

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wade Plair, :
Appellant :
v. :
Commonwealth of Pennsylvania, :
Department of Transportation, : No. 557 C.D. 2011
Bureau of Driver Licensing : Submitted: August 12, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: September 13, 2011

Wade Plair (Plair) challenges the order of the Court of Common Pleas of Blair County (common pleas court) which dismissed Plair’s appeal from the suspensions of his operator’s license as untimely filed.

On June 6, 2006, Plair was arrested by the City of Pittsburgh Police Department and charged with possession with intent to deliver, possession of a controlled substance, three counts of DUI, and possession of marijuana. On April 6, 2009, Plair entered into a plea agreement. He pled guilty to possession of a controlled substance and DUI.

On September 10, 2010, DOT mailed Plair a Restoration Requirements Letter (Letter) which indicated what DOT required Plair to do to restore his driving privilege. The Letter informed him of restoration fees he was required to pay, proof of insurance he was required to produce, and the

requirement that he complete a court ordered treatment program for alcohol or drug addiction. The Letter also listed the following suspensions and disqualifications:

You have a 1 YEAR suspension/revocation that began (or will begin) on 09/05/06. Credit for serving this suspension/revocation began (or will begin) on 04/09/10 and will end on 04/09/11. The suspension/revocation resulted from a violation on 06/10/06 of Section 1547, CHEMICAL TEST REFUSAL

.....

You have a 1 YEAR(S) suspension/revocation that began (or will begin) on 05/08/09. Credit for serving this suspension/revocation began (or will begin) on 04/09/11 and will end on 04/09/12. The suspension/revocation resulted from a violation on 06/10/06 of Section 3802A1, DUI GENERAL IMPAIRMENT

.....

You have a 6 MONTH(S) suspension/revocation that began (or will begin) on 05/08/10. Credit for serving this suspension/revocation began (or will begin) on 04/09/12 and will end on 10/09/12. The suspension/revocation resulted from a violation on 06/10/06 of Section 13A16 POSSESSION OF CTRL SUB

.....

You have a 1 LIFETIME disqualification that began (or will begin) on 05/08/09. Credit for serving this disqualification began (or will begin) on 04/09/10 and will end on . It resulted from a violation on 06/10/06 of Section 3802A1, DUI GENERAL IMPAIRMENT^[1]

Department of Transportation, Restoration Requirements Letter, September 10, 2010, at 2-3; Supplemental Reproduced Record (S.R.R.) at 4b-5b.

¹ This disqualification was for a commercial driver's license.

On November 3, 2010, Plair appealed the suspensions to the common pleas court. In his petition for appeal, Plair stated that he received a notice on September 10, 2010, that his license was to be suspended as of September 6, 2006.

On November 8, 2010, the common pleas court dismissed Plair's petition for appeal as untimely filed and determined "the Court has no jurisdiction due to the suspension dates provided." Common Pleas Court Order, November 8, 2010, at 1; S.R.R. at 6b.

Plair appealed to the Pennsylvania Superior Court. The case was then transferred to this Court. On June 13, 2011, DOT moved to remand the case to the common pleas court for a *de novo* hearing. On July 5, 2011, DOT's motion was denied.

Plair contends that DOT lacked jurisdiction and authority to sanction or suspend his license based on a criminal charge that was withdrawn and that the suspension of his license based on a withdrawn criminal charge unduly prejudiced him and deprived him of due process of law.²

The common pleas court denied Plair's appeal as untimely. In his brief, Plair did not address whether his appeal was timely or whether he had a legal basis for an appeal *nunc pro tunc*.

² This Court's review is limited to determining whether the trial court's findings are supported by competent evidence, whether errors of law were committed, or whether the trial court committed an abuse of discretion in making its determination. Department of Transportation v. Renwick, 543 Pa. 122, 669 A.2d 934 (1996).

In order to timely appeal the suspension of his driving privilege, a licensee is required to file an appeal within thirty days of the mailing date of DOT's notice of suspension. See Sections 5571(b) and 5572 of the Judicial Code, 42 Pa. C.S. §§5571(b) and 5572. See also Smith v. Department of Transportation, Bureau of Driver Licensing, 749 A.2d 1065 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 568 Pa. 669, 795 A.2d 980 (2000). Courts may grant leave to appeal nunc pro tunc in extraordinary circumstances. Traditionally, leave to appeal nunc pro tunc is only granted when a party fails to timely appeal due to fraud or an administrative breakdown in operations. More recently, leave to appeal nunc pro tunc has been extended when an appeal was filed late due to non-negligent circumstances on the part of the appellant or his counsel. Schofield v. Department of Transportation, Bureau of Driver Licensing, 828 A.2d 510 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 575 Pa. 705, 837 A.2d 1179 (2003). Our Pennsylvania Supreme Court has explained that the exception for allowance of an appeal nunc pro tunc for non-negligent circumstances is limited to unique and compelling cases in which an appellant establishes an attempt to file the appeal but was precluded from doing so due to unforeseeable and unavoidable events. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001).

Here, Plair attempted to appeal the suspensions³ which were listed in the Letter. The suspension for refusal to submit to chemical testing had begun on September 5, 2006. The suspensions for the convictions had begun on May 8,

³ If Plair had properly appealed the suspensions, he would have filed two separate appeals: one from the 2006 refusal suspension and one from the 2009 suspensions for the convictions. Plair could then have moved to consolidate the appeals.

2009, with the second suspension beginning one year after the first. Plair's appeal was well past the thirty day limit for a timely appeal from the imposition of a suspension. Actually, the appeal period began to run when DOT issued the notices of suspension and would have been before the suspensions actually went into effect. Clearly, the common pleas court correctly concluded that any appeal was untimely. Further, Plair offered no justification for the untimely appeal.⁴

⁴ Plair appealed after he received the Letter. While the Letter listed his suspensions, the Letter's main purpose was to inform Plair of what DOT required before his license would be restored. In Ercolani v. Department of Transportation, Bureau of Driver Licensing, 922 A.2d 1034 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 593 Pa. 758, 932 A.2d 77 (2007), DOT suspended the operating privilege of Gregory C. Ercolani (Ercolani) for a refusal to submit to chemical testing on April 17, 2003. The record reflected that DOT mailed the notice of suspension on March 13, 2003, though Ercolani claimed he never received it. DOT mailed Ercolani a Restoration Requirements Letter dated May 20, 2003. Ercolani appealed the suspension within a month or two after he received the Restoration Requirements Letter. The Court of Common Pleas of Montgomery County sustained the appeal. DOT appealed to this Court. Ercolani, 922 A.2d at 1036-1037.

This Court held, "Ercolani's appeal, filed well outside the thirty days following his presumed receipt of the suspension notice, was out of time and could not properly be considered absent grounds justifying an allowance of the appeal *nunc pro tunc*." Ercolani, 922 A.2d at 1037. This Court also held that Ercolani had to proceed with reasonable diligence once he knew of the suspension and that his inaction for "a month or two" after he received the Restoration Requirements Letter did not constitute reasonable diligence. Ercolani, 922 A.2d at 1037-1038.

Similarly, here Plair had thirty days from receipt of the notices of suspension to file an appeal. There is no record as to when that was. However, given that the suspensions were in 2006 and 2009, it stands to reason that the notices were more than thirty days before November 3, 2010. Furthermore, Plair waited close to two months before he attempted to appeal after he received the Letter. That delay foreclosed any reasonable diligence. Ercolani.

Accordingly, this Court affirms.⁵

BERNARD L. McGINLEY, Judge

⁵ Because this Court affirms the common pleas court's determination that the appeal was untimely, this Court need not address Plair's arguments on the merits.

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ORDER

AND NOW, this 13th day of September, 2011, the order of the Court of Common Pleas of Blair County in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge