

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lonnie Lowndes, :
 :
 Appellant :
 :
 v. : No. 742 C.D. 2008
 : Submitted: September 19, 2008
 Commonwealth of Pennsylvania, :
 Department of Transportation :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: October 23, 2008

Lonnie Lowndes (Licensee) appeals from the March 24, 2008, order of the Court of Common Pleas of Cambria County (trial court) denying his petition to appeal *nunc pro tunc* from an eighteen-month suspension of his operating privileges imposed by the Department of Transportation (DOT) pursuant to section 1547(b)(1)(ii)(A) of the Vehicle Code (Code).¹ We affirm.

On May 2, 2007, DOT sent a notice to Licensee informing him that his operating privileges would be suspended for eighteen months, effective June 6, 2007, as the result of his failure to submit to chemical testing on April 7, 2007, and advising

¹ 75 Pa. C.S. §1547(b)(1)(ii)(A). This provision authorizes DOT to suspend the driving privileges of a licensee for eighteen months when, as here, the licensee's license has been suspended previously under this subsection.

him that he had thirty days to file an appeal. The notice was sent to Licensee's last known address of record. On December 21, 2007, Licensee filed a Petition for Review *nunc pro tunc* with the trial court, challenging the May 2, 2007, suspension of his license, and a hearing was held before the trial court on the timeliness of his appeal.

DOT introduced the following evidence: (1) a certification page; (2) a copy of the notice of suspension to Licensee's last known address with a "mail date" of May 2, 2007; (3) a copy of the DL-26 Form (refusal form); and (4) a copy of Licensee's certified driving history. (S.R.R. at 1b-11b.) For his part, Licensee testified that he did not receive the May 2, 2007, notice and was unaware that his license was suspended; however, he acknowledged that, until the end of July 2007, he lived at the address to which DOT sent the notice.² (R.R. at 14a-16a.)

After considering the evidence, the trial court rejected Licensee's explanation and held that Licensee failed meet his burden of proving an entitlement to a *nunc pro tunc* appeal.³ Licensee now appeals to this court.⁴

² Licensee also offered the testimony of his live-in girlfriend, who stated that she did not receive any notice that Licensee's operating privileges were suspended. (R.R. at 17a-18a.)

³ It is the licensee's burden to prove that his failure to file a timely appeal resulted from extraordinary circumstances involving fraud, a breakdown in the administrative or judicial process or non-negligent circumstances related to the appellant or his counsel. *Baum v. Commonwealth*, 949 A.2d 345 (Pa. Cmwlt. 2008).

⁴ Our 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*.

Licensee argues that the trial court abused its discretion by denying his request to appeal *nunc pro tunc* when he filed the appeal within a reasonable time of receiving actual notice of the suspension. We disagree.

A licensee has thirty days from the mailing date of the notice of suspension to file an appeal to the court of common pleas, and the failure to file an appeal within the thirty-day period deprives the court of common pleas of subject matter jurisdiction over the appeal. *Baum v. Commonwealth*, 949 A.2d 345 (Pa. Cmwlth. 2008). The “mailbox rule” is applicable to section 1547 license suspensions, and, under this rule, proof of mailing the license suspension notice raises a rebuttable presumption that the mailed item was received.⁵ *Ercolani v. Commonwealth*, 922 A.2d 1034 (Pa. Cmwlth.), *appeal denied*, 593 Pa. 758, 932 A.2d 77 (2007); *Department of Transportation, Bureau of Driver Licensing v. Grasse*, 606 A.2d 544 (Pa. Cmwlth. 1991). DOT’s certification of a driving record showing that notice was given is competent to establish that notice was sent. *Grasse*. DOT is not required to show that the licensee actually received the notice. *Id.*

⁵ Licensee argues that, in order to sustain a criminal conviction under section 1543(b) of the Code, 75 Pa. C.S. §1543(b) (driving while operating privilege is suspended or revoked for refusal to submit to a chemical test), DOT must prove that the licensee had actual notice that his license has been suspended or revoked and may not, as DOT did here, rely on the “mailbox rule” to establish actual notice. However, because Licensee’s argument relates to the burden of proof for criminal convictions under section 1543(b) of the Code, it has no relevance here because the suspension being challenged is pursuant to section 1547 of the Code, which is civil, not criminal, in nature. *Sebek v. Department of Transportation, Bureau of Driver Licensing*, 714 A.2d 526 (Pa. Cmwlth. 1998).

Here, DOT offered into evidence Licensee's certified driving record, as well as the May 2, 2007, notice, indicating that the notice was mailed to Licensee at his last known address of record on May 2, 2007. This raises the presumption that Licensee received the notice, and, although denied by Licensee and his girlfriend, this denial alone does not nullify the presumption. *Grasse*. Accordingly, because Licensee filed his appeal well outside the thirty days following his presumed receipt of the suspension notice, his appeal could not be considered unless he established entitlement to an appeal *nunc pro tunc*.

An extension of time to file *nunc pro tunc* is permitted where either fraud or an administrative breakdown cause the delay in filing the appeal. *Baum*. *Nunc pro tunc* relief also is available where the untimeliness of an appeal is the result of non-negligent circumstances that are related to the appellant or the appellant's counsel. *Id.* Licensee asserts no fraud or breakdown within the administrative or judicial process, and he provides no evidence that non-negligent circumstances related to either himself or his counsel caused the untimeliness of his appeal. Therefore, we agree with the trial court that Licensee failed to satisfy his burden of proving his entitlement to a *nunc pro tunc* appeal of his May 2, 2007, license suspension.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

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Department of Transportation	:

ORDER

AND NOW, this 23rd day of October, 2008, the order of the Court of Common Pleas of Cambria County, dated March 24, 2008, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge