

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
)	MN 07120022 AP
v.)	
)	
HARMON R. CAREY)	
)	

Date Submitted: October 10, 2008
Date Decided: October 20, 2008

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OPINION AND ORDER ON STATE’S MOTION TO DISMISS

This is a final opinion and order on the State’s motion to dismiss Defendant’s untimely appeal of a Justice of the Peace Court decision. The Court finds that Defendant has failed to meet his burden of proving why the applicable time for an appeal should be tolled, and therefore the State’s motion is granted.

FACTS

On November 6, 2007, after a trial, the Justice of the Peace Court No. 20 found Defendant Harmon R. Carey (hereinafter “Carey”) guilty of failing to pay an annual vacant property registration fee, in violation of *Wilmington City Code* §4-125. The Court

fined Carey \$500 plus costs. On November 28, 2007, Carey appealed the decision to this Court. The State of Delaware moved to dismiss on the grounds that Carey's appeal was filed untimely pursuant to 11 Del. C. §5917(b). This section specifically provides a 5-day period within which an appeal of a conviction of municipal code violations must be filed.

In response to the State's Motion, Carey argues that the appeal period limitation should be tolled in this case because of problems attributable to court related personnel.

DISCUSSION

Title 11 Del. C. §5917(b) grants a defendant convicted of municipal code violations a right of appeal to the Court of Common Pleas within 5 days of conviction. Both parties acknowledge that this 5-day limitation for appeals applies to the instant case rather than the general 15-day appeal period.¹

It is well settled under Delaware law that an untimely appeal is excused where the tardiness is caused by court personnel, and the filing party acted with due diligence. *See Thompson v. Home*, 2008 WL 4511797 (Del. Super.); *Wilson v. King*, 673 A.2d 1228 (Del. Super. 1996); *Bey v. State*, 402 A.2d 362 (Del. Supr. 1979). Defendant's response to the State's motion argues that this judicially recognized exception applies to this case due to misinformation and/or lack of promptness on the part of court personnel.

Carey asserts that Justice of the Peace Court No. 20 failed to adequately advise him about the appeals process. Justice of the Peace Court traditionally provides parties with a Jurisdictional Form explaining their rights. Each form includes two signature areas—one to be signed by the Justice of the Peace, verifying that he or she has explained

¹ Court of Common Pleas Criminal Rule 39(a) provides that “[a]ll appeals to the Court shall be taken within 15 days from the date of sentence, *unless otherwise provided by statute.*” (emphasis added)

to the party his or her rights and is satisfied that the party fully understands the explanation, and one to be signed by the party, verifying the same. The record before the court in this matter includes a Jurisdictional Form prepared for the case below. While the form clearly describes the 5-day appeal limitation, neither Carey nor the Justice of the Peace signed the form. Therefore, for purposes of the instant motion, the Court will assume that this Jurisdictional Form was not provided to Carey after his trial below.

Such determination, however, is not fatal to the State's motion. Carey has previously been party to convictions of Wilmington City Code violations and signed Jurisdictional Forms in those cases indicating that he understood the 5-day period following sentencing in which to appeal. Carey sought to distinguish those forms because they were for different code violations than the one in the instant matter. However, the Court finds this distinction unpersuasive.

In addition, Carey conceded during closing argument that the issue of knowledge and understanding of the time limit for filing appeals was of no real consequence because his claim for relief is based on the actions of court personnel which caused him to file an untimely appeal.

Carey also argues that lack of diligence on the part of the clerk's office at Court No. 20 caused his failure to file a timely appeal. He claims that on November 7 or 8, 2008, he telephoned the Clerk's Office at Court No. 20 and spoke with a staff member regarding his desire to appeal the November 6, 2007 decision. The staff member allegedly advised Carey that in order to appeal he would need to speak with Irene Freeman (hereinafter "Freeman"), a member of the court staff who handled appeals. Carey further asserts that, according to the staff member, Freeman was out of the office

and would contact Carey once she returned. Carey testified that not having heard from Freeman for two days, he called the office again, and was informed that Freeman was still out of the office. He also claims that he was told that because he had previously called, his appeal would be accepted once Freeman returned. Carey has presented no supporting evidence regarding any of his communications with the Clerk's Office beyond his own testimony. He stated that he believes the woman he initially spoke with was named Charlene, but that he does not remember the name precisely.

Freeman testified that she was not out of the office at any time during her normal working hours in November 2007. She filed with the Court a time sheet showing that she used no annual or sick leave during that month. Freeman further asserts that none of the members of the clerk's staff advised her that Carey had called the office at any time in November 2007 regarding his desire to appeal this case. Finally, she stated that all of the staff members in the clerk's office have denied ever speaking about an appeal in this case with Carey at any time prior to November 28, 2007, and that there has been no employee at the clerk's office named Charlene from November 2007 to the present.

Counsel for Carey asserted during the hearing on this motion that Carey filed his appeal in an untimely manner because he was under the impression that he needed to speak with Freeman before he was able to appeal. However, Freeman testified that she never spoke with Carey at all regarding his appeal of this particular case, and Carey has failed to present evidence otherwise. If Carey was indeed waiting to speak with Freeman before he appealed, he fails to show how he perfected his appeal on November 28, when apparently he did not speak with her on that day.

Carey has failed to present sufficient evidence to suggest that the alleged events regarding the clerk's office occurred. While Freeman has experience in licensing and inspection code violations, it is difficult to conclude that staff members of the clerk's office would be unable to respond to a simple query regarding appeals without Freeman's assistance. In addition, it is clear from the testimony presented that such appeals were not required to go through Freeman before they were processed. Assuming that Freeman was out of the office during the entire month of November, there is nothing in the record to suggest that the court staff would have delayed responding to Carey until Freeman returned.

The Supreme Court in *Thompson, cited supra*, has pointedly noted that time is a jurisdictional requirement and an appeal is not effective if not filed within an applicable time period, A *pro se* status does not excuse failure to follow the time requirement. Absent a showing that an untimely filing is attributable to court-related personnel, a *pro se* litigant's appeal must fail.

Because Carey contends that the appeal period limit should be tolled, he carries the burden of proof to demonstrate this. Carey has simply not met this burden, and accordingly, the State's Motion to Dismiss must be granted.

ORDER

The State's Motion to Dismiss Defendant's appeal is hereby granted.

SO ORDERED

ALFRED FRACZKOWSKI²

² Sitting by appointment pursuant to Del. Const., Art. IV, §38 and 29 Del. C. §5610.