

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Thompson, :
Appellant :
v. : No. 395 C.D. 2011
Commonwealth of Pennsylvania, : Submitted: August 19, 2011
Department of Transportation, :
Bureau of Driver Licensing :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: September 19, 2011

On August 4, 2010, Thompson, through his counsel, filed a Petition for Appeal from Suspension of Driving Priveleges (sic) with the Court of Common Pleas of Delaware County (trial court). Therein, Thompson sought *de novo* review of the July 5, 2010, Official Notice of the Suspension of his driving privilege issued by the Pennsylvania Department of Transportation, Bureau of Driver Licensing (DOT), pursuant to Section 1547(b)(1)(ii) of the Vehicle Code,¹ as a result of Thompson's

¹ 75 Pa.C.S. §1547(b)(1)(ii). Section 1547(b)(1)(ii) provides, in relevant part:

(b) Suspension for refusal.—

(Continued....)

refusal to submit to chemical testing. On August 5, 2010, a hearing on Thompson's appeal was scheduled by the trial court for October 5, 2010. The trial court called the matter on October 5, 2010, as scheduled; however, neither Thompson nor his counsel appeared. Accordingly, the trial court entered an order on October 5, 2010, denying Thompson's appeal of his driving privilege and reinstating the eighteen month suspension. No appeal from that order was filed with this Court within the mandated thirty day time period. See Pa.R.A.P. 903 ("Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken.").

On October 25, 2010, Thompson, through his counsel, filed with the trial court a Motion for Reconsideration of the Order Entered October 5, 2010. Therein, counsel stated that the cover sheet from the court administrator scheduling a hearing with respect to Thompson's appeal stated that the hearing was scheduled for October 15, 2010, not October 5, 2010. Counsel attached her copy of the cover sheet scheduling the hearing to the Motion for Reconsideration. This copy reflects a hearing date of October 15, 2010. See Original Record at Item 4, Exhibit B-1. Counsel stated further in the Motion for Reconsideration that she learned through

(1) If any person placed under arrest for a violation of section 3802 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 as follows:

(i) Except as set forth in subparagraph (ii), for a period of 12 months.

(ii) For a period of 18 months if any of the following apply:

(A) The person's operating privileges have previously been suspended under this subsection.

telephone calls that the hearing was held on October 5, 2010, and that counsel had not received an order dismissing Thompson's appeal. Finally, counsel asserted that Thompson would be severely prejudiced if a new hearing was not scheduled.

The trial court denied Thompson's Motion for Reconsideration by order of November 1, 2010. In an opinion in support of that order, the trial court stated that it reviewed the copy of the cover sheet attached to the Motion for Reconsideration and compared the same to the original cover sheet attached to Thompson's Petition for Appeal that is contained in the trial court's certified record. The trial court summarized its comparison as follows:

The blanks in the cover sheet with handwritten notes appeared to be identical - save for the additional vertical line inserted before the number "5" in the version submitted by [Thompson's] counsel. This line makes it appear that the hearing date was scheduled for October 15th and not October 5th. However, from the apparent identity between the two documents it appears that [Thompson's] version is, by-and-large, a photocopy of the filed original. Thus, we question the divergence between the original and the copy. Frankly, we do not believe that the copy transmitted to [Thompson's] counsel reflected October 15th.

We also recognize that [Thompson's] Motion for Reconsideration makes no reference to [Thompson] or his counsel's appearance at the courthouse on October 15th. Had the Motion contained specific reference to the efforts made to locate the hearing in the courthouse complex on that date and individuals that were contacted by counsel in the effort to locate the hearing, we might have been more inclined to entertain reconsideration. Moreover, we are surprised that it took over a week for defense counsel to formally bring the matter to the court's attention, especially in light of the "scheduling problem" ostensibly created by the court or its functionaries.

For these reasons, we rejected the overture to reconsider. In the absence of a record to support the

Petition, we have no basis to overturn the suspension notice issued by Respondent. While the record is not optimal, we are satisfied that our disposition of the matter was correct.

Trial Court Opinion at 2-3. On November 3, 2010, the trial court entered an order sealing its file in this matter until further order of the court.²

On December 2, 2010, Thompson filed a notice of appeal with this Court seeking review of two orders: (1) the November 1, 2010, order of the trial court denying Thompson's Motion for Reconsideration of the court's October 5, 2010, order denying Thompson's appeal from the eighteen month suspension of his driving privilege; and (2) the November 3, 2010, order of the trial court sealing the court's file.³ By order of March 15, 2011, this Court dismissed Thompson's appeal from the trial court's November 1, 2010, order because the order denying Thompson's Motion for Reconsideration was not appealable. See Provident National Bank v. Rooklin, 378 A.2d 893, 897 (Pa. Super. 1977) ("Pennsylvania case law is absolutely clear that the refusal of a trial court to reconsider, rehear, or permit reargument of a final decree is not reviewable on appeal."); Thorn v. Newman, 538 A.2d 105, 108 (Pa. Cmwlth. 1988); see also Pa.R.A.P. 1701, Note. This Court further ordered Thompson to address in his brief on the merits why the November 3, 2010, order is appealable and how Thompson is aggrieved by the order.

On May 31, 2011, Thompson filed a Petition to Appeal Nunc Pro Tunc the Order Dismissing the Appeal of Michael Thompson. Therein, Thompson requested that this Court reinstate his appeal of the trial court's November 1, 2010,

² It is not clear from the certified record why the trial court entered an order sealing its file in this matter.

³ Thompson originally filed his notice of appeal with the Superior Court which transferred this matter to this Court on January 21, 2011.

order. By order of June 6, 2011, this Court treated Thompson's Petition to Appeal Nunc Pro Tunc as a Petition for Reconsideration of our March 15, 2011, order and dismissed the Petition as untimely.

Thompson filed his brief on the merits and a reproduced record with this Court on May 25, 2011. On June 8, 2011, DOT filed a Motion to Strike Portions of the Reproduced Record and an Application to Compel Appellant to Order and Pay for the Transcript of the Hearing Conducted on October 5, 2010. Thompson filed an Answer to the Application to Strike and the Motion to Compel. This Court heard argument on both the Application to Strike and the Motion to Compel and by order entered July 20, 2011, the Motion to Compel was denied and the Application to Strike was granted. Accordingly, pages 12a through 24a and 29a through 34a were stricken from the reproduced record. DOT filed its brief in opposition to Thompson's appeal on August 5, 2011.

Initially, we note that despite this Court's dismissal of Thompson's appeal of the trial court's November 1, 2010, order denying his Motion for Reconsideration, Thompson states in his brief on the merits filed May 25, 2011, that he is appealing both the November 1, 2010 and November 3, 2010, orders of the trial court. Notwithstanding Thompson's inclusion of the November 1, 2010 order, we will not address any arguments regarding that order in this appeal.

In addition, we point out that Thompson has not complied with this Court's order of March 15, 2011, directing Thompson to address in his brief on the merits why the November 3, 2010, order is appealable. Thompson merely attempts to confer jurisdiction on this Court in the combined Jurisdiction Statement and Orders in Question portion of his brief, wherein he states as follows:

The lower court essentially granted *non-pros* against the Plaintiff on October 5, 2010 for failure to appear.

Appellant does not possess a copy as the record was sealed and court process was being sent to Thompson *pro se*. A timely appeal was filed on December 2, 2010.

This Court has jurisdiction of the appeal pursuant to §933. The appeal is from final orders dated November 1, 2010 and November 3, 2010 disposing of all of the claims.

Thompson's Brief at 1.

The Pennsylvania Rules of Appellate Procedure mandate that the brief of the appellant shall consist of, *inter alia*, a "Statement of Jurisdiction" and the "Order or other determination in question" and are to be separately and distinctly entitled. Pa.R.A.P. 2111. Rule 2114 mandates that "[t]he statement of jurisdiction shall contain a precise citation to the statutory provision, general rule or other authority believed to confer on the appellate court jurisdiction to review the order or other determination in question." Pa.R.A.P. 2114. Rule 2115 mandates that "[t]he text of the order or other determination from which an appeal has been taken or which is otherwise sought to be reviewed shall be set forth verbatim immediately following the statement of jurisdiction." Pa.R.A.P. 2115(a) (emphasis added). We note that Thompson has failed to comply with the foregoing rules by combining the statement of jurisdiction and order in question into one item in his brief, by failing to contain a precise citation to the statutory provision or authority believed to confer jurisdiction on this Court and by failing to set forth verbatim the text of the order from which this appeal has been taken.

This Court does not look favorably on counsel who blatantly disregards our orders and rules. We warn counsel that any future disregard may result in sanctions or the dismissal of an appeal. See Pa.R.A.P. 2101; Pa.R.A.P. 2744.

However, rather than dismissing Thompson's appeal, we will address the merits of his appeal. Thompson contends that he has been prejudiced by the trial

court's November 3, 2010, order sealing the record because his counsel has never received a copy of the October 5, 2010, order dismissing his appeal from the suspension of his driving privilege. Thompson contends that his counsel's efforts to obtain a copy of the October 5, 2010, order have been thwarted by the trial court's order sealing the record.

Thompson contends further that the October 5, 2010, order should have been an order granting *non-pros* for failure to appear for trial without a sufficient excuse and which could have been properly pursued by a petition to open which if denied on November 1, 2010, would have been appealable on December 2, 2010.

Finally, Thompson argues that there was a breakdown in the court process because his Petition to Appeal From Suspension of his Driving Priveleges (sic) was clearly filed by his counsel and was not filed as a *pro se* petition. Thompson contends that since his petition was marked as a *pro se* filing, the court hearing notices and orders were sent only to his family's address. Thompson contends that his family then gave him the notices and orders and he then gave the documents to his counsel. Thompson argues that this could not be a clearer case of prejudice to his legal rights.

The flaw in Thompson's argument is that his counsel clearly had notice on or before October 25, 2010, when the Motion for Reconsideration was filed with the trial court, that an order had been entered with regard to his appeal from his driving privilege suspension. As such, counsel could have requested at that time that a copy of the October 5, 2010, order be immediately resent to her address of record or she simply could have gone to the court house and secured a copy personally. There is no indication in the record that counsel took the necessary steps to secure a copy of the October 5, 2010, order prior to the record being sealed on November 3, 2010.

Thompson's arguments that it was the fault of court processing that his counsel did not receive the October 5, 2010, order are simply without merit given the timeline of his counsel's other filings in this matter. Moreover, the trial court did not credit counsel's assertions that the cover sheet she received actually scheduled the hearing on Thompson's appeal for October 15, 2010, rather than October 5, 2010, and that is why Thompson and his counsel failed to appear for the hearing. More importantly, when the trial court entered the November 1, 2010, order denying Thompson's Motion for Reconsideration, the appeal period had not expired to file an appeal from the trial court's October 5, 2010, order and the record was not sealed until November 3, 2010. In addition, Thompson or his counsel could have petitioned the trial court to view the sealed record under supervision by the court. Therefore, we reject Thompson's arguments that he was prejudiced by the trial court's sealing of its file in this matter.

The trial court's November 3, 2010, order is affirmed. As for the trial court's October 5, 2010, order dismissing Thompson's appeal from the eighteen month suspension of his driving privilege, that order became final on November 5, 2010, due to Thompson's failure to timely appeal therefrom.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 19th day of September, 2011, the November 3, 2010, order of the Court of Common Pleas of Delaware County entered at docket number 10-10251 is affirmed.

JAMES R. KELLEY, Senior Judge