STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **RHODE ISLAND TRAFFIC TRIBUNAL**

CITY OF PROVIDENCE	:	
	:	
v.	:	**C.A. No. T09-0114**
	:	
ARTHUR TOEGEMANN	:	

DECISION

PER CURIAM: Before this Panel on December 9, 2009—Magistrate Goulart (Chair, presiding) and Judge Almeida and Judge Parker, sitting—is Arthur Toegemann's (Appellant) appeal from a decision of Judge Ciullo, denying his motion for relief of judgment, and sustaining the charged violation of G.L. 1956 § 31-20-12, "Stopping for school bus required – Penalty for violation." Appellant appeared pro se before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On June 23, 2009, the Providence Police Department (Officer) charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial.

After trial, the trial judge sustained the charged violation. Subsequently, Appellant filed a motion for relief from judgment pursuant to Rule 20 of the Traffic Tribunal Rules of Procedure.[1] During the hearing, Appellant presented the judge with an

[1] Rule 20 of the Traffic Tribunal Rules of Procedure states in pertinent part,

> "[o]n motion and upon such terms as are just the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; (2) Newly discovered evidence; (3) Fraud, misrepresentation, or other misconduct of an adverse party; (4) The judgment is void; (5) The judgment has been satisfied, released, or discharged or a prior judgment

affidavit, which explained that he had mailed a certified copy of his motion to the City of Providence prior to his hearing. However, a representative from the City of Providence did not appear at Appellant's motion hearing. Thus the only testimony on record is that of Appellant.

Appellant explained to the hearing judge that he filed a motion for relief from judgment because he has discovered new evidence since his trial date. (Tr. at 6.) Appellant contends that he spoke to an engineer from the Department of Transportation and was informed that "in the location [on Elmwood Avenue] where [he] was alleged to have violated the school bus stop sign law, the [Department of Transportation] had changed the traffic control device" from a median strip to a dividing line, "and they "intend[] to change it back" to a median strip. (Tr. at 6-7.) Appellant argues that the charged violation should be dismissed because at some point in the past a median strip divided the roadway where Appellant was charged with violating § 31-20-12. Appellant relies on § 31-20-13 as the basis for his argument:

> "when operating a vehicle upon a highway, the driver need not stop upon meeting or passing a bus marked as "school bus" . . . [w]hen the highway is divided by a median strip separating opposing lanes of traffic and the bus is stopped in the roadway on one side of the median strip and the driver is operating on the other side of it." Section 31-20-13 (emphasis added).

According to Appellant, the Department of Transportation explained that the traffic control device on Elmwood Avenue was not changed from a median strip to a dividing line to force "drivers . . . to stop for school buses"; instead, the device was

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upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) Any other reason justifying relief from the operation of the judgment, in whole or in part." Traffic Trib. R.P. 20

transformed "so that pedestrians would have an easier time crossing Elmwood Avenue." (Tr. at 7.) However, the engineer allegedly told Appellant that the median strip would be back in its original place on Elmwood Avenue by "next spring." Id. Upon questioning from the hearing judge, Appellant admitted that the median strip was not in place on Elmwood Avenue at the time of the hearing, nor was the median strip present at the time that Appellant was charged with violating § 31-20-12. Id.

At the completion of Appellant's testimony, the hearing judge denied the motion for relief from judgment, because the median strip was not present on Elmwood Avenue, on the date Appellant was charged with violating § 31-20-12. (Tr. at 7-8.) Additionally, Appellant's motion was denied because the information presented at the hearing was not newly discovered evidence. The judge explained, "[n]ewly discovered evidence is evidence that could not have been discovered prior to the original trial, for whatever reasons." (Tr. at 8.) According to the hearing judge, Appellant was able to have discovered this information, prior to his trial, if he had made a timely phone call to the Department of Transportation.

At the conclusion of the hearing, the judge denied Appellant's motion and sustained the charged violation of § 31-20-12. Appellant, aggrieved by this decision, filed a timely appeal to this Panel. Our decision is rendered below.

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 prejudiced because the judge's findings, inferences, conclusions or decisions are:
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> (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 Insurance 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 Environmental 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 argues that the hearing judge's decision is in violation of statutory provisions, characterized by abuse of discretion, and affected by other errors of law. Appellant has advanced three arguments, without merit, in support of his appeal. This Panel is satisfied that the hearing judge appropriately denied the motion for relief of judgment and properly sustained the charged violation of § 31-20-12.

I

Abuse of Discretion

Appellant's first argues that the hearing judge abused his discretion by refusing to dismiss the charged violation. Appellant argues that the trial judge incorrectly chose to disregard his newly discovered evidence, which he was presenting pursuant to Rule 20 of the Traffic Tribunal Rules of Procedure.

Rule 20 (2) of the Traffic Tribunal Rules of Procedure explains that "[o]n motion and upon such terms as are just the court may relieve a party . . . from a final judgment . . . [based on] newly discovered evidence." Traffic Trib. R.P. 20(2). Rule 20(2) of the Traffic Tribunal Rules of Procedure mirrors Rule 60 of the Rhode Island Rules of Civil Procedure, which allows a trial justice to relieve a party from judgment if the party has "newly discovered evidence which by due diligence could not have been discovered in time for a new trial . . . ." Super. R. Civ. P. 60(b)(2). However, our Supreme Court has made clear that this Panel's review is limited to an examination of the decision to determine "the correctness of the order granting or denying the motion, not the correctness of the original judgment." Greenfield Hill Investments, LLC v. Miller, 934 A.2d 223, 224 (R.I. 2007) (citing McBurney v. Roszkowski, 875 A.2d 428, 435 (R.I.

2005)). "A motion to vacate a judgment is left to the sound discretion of the trial judge and such a ruling will not be disturbed absent an abuse of discretion." Malinou v. Seattle Sav. Bank, 970 A.2d 6 (R.I. 2009) (citing Medeiros v. Anthem Casualty Insurance Group, 822 A.2d 175, 178 (R.I. 2003)). Specifically, the Supreme Court in Malinou explains that such a motion will not be granted unless "the evidence is material enough that it probably would change the outcome of the proceedings and the 'evidence was not discoverable at the time of the original hearing by the exercise of ordinary diligence.'" Malinou, 970 A.2d at 10 (quoting Forcier v. Forcier, 558 A.2d 212, 213 (R.I. 1989)).

Here, Appellant asserted that he had new evidence, which included his own testimony recanting a conversation with "an engineer from the Department of Transportation." (Tr. at 6.) The engineer allegedly explained to Appellant that Elmwood Avenue where he was charged with violating § 31-20-12, was once divided by a median strip. According to Appellant, the median strip was removed from Elmwood Avenue, and replaced with yellow dividing lines. This change was made to allow pedestrians an easier path across the road. (Tr. at 6-7.) As set forth in § 31-20-13, "when the highway is divided by a median strip separating opposing lanes of traffic and the bus is stopped on one side of the median strip and the driver is on the other side of it," the driver does not need to stop his vehicle. Appellant believes that the charged violation of § 31-20-12 should be dismissed, based on his conversation with the Department of Transportation, the past presence of a median strip on Elmwood Avenue, and the statutory language of § 31-20-13. (Tr. at 6-7.)

Ultimately, the hearing judge found that Appellant failed to demonstrate either that the new evidence was material or that such evidence was not discoverable at the time

of the trial. The hearing judge's determination that there was no indication that the evidence was material because the median strip—which allows a motorist to avoid stopping for a school bus—was neither present on Elmwood Avenue at the time of Appellant's violation, nor was it in place at the time of the motion hearing. This was supported by competent evidence of record. Secondly, this evidence could have been discovered prior to the original hearing; however, Appellant failed to make the phone call to the Department of Transportation in a timely fashion. For both reasons, the evidence of the conversation between Appellant and the Department of Transportation was immaterial, and Appellant failed to prove that it was not discoverable during the trial. See Malinou, 970 A.2d at 10.

Additionally, in Link, our Supreme Court made clear that this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact." Link, 633 A.2d at 1348 (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). As the members of this Panel did not have an opportunity to view the live trial testimony [of Appellant] it would be impermissible to second-guess the trial judge's "impressions as he . . . observe[d] [Appellant] [,] listened to [his] testimony [and] . . . determine[ed] . . .what to accept and what to disregard[,] . . . what . . . [to] believe[] and disbelieve[]." Environmental Scientific Corp., 621 A.2d at 206. Accordingly, this Panel is satisfied that the motion judge correctly denied Appellant's motion for relief from judgment. Based on the reliable, probative, and substantial evidence on record the hearing judge did not abuse his discretion by sustaining the charged violation of § 31-20-12.

II

Traffic Control Device

Next, Appellant asserts that he is charged with violating a traffic control device that does not comply with the Federal "Manual on Uniform Traffic Control Devices" (MUTCD). This Panel disagrees.

The MUTCD sets forth specifications for signage that is not at issue in the present case. In fact, there is no signage at issue in the evidence presented during the motion hearing, nor in the statutory language of § 31-20-12. (Tr. at 1-8.) Instead, the trial judge found that Appellant failed to "stop [his] vehicle before reaching the bus," and then, Appellant chose to "proceed [before] the bus resume[d] motion or [before] the flashing lights [we]re . . . actuated." Id.

The trial judge did not decide that Appellant violated a traffic control device, or operated his vehicle in any way to disobey signage restrictions set forth in the MUTCD. Section 31-13-1 of the general laws delegated authority to the Rhode Island State Traffic Commission to "adopt and cause to be printed for publication a manual of regulations and specifications establishing a uniform system of traffic control signals, devices, signs, and markings . . . for use upon the public highways." In addition to the promulgation of written regulations and specifications, the Commission was required to "place and maintain . . . traffic control devices, conforming to its manual and specifications, upon any state highways, that it shall deem necessary to carry out the provisions of chapters 12 – 27 of [the motor vehicle code] or to regulate, warn, or guide traffic." Section 31-13-2. Pursuant to these statutory directives, the Commission adopted in its entirety the

MUTCD that had been promulgated by the U.S. Department of Transportation's Federal Highway Administration.

Although the MUTCD sets forth specifications for numerous traffic control devices—including two for use in school bus areas—Appellant's argument falls short because Appellant has not been charged with disobeying such a sign. The MUTCD discusses school bus "turn ahead" and "stop ahead" signs that should be installed "in advance of locations where school buses" turn and stop, and at locations where a school bus is "not visible to road users for an adequate distance and where there is no opportunity to relocate the school bus stop to provide adequate sight distance." See MUTCD, Section 7B.13 and 7B.14 at 742 (2009). Thus the MUTCD does not apply to the present case.

Instead, Appellant was charged with violating § 31-20-12, which does not contain a provision enumerating a signage restriction that is present in the MUTCD. Section 31-20-12 was established to require motorists to stop for a school bus "whenever the bus is being operated in accordance with § 31-20-11 and on which there is in operation flashing red lights, shall stop the vehicle before reaching the bus." The charged violation of § 31-20-12 does not contain any reference to traffic control signs that would be appropriately found in the MUTCD. Thus Appellant's argument fails and does not constitute a defense to violating § 31-20-12. This Panel is satisfied that noncompliance with the requirements in the MUTCD is an inappropriate argument, as no traffic control sign is presently at issue. Thus Appellant's appeal is denied, and the charged violation of § 31-20-12 is sustained.

Additionally, Appellant did not appropriately set forth this argument in his motion hearing. Therefore, pursuant to the 'raise-or-waive' rule articulated by our Supreme Court, "[i]t is axiomatic that 'this court will not consider an issue raised for the first time on appeal that was not properly presented before the trial court.'" Pollard v. Acer Group, 870 A.2d 429 (R.I. 2005) (quoting State v. Gatone, 698 A.2d 230, 242 (R.I. 1997)).[2] "The importance of the 'raise or waive' rule is not to be undervalued. Not only does the rule serve judicial economy by encouraging resolution of issues at the trial level, it also promotes fairer and more efficient trial proceedings by providing opposing counsel with an opportunity to respond appropriately to claims raised." State v. Burke, 522 A.2d 725 (R.I. 1987); see 3 LaFave & Israel, Criminal Procedure § 26.5(c) at 251 (1984). Accordingly, the members of this Panel find the trial judge's denial of Appellant's motion did not constitute an abuse of discretion.

III

Section 31-20-13

Appellant's argument that he suffered prejudice because there are two statutes, §§ 31-20-12 and 31-20-13, which both discuss stopping for school buses, is without merit. The General Assembly properly enacted the statutes, and an individual cannot simply choose to disregard a statute because one does not agree with the statutory language. Accordingly, this Panel's "responsibility in interpreting [§§ 31-20-12 and 31-20-13] is to determine and effectuate the Legislature's intent and to attribute to the enactment the

[2] See also Chase v. Bouchard, 671 A.2d 794, 795 (R.I. 1996) ("One of our most settled doctrines in this jurisdiction is that a matter not raised before the trial court may not be raised for the first time on appeal."); Ferland Corp. v. Bouchard, 626 A.2d 210, 217 (R.I. 1993) ("It is a well-settled rule of appellate practice that matters not brought to the attention of the trial justice may not be raised for the first time in this court on appeal."); Bouchard v. Clark, 581 A.2d 715, 716 (R.I. 1990) ("It is well established rule of law in Rhode Island that this court will not consider an issue raised for the first time on appeal that was not properly presented before the trial court.").

meaning most consistent with its policies or obvious purposes." Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987) (citing Gryguc v. Bendick, 510 A.2d 937, 939 (R.I. 1986)). The Legislature's intent was to reduce highway fatalities through increased caution when operating motor vehicles in the vicinity of school buses. Section 31-20-12 gives effect to this by mandating that the motorist stop his or her vehicle before reaching the bus, and the driver must not proceed until the bus begins to move or until the flashing lights cease. Additionally, § 31-20-13 further clarifies the Legislature's intended purpose because the statutory language specifies two situations when the motorist does not need to stop upon meeting or passing a school bus: when a median strip divides a highway, and the driver is on the opposite side, and when the bus is stopped "in a loading zone and pedestrians are not permitted to cross the highway." Section 31-20-13.

Furthermore, §§ 31-20-12 and 31-20-13 are separate statutes that should be read together, and not in conflict with one another. It is a well-settled principle that "statutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent" with their general scope. Theodore H. Such, Jr. et al. v. State of Rhode Island et al., 950 A.2d 1150; State ex rel. Webb v. Cianci, 591 A.2d 1193, 1203 (R.I. 1991); see also Horn v. Southern Union Co., 927 A.2d 292, 295 (R.I. 2007). "Such statutes are considered to be in pari materia, which stands for the simple proposition that 'statutes on the same subject are, when enacted by the same jurisdiction, [meant] to be read in relation to each other.'" Horn, 927 A.2d at 294 (quoting Reed Dickerson, *The Interpretation and Application of Statutes* 233 (1975)).

This Panel—when applying these principles to the case at bar—concludes that both pieces of legislation were "intended to have effect together," as evidenced by the

language themselves the two statutes anticipate each other. Such, Jr. et al., 950 A.2d 1157. Additionally, §§ 31-20-12 and 31-20-13 have the same distinct legislative purpose of reducing fatalities through increased caution when operating vehicles in the vicinity of school buses. "Viewed in this light [both statutes] are not irreconcilably repugnant and they can easily be harmonized with each other." Id. Thus this Panel is satisfied that both statutes properly ascertain and give effect to the intent of the General Assembly. See Brennan, 529 A.2d at 637.

This Panel finds that the hearing judge's denial of Appellant's motion was not an abuse of discretion, as there is no reason to justify relief from the operation of the judgment, neither in whole nor in part. Traffic Trib. R.P. 20(6). Confining our review of the record to its proper scope, this Panel further finds that the hearing judge's decision is supported by legally competent evidence and is not affected by error of law. Appellant chose to proceed before the bus resumed motion or the flashing lights were no longer actuated. Elmwood Avenue, the roadway on which Appellant was operating his motor vehicle, was neither divided by a median strip at the time of the charged violation, nor was Appellant within a loading zone adjacent to a highway, where pedestrians are not permitted to cross. Section 31-20-13. The evidence of the conversation between Appellant and the Department of Transportation did not satisfy the two prong test to qualify as newly discovered evidence. Nor did Appellant violate a traffic control device, which pertained to signage specifications enumerated in the MUTCD. Lastly, every motorist in the State of Rhode Island must abide by the motor vehicle code, Appellant is no exception. Thus Appellant's arguments fail. Accordingly, for the reasons set forth

above, the members of this Panel deny Appellant's appeal and sustain the charged violation of § 31-20-12.

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 is not characterized by abuse of discretion, in violation of statutory provisions, clearly erroneous in light of the reliable, probative, and substantial record evidence, or affected by error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.