

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kimberly A. Bayer :  
 :  
 v. : No. 1887 C.D. 2009  
 :  
 Commonwealth of Pennsylvania, : Submitted: February 26, 2010  
 Department of Transportation, :  
 Bureau of Driver Licensing, :  
 Appellant :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: May 3, 2010

The Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the August 28, 2009, order of the Court of Common Pleas of Centre County (trial court) reversing the ninety-day suspension of the operating privilege of Kimberly A. Bayer (Licensee) imposed by DOT pursuant to section 1532(d) of the Vehicle Code (Code), 75 Pa. C.S. §1532(d).<sup>1</sup> We affirm.

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<sup>1</sup> In relevant part, section 1532(d) of the Code provides that DOT shall suspend the operating privilege of any person upon receiving a certified record of the driver's conviction, adjudication of delinquency, or admission into a preadjudication program for a violation under 18 Pa. C.S. §6308 (prohibiting the purchase, consumption, possession or transportation of liquor by a person under twenty-one years of age).

Licensee was issued a citation for a violation of section 6308 of the Crimes Code, 18 Pa. C.S. §6308, on September 19, 2008. Licensee and the Commonwealth entered into a plea agreement on November 6, 2008, which required Licensee to complete twenty hours of community service by January 12, 2009, in exchange for dismissal of the case. (R.R. at 70a.) At the same time, Licensee signed a conditional guilty plea that would become effective if she failed to timely complete the community service. Licensee submitted documentation of her community service to the district magistrate. However, on January 9, 2009, a representative of the district magistrate's office called Ken Buckalew, who was overseeing Licensee's community service for Bensalem Township. Buckalew advised the representative that he had no idea who Licensee was and that she did not perform twenty hours of community service. Id. The district magistrate did not contact Licensee, but instead immediately entered the conditional guilty plea previously Licensee previously executed.

The district magistrate forwarded notice of Licensee's conviction to DOT. By letter mailed January 22, 2009, DOT notified Licensee that, as a result of her conviction, her operating privilege would be suspended for ninety days pursuant to section 1532(d) of the Code. This letter advised Licensee that any appeal of the suspension had to be filed within thirty days of the mailing date. Licensee then submitted additional verification that she completed the required community service to the district magistrate, who dismissed the case on February 12, 2009. The district magistrate notified DOT of the dismissal of Licensee's case by letter dated March 2, 2009. Licensee thereafter learned, after contacting DOT, that the letter had been rejected by DOT and that the district magistrate needed to

submit an amended form/notice.<sup>2</sup> For unknown reasons, and despite repeated requests from Licensee's counsel, the district magistrate did not do so.

On April 27, 2009, Licensee filed an application with the trial court to appeal DOT's January 22, 2009, suspension *nunc pro tunc*. In this application, Licensee alleged that the district magistrate failed to send the appropriate paperwork to DOT advising them of the dismissal of the charge and, despite repeated requests from Licensee's counsel, failed to provide DOT with an amended form/notice indicating that Licensee was not convicted of violating section 6308 of the Code. (R.R. at 3a.)

By order dated April 28, 2009, the trial court granted Licensee's application without holding a hearing.<sup>3</sup> On the same day, Licensee filed a petition for appeal of DOT's suspension of her operating privilege, which the trial court granted by order dated May 5, 2009. The trial court held a *de novo* hearing on August 28, 2009, and permitted DOT to raise issues concerning Licensee's application to appeal *nunc pro tunc*. Additionally, DOT asserted that the district magistrate was without authority to modify Licensee's January 9, 2009, conviction on February 12, 2009, because section 5505 of the Judicial Code, 42 Pa. C.S. §5505, limits the authority of a court to modify or rescind any order within thirty days after its entry.

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<sup>2</sup> According to Licensee, neither she nor the district magistrate's office ever received any indication from DOT that the district magistrate's March 2, 2009, letter had been rejected.

<sup>3</sup> Due process requires that a hearing be held with respect to a party's request to appeal *nunc pro tunc*. Department of Transportation, Bureau of Driver Licensing v. Schillaci, 639 A2d 924 (Pa. Cmwlth. 1994).

Licensee testified that she provided proof that she completed her community service to the district magistrate on January 6, 2009. Licensee explained that Buckalew was not in his office when the district magistrate's representative called, adding that there were "a lot of people that he does community service with." (R.R. at 52a.) Licensee testified that, following a hearing on February 12, 2009, relating to a different case in which Licensee was a witness, the district magistrate called Licensee to the bench, advised Licensee that she had all the paperwork, knew that Licensee was not guilty, and would take care of everything. (R.R. at 41a-42a.) Licensee indicated that she immediately contacted her attorney as she believed the suspension was unwarranted since she had completed her community service. Licensee stated that she did not file an appeal within the required thirty days due to her belief that the dismissal of the underlying citation would nullify the suspension. (R.R. at 50a.)

By order dated August 28, 2009, the trial court reversed DOT's suspension of Licensee's operating privilege. DOT filed a notice of appeal with the trial court. The trial court subsequently issued an opinion setting forth its conclusions that the grant of Licensee's application to appeal *nunc pro tunc* was proper due to an administrative breakdown in the judicial system and that Licensee had her license suspended for an offense that the district magistrate later dismissed. (R.R. at 85a.)

On appeal,<sup>4</sup> DOT argues that the trial court erred as a matter of law in granting Licensee's application to appeal *nunc pro tunc* and in reversing Licensee's suspension. We disagree.

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<sup>4</sup> Our scope of review in a driver's license suspension case is limited to determining whether the findings of the trial court are supported by competent evidence, whether errors of **(Footnote continued on next page...)**

The thirty-day appeal period provided by section 5571(b) of the Judicial Code, 42 Pa. C.S. §5571(b), is jurisdictional, and the failure to bring an appeal within the statutorily prescribed period precludes the common pleas court from exercising subject matter jurisdiction. Baum v. Department of Transportation, Bureau of Driver Licensing, 949 A.2d 345 (Pa. Cmwlth. 2008); Kovalesky v. Department of Transportation, Bureau of Driver Licensing, 850 A.2d 26 (Pa. Cmwlth. 2004). A common pleas court may only assume jurisdiction over cases brought outside the thirty-day appeal period if the party requests to appeal *nunc pro tunc* and provides sufficient evidence to merit such an appeal. Kovalesky.

Generally, a court may permit a licensee to appeal *nunc pro tunc* only where the licensee's failure to file a timely appeal resulted from extraordinary circumstances involving fraud or a breakdown in the administrative or judicial process. Ercolani v. Department of Transportation, Bureau of Driver Licensing, 922 A.2d 1034 (Pa. Cmwlth.), appeal denied, 593 Pa. 758, 932 A.2d 77 (2007); Kulick v. Department of Transportation, Bureau of Driver Licensing, 666 A.2d 1148 (Pa. Cmwlth. 1995), appeal denied, 544 Pa. 616, 674 A.2d 1077 (1996).<sup>5</sup> Here, the record reflects that the district magistrate relied on erroneous information

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**(continued...)**

law were committed or whether there has been a manifest abuse of discretion. Hockenberry v. Department of Transportation, Bureau of Driver Licensing, 972 A.2d 97 (Pa. Cmwlth. 2009).

<sup>5</sup> A *nunc pro tunc* appeal also may be granted in limited circumstances where an appellant is precluded from filing a timely appeal because of non-negligent, unforeseeable, and unavoidable circumstances relating to appellant or appellant's counsel. Schofield v. Department of Transportation, Bureau of Driver Licensing, 828 A.2d 510 (Pa. Cmwlth.), appeal denied, 575 Pa. 705, 837 A.2d 1179 (2003).

to enter Licensee's conviction and then acknowledged the mistake, assured Licensee she would correct it, and failed to do so. We agree with the trial court that these facts evidence a breakdown in the judicial process warranting the grant of Licensee's appeal *nunc pro tunc*.

Turning to the merits of the suspension, we note that the plain language of section 1532(d) of the Code requires a conviction as a condition precedent to the imposition of a suspension under that section. DOT's suspension of Licensee's operating privilege in this case was premised upon Licensee's conviction under section 6308 of the Crimes Code, but the underlying criminal charge was dismissed by the district magistrate on February 12, 2009.<sup>6</sup> Accordingly, we conclude that DOT lacked the authority to suspend Licensee's operating privilege under section 1532(d).

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<sup>6</sup> The trial court did not address DOT's argument that the district magistrate lacked authority to rescind the entry of Licensee's conviction after thirty days pursuant to section 5505 of the Judicial Code, and DOT reiterates this argument on appeal. We agree with DOT that the district magistrate's failure to modify or rescind the January 9, 2009, order within thirty days presents a jurisdictional issue that could render the February 12, 2009, order a nullity. Department of Transportation, Bureau of Driver Licensing v. Duncan, 601 A.2d 456 (Pa. Cmwlth. 1991). However, DOT fails to recognize that a court may vacate, amend or modify an order beyond thirty days in cases involving extraordinary cause. Department of Transportation, Bureau of Motor Vehicles v. Messa, 632 A.2d 954 (Pa. Cmwlth. 1993); Duncan. Accordingly, "[c]ourts have modified and rescinded orders beyond the normal time limits and taken other corrective measures in cases where it would have been inequitable for parties to suffer consequences of the court's errors." Ainsworth v. Department of Transportation, Bureau of Driver Licensing, 807 A.2d 933, 937 (Pa. Cmwlth. 2002), appeal denied, 573 Pa. 699, 825 A.2d 1262 (2003), citing Jackson v. Hendrick, 560 Pa. 468, 473, 746 A.2d 574, 576 (2000). We conclude that such extraordinary cause exists here, where the district magistrate issued the February 12, 2009, order to correct a previous order that was improvidently entered based on erroneous information obtained during an *ex parte* telephone conversation and without affording Licensee an opportunity to respond.

In a similar situation, we affirmed a trial court's order sustaining the appeal of a license suspension. See Passel v. Department of Transportation, Bureau of Driver Licensing, 928 A.2d 381 (Pa. Cmwlth. 2007). In Passel, pursuant to section 1535 of the Code, 75 Pa. C.S. §1535, DOT suspended Passel's operating privilege for thirty days based upon his conviction for a violation of section 3341(b)(1) of the Code, 75 Pa. C.S. §3341(b)(1), relating to a disregard of railroad barriers. Passel appealed both his underlying criminal conviction and his license suspension. Pursuant to a plea agreement, Passel pled guilty to a summary offense and the charge relating to section 3341(b)(1) of the Code was *nolle prossed*. This occurred prior to the trial court's hearing on his suspension. The common pleas court sustained Passel's appeal, and we affirmed, citing the *de novo* nature of the trial court's review and concluding that DOT had not met its initial burden to produce a record of conviction supporting a suspension.

The same rationale applies in the present case. As Licensee's underlying criminal charge mandating a suspension of Licensee's operating privilege had been dismissed by the district magistrate prior to the *de novo* hearing before the trial court, DOT could not meet its initial burden of establishing a record of conviction to support the suspension. Therefore, the trial court did not err in reversing Licensee's suspension.

We note that, as an alternative argument, DOT argues that a suspension of Licensee's operating privilege was appropriate under section 1532(d) of the Code because Licensee's plea agreement involving community service constituted an "admission into a preadjudication program." However, DOT's suspension in this case was premised upon Licensee's conviction, not her admission into such a program. Moreover, because DOT failed to raise this issue

during the hearing before the trial court or in its statement of matters complained of on appeal, this issue is waived on appeal. Pa. R.A.P. 302(a); Busch v. Department of Transportation, Bureau of Driver Licensing, 900 A.2d 992 (Pa. Cmwlth.), appeal denied, 590 Pa. 662, 911 A.2d 937 (2006); Westfall v. Department of Transportation, Bureau of Driver Licensing, 558 A.2d 619 (Pa. Cmwlth. 1989).

Accordingly, the order of the trial court is affirmed.

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PATRICIA A. McCULLOUGH, Judge



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v.	:	No. 1887 C.D. 2009
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Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

**ORDER**

AND NOW, this 3rd day of May, 2010, the order of the Court of Common Pleas of Centre County, dated August 28, 2009, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge