

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kia Poe	:	
	:	
v.	:	No. 1632 C.D. 2007
	:	Submitted: March 20, 2008
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY

FILED: April 25, 2008

The Department of Transportation, Bureau of Driver Licensing (DOT) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), sustaining the appeal of Kia Poe from a three-month suspension of her motor vehicle registration.¹ We reverse.

AIG National Insurance Company (AIG) notified DOT that it had terminated Ms. Poe’s policy of motor vehicle liability insurance as of March 21, 2006. On June 3, 2006, DOT sent Ms. Poe a letter stating that it had received notification that her motor vehicle liability insurance had been canceled. The letter provided her with an opportunity to establish that she still had insurance or no longer owned the vehicle.

¹ Ms. Poe did not file a brief with this Court and, by order dated March 13, 2008, we determined that she was precluded from filing the same.

Pursuant to the letter, if a registrant was claiming to still have continued coverage with the same insurance company that had notified DOT of the termination of coverage, the following information was to be provided to DOT:

a signed letter, on insurance company letterhead, from either the insurance company's headquarters or your agent, stating the date your policy resumed active coverage. The letter must include the policy number, policy effective and expiration dates, NAIC number and Vehicle Identification Number.

(R.R. at 36a). In response to this letter, Ms. Poe sent DOT a copy of her financial responsibility identification card. The financial responsibility identification card submitted by Ms. Poe actually expired prior to March 21, 2006. Ms. Poe did not provide DOT with a letter from AIG or her agent.

DOT then notified Ms. Poe that the registration of her 2005 Ford sedan, Pennsylvania tag number FVN7641, was being suspended for three months. The notice had a mailing date of July 20, 2006, and the suspension was to become effective as of August 24, 2006. The notice further provided that Ms. Poe had a right to appeal the suspension, "within thirty (30) days of the mail date of this letter." (R.R. at 7a).

Ms. Poe filed a *pro se* motion to appeal *nunc pro tunc* on August 23, 2006. Her appeal was filed thirty-four days after the mailing date of the letter. In her appeal, Ms. Poe requested permission to appeal late for the following reason: "I have been out of work and I have no money." (R.R. at 13a).

The trial court held a hearing as to the motion to appeal *nunc pro tunc*. At the hearing, Ms. Poe did not present any evidence as to why her appeal was filed late. Instead the trial court announced that "She was two days late. All right. We will give it

to her. I will grant your right to appeal.” (R.R. at 18a).² A hearing date was then set for the merits of Ms. Poe’s appeal.

At that hearing, Ms. Poe testified that when she first received notice from DOT regarding the termination of her automobile insurance, she inadvertently sent them an outdated financial responsibility identification card. When she received the July 20, 2006, suspension notice, she realized that she had sent DOT the wrong financial responsibility identification card and she contacted DOT by telephone. She was informed that she would have to go through the appeal process. As she had not appealed within the thirty days as required, she then sought permission from the trial court to appeal *nunc pro tunc*.

Ms. Poe stated that following the grant of her appeal *nunc pro tunc*, she again contacted DOT and asked what constituted acceptable proof of insurance. She was informed that she could not provide DOT with proof of insurance as she had already filed an appeal.³ Ms. Poe testified that she spoke to “Yolonda” and “Kendra.” (R.R. at 26a).

As evidence of insurance, Ms. Poe provided the trial court with a financial responsibility identification card from AIG, that had an effective date of March 21, 2006, and an expiration date of September 21, 2006. She also provided a letter from AIG dated July 16, 2007. The letter stated that there was no lapse in Ms. Poe’s coverage from December 23, 2006, through December 23, 2007.

² DOT alleges that the appeal was actually 4 days late. However, the appeal period ended on Saturday, August 19, 2006. Pursuant to Pa.R.C.P. No. 106(b), Ms. Poe had until Monday, August 21, 2006, to timely file an appeal.

³ DOT repeatedly objected to Ms. Poe’s testimony as to what was communicated to her via telephone. However, the trial court overruled the objections.

DOT argued that a financial responsibility identification card was not valid evidence of insurance because the insurance company issues the card to its customers prior to the validation date. Therefore, if payment is not received, termination of coverage would occur; yet, the customer would still possess a seemingly valid financial responsibility identification card for the terminated period. DOT also noted that the letter provided by Ms. Poe was irrelevant, as it only verified coverage as of December 23, 2006, whereas the period of time at issue in the case was March of 2006.

The trial court concluded that the financial responsibility identification card provided by Ms. Poe was acceptable proof of insurance. The trial court determined that DOT accepted said card as proof of insurance based on the information provided to Ms. Poe in DOT's letter of June 3, 2006. Accordingly, Ms. Poe's appeal was granted and the suspension was rescinded.

DOT now appeals to this Court.⁴ DOT argues that the trial court abused its discretion in allowing Ms. Poe to appeal *nunc pro tunc*. In the alternative, DOT argues that Ms. Poe did not provide sufficient evidence to establish that she had motor vehicle liability insurance coverage effective March 21, 2006.

We first consider the trial court's grant of Ms. Poe's motion to appeal *nunc pro tunc*. Failure to timely appeal an administrative agency's action is a jurisdictional defect; consequently, the time for taking an appeal cannot be extended as a matter of grace or mere indulgence. Kovalesky v. Department of Transportation, Bureau of Driver Licensing, 850 A.2d 26 (Pa. Cmwlth. 2004). To establish grounds to file an

⁴ Our scope of review from a trial court order sustaining an appeal from a suspension of registration is limited to determining whether the trial court abused its discretion, committed an error of law, or whether the findings of fact are supported by substantial evidence of record. Fagan v. Department of Transportation, Bureau of Motor Vehicles, 875 A.2d 1195 (Pa. Cmwlth. 2005).

appeal *nunc pro tunc*, a petitioner must show that the delay in filing the appeal was caused by extraordinary circumstances involving fraud, a breakdown in the administrative process, or non-negligent conduct involving petitioner, his counsel, or a third party. Kovalesky, 850 A.2d at 29.

Judge Alan Silverstein granted the motion to proceed *nunc pro tunc*. Judge Lisa Rau granted Ms. Poe's appeal from the suspension of her registration. In Judge Rau's opinion in support of her decision to grant the appeal, she stated that Judge Silverstein is now retired. While Judge Rau admitted to having no insight as to the reasoning Judge Silverstein used in granting the motion to appeal *nunc pro tunc*, she suggests that the record is "replete with indications" that Ms. Poe was misled by DOT. (DOT's brief, Trial Court opinion at 16).

Judge Rau first claims that DOT's letter of June 3, 2006, permitted Ms. Poe to send a financial responsibility identification card as proof of insurance.⁵ We disagree. The letter allowed a person to submit a financial responsibility identification card as acceptable proof of insurance in certain situations; such as, when insurance was obtained with a new insurance company or continued with the same company within thirty days after the policy was cancelled. Ms. Poe claimed that her insurance never lapsed. Therefore, the instructions required her to provide DOT with a letter from her insurance company or her agent indicating she had active coverage. (R.R. at 36a).

Judge Rau also notes that when Ms. Poe later contacted DOT, she was told that as she had appealed the suspension, she could no longer rectify the matter through direct communication. Judge Rau states that DOT never informed Ms. Poe that an

⁵ Even if we accept that Ms. Poe was confused by the instructions and a financial responsibility identification card was acceptable, Ms. Poe testified that the card she sent to DOT expired prior to March 21, 2006.

appeal would prohibit her from working out the dispute amicably. We disagree that this constitutes a valid reason for granting the appeal *nunc pro tunc*. When Ms. Poe contacted DOT, she claimed to have been told that she needed to file an appeal. She claimed that after she filed an appeal, she was informed that the matter had to go through the appeal process. Being informed of the need to appeal and/or being informed that the matter had to be handled through the appeal process hardly constitutes fraud or a breakdown of the process.

Moreover, before the trial court, we note that Ms. Poe did not claim that her appeal was untimely due to confusion with the process. In fact, in her motion to appeal *nunc pro tunc*, Ms. Poe stated that lack of money was the reason for delay. Also, Ms. Poe has failed to provide this Court with any justifiable reason for her delay. As such, we agree with DOT that the trial court abused its discretion in granting the appeal *nunc pro tunc*.

As the trial court granted the appeal *nunc pro tunc* without requiring Ms. Poe to present any evidence, we would consider remanding the case to give Ms. Poe an opportunity to do so. However, as Ms. Poe has not provided this Court with any factual scenario under which her appeal *nunc pro tunc* could be granted and because, as discussed below, we further find that Ms. Poe did not present sufficient evidence at the hearing to establish that her motor vehicle liability insurance was not terminated, we decline to remand to case.

In Capone v. Department of Transportation, Bureau of Driver Licensing, 875 A.2d 1228 (Pa. Cmwlth. 2005), a registrant received a three-month suspension of her driver's license for allowing her son to drive her uninsured vehicle. The registrant's spouse testified that the insurance payments were automatically withdrawn from their bank account and changes made to the account caused the account to be overdrawn. As

a result, the monthly insurance payment was not made. However, the registrant and her spouse claimed that they never received notice from the insurance company that their policy was terminated.

At the hearing, the registrant presented a copy of her policy and a valid financial responsibility identification card for the period of time at issue. The trial court determined that the registrant's testimony, along with the testimony of her spouse was credible. The trial court concluded that the financial responsibility identification card and the policy demonstrated that the vehicle was properly insured.

DOT appealed to this Court. We noted that once DOT establishes that it has received notice that insurance on a vehicle has been terminated, a presumption arises that the registrant lacks the required coverage. The burden then shifts to the registrant to rebut the presumption by establishing through "clear and convincing evidence" that the vehicle was properly insured. Capone, 875 A.2d at 1231. We explained that a financial responsibility insurance card is insufficient to prove coverage, as the card is routinely sent in advance of payment.

Therefore, in the case as issue, Ms. Poe's financial responsibility insurance card did not constitute clear and convincing evidence that the vehicle was insured. As to her testimony that she had proper insurance, we determined in Fagan that a registrant's uncorroborated claim of valid insurance did not constitute clear and convincing evidence.

Judge Rau acknowledged our opinion in Fagan, that uncorroborated testimony was insufficient evidence, as well as our opinion in Capone, that financial responsibility insurance cards were inadequate to establish proof of insurance. However, she concluded that the present case was distinguishable. Judge Rau claimed that Ms. Poe's testimony as to her direct attempts to contact DOT via telephone

bolstered her claim that she had valid insurance. We must disagree. Ms. Poe's alleged attempts to contact DOT via telephone in an attempt to rectify the matter provide no support towards Ms. Poe's claim that she had a valid motor vehicle liability insurance policy.⁶

Judge Rau also found that the letter from Ms. Poe's insurance company was valid evidence in support of her claim. We again disagree. As noted by DOT, the letter merely stated that Ms. Poe had valid coverage from December 23, 2006, through December 23, 2007. As such, the letter was irrelevant to the time period at issue.

Accordingly, the order of the trial court is reversed.

JOSEPH F. McCLOSKEY, Senior Judge

⁶ Judge Rau also claimed that DOT's letter of June 3, 2006, permitted Ms. Poe to send DOT a financial responsibility identification card as proof of insurance. As discussed above, this determination is incorrect; Ms. Poe was actually required to send DOT a letter from her insurance company or agent.

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ORDER

AND NOW, this 25th day of April, 2008, the order of the Court of Common Pleas of Philadelphia County, dated August 3, 2007, is hereby reversed. The three-month suspension of the registration of Kia Poe's 2005 Ford Sedan, imposed by the Department of Transportation, Bureau of Driver Licensing, is reinstated.

JOSEPH F. McCLOSKEY, Senior Judge