subsequently, Appellee questioned the Corporal regarding whether he searched the car for marijuana based on the odor. (Tr. at 102-03.) The Corporal responded that he searched the car for marijuana and to see if there was any other stolen merchandise. Id. Thereafter, Appellee read the Corporal's testimony from the trial on October 15, 2013, when Corporal testified that the females were removed from the vehicle to "conduct a search of the vehicle for marijuana." (Tr. at 117.) The Corporal affirmed that was his previous testimony. (Tr. at 118.) Next, Appellee asked the Corporal if the amount of marijuana was less than an ounce, and the Corporal confirmed that the amount was under an ounce. (Tr. at 119.)

Thereafter, Appellee moved to dismiss the charge, arguing that there was no probable cause for the Corporal to search the car because there was no reasonable belief that the amount of marijuana he was searching for was over an ounce. (Tr. at 124.) Furthermore, Appellee argued that even if there was probable cause, the town did not prove possession. (Tr. at 125.)

In order to prove possession, the town has to prove Appellee had knowledge of the presence of the marijuana and that she intended to exercise control over it. Id.

After hearing each party's arguments, the trial magistrate dismissed the charged violation. In doing so, the trial magistrate highlighted that the Town did not present evidence as to Appellee's actual or constructive possession of the bag. Aggrieved by the trial magistrate's dismissal of the charge, the Town timely filed the instant appeal.

Standard of Review

Pursuant to G.L. 1956 § 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." Link, 633 A.2d at 1348 (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." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant, the Town of Richmond, asserts that the trial magistrate's decision is erroneous in view of the reliable, probative, and substantial evidence on the record. Specifically, Appellant contends that the facts at trial demonstrated the Appellee had constructive possession of the makeup bag containing the marijuana.

It is a civil offense in Rhode Island to possess one ounce or less of marijuana. G.L. 1956 § 21-28-4.01(c)(2)(iii).[1] Possession "requires the 'intentional control of (the) designated (substance) with knowledge of its nature.'" State v. Jenison, 442 A.2d 866, 875 (R.I. 1982) (citing State v. Gilman, 291 A.2d 425, 430 (R.I. 1972)). Possession can be actual or constructive. Id. Constructive possession "occurs when an individual exercises dominion and control over such object even though it is not within his immediate physical possession." Id. "Proof of constructive possession of a controlled substance requires a showing that defendant knew of the presence of the substance and that he intended to exercise control over it." Id.

[1] Section 21-28-4.01(c)(2)(iii) reads:

> "[P]ossession of one ounce (1 oz.) or less of marijuana by a person who is eighteen (18) years of age or older and who is not exempted from penalties pursuant to chapter 28.6 of this title shall constitute a civil offense, rendering the offender liable to a civil penalty…this civil…shall apply if the offense is the first (1st) or second (2nd) violation within the previous eighteen (18) months."

These "elements can be inferred from [the] totality of the circumstances." Id. "Although consciousness of the presence of the object is essential to a finding of constructive possession, the fact the object is located within property under the individual's control does not, in and of itself, constitute constructive possession." State v. Berroa, 6 A.3d 1095, 1101 (R.I. 2010).

Here, the argument in this case requires this Panel to review Rhode Island law on constructive possession, and determine on these facts whether Appellee "possessed" the marijuana in the makeup bag. The facts in this case are quite clear. The Corporal found the makeup bag on the passenger seat near the middle of the car. (Tr. at 67.) The Corporal testified that he did not see anyone handle the bag. (Tr. At 69.) Furthermore, the bag was sealed and opaque, thus it was impossible for one to infer what was inside the bag. (Tr. at 80-82.) See State v. Fortes, 293 A.2d 506, 508 (R.I. 1972) (finding pills found on a car seat vacated by the defendant was not enough to infer constructive possession by the defendant). Moreover, the Appellant did not provide any additional evidence to support that the Appellee owned the makeup bag, or that she knew it contained marijuana. Thus, there is no proof that the Appellee had knowledge of what was in the bag or intended to exercise control over the makeup bag and the marijuana. See Jenison, 442 A.2d at 875.

Conclusion

As a result based on the facts of this case and having reviewed the record before it, this Panel is satisfied that the trial magistrate's decision dismissing the charged violation of § 21-28-4.01(c)(2)(III), Possession of Marijuana was supported by the evidence on the record. This Panel is also satisfied that the trial magistrate's decision was not affected by error of law. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied.

ENTERED:

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Chief Magistrate William R. Guglietta

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Judge Lillian M. Almeida

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Magistrate William T. Noonan

DATE: _____________