

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Bell, :
Appellant :
v. : No. 526 C.D. 2010
Commonwealth of Pennsylvania, : Submitted: October 8, 2010
Department of Transportation, :
Bureau of Driver Licensing :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: December 22, 2010

John Bell (Appellant) appeals from the order of the Court of Common Pleas of Lackawanna County (trial court) dismissing his appeal from his operating privilege suspension issued by the Department of Transportation (Department). For the reasons that follow, we affirm the trial court's order but on different grounds.

According to testimony before the trial court by Officer Brian Munley (Officer Munley), the supervisor of the Lackawanna County Central Booking Office, Appellant was taken to him following an arrest for suspicion of driving under the influence of alcohol. The arresting officer did not testify and, over

objection, the trial judge admitted Officer Munley's testimony that Appellant had been arrested for driving under the influence of alcohol solely for purposes of laying groundwork and not for the truth of the matter asserted. Once Appellant was in Officer Munley's control, Officer Munley gave Appellant the walk and turn test and the one-leg stand test, both of which Appellant failed. Officer Munley then asked Appellant to take a blood test and read him the chemical test warnings that stated that his license would be suspended for refusal to take the test. When asked if he would take the test, Appellant responded by asking why he had been arrested. Officer Munley again asked Appellant to take the test, and Appellant again asked why he had been arrested. Officer Munley took this second non-responsive answer as a refusal to take the test.¹ Accordingly, the Department suspended Appellant's operating privileges for one year.²

At the same hearing before the trial judge and before Officer Munley testified, counsel for the Department asked the judge to quash Appellant's appeal.

¹ Officer Munley's testimony was corroborated by a DVD of the conversation between Appellant and Officer Munley that the trial judge viewed.

² Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa. C.S. §1547(b)(1)(i), provides, in relevant part:

(b) Suspension for refusal. –

(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.

Appellant had filed his appeal one day late, and his counsel had filed a petition to appeal *nunc pro tunc* the day before the hearing. Upon being questioned by the judge, Appellant's counsel stated:

[W]e knew Mr. Bell had refused his test. And we called him and asked him for a copy of the letter of suspension. And when we got it, I saw the time had expired when he delivered it to us and we filed the appeal anyhow. . . . And I just think it was an error on either our part or Mr. Bell's part as to the date on which it was necessary for this to be filed. . . . So, I mean, are we a day late, we are. . . . [T]here just may have been a breakdown in communication as a result in which it was filed a day late.

(Transcript of January 27, 2010 hearing, pages 5-7.) The trial court granted Appellant's petition to file his appeal *nunc pro tunc*. However, the trial court dismissed Appellant's appeal on the merits by finding that Appellant refused to submit to chemical testing, and this appeal followed.³

On appeal, Appellant argues that the trial court erred in finding that he refused to submit to chemical testing. He contends the evidence was insufficient to establish that he had been placed under arrest and that there were reasonable grounds to submit him to chemical testing. He also contends that there was insufficient evidence that he refused to submit to chemical testing once asked. In

³ Our review is limited to determining whether the trial court's findings are supported by substantial evidence and whether it committed an error of law or abused its discretion. *Department of Transportation, Bureau of Driver Licensing v. Moss*, 605 A.2d 1279 (Pa. Cmwlth. 1992).

its brief, the Department does not attempt to argue its position on the merits, merely stating in passing that it stands by the trial court's opinion. Rather, the Department devotes its entire brief to arguing that the trial court erred by granting the petition to appeal *nunc pro tunc*.

We do not need to decide whether Appellant's question to Officer Munley about why he was arrested was sufficient to constitute a refusal to submit to chemical testing because his appeal was untimely. While it is true that Appellant's appeal was only one day late, that is of no relevance. We have held that:

The failure to appeal an administrative agency's action in a timely fashion is a jurisdictional defect. An appeal *nunc pro tunc* will be allowed only where the petitioners (sic) delay was caused by extraordinary circumstances involving fraud, a breakdown in the administrative process, or non-negligent circumstances related to the petitioner, his counsel or a third party. . . . Whether a delay is one day or six years late, however, does not change the analysis with respect to a *nunc pro tunc* appeal.

C.S. v. Department of Public Welfare, 879 A.2d 1274, 1279-80 (Pa. Cmwlth. 2005). Here, there was no allegation of fraud, a breakdown of the administrative process or non-negligent circumstances. Rather, Appellant's counsel admitted that the appeal was filed late because of some unspecified "error on either our part or Mr. Bell's part."

Furthermore, this Court has previously held that an appeal filed one day late could not proceed *nunc pro tunc*. In *Smith v. Department of Transportation, Bureau of Driver Licensing*, 749 A.2d 1065 (Pa. Cmwlth. 2000), the petitioner sought to appeal *nunc pro tunc* from a one-year suspension of her driving privilege after she filed her appeal one day late. Her counsel explained to the trial court that his secretary, whose job it was to file the appeal, was ill and absent from the office on the day she was to have filed it. The trial court accepted this explanation, and granted leave to appeal *nunc pro tunc*. On appeal to this court, we reversed, holding that because the secretary did not testify, there was no evidence to substantiate counsel's assertion that she was ill and unable to file the appeal on time. Absent such testimony, there was no evidence of fraud, a breakdown in the system or a non-negligent reason for filing late, and, thus, we reversed the trial court and disallowed the petitioner's appeal. Likewise, here, Appellant offered no testimony showing that fraud, a breakdown in the system or some other non-negligent reason led to his appeal being filed one day late.

For the foregoing reasons, the order of the trial court is affirmed, albeit on different grounds.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 22nd day of December, 2010, the order of the Court of Common Pleas of Lackawanna County, dated March 8, 2010, is affirmed.

DAN PELLEGRINI, JUDGE