

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William L. Galebach, Jr., :
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 Appellant :
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 v. : No. 596 C.D. 2011
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 Commonwealth of Pennsylvania, : Submitted: October 7, 2011
 Department of Transportation, :
 Bureau of Driver Licensing :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: December 29, 2011

William L. Galebach, Jr., (Licensee) appeals from the Order of the Court of Common Pleas of Lancaster County (trial court), which dismissed Licensee's appeal *nunc pro tunc* and reinstated the one-year suspension of Licensee's operating privileges and disqualification from the use his commercial driving license (CDL) imposed by the Department of Transportation (Department), Bureau of Driver Licensing (Bureau), pursuant to Sections 1547(b)(1)(i) and 1613 of the Vehicle Code,

75 Pa. C.S. §§ 1547(b)(1)(i), 1613,¹ for his refusal to submit to chemical testing. On appeal, Licensee argues that the trial court erred in denying his appeal *nunc pro tunc* because his uncontradicted testimony established that he did not receive the Notice of License Suspension (Suspension Notice) and Notice of Disqualification for CDL (Disqualification Notice) (together, Notices) and because all of the competent evidence presented indicated that the Notices were sent to the wrong address.

On September 17, 2010, the Bureau sent the Notices to Licensee's address on record with the Bureau, 3901 Columbia Avenue, Lot 21. (Suspension Notice at 1, Bureau Ex. A, S.R.R. at 2b; Disqualification Notice at 1, Bureau Ex. A, S.R.R. at 5b.) The Notices indicated that, on August 10, 2010, Licensee refused to submit to chemical testing and, as a result, the Bureau was suspending his operating privileges for one year and he was disqualified from using his CDL for one year. (Suspension Notice at 1, Bureau Ex. A, S.R.R. at 2b; Disqualification Notice at 1, Department Ex. A, S.R.R. at 5b.) On February 23, 2011, Licensee filed a "Petition for License Appeal from Suspension of Operating Privilege and Disqualification of CDL *Nunc Pro Tunc*" (Petition) with the trial court, (Petition, R.R. at 4a-6a), which scheduled a hearing on the Petition for March 22, 2011, (Order, February 25, 2011, R.R. at 3a). Licensee asserted in the Petition that he did not become aware of his suspension and

¹ Section 1547(b)(1)(i) provides, in relevant part, that if a person placed under arrest for violating Section 3802 of the Vehicle Code, 75 Pa. C.S. § 3802 (related to driving under the influence of alcohol or a controlled substance), is requested to submit to a chemical test and refuses to do so, the Bureau is required to suspend the person's operating privileges for a period of one year. 75 Pa. C.S. § 1547(b)(1)(i). Section 1613 provides that if a person who has a CDL is asked to submit to a chemical test, refuses, and has a report issued pursuant to Section 1547, the person is disqualified from using his or her CDL for the same period of time as the person's regular driver's license is suspended. 75 Pa. C.S. § 1613.

disqualification until February 14, 2011, and his “failure to file an appeal from the [Notices] was due to unique and compelling circumstances and unforeseeable and unavoidable events which precluded him from doing so.” (Petition ¶¶ 7, 8.) The alleged unique circumstances in this case came about because, sometime in 2009 or 2010, the United States Postal Service (USPS) renumbered Licensee’s address from 3901 Columbia Avenue to 3887 Columbia Avenue, #21. (Petition ¶ 5.) Although Licensee’s address changed, Licensee did not move from his residence, and the same postal employee continued to deliver his mail. (Petition ¶ 5.) Licensee contended that, because he had not physically moved, he did not, and was not required to, notify the Bureau pursuant to Section 1515 of the Vehicle Code, 75 Pa. C.S. § 1515,² of the change in his mailing address. The Petition also included a recitation of issues related to the merits of Licensee’s suspension and disqualification.

The Bureau introduced Licensee’s certified driving record as evidence, and Licensee presented his own testimony and a copy of his vehicle registration, which displayed the 3887 Columbia Avenue address. The Bureau contended that Licensee’s *nunc pro tunc* Petition should be denied because the Bureau sent the Notices to Licensee’s address of record, the 3901 Columbia Avenue address. (Hr’g Tr. at 4-5, R.R. at 10a-11a.) Licensee’s counsel responded that the address on the DL-26 Form registering Licensee’s refusal to submit to chemical testing was 3887 Columbia Avenue and, although he notified the Department of his new street address for his

² Section 1515(a) of the Vehicle Code provides, in relevant part, that “Whenever any person after . . . receiving a driver’s license moves from the address named . . . in the driver’s license issued . . . such person shall, within 15 days thereafter, notify the [D]epartment of the old and new addresses” 75 Pa. C.S. § 1515(a).

vehicle registration as required by Section 1312 of the Vehicle Code, 75 Pa. C.S. § 1312,³ he did not notify the Bureau regarding his driver's license and was not required to do so by the Vehicle Code. (Hr'g Tr. at 5-6, R.R. at 11a-12a.) The Bureau's counsel indicated that the Department's computer systems are separate for registration and driver's license information and, simply because Licensee informed the Bureau of Motor Vehicles of his new address did not mean that the Bureau received that information. (Hr'g Tr. at 6-7, R.R. at 12a-13a.)

Licensee testified that he lived in a mobile home park and that, sometime in 2009, the addresses on his street were renumbered. (Hr'g Tr. at 10-11, R.R. at 16a-17a.) Licensee acknowledged that he had the same postman as before and that he continued to get mail at his new street address. (Hr'g Tr. at 11, R.R. at 17a.) He admitted to being arrested for driving under the influence on August 10, 2010, but denied ever receiving the Notices. (Hr'g Tr. at 11, R.R. at 17a.) Licensee indicated that he first became aware of his license suspension and CDL disqualification when he retained his present counsel in 2011. (Hr'g Tr. at 11-12, R.R. at 17a-18a.) When questioned by the trial court as to why he had retained a new attorney, Licensee stated that he "was under the impression that I should ha[ve] something to this effect, [i.e., he should have received something in the mail from the Bureau,] but I just never received it." (Hr'g Tr. at 12, R.R. at 18a.) Licensee indicated that there were problems with his mailman and that "it seem[ed like] anything important in the mail you just don't get. I don't know if he plays that technical 3901, 3887 game with

³ Section 1312 states, in relevant part, "Any person whose address is changed from the address named . . . on the registration card . . . shall, within 15 days, notify the [D]epartment in writing of the old and new address. . . ." 75 Pa. C.S. § 1312.

everybody and if they didn't change their numbers, he won't deliver the mail, but I'm not the only one that d[id]n't receive my mail." (Hr'g Tr. at 13, R.R. at 19a.) The trial court inquired whether the mailman did not deliver "[j]ust the important stuff" and Licensee responded "[y]eah[,] [m]y other neighbor didn't get his registration, electric bills, you know, anything that's time important." (Hr'g Tr. at 13, R.R. at 19a.) The trial court asked Licensee when he became aware that his important mail was not being delivered, and Licensee answered that it was "[p]robably a good year ago," i.e., after the address change, but he agreed that he never contacted the post office about the problem with the mailman. (Hr'g Tr. at 15-17, R.R. at 21a-23a.) On cross-examination, Licensee stated that he never contacted the Bureau regarding what was going on related to his refusal and that he intended to change the address on his driver's license when he renewed his license. (Hr'g Tr. at 19, R.R. at 25a.)

After considering the argument and Licensee's testimony, the trial court concluded that Licensee's "credibility on the plausible scale doesn't impress me. I have no doubt in my mind that he received these [N]otices, and based on my assessment of [Licensee's] credibility while on the stand, I am denying [his] request for an appeal *nunc pro tunc* in this matter." (Hr'g Tr. at 21, R.R. at 27a.) Accordingly, the trial court dismissed Licensee's appeal and reinstated the Department's suspension and disqualification of Licensee's CDL. (Hr'g Tr. at 21, R.R. at 27a; Order, March 22, 2011, R.R. at 29a.) Licensee appealed and filed a Concise Statement of Matters Complained of on Appeal (Statement) pursuant to Pa. R.A.P. 1925(b), to which the trial court issued an opinion in accordance with Pa. R.A.P. 1925(a). In the Statement, Licensee argued that competent evidence did not support the trial court's finding that Licensee was not credible, and that whatever

competent evidence there was contradicted the trial court's finding. (Statement ¶ 1, R.R. at 44a.) According to Licensee, his testimony, the vehicle registration card, and the DL-26 Form all reflected his newly assigned address (3887 Columbia Avenue), and he testified that he has not received important mail because of his mailman. (Statement ¶¶ 2-4, R.R. at 44a-45a.) Additionally, although Licensee changed the address on his vehicle registration, he contends that he was not required to change the address on his driver's license because he did not physically move and the Bureau should have been aware of his correct address because it was listed on the DL-26 Form and his vehicle registration. (Statement ¶¶ 5-6, R.R. at 45a.) Thus, Licensee contended that he met the requirements for obtaining *nunc pro tunc* relief due to non-negligent circumstances caused by the USPS changing his address, his mailman not delivering his important mail, he filed his appeal as soon as he learned of the Notices, and the Bureau has not been prejudiced by the lateness of his appeal. (Statement ¶¶ 7-8, R.R. at 45a-46a.) In its 1925(a) opinion, the trial court held that, as "[t]he finder of fact[, it] is free to believe all, part or none of the evidence presented and to determine the credibility of the witnesses." (Trial Ct. Op. at 2 (citing Commonwealth v. Champney 574 Pa. 435, 444, 832 A.2d 403, 408 (2003)).) Citing various aspects of Licensee's testimony, the trial court reiterated its finding that Licensee's testimony, including his claims that he did not receive the Notices and his mailman liked to play games with important mail, were not credible and, therefore, the basis of Licensee's appeal was without merit. (Trial Ct. Op. at 2-3.) This matter is now ripe for this Court's review.⁴

⁴ Our review of a trial court's determination regarding the filing of "an untimely appeal to be filed *nunc pro tunc*, is limited to determining whether the trial court abused its discretion[,], committed an error of law," Lajevic v. Department of Transportation, Bureau of Driver Licensing, 718 A.2d 371, 372 (Pa. Cmwlth. 1998), or whether the trial court's findings of fact are supported by
(Continued...)

Licensee argues that the trial court erred when it denied his appeal *nunc pro tunc* and committed a manifest abuse of discretion when it found his testimony that he did not receive the Notices not credible. Licensee contends that there can be no reasonable dispute that, at the time the Notices were sent to 3901 Columbia Avenue, Licensee's correct address was 3887 Columbia Avenue and that the Bureau was or should have been aware of Licensee's correct address because that was the address he submitted to the Department for his vehicle registration and the address the police officer used on the DL-26 Form, which was forwarded to the Bureau. Licensee asserts that, "[t]he grant or denial of a *nunc pro tunc* appeal is a matter within the [trial c]ourt's discretion. Fundamentally, it boils down to a question of what is fair to [Licensee]." (Licensee's Br. at 10.) According to Licensee, this is one of the unique and compelling circumstances where *nunc pro tunc* relief is proper because he did not receive the Notices that were sent to him at an address different from his correct address, which was changed by the USPS. He cites this Court's decision in Department of Transportation, Bureau of Driver Licensing v. Lang, 610 A.2d 1076, 1078 (Pa. Cmwlth. 1991), to support his position that *nunc pro tunc* relief is appropriate under these circumstances.

"[A]ppel periods are jurisdictional and may not be extended as a matter of grace or mere indulgence; otherwise there would be no finality to judicial action."⁵

competent evidence, Piasecki v. Department of Transportation, Bureau of Driver Licensing, 6 A.3d 1067, 1070 n.7 (Pa. Cmwlth. 2010).

⁵ Pursuant to Section 5571(b) of the Judicial Code, 42 Pa. C.S. § 5571(b), a driver has thirty days to file an appeal from the suspension of the driver's operating privileges, and Section 5572 of the Judicial Code, 42 Pa. C.S. § 5572, states that the date of mailing is the date of service of a governmental unit's order.

City of Philadelphia v. Tirrill, 906 A.2d 663, 665 (Pa. Cmwlth. 2006). “Under extraordinary circumstances, however, a court may extend the appeal period by granting equitable relief in the form of a *nunc pro tunc*” appeal. Id. at 666. In order to obtain an appeal *nunc pro tunc*, the party seeking the equitable relief bears the burden of showing that: (1) the delay in filing his appeal was due to fraud, a breakdown in the court’s operations, or some other non-negligent circumstances, id.; (2) that the party “proceed[ed] with reasonable diligence once he [knew] of the necessity to take action,” Schofield v. Department of Transportation, Bureau of Driver Licensing, 828 A.2d 510, 513 (Pa. Cmwlth. 2003); and (3) any prejudice to the opposing party is minimal, Bass v. Commonwealth, 485 Pa. 256, 260, 401 A.2d 1133, 1135-36 (1979).

“Determinations as to the credibility of witnesses and the weight assigned to the evidence are solely within the province of the trial court as fact-finder.” Reinhart v. Department of Transportation, Bureau of Driver Licensing, 954 A.2d 761, 765 (Pa. Cmwlth. 2008). “As fact-finder, the trial court may accept or reject the testimony of any witness in whole or in part.” Id. This Court is “bound by these credibility determinations and cannot reweigh the evidence as Licensee desires.” Sitoski v. Department of Transportation, Bureau of Driver Licensing, 11 A.3d 12, 17 (Pa. Cmwlth. 2010). An abuse of discretion is established when there is a “manifestly unreasonable exercise of judgment, or a final result that evidence partiality, bias or ill will.” Rutkowski v. Department of Transportation, Bureau of Driver Licensing, 987 A.2d 841, 846 (Pa. Cmwlth. 2009) (quoting Centrum Prime Meats, Inc. v. Pennsylvania Liquor Control Board, 455 A.2d 742, 745 (Pa. Cmwlth. 1983)).

Here, Licensee attempted to satisfy his burden of proving his entitlement to *nunc pro tunc* relief based on his non-receipt of the Notices because his address changed and his mailman did not deliver important mail that was addressed to Licensee's former address. As noted above, Licensee testified that he did not receive the Notices because of the change of his address. (Hr'g Tr. at 14, R.R. at 20a.) Licensee also stated that, while his address changed, he still had the same mailman delivering his mail and that he continued to receive mail addressed to the former address at the newly assigned address.⁶ (Hr'g Tr. at 10-11, R.R. at 16a-17a.) Although Licensee stated that he thought his mailman was not delivering "important" mail or was playing some kind of game with Licensee and Licensee's neighbors, (Hr'g Tr. at 13, R.R. at 19a), the trial court found this allegation to be "outlandish," particularly where Licensee did not complain to the postal authorities about the mailman's actions. (Trial Ct. Op. at 2-3.) Moreover, the trial court did not credit Licensee's claim that he did not receive the Notices, finding the claim implausible. (Hr'g Tr. at 21, R.R. at 27a; Trial Ct. Op. at 2.) We cannot say that the trial court's credibility determination was a "manifestly unreasonable exercise of judgment" or was the result of "partiality, bias or ill will" where the trial court observed Licensee's demeanor on the stand and referenced particular parts of Licensee's testimony that the trial court concluded were not plausible. As the Bureau points out in its brief, Licensee could have asked his neighbors to corroborate his allegations against the mailman or, as noted by the trial court, complained to the USPS that his mailman was

⁶ Although not expressly stated, this fact can be inferred by the totality of Licensee's testimony, particularly his testimony that he believed the mailman "plays that technical 3901, 3887 game." (Hr'g Tr. at 13, R.R. at 19a.) The "evidence must be viewed in a light most favorable to the prevailing party, who must be given the benefit of *all reasonable inferences* arising from the evidence." In re McGlynn, 974 A.2d 525, 534 n.9 (Pa. Cmwlth. 2009) (citing Bensalem Township v. Press, 501 A.2d 331, 334 (Pa. Cmwlth. 1985)) (emphasis added).

not delivering important mail. Licensee did neither in this matter, and we conclude that it was not an abuse of discretion for the trial court to disbelieve Licensee's claims that he did not receive the Notices of his suspension and disqualification. Because we are bound by the trial court's credibility determinations, and absent credited evidence of non-negligent circumstances, Licensee cannot satisfy his burden of establishing an entitlement to *nunc pro tunc* relief.

Moreover, Lang does not require a different result. In Lang, the licensee, who had moved and had updated her vehicle registration but not her driver's license, did not receive the notice of the suspension of her operating privileges, pursuant to Section 1547(b)(1)(i), that had been sent by the Bureau to her prior address. Lang, 610 A.2d at 1076-77. The licensee filed an untimely appeal, and the Bureau filed a motion to quash, which the trial court denied reasoning that the licensee was entitled to *nunc pro tunc* relief. Id. The Bureau appealed to this Court, and the licensee argued that the trial court properly granted her *nunc pro tunc* relief based on an administrative breakdown because "the Department had within its bureaucratic network the [licensee's] current mailing address," referring to her vehicle registration. Id. at 1077. We held, however, that because the registration card was not entered into evidence and Section 1515 requires a separate notification to the Bureau, there was no evidence before this Court that the licensee had changed her address with either the Bureau of Motor Vehicles or the Bureau. Id. at 1078. Thus, there was no basis for *nunc pro tunc* relief, and we reversed the trial court's order granting such relief. Id.

Licensee argues that, because this Court referred to the lack of the registration card in Lang and he presented that evidence in this case, he established that there was an administrative breakdown and his appeal should be considered *nunc pro tunc*. However, unlike in Lang, where there was no dispute that the licensee had not actually received the suspension notice because she had moved to a new location, Licensee did not move and his own testimony established that, although his address changed, Licensee's mailman remained the same and he continued to receive mail at his new address that had been addressed to his former address. This situation is different from Lang, notwithstanding the fact that the Bureau did not have Licensee's most recent address, which was available somewhere in the Department's computer system, the Bureau used Licensee's address of record, at which Licensee indicated he continued to receive mail. The trial court, acting within its role as fact-finder, did not believe Licensee's testimony that he did not receive the Notices. Thus, Lang does not require this Court to reverse the trial court's Order.

Accordingly, we are constrained to affirm the trial court's Order dismissing Licensee's appeal and reinstating the suspension of Licensee's driving privileges, and disqualification of the use of Licensee's CDL.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, December 29, 2011, the Order of the Court of Common Pleas of Lancaster County in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge