

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Janet A. Dunn :
 :
 v. : No. 79 C.D. 2010
 : Submitted: August 13, 2010
 Commonwealth of Pennsylvania, :
 Department of Transportation, :
 Bureau of Driver Licensing, :
 Appellant :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: November 9, 2010

The Department of Transportation, Bureau of Driver Licensing (PennDOT) appeals an order of the Court of Common Pleas of Philadelphia County (trial court) reinstating the driver's license of Janet A. Dunn (Licensee). PennDOT contends that the trial court erred (i) in allowing Licensee to appeal *nunc pro tunc* and (ii) in deciding the merits of her appeal. Concluding that the trial court erred in allowing Licensee to appeal *nunc pro tunc* without an evidentiary record, we vacate and remand.

On May 22, 2008, PennDOT notified Licensee that her privilege to apply for a driver's license was "cancelled" for the reason that her driving privileges had been suspended by the State of New Jersey. The notice also informed Licensee that she would be ineligible for a Pennsylvania driver's license until she could provide proof that her New Jersey operating privileges had been restored. The notice

directed Licensee to return any driver's license, learner's permit or temporary license in her possession. Finally, the notice informed Licensee that she had thirty days to appeal.

On December 5, 2008, Licensee petitioned for leave to appeal PennDOT's May 2008 notice *nunc pro tunc*, asserting that the notice had been delivered to an abandoned property located in her neighborhood, not to her. A potential buyer of the abandoned property gave her the notice approximately one week before she filed her petition for leave to appeal *nunc pro tunc*. The petition also complained that PennDOT's notice

was not sent with an address verification; therefore, [PennDOT] did not notify [her] that the notice was never delivered nor was [she] previously aware of the notice or [PennDOT's] action.

Reproduced Record at 8a (R.R. ___). According to Licensee, PennDOT's failure to confirm her receipt of its notice coupled with the U.S. Postal Service's failure to deliver her mail correctly constituted a breakdown in administrative operations warranting *nunc pro tunc* relief. Finally, the petition asserted that the PennDOT notice was confusing because it stated that her privilege to apply for a driver's license was cancelled, but then it also stated that her license was being cancelled effective June 26, 2008.¹

PennDOT answered the petition, stating that its notice to Licensee was mailed in the ordinary course of business, entitling it to a presumption that it was received in a timely manner. PennDOT's answer pointed out that Licensee's

¹ Licensee states in her petition for leave to appeal *nunc pro tunc* that she applied for and received a Pennsylvania driver's license in February 2007.

allegations about the confusing nature of the notice were irrelevant to her petition for leave to appeal *nunc pro tunc*.

Without a hearing, the trial court granted Licensee's petition for leave to appeal *nunc pro tunc*. Thereafter, on December, 11, 2009, the trial court conducted a hearing on the merits of Licensee's appeal. PennDOT argued that Licensee's petition for leave to appeal *nunc pro tunc* should not have been granted, but the hearing on the merits went forward.²

PennDOT presented several documents, including a copy of its cancellation notice; Licensee's Pennsylvania driving record; a record from the National Driver Register; and a certification from the legal custodian of Pennsylvania driver licensing records. PennDOT contended that the National Driver Register established that Licensee's driving privileges had been suspended in New Jersey. PennDOT then rested its case. Licensee did not present any evidence. Instead, Licensee presented a legal argument based on this Court's holding in *Reardon v. Department of Transportation, Bureau of Driver Licensing*, 935 A.2d 63 (Pa. Cmwlth. 2007) (printout from the National Driver Register did not clearly show that the licensee's operating privileges had been suspended in Maryland and, thus, was insufficient to support a license suspension in Pennsylvania). Concluding that *Reardon* was on point, the trial court held that PennDOT's documentary evidence was insufficient to support PennDOT's action. It sustained Licensee's appeal.

² The Honorable Peter F. Rogers decided Licensee's appeal on the merits. His PA. R.A.P. 1925(a) opinion did not address the *nunc pro tunc* issue presumably because of "[t]he general rule ... that absent some new evidence, it is improper for a trial judge to overrule an interlocutory order entered by another judge of the same court involving the same issue." *Department of Environmental Resources v. PBS Coals, Inc.*, 677 A.2d 868, 871 (Pa. Cmwlth. 1996).

PennDOT now appeals to this Court. Its appeal is twofold. First, PennDOT argues that the trial court erred in granting Licensee leave to appeal *nunc pro tunc*.³ Second, PennDOT argues that its evidence proved Licensee’s operating privileges had been suspended in New Jersey and that the trial court erred in holding otherwise.

We begin with the trial court’s grant of Licensee’s petition to appeal *nunc pro tunc*. PennDOT argues that there is a presumption that its notice, sent by first class mail, was received by Licensee. Accordingly, a hearing was necessary in order for Licensee to overcome this presumption, and it was error for the trial court to grant Licensee leave to appeal *nunc pro tunc* without a hearing.

Licensee counters that PennDOT has waived the issue because it did not appeal the *nunc pro tunc* order, which was entered under a separate docket number. PennDOT only effected an appeal of the trial court’s order reinstating her license. Alternatively, Licensee argues that PennDOT’s confusing notice was, in itself, grounds for granting a *nunc pro tunc* petition.

We reject Licensee’s contention that PennDOT waived its ability to challenge the trial court’s *nunc pro tunc* order. First, as Licensee concedes, an order authorizing a *nunc pro tunc* appeal is interlocutory. *See* PA. R.A.P 341 (defining final appealable orders).⁴ The only appealable order was the final order on the merits. It is

³ Our scope of review following the grant of a petition for leave to appeal *nunc pro tunc* is limited to a determination of whether the trial court abused its discretion or committed an error of law. *Department of Transportation, Bureau of Driver Licensing, v. Kruc*, 557 A.2d 443, 445 n.6 (Pa. Cmwlth. 1989). Our scope of review from the suspension of a driver’s operating privilege is limited to determining whether the trial court’s findings are supported by competent evidence and whether the trial court committed an error of law or abused its discretion. *Tirado v. Department of Transportation, Bureau of Driver Licensing*, 876 A.2d 1082, 1085 n.6 (Pa. Cmwlth. 2005).

⁴ It states, in relevant part:

(Footnote continued on the next page . . .)

of no moment that the judge who granted the petition to appeal *nunc pro tunc* was not the judge who ruled on the merits of Licensee’s appeal. PA. R.A.P. 1925 does not require an appellant to serve both judges. Instead, it provides:

If the case appealed involves a ruling issued by a judge who was not the judge entering the order giving rise to the notice of appeal, the judge entering the order giving rise to the notice of appeal may request that the judge who made the earlier ruling provide an opinion to be filed in accordance with [this rule] to explain the reasons for that ruling.

PA. R.A.P. 1925(a)(1).⁵ Second, the grant of *nunc pro tunc* relief “is a question of jurisdiction” that “cannot be waived.” *Kruc*, 557 A.2d at 445. PennDOT could raise the issue for the first time in its appeal to this Court, and, further, this Court could raise the issue *sua sponte*. *Id.*

Next, we consider Licensee’s claim that the notice was so confusing that it warrants the grant of a *nunc pro tunc* appeal. The notice provided as follows:

Your right to apply for a driver’s license or learner’s permit is being denied due to information received from the State of NEW JERSEY indicating that your driving privileges are suspended. This denial is authorized by Section 1572 of the Vehicle Code. You will not be able to apply for a driver’s license or learner’s

(continued . . .)

- (b) Definition of final order. A final order is any order that:
- (1) disposes of all claims and of all parties; or
 - (2) is expressly defined as a final order by statute; or
 - (3) is entered as a final order pursuant to subdivision (c) of this rule. [Relating to when a determination of finality is made by a court].

PA. R.A.P. 341(b).

⁵ Judge Rogers apparently did not make this request to Judge Moss. His opinion merely notes that the *nunc pro tunc* petition was granted by another judge of concurrent jurisdiction.

permit until sufficient proof of restoration is received from the State of NEW JERSEY.

In order to comply with this sanction you are required to return any current driver's license, learner's permit and/or temporary driver's license (camera card) in your possession no later than the effective date listed. If you cannot comply with the requirements stated above, you are required to submit a DL16LC Form or a sworn affidavit stating that you are aware of the sanction against your driving privilege. Failure to comply with this notice shall result in this Bureau referring this matter to the Pennsylvania State Police for prosecution under SECTION 1571(a)(4) of the Vehicle Code.

You have the right to appeal the Department's action to the Court of Common Pleas (Civil Division) within 30 days of the mail date (MAY 22, 2008) of this notice.

R.R. 11a-12a (emphasis in original). The composition of this notice is a study in bureaucratese, not clarity. However, it is clear on when and how to appeal.

In *Dwyer v. Department of Transportation, Bureau of Driver Licensing*, 849 A.2d 1274 (Pa. Cmwlth. 2004), we explained that a confusing notice can justify an appeal *nunc pro tunc*. In *Dwyer*, the trial court granted an appeal *nunc pro tunc* because it found that PennDOT's notice to install an interlock device was unclear on the appeal deadline. We reversed because the licensee never claimed that PennDOT's confusing notice was the reason for her delay in filing an appeal. Thus, we concluded that the licensee did not establish grounds for *nunc pro tunc* relief.

In the present case, Licensee's petition for leave to appeal *nunc pro tunc* complained about the confusing instructions in the notice, but it did not claim that Licensee was confused about when or how to appeal. Rather, the petition asserted that the delay in filing was principally caused by the failure of the U.S. Postal Service to deliver PennDOT's notice to the correct address, noting that Licensee had received

the notice “approximately one week [before filing her petition].” R.R. 8a. This assertion is inconsistent with Licensee’s alternate position that the five-month delay in filing her appeal was caused by the content of the notice. As in *Dwyer*, Licensee does not correlate her delay in filing an appeal to confusion caused by the content of the notice.

We turn, then, to PennDOT’s argument that the trial court erred in granting the petition to proceed *nunc pro tunc* without a hearing. A *nunc pro tunc* appeal may be allowed “where the licensee’s failure to file a timely appeal resulted from extraordinary circumstances involving fraud or a breakdown in the administrative or judicial process.” *Ercolani v. Department of Transportation, Bureau of Driver Licensing*, 922 A.2d 1034, 1037 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 593 Pa. 758, 932 A.2d 77 (2007).

Licensee’s *nunc pro tunc* petition asserted that breakdown in the administrative process occurred because PennDOT did not send the notice “with an address verification.” R.R. 8a. However, the Vehicle Code does not require a verification. PennDOT is required only to notify a licensee of a suspension, revocation or disqualification by mailing a notice “at the address of record.” 75 Pa. C.S. §1540(b)(1).⁶ Licensee’s assertions about PennDOT’s failure to obtain a verification does not demonstrate an administrative breakdown.

⁶ It states:

Upon the suspension or revocation of the operating privilege or the disqualification of the commercial operating privilege of any person by the department, the department shall forthwith notify the person in writing at the address of record to surrender his driver’s license to the department for the term of suspension, revocation or disqualification.

75 Pa. C.S. §1540(b)(1).

On the other hand, the failure of the U.S. Postal Service to deliver PennDOT's notice to Licensee's home is such a breakdown. In *Kulick v. Department of Transportation, Bureau of Driver Licensing*, 666 A.2d 1148, 1150 (Pa. Cmwlth. 1995), we explained that PennDOT has the initial burden of establishing that the notice was mailed to the address of record.⁷ Once PennDOT satisfies this burden, it is presumed that the notice was received. The burden of proof then shifts to the licensee to rebut the presumption; however, "[t]estimony denying receipt of the notice is insufficient evidence to rebut the presumption of receipt." *Id.*

A hearing was needed to establish whether Licensee's notice was delivered to the wrong address, and it was error to grant the petition without a hearing.⁸ Further, as we explained in *Department of Transportation, Bureau of Driver Licensing v. Schillaci*, 639 A.2d 924, 925 (Pa. Cmwlth. 1994), a suspension hearing granting a licensee's appeal cannot negate a trial court's error in failing to hold a hearing on whether to grant the licensee's *nunc pro tunc* petition. If a *nunc pro tunc* appeal is improperly granted, the trial court is divested of jurisdiction to consider the merits of Licensee's appeal. *Id.* at 926.

For these reasons, the trial court's grant of Licensee's petition for leave to appeal *nunc pro tunc* and sustaining of Licensee's appeal will be vacated, and the

⁷ Licensee's petition concedes that PennDOT properly mailed the notice to the correct address.

⁸ Because the trial court's opinion did not address Licensee's *nunc pro tunc* petition, this Court would normally order a remand with directions that a PA. R.A.P. 1925(a) opinion on the *nunc pro tunc* issue be prepared and returned. *Duquesne Light Company v. Woodland Hills School District*, 700 A.2d 1038, 1046 (Pa. Cmwlth. 1997). However, as Licensee's petition for leave to appeal *nunc pro tunc* clearly requires that a hearing be held prior to any court determination, "in the interests of judicial economy," we will not require another Rule 1925(a) opinion from the trial court.

matter remanded for a hearing on whether Licensee should be granted leave to appeal *nunc pro tunc*.⁹

MARY HANNAH LEAVITT, Judge

⁹ Because we vacate and remand, we do not reach PennDOT's second allegation of error related to the trial court's review of the merits of the action.

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ORDER

AND NOW, this 9th day of November, 2010, the order of the Court of Common Pleas of Philadelphia County of December 11, 2009, sustaining Janet A. Dunn's appeal and rescinding the cancellation of her driver's license, and the order of January 21, 2009, granting Janet A. Dunn's petition for leave to appeal *nunc pro tunc* are VACATED and the above captioned matter is REMANDED to the trial court for further proceedings in accordance with the attached opinion.

Jurisdiction relinquished.

MARY HANNAH LEAVITT, Judge