IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Keightly, Jr.	:	
	:	
v.	:	No. 2508 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	Submitted: April 15, 2011
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: October 17, 2011

The Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the November 5, 2010, order of the Court of Common Pleas of Bucks County (trial court) sustaining the *nunc pro tunc* appeal of George Keightly, Jr. (Licensee) and rescinding the one-year suspension of Licensee's operating privilege imposed by DOT pursuant to section 1547(b)(1) of the Vehicle Code (Code), 75 Pa. C.S. §1547(b)(1), for refusing to submit to chemical testing.[1] We reverse.

On August 9, 2009, Licensee was involved in a motorcycle accident. Officers Aileen Parker and Mark Leonhauser of the Middletown Township Police

[1] Section 1547(b)(1)(i) of the Code provides that DOT shall suspend a person's operating privilege for twelve months for refusing to submit to chemical testing following an arrest for a violation of section 3802 of the Code, 75 Pa. C.S. §3802 (relating to driving under influence of alcohol or controlled substance). 75 Pa. C.S. §1547(b)(1)(i).

Department were dispatched to the scene. Licensee was thereafter transported to the hospital by ambulance. After interviewing several witnesses, Officer Parker made her way to the hospital and briefly spoke with Licensee. Officer Leonhauser arrived at the hospital a few minutes later. Ultimately Licensee was advised that he was being placed under arrest for DUI and was asked to submit to chemical testing. Licensee refused to provide a blood sample or to sign the DL-26 form. (R.R. at 61a-62a.)

By notice dated January 11, 2010, DOT advised Licensee that his operating privilege would be suspended for a period of one year as a result of his refusal to submit to chemical testing in accordance with section 1547 of the Code. (R.R. at 11a-13a.) This notice also advised Licensee of his right to appeal within 30 days. However, Licensee did not file an appeal with the trial court until April 1, 2010. Licensee requested that the trial court grant his appeal *nunc pro tunc*, alleging that, due to a breakdown in the legal system, he was never served with timely notice of his suspension and only became aware of the same after the 30-day appeal period had expired. More specifically, Licensee asserted that, on August 17, 2009, he requested that the United States Postal Service forward his mail from his residence at 434 Squirrels Nest Lane, Frenchville, Pennsylvania, to 1611 South Crescent Boulevard, Yardley, Pennsylvania. Licensee stated that DOT mailed the suspension notice to his Frenchville address and he did not receive it. Instead, Licensee alleged that he first became aware of his suspension after speaking to his insurance agent on or about February 27, 2010, and that his insurance agent subsequently forwarded him the suspension notice. (R.R. at 4a-9a.)

The trial court held a *de novo* hearing on November 5, 2010. Licensee testified regarding the August 9, 2009, accident and his subsequent injuries, which prevented him from driving and required months of physical therapy. As to the untimeliness of his appeal, Licensee acknowledged that, at the time of the accident, he was living at 434 Squirrels Nest Lane, Frenchville, Pennsylvania. However, he stated that upon his release from the hospital, he went to live with his fiancé at 1611 South Crescent Boulevard, Yardley, Pennsylvania, and filed a change of address with the post office in Frenchville. The trial court admitted, over DOT's objection, a copy of the post office's confirmation of the change of address requested by Licensee. (R.R. at 44a-52a, 121a.)

Licensee testified that, while he received mail in Yardley, he never received DOT's notice of suspension. Rather, Licensee indicated that he first became aware of his suspension in the latter part of January 2010 during a conversation with his insurance agent.[2] Licensee noted that he immediately contacted the post office in Frenchville to determine if there had been a problem with forwarding his mail and that the post office informed him they had some mail and that the forwarding period had ended. Licensee testified that at some point prior to his birthday on March 7, 2010, either in late February or early March, he picked up his mail, which included DOT's January 11, 2010, notice of suspension. Licensee subsequently contacted counsel regarding an appeal. (R.R. at 52a-55a.)

With respect to the merits, Licensee asserted, inter alia, that he was not advised of the Implied Consent Law, that he did not refuse to submit to chemical

[2] This testimony contradicts Licensee's allegation in his petition for appeal *nunc pro tunc* that he first became aware of his suspension on February 27, 2010, while speaking with his insurance agent.

testing, and that the severity of his injuries and pain would have made it impossible for him to make a knowing and conscious refusal. Licensee testified that, during the accident, his helmet smashed in his face, and afterwards, his face was covered in blood, he could not see, and he could not move his limbs. Licensee indicated that he had no recollection of any interaction with Officers Parker or Leonhauser, including any refusal to submit to chemical testing or to signing the DL-26 form. (R.R. at 85a-96a.)

On cross-examination, Licensee acknowledged that the change of address confirmation form admitted into evidence specifically indicated that the forwarding of his mail would begin on August 17, 2009, and cease as of January 1, 2010. Licensee conceded that he had received this confirmation form from the post office. Licensee further conceded that he knew the forwarding of his mail would expire on January 1, and that DOT's notice of suspension was dated January 11, 2010. (R.R. at 58a.) Licensee noted that he filed a new change of address form for the period from February 19, 2010, to August 19, 2010. Further, Licensee acknowledged that, despite learning of the suspension from his insurance agent in late January 2010, he took no action until March 2010. (R.R. at 59a.)

Officers Parker and Leonhauser testified that, upon arriving at the accident scene, they observed Licensee lying on the ground with his helmet on and an off-duty physician holding his head. The Officers noted that Licensee was conscious and able to answer questions regarding his name and the model year of his motorcycle. The Officers indicated that an off-duty physician advised them that he smelled the odor of an alcoholic beverage on Licensee's breath. At the hospital, Officer Parker advised Licensee that he was being placed under arrest for DUI and

she read him the implied consent warnings as contained on the DL-26 form. Licensee refused to provide a blood sample or to sign the form. Officer Parker noted Licensee's refusal and had one of the medical personnel sign the form as a witness. Officer Parker testified that she read Licensee the implied consent warnings a second time in the presence of Officer Leonhauser, but Licensee again refused. Officer Leonhauser asked another one of the medical personnel to sign the form.[3] (R.R. at 61a-62a, 75a-80a.)

On cross-examination, Officer Parker could not recall if Licensee was wearing his helmet upon her arrival at the accident scene, but she did acknowledge that it was readily apparent he was injured and bleeding from his hand. Officer Parker denied seeing any blood around Licensee's head. Finally, Officer Parker noted that Licensee was conscious and talking while being treated in the hospital's trauma room. Officer Leonhauser testified on cross-examination that he never inquired as to Licensee's condition or his treatment from medical staff at the hospital, nor could he recall whether Licensee had an IV. However, Officer Leonhauser noted that Licensee appeared to be in significant pain at the accident scene. Like Officer Parker, Officer Leonhauser only recalled blood on Licensee's hand at the scene. (R.R. at 61a-74a, 80a-84a.)

By order dated November 5, 2010, the trial court sustained Licensee's appeal and rescinded the suspension imposed by DOT. DOT filed a notice of appeal with the trial court, which issued an opinion in support of its order on January 5, 2011. Regarding Licensee's *nunc pro tunc* appeal, the trial court indicated that

[3] A copy of the DL-26 form was admitted into evidence before the trial court. (R.R. at 63a, 113a.)

Licensee was never directly informed that his original mail forwarding request would expire on January 1, 2010, "even though the Change-Of-Address Confirmation indicated such termination date." (Trial court op. at 5.) The trial court noted that DOT's suspension notice was mailed only ten days later. Additionally, the trial court stated that Licensee did not receive the suspension notice until early March 2010, and that he filed an appeal within 30 days, on April 1, 2010. The trial court held that the circumstances described above constituted a non-negligent basis for Licensee's failure to file a timely appeal.

Regarding the merits, the trial court found that Licensee was unable to make a knowing and conscious refusal to submit to chemical testing as a result of the severe injuries he sustained in the accident. The trial court further found that said injuries should have been obvious to Officers Parker and Leonhauser. Noting Licensee's distress at the scene of the accident and his relatively calm demeanor only fifteen minutes later in the emergency room, the trial court concluded it was obvious that Licensee must have been provided with an anesthetic or painkiller prior to his refusal. Based upon this evidence, the trial court ruled out alcohol as being the contributing factor to Licensee's inability to make a knowing and conscious refusal.

On appeal to this Court, DOT first argues that the trial court erred in granting Licensee permission to proceed *nunc pro tunc*.[4] For the reasons set forth below, we agree.

[4] Our scope of review of a trial court's decision granting or denying an appeal *nunc pro tunc* is limited to determining whether the trial court abused its discretion or committed an erred of law. Baum v. Department of Transportation, Bureau of Driver Licensing, 949 A.2d 345 (Pa. Cmwlth. 2008).

The general rule is that a licensee has 30 days from the mailing date of the notice of suspension to file an appeal to the court of common pleas under section 5571(b) of the Judicial Code, 42 Pa. C.S. §5571(b). Baum v. Department of Transportation, Bureau of Driver Licensing, 949 A.2d 345 (Pa. Cmwlth. 2008). Failure to file an appeal within the 30-day period deprives the court of common pleas of subject matter jurisdiction over the appeal. Id. Moreover, statutory appeal periods are mandatory and may not be extended as a matter of grace or mere indulgence. Hudson v. Department of Transportation, Bureau of Driver Licensing, 830 A.2d 594 (Pa. Cmwlth. 2003).

There are exceptions to this rule which permit the filing of a late appeal. However, these exceptions are only appropriate in extraordinary circumstances and involve cases of fraud, a breakdown in the administrative process, or non-negligent circumstances. Baum; Hudson. We are concerned solely with the last exception in the present case. Our Pennsylvania Supreme Court has established the following three-part test for meeting the "non-negligent circumstances" exception: (1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001) (citing Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979)).[5] Nevertheless, this

[5] The "non-negligent circumstances" exception was first crafted by our Supreme Court in Bass. In that case, a widow filed suit in this Court against the Commonwealth, the City of Philadelphia, the City's police department, the Commissioner of the Bureau of Corrections, the Superintendent of Graterford Prison, and others following the murder of her husband by an inmate who absconded following a weekend furlough. This Court sustained the preliminary objections of the Commissioner raising the defense of official immunity and dismissed him from the suit.

exception was meant to apply only in unique and compelling cases in which the appellant has clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so. Id.

Furthermore, this Court has previously held that a petitioner in a *nunc pro tunc* appeal must proceed with reasonable diligence once he knows of the necessity to take action. 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).[6] Indeed, we have previously held that a lapse of eleven days between the

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Counsel for the widow prepared the necessary appeal papers and the appeal was ready for filing six days prior to the appeal expiration date. However, counsel's secretary became ill and left work and did not return for an entire week. Counsel's secretary was also the individual who routinely checked for filings in the case of secretary illnesses. Upon her return to work, counsel's secretary discovered the un-filed appeal and she immediately notified counsel, who filed a petition with the Supreme Court for permission to file the appeal *nunc pro tunc*. This petition was filed only four days after the appeal expiration date. The Supreme Court granted the petition concluding that members of the public should not lose their day in court due to the non-negligent conduct of their counsel or counsel's staff.

In Criss, the Supreme Court rejected application of the "non-negligent circumstances" exception to a situation where an appeal was received by a common pleas court two days late. Although the appeal was placed in the mail six days prior to the appeal expiration date, the Court concluded that mail delays are both foreseeable and avoidable and did not constitute non-negligent conduct warranting the grant of an appeal *nunc pro tunc*. However, *nunc pro tunc* appeals have been permitted by our Supreme Court and this Court under the "non-negligent circumstances" exception where the appellant or his counsel became seriously ill and required hospitalization, Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996), Tony Grande, Inc. v. Workmen's Compensation Appeal Board (Rodriguez), 455 A.2d 299 (Pa. Cmwlth. 1983), respectively, and where a law clerk's car broke down on route to the post office, thereby precluding him from getting to the post office before closing time, Perry v. Unemployment Compensation Board of Review, 459 A.2d 1342 (Pa. Cmwlth. 1983).

[6] In Ercolani, the record revealed that DOT sent the licensee a suspension notice on March 13, 2003. The licensee filed a petition on July 16, 2003, alleging that he never received DOT's original suspension notice. However, the licensee testified before the common pleas court that he became aware of the suspension on May 20, 2003, when he received a restoration requirements

discovery of the untimeliness and the filing of the *nunc pro tunc* appeal was not reasonably diligent. Stanton v. Department of Transportation, Bureau of Driver Licensing, 623 A.2d 925 (Pa. Cmwlth. 1993).

In the present case, Licensee sought permission to appeal *nunc pro tunc*, alleging that he was never served with timely notice of his suspension despite his filing of a change of address form with the post office. As DOT observes, the change of address confirmation form clearly states an expiration date and, more importantly, Licensee admitted he knew that his mail would not be forwarded after January 1, 2010.[7] Nevertheless, the trial court concluded that Licensee was not directly informed that the forwarding of his mail would expire on January 1, 2010. The record simply does not support Licensee's contentions or the trial court's conclusion.

Moreover, Licensee testified that, despite becoming aware of the suspension in late January 2010, he took no action regarding an appeal for a period of two months, until March 2010. More specifically, Licensee indicated that he did not pick up his un-forwarded mail from the post office until late February or early March, at some point prior to his birthday on March 7, 2010. Licensee's actions do not

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letter from DOT. The licensee further testified that he waited a month or two before contacting an attorney regarding an appeal. This Court held that the licensee failed to act promptly and diligently after he became aware of his suspension and, therefore, he was not entitled to a *nunc pro tunc* appeal.

[7] Licensee neglects to mention in his brief to this Court that the change of address form specifically indicated that the forwarding of mail would cease as of January 1, 2010. Further, Licensee disingenuously argues in his brief to this Court that "inexplicably, the post office did not deliver the Department [sic] Notice of Suspension" and that post office "inexplicably ignored his change of address" form. (Brief of Licensee at 4, 6.)

exhibit reasonable diligence on his part and, thus, the trial court should not have granted Licensee's *nunc pro tunc* appeal.

Accordingly, the order of the trial court is reversed.[8]

PATRICIA A. McCULLOUGH, Judge

[8] DOT also argues on appeal that the trial court erred in determining that Licensee was unable to make a knowing and conscious refusal to submit to chemical testing. Since we have determined above that the granting of Licensee's appeal *nunc pro tunc* was error, there is no need to address the merits of this argument.

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Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

ORDER

AND NOW, this 17th day of October, 2011, the order of the Court of Common Pleas of Bucks County, dated November 5, 2010, is hereby reversed. The one-year suspension of the operating privilege of George Keightly, Jr., imposed by the Department of Transportation, Bureau of Driver Licensing, is hereby reinstated.

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PATRICIA A. McCULLOUGH, Judge