IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gregory Smith, Appellant	:	
v.	:	No. 2544 C.D. 2010
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	Submitted: July 1, 2011

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: August 24, 2011

Gregory Smith (Licensee) appeals from an order of the Court of Common Pleas of Dauphin County (Trial Court) denying on the grounds of lack of jurisdiction Licensee's Petition to Accept Appeal From Suspension of Commercial Motor Vehicle License *Nunc Pro Tunc*, seeking review of the disqualification of Licensee's commercial driving privilege by the Department of Transportation,

Bureau of Driver Licensing (DOT), pursuant to Section 1613 of the Vehicle Code, 75 Pa.C.S. §1613.[1] We affirm.

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[1] Section 1613 of the Vehicle Code reads, in relevant part:

> Implied consent requirements for commercial motor vehicle drivers
>
> (a) Implied consent.--A person who drives a commercial motor vehicle in this Commonwealth is deemed to have given consent to take a test or tests of the person's breath, blood or urine for the purpose of determining the person's alcohol concentration or the presence of other controlled substances.
>
> * * *
>
> (c) Warning against refusal.--A person requested to submit to a test as provided in subsection (a) shall be warned by the police officer requesting the test that refusal to submit to the test will result in the person's being disqualified from operating a commercial motor vehicle under subsection (e).
>
> (d) Report on test refusal.--If the person refuses testing, the police officer shall submit a sworn report to the department certifying that the test was requested pursuant to subsection (a) and that the person refused to submit to testing.
>
> (d.1) Disqualification for refusal.--Upon receipt of a report of test refusal, the department shall disqualify the person who is the subject of the report for the same period as if the department had received a report of the person's conviction for violating one of the offenses listed in section 1611(a) (relating to disqualification). A person who is disqualified as a result of a report of test refusal that originated in this Commonwealth shall have the same right of appeal as provided for in cases of suspension
>
> * * *
>
> (d.3) Definition.--As used in this section, the term "report of test refusal" shall mean the following:
>
> (1) A report of a police officer submitted to the department that a person refused to submit to testing requested under this section.

(Continued....)

On September 20, 2009, Licensee was a passenger in a properly traveling vehicle that was involved in a head on crash with another vehicle that was improperly traveling the wrong way on Interstate 83. Following the crash, Pennsylvania State Trooper Baluh arrived on the scene and encountered Licensee in the back of an ambulance, observing a strong smell of alcohol and blood on Licensee's mouth. Trooper Baluh determined that Licensee was the owner of the vehicle in which he was traveling, and upon following the ambulance to a hospital, Trooper Baluh requested Licensee to submit to a blood alcohol test, which Licensee refused.

On November 6, 2009, DOT mailed Licensee two distinct and separate notices: an Official Notice of Suspension of Driving Privilege for violation of Section 1547 of the Vehicle Code, 75 Pa.C.S. §1547 (providing for the suspension of an operating privilege in the wake of a refusal to submit to chemical testing to determine

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> (2) A notice by a police officer to the department of a person's refusal to take a test requested pursuant to section 1547 (relating to chemical testing to determine amount of alcohol or controlled substance) where the person was a commercial driver at the time relevant to the refusal.
>
> (b) Suspension for refusal.--
>
> (1) If any person placed under arrest for a violation of section 3802 [relating to driving under the influence of alcohol] 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) . . . for a period of 12 months.

blood alcohol level) (hereinafter, the Driving Suspension); and an Official Notice of Disqualification of Commercial Driving Privilege pursuant to Section 1613 of the Vehicle Code (hereinafter, the CDL Disqualification).

Licensee took the Driving Suspension notice to an attorney, who thereafter filed a timely notice of appeal in the Trial Court.[2] Licensee, however, took no action on the CDL Disqualification notice, and no timely appeal therefrom was taken. Upon later learning that the CDL Disqualification was separate from the Driving Suspension, Licensee contacted his attorney, who then filed a Petition to Appeal *Nunc Pro Tunc*, in relation to the CDL Disqualification, in the Philadelphia County Court of Common Pleas.[3] Licensee's Petition to Appeal *Nunc Pro Tunc* (addressing the CDL Disqualification) was filed on December 10, 2009, and was summarily dismissed on April 6, 2010, without a hearing, by the Philadelphia County Court of Common Pleas.

Licensee thereafter retained a different attorney in relation to the CDL Disqualification, who filed in the Trial Court, on August 17, 2010, the Petition to Accept Appeal From Suspension of Commercial Motor Vehicle License *Nunc Pro Tunc* (the Petition) at issue herein. A hearing was held on November 1, 2010, on the

[2] Licensee's Driving Suspension appeal is not at issue in the instant matter.

[3] Licensee's Driving Suspension appeal was also originally filed in the Philadelphia County Court of Common Pleas, and was subsequently transferred to the Trial Court.

Trial Court's jurisdiction over the Petition, and an order issued on November 2, 2010, dismissing the Petition and concomitant CDL Disqualification appeal due to a lack of jurisdiction.

In an opinion in support of its order, the Trial Court emphasized that DOT's two notices of the Driving Suspension and the CDL Disqualification were plainly distinct and separate, were not misleading or ambiguous, and clearly stated the differing sections of the Vehicle Code on which they were based, as well as notifying Licensee of his right to appeal within thirty days. The Trial Court concluded, *inter alia*, that Licensee's failure to heed both separate notices and to file two separate appeals did not constitute grounds for an appeal *nunc pro tunc* in that no fraud or breakdown in the administrative or judicial processes occurred; the Trial Court concluded that Licensee's failure was attributable to negligence on Licensee's part. Noting that the record has since shown that Licensee was not the driver of the vehicle involved in the accident on which the suspension and disqualification were predicated, the Trial Court nonetheless noted that Licensee's arguments that there existed no reasonable ground for Trooper Baluh to believe that Licensee was operating the vehicle, or that Licensee had consumed enough alcohol to a degree that placed him in violation of the Vehicle Code, were not cognizable bases upon which to grant Licensee's Petition for *nunc pro tunc* appeal. Licensee now appeals to this Court.

This Court's scope of review of a trial court's decision whether to allow an appeal *nunc pro tunc* is limited to determining whether the trial court abused its discretion or committed an error of law. Baum v. Department of Transportation, Bureau of Driver Licensing, 949 A.2d 345 (Pa. Cmwlth. 2008).

Licensee first argues that the Trial Court erred in denying his *nunc pro tunc* appeal of the CDL Disqualification on the grounds that Licensee's untimely filing was caused by DOT's misleading, incomplete, and inadequate notice of disqualification. Licensee emphasizes that his immediate action in taking DOT's Driving Suspension notice to his attorney, and the attorney's timely filing of an appeal from the Driving Suspension, establish Licensee's intent to challenge both the Driving Suspension and the CDL Disqualification. Licensee argues that the language in the two separate DOT notices is confusingly similar, in relation to the procedural requirements for appeal. Licensee argues that these facts can be characterized as a breakdown in administrative procedure, together with a breakdown in the court's operations, and was the result of non-negligent circumstances involving both Licensee and his attorney. We disagree.

It is axiomatic that a licensee has, generally speaking, thirty days from the mailing date of a notice of suspension or disqualification to file an appeal to the court of common pleas under Section 5571(b) of the Judicial Code, 42 Pa.C.S. §5571(b); Accord Baum. A failure to file such an appeal within the thirty-day period

deprives the court of common pleas of subject matter jurisdiction over the appeal. Hudson v. Department of Transportation, Bureau of Driver Licensing, 830 A.2d 594 (Pa. Cmwlth. 2003). This Court has stated:

> [S]tatutory appeal periods are mandatory and may not be extended as a matter of grace or mere indulgence. By allowing a licensee to file a late appeal, the trial court extends the time in which an appeal may be filed, thereby extending itself jurisdiction it would not otherwise have. Such an extension is appropriate only when the licensee proves that either fraud or an administrative breakdown cause the delay in filing the appeal.

Id. at 598 (citations omitted). Thus, an extension of time to file an appeal *nunc pro tunc* is permitted where either fraud or an administrative breakdown cause the filing delay, and it is a licensee's burden to prove that any failure to file a timely appeal resulted from extraordinary circumstances involving such grounds. Baum.

Our Supreme Court has, however, also emphasized a "non-negligent circumstances" exception, and established a three-part test therefor: (1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001) (citations omitted). As the Supreme Court further noted in Criss:

> The exception for allowance of an appeal *nunc pro tunc* in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has

> clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so. See Cook [v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996) (granting appeal *nunc pro tunc* where claimant filed appeal four days late because he was hospitalized)]; Perry v. Unemployment Compensation Board of Review, [] 459 A.2d 1342, 1343 ([Pa. Cmwlth.] 1983) (fact that law clerk's car broke down while he was on route to the post office, precluding him from getting to the post office before closing time, was a non-negligent happenstance for granting appeal *nunc pro tunc*); Tony Grande, Inc. v. Workmen's Compensation Appeal Board (Rodriquez), []455 A.2d 299, 300 ([Pa. Cmwlth.] 1983) (hospitalization of appellant's attorney for unexpected and serious cardiac problems ten days into twenty day appeal period was reason to allow appeal *nunc pro tunc*); Walker v. Unemployment Compensation Board of Review, [] 461 A.2d 346, 347 ([Pa. Cmwlth.] 1983) (U.S. Postal Service's failure to forward notice of referee's decision to appellant's address, as appellant had requested, warranted appeal *nunc pro tunc*)…

Id. at 443–444, 781 A.2d at 1160.

As the examples cited within Criss demonstrate, Licensee's circumstances in the instant matter do not rise to the level of non-negligent circumstances entitling Licensee to an appeal *nunc pro tunc.* A cursory examination of the two Notices sent by DOT to Licensee reveal that the first sentence of each Notice differentiate the separate Notices from each other by plainly stating that one is for a "Suspension of your Driving Privilege as authorized by Section 1547BII of the Pennsylvania Vehicle Code," and the other for "Disqualification of your commercial driving privilege as authorized by Section 1613 of the Pennsylvania Driving Code."

Original Record, Licensee's Petition, Exhibits A-B. The Notices are neither ambiguous nor misleading, and each plainly states the requirements for filing an appeal therefrom. Licensee's failure, in this case, to closely read even the first sentence of each Notice and follow the concomitant appeal instructions contained for each do not establish a "unique and compelling case [ ] in which the appellant has clearly established that [he] attempted to file an appeal, but unforeseeable and unavoidable events precluded [him] from actually doing so," and cannot be held to be a non-negligent circumstance under Pennsylvania's precedents. Criss, 566 Pa. at 443, 781 A.2d at 1160; accord Baum. As a result, the Trial Court did not err in denying Licensee's Petition.

Licensee also argues that neither of the two separate DOT notices stated that two distinct appeals had to be filed to effect appeals of both the Driving Suspension, and the CDL Disqualification. Licensee asserts that DOT's assumption of the duty to offer procedural advice – in the form of the appeal instructions contained on each Notice – gives rise to a concomitant duty on DOT's part to fully apprise a licensee of any closely relevant and parallel procedural paths required, such as the two separate appeals required herein to challenge both the License Suspension, and the CDL Disqualification. DOT's failure to so advise, Licensee argues, amounts to a breakdown in administrative procedure, entitling Licensee to an appeal *nunc pro tunc* under our precedents in Piasecki v. Department of Transportation, Bureau of

Driver Licensing, 6 A.3d 1067 (Pa. Cmwlth. 2010), and Webb v. Department of Transportation, Bureau of Driver Licensing, 870 A.2d 968 (Pa. Cmwlth. 2005). We are, however, constrained to distinguish those precedents from the facts *sub judice*.

In Piasecki, we found an administrative breakdown where DOT failed to inform a licensee that a separate procedural challenge to the validity of the licensee's insurance cancellation had to be brought with the Insurance Commissioner, in the face of incomplete procedural advice merely informing the licensee of the procedure to appeal a license suspension, where the underlying insurance cancellation appeal was a prerequisite to succeeding in a challenge to the suspension based thereon. Piasecki, 6 A.3d at 1072-1074. Additionally, in that case a third party – the licensee's bank – incorrectly failed to honor a check written by licensee, which bank failure initiated the insurance cancellation upon which the eventual license suspension was predicated. Id. We held that such a clearly relevant and closely related procedural path, which was the sole and exclusive avenue upon which to found the suspension challenge, was a path of which DOT should have apprised licensee in its suspension notice. Id.

In Webb, we found a similar administrative breakdown on the part of DOT where a licensee also intended to seek review by the Insurance Commisioner, and where the licensee relied to his detriment on incomplete and erroneous procedural guidance from DOT. Webb, 870 A.2d at 974-975. In that case, upon

which Piasecki's holding was partially based, we also concluded that DOT's procedural guidance failed to instruct the licensee of the necessity for such a parallel challenge upon which a license suspension had to be founded. Id.

Under the instant facts, no such lack of procedural guidance can be found on DOT's part. Both of DOT's Notices plainly stated the precise appeal procedures required to challenge both the Driving Suspension and the CDL Disqualification, and both Notices were easily distinguishable from each other upon a simple reading thereof. No necessary procedural avenue was omitted by DOT in this case, as was omitted under the facts of Piasecki and Webb. The failure of Licensee to properly file an appeal of the CDL Disqualification can attributed to, solely and exclusively, Licensee's own negligence by not simply reading the Notices at issue in an even perfunctory manner.

Finally, Licensee presents two remaining issues: whether the Trial Court erred in denying Licensee's Petition where no reasonable ground existed to believe that Licensee was operating the vehicle at issue, and; whether the Trial Court erred in such denial due to a lack of reasonable grounds to believe Licensee consumed alcohol to a degree that placed him in violation of the Vehicle Code. Licensee's arguments on these related issues go solely to the merits of the underlying disqualification, and not to the merits of the Trial Court's denial of Licensee's Petition for a *nunc pro tunc* appeal. Criss; Baum. As such, these arguments are without merit, and are irrelevant

to the issue of whether the Trial Court was vested with jurisdiction over Licensee's appeal in this matter, which is the sole issue before this Court.

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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Appellant	:	
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	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

O R D E R

AND NOW, this 24th day of August, 2011, the Order of the Court of Common Pleas of Dauphin County, dated November 2, 2010, is affirmed.

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JAMES R. KELLEY, Senior Judge