

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Thomas F. Smith	:	
	:	
v.	:	No. 1493 C.D. 2010
	:	SUBMITTED: December 30, 2010
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE P. KEVIN BROBSON, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: March 17, 2011**

The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (Department) appeals from the order of the Court of Common Pleas of Luzerne County that sustained the statutory appeal of Thomas F. Smith from an 18-month suspension of his operating privilege imposed by the Department for refusing to submit to chemical testing after his arrest for driving under the influence of alcohol (DUI). The Department argues that the trial court lacked jurisdiction to consider Smith's untimely appeal.

In official notice mailed on July 9, 2009 to Smith's address in its record, 6 Prospect Street, Pittston, PA 18640, the Department notified him that his operating privilege was suspended for 18 months, effective September 19, 2010, pursuant to Section 1547(b)(1)(ii) of the Vehicle Code, *as amended*, 75 Pa. C.S. §

1547(b)(1)(ii),<sup>1</sup> for his refusal to submit to chemical testing on June 13, 2009. He was advised that he had a right to appeal the suspension within 30 days of the notice mailing date. Smith appealed the suspension on August 18, 2009, 8 days after expiration of the 30-day appeal period on Monday, August 10.

At a *de novo* hearing held before the trial court, the Department's counsel submitted, *inter alia*, the July 9, 2009 suspension notice; a Form DL-26 (chemical testing warning and report of refusal to submit to chemical testing) signed by Smith and Officer Robert Evans of the Hughestown Borough Police Department on June 13; and the record of Smith's previous DUI convictions and suspensions of his operating privilege. The Department's counsel then moved to quash Smith's appeal as untimely. Smith's counsel responded: "[T]he arresting officer in this case has perpetrated a fraud which is grounds for an extension of time within which to file it. And we have testimony to indicate that the officer has been arrested ... on a drug offense [and] ... is facing criminal charges in Lackawanna County. He's no longer a police officer." Notes of Testimony (N.T.) at 3; Reproduced Record (R.R.) at 12a. Officer Evans did not appear at the hearing.

Smith testified that he went to his mother's house located at 6 Prospect Street in Pittston after work on June 13, 2009 and waited for his mother to give him a ride to his apartment located at 300 Wyoming Avenue in Dupont. At that time, his driver's license had been suspended, and he was on an IPP (Intermediate

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<sup>1</sup> Section 1547(b)(1)(ii) of the Vehicle Code imposes an 18-month suspension of operating privilege of any person who refuses to submit to chemical testing after being placed under arrest for violating Section 3802 of the Vehicle Code, *as amended*, 75 Pa. C.S. § 3802 (DUI), where the person's operating privilege has previously been suspended for such refusal or been sentenced for DUI. Smith had two prior DUI convictions and two prior suspensions for refusing to submit to chemical testing.

Punishment Program). Smith claimed that he drank a couple of beers at his mother's house but did not drive a vehicle that day and that Officer Evans picked him up at his mother's house and took him to the hospital later that day. Smith testified that Officer Evans induced him to sign "the refusal" at the hospital and took him to the prison where he stayed for 31 days. N.T. at 8; R.R. at 13a. Smith insisted that he was arrested on June 13 for violating the terms of the IPP, not for DUI, and that he was charged with DUI after he was released from the prison on July 17. According to Smith, the charges against him for the IPP violation and DUI were subsequently dismissed. After he was released from the prison, he moved back to his mother's house.

Smith further testified that he previously filed change of address forms with the post office to change his mailing address from 6 Prospect Street to 300 Wyoming Avenue and back to 6 Prospect Street after he was released from the prison on July 17. He conceded that he never notified the Department of those address changes and that the 6 Prospect Street address was his address in the Department's record. He testified that he lost the lease for his apartment at 300 Wyoming Avenue and was not getting any mail at that address while he was incarcerated and that he received the suspension notice at the 6 Prospect Street address at the end of July or beginning of August.

Smith's counsel argued that the delay in filing the appeal was caused by "the fraud perpetrated by the Commonwealth and Officer Evans." N.T. at 18; R.R. at 16a. The Department's counsel responded:

[W]hen the police officer sent me the report it indicate[d] that there was a one car accident, [Smith] matched the description of the person that went away from the vehicle. ... [A]ccording to the police affidavit, when they picked him up he was intoxicated, he had drinks. They took him back to the scene, the witnesses that were

there identified him as the person that left the vehicle. ...  
He was taken back and ID'd by two people apparently  
that he was actually the driver ....

N.T. at 20; R.R. at 16a. By order entered on June 29, 2010, the trial court sustained Smith's appeal. The Department's appeal to this Court followed.

In a concise statement of matters complained of on appeal filed pursuant to Pa. R.A.P. 1925(b), the Department argued that the trial court lacked jurisdiction to hear Smith's untimely appeal. In the subsequently filed memorandum opinion, the trial court agreed with the Department and concluded that Smith's appeal should not have been sustained because his incarceration and changes of address could not provide a basis for permitting an appeal *nunc pro tunc*. The trial court requested that this Court remand this matter "for an appropriate order." Trial Court's Opinion at 2; R.R. at 60a. The Department "concur[s] fully" with the trial court's request. Department's Brief at 18. In the interest of judicial economy, however, we will decide the appeal without remand because the record shows that Smith cannot prevail on the issue of whether he should be permitted to file an appeal *nunc pro tunc*. See *Joseph v. Allegheny County Airport Auth.*, 842 A.2d 485 (Pa. Cmwlth. 2004) (holding that this Court may decide an appeal without remand for a further proceeding where, as here, the record shows that the appellant cannot prevail on the merits).

A licensee must file an appeal within 30 days after a suspension notice is mailed. Sections 5571(b) and 5572 of the Judicial Code, *as amended*, 42 Pa. C.S. §§ 5571(b) and 5572; *Ercolani v. Dep't of Transp., Bureau of Driver Licensing*, 922 A.2d 1034 (Pa. Cmwlth. 2007). The Department mailed the suspension notice to Smith's "address of record" on July 9, 2009, as required by Section 1540(b)(1) of the Vehicle Code, *as amended*, 75 Pa. C.S. § 1540(b)(1). Smith appealed the suspension 8 days after expiration of the 30-day appeal period.

A statutory appeal period is mandatory and may not be extended as a matter of grace or mere indulgence. *Union Elec. Corp. v. Bd. of Prop. Assessment, Appeals & Review of Allegheny County*, 560 Pa. 481, 746 A.2d 581 (2000). An appeal *nunc pro tunc* may be permitted only where a delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process, or non-negligent circumstances related to an appellant, his or her counsel, or a third party. *Sofronski v. Civil Serv. Comm'n, City of Philadelphia*, 695 A.2d 921 (Pa. Cmwlth. 1997). In addition, the appellant must establish that: (1) the appeal was filed within a short period of time after learning of and having an opportunity to address the untimeliness; (2) the elapsed time period is of very short duration; and (3) the appellee has not been prejudiced by the delay. *Cook v. Unemployment Comp. Bd. of Review*, 543 Pa. 381, 671 A.2d 1130 (1996); *Sofronski*. The burden of establishing a basis for permitting an appeal *nunc pro tunc* is on the licensee. *Anderson v. Dep't of Transp., Bureau of Driver Licensing*, 744 A.2d 825 (Pa. Cmwlth. 2000).

Admittedly, Smith failed to notify the Department of his address changes from the Prospect Street address to the Wyoming Avenue address and back to the Prospect Street address within 15 days of those changes, as required by Section 1515(a) of the Vehicle Code, *as amended*, 75 Pa. C.S. § 1515(a). A licensee who has not notified the Department of an address change may not use such change as an excuse for filing an untimely appeal. *Redenbach v. Dep't of Transp., Bureau of Driver Licensing*, 817 A.2d 1230 (Pa. Cmwlth. 2003). In addition, Smith did not make any arrangements to have his mail forwarded to him while he was incarcerated. Therefore, his incarceration cannot constitute extraordinary circumstances justifying an appeal *nunc pro tunc*. *Puckett v. Dep't of*

*Transp., Bureau of Driver Licensing*, 804 A.2d 140 (Pa. Cmwlth. 2002). See also *McKeown v. Dep't of Transp.*, 601 A.2d 486 (Pa. Cmwlth. 1991) (the licensee, who was incarcerated and did not receive the notice of revocation until after the appeal period expired, was not permitted to file an appeal *nunc pro tunc*). Moreover, Smith failed to proceed with due diligence after learning of the necessity to take action to file an appeal. Smith testified that he received the suspension notice at the end of July or the beginning of August. When asked why he waited until August 18 to appeal the suspension, he replied: "I don't know. I'm not sure." N.T. at 18, R.R. at 16a. Hence, he failed to establish that the delay in filing the appeal was caused by any non-negligent circumstances.

Smith maintains, however, that he should be allowed to appeal the suspension *nunc pro tunc* because Officer Evans fraudulently charged him with DUI when he did not drive on the date of his arrest. Smith asserts that his late appeal was due to the fraud perpetuated by Officer Evans who he claims was an agent of the Commonwealth and the Department.

In so arguing, Smith fails to recognize that a license suspension proceeding is a civil proceeding and is unrelated to a criminal prosecution of a DUI charge. *Shewack v. Dep't of Transp., Bureau of Driver Licensing*, 993 A.2d 916 (Pa. Cmwlth. 2010). As we have held, "an acquittal of the criminal charge of [DUI] is of no consequence to the outcome of the civil proceeding." *Dep't of Transp. v. Crawford*, 550 A.2d 1053, 1054 (Pa. Cmwlth. 1988). Further, "the 'Commonwealth' in a criminal prosecution is not the same party as the Department in an administrative appeal." *Pat's Auto Sales v. Dep't of Transp., Bureau of Motor Vehicles*, 744 A.2d 355, 358 (Pa. Cmwlth. 2000). Consequently, "the outcome of the criminal proceeding could not collaterally estop DOT from suspending a

motorist's license in a civil proceeding." *Id.* at 359. Therefore, neither Officer Evans' alleged fraudulent conduct nor the dismissal of the DUI charge can provide a basis for permitting Smith to file an appeal *nunc pro tunc*.

It is well established that failure to timely appeal an administrative agency's decision is a jurisdictional defect. *Sofronski*. The trial court, therefore, lacked jurisdiction to decide Smith's appeal. Accordingly, we vacate the trial court's order and reinstate the suspension of Smith's operating privilege imposed by the Department.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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**ORDER**

AND NOW, this 17th day of March, 2011, the order of the Court of Common Pleas of Luzerne County in the above-captioned matter is VACATED, and the suspension of Thomas F. Smith's operating privilege imposed by the Department of Transportation, Bureau of Driver Licensing is REINSTATED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge