

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eugene Pete Vanker, :
Appellant :
v. :
Commonwealth of Pennsylvania, :
Department of Transportation, : No. 2340 C.D. 2009
Bureau of Driver Licensing : Submitted: November 5, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: December 22, 2010

Eugene Pete Vanker (Vanker) appeals the order of the Court of Common Pleas of Lackawanna County (trial court) which granted the Department of Transportation, Bureau of Driver Licensing's (DOT) motion to quash Vanker's appeal from a one-year suspension of his operating privilege pursuant to Section 1547(b)(1) of the Vehicle Code (Code), 75 Pa.C.S. § 1547(b)(1).¹ In the same proceeding, Vanker sought to appeal the one-year disqualification of his commercial driver's license which arose from the same refusal to submit to chemical testing.

¹ Section 1547 of the Code provides:

(b) Suspension for refusal-

(1) If any person placed under arrest for a violation of section 3802 [relating to driving under the influence of alcohol or controlled substance] is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person . . . for a period of 12 months.

By official notice dated December 12, 2008, DOT informed Vanker that his operating privilege was to be suspended for one year, effective January 16, 2009, as a result of his refusal to submit to chemical testing on November 4, 2008. The notice also informed Vanker that he had “the right to appeal this action to the Court of Common Pleas (Civil Division) within thirty days of the mail date, DECEMBER 12, 2008, of this letter.” Official Notice of Suspension, December 12, 2008, at 2; Supplemental Reproduced Record (S.R.R.) at 2b.

Vanker did not appeal the suspension until January 23, 2009, more than thirty days after the date of the official notice of suspension.

At hearing before the trial court on October 27, 2009, DOT introduced the official notice of suspension of Vanker’s operating privilege and the disqualification of his commercial driver’s license. DOT moved to quash the appeal because it was not timely filed. Vanker’s attorney, Robert Saurman (Attorney Saurman) stated that Vanker ran a trucking business and was out of state for long periods of time. He further stated that Vanker did not make any arrangements for anyone to pick up his mail. Notes of Testimony, October 27, 2009, (N.T.) at 5-6; Reproduced Record (R.R.) at 17a-18a. Vanker testified, “There is nobody in the office.” N.T. at 7; R.R. at 19a. Attorney Saurman further stated that Vanker believed that he delivered the official notice of suspension to him on January 4, 2009, or at least by January 6, 2009. N.T. at 12, 15; R.R. at 24a, 27a. Attorney Saurman stated, “I think it makes the matter even worse for Mr. Vanker that not only was he not available but his counsel apparently, being me,

took longer than he should have to get this filed. I don't know how that would have happened in my office." N.T. at 12; R.R. at 24a.

When the trial court inquired as to why Vanker did not have his other driver check his mail, Vanker responded, "Well, the trucks are parked in Dunmore. He lives in Wilkes-Barre. He's not going to go all the way to Gouldsboro. . . . Because he doesn't get paid for that." N.T. at 13; R.R. at 25a.

The trial court granted the motion and dismissed the appeal:

Counsel for the appellant [Vanker] advised the court on the record that Mr. Vanker got the notice of suspension to him on January 6, 2009 and that his [attorney] (Robert Sausman [sic]) did not get the appeal prepared and filed on time and that it was his fault the appeal was not timely filed.

Both parties cited the Bass [v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979)] case. In this courts [sic] view the Bass case doesn't offer any relief to the appellant [Vanker].

For the reasons set forth herein the Motion to Quash the Appeal appears to be well taken and accordingly the Motion to Quash was granted and the Appeal dismissed.

Trial Court Opinion, May 19, 2010, at 2-3; S.R.R. at 33b-34b.

Vanker contends that the trial court erred and abused its discretion when it dismissed his appeal and that the trial court erred in dismissing the appeal where the evidence clearly demonstrated that the suspension was inappropriate.²

Vanker argues that because he was out of town running his trucking business, Vanker's Tankers, he did not become aware of the official notice of suspension until he returned to Pennsylvania. He asserts that he immediately contacted Attorney Saurman but the filing was delayed until Vanker could pay counsel fees for the appeal. Then there was an additional delay due to clerical confusion.

In order to timely appeal the suspension of his driving privilege, Vanker was required to file an appeal within thirty days of the mailing date of DOT's notice of suspension. See Sections 5571(b) and 5572 of the Judicial Code, 42 Pa. C.S. §§5571(b) and 5572. See also Smith v. Department of Transportation, Bureau of Driver Licensing, 749 A.2d 1065 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 568 Pa. 669, 795 A.2d 980 (2000). Courts may grant leave to appeal nunc pro tunc in extraordinary circumstances. Traditionally, leave to appeal nunc pro tunc is only granted when a party fails to timely appeal due to fraud or an administrative breakdown in operations. More recently, leave to appeal nunc pro tunc has been extended when an appeal was filed late due to non-negligent circumstances on the part of the appellant or his counsel. Schofield v. Department

² This Court's review is limited to determining whether the trial court's findings are supported by competent evidence, whether errors of law were committed, or whether the trial court committed an abuse of discretion in making its determination. Department of Transportation v. Renwick, 543 Pa. 122, 669 A.2d 934 (1996).

of Transportation, Bureau of Driver Licensing, 828 A.2d 510 (Pa. Cmwlth.), *petition of allowance of appeal denied*, 575 Pa. 705, 837 A.2d 1179 (2003). Our Pennsylvania Supreme Court has explained that the exception for allowance of an appeal nunc pro tunc for non-negligent circumstances is limited to unique and compelling cases in which an appellant establishes an attempt to file the appeal but was precluded from doing so due to unforeseeable and unavoidable events. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001).

Here, there clearly was no fraud or administrative breakdown on the part of DOT. Further, the failure to arrange for someone to check his mail, the failure to secure funds to pay the legal fees for the appeal,³ and unspecified clerical problems with Attorney Saurman's office do not constitute non-negligent circumstances which warranted a nunc pro tunc appeal. Vanker cites no case law to support his position.

Accordingly, this Court affirms.⁴

BERNARD L. McGINLEY, Judge

³ Vanker did not raise this argument before the trial court.

⁴ This Court need not address Vanker's argument concerning the merits of his appeal.

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ORDER

AND NOW, this 22nd day of December, 2010, the order of the Court of Common Pleas of Lackawanna County in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge