

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| COMMONWEALTH OF PENNSYLVANIA, | ⋮ | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellee | | |
| v. | | |
| JUSUF M. DJUNED, | | |
| Appellant | | No. 1982 WDA 2011 |

Appeal from the Judgments of Sentence Dated November 21, 2011
In the Court of Common Pleas of Fayette County
Criminal Division at No(s):
CP-26-SA-0000122-2010
CP-26-SA-0000176-2010

BEFORE: BENDER, J., MUNDY, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, J.

FILED JUNE 04, 2013

Jusuf M. Djuned (Appellant) appeals *pro se* from the judgments of sentence that dismissed his summary appeals and reinstated the judgments of the Magisterial District Court that found him guilty of violating township property maintenance ordinances. Appellant also appeals from the order denying his motion to consolidate, continue and/or stay the summary appeal trials that were subsequently held in his absence. We affirm.

Appellant owns property in Fayette County, Pennsylvania, although he resides in the State of Washington. On June 23, 2010, and on August 24, 2010, he was cited for violating Local Ordinance 59, which requires grass

* Retired Senior Judge assigned to the Superior Court.

and weeds not to exceed six inches in height.¹ After the magistrate found Appellant guilty *in absentia*, Appellant appealed to the trial court. The trial *de novo* was scheduled for November 21, 2011. What occurred on the day of the scheduled trial is explained by the trial court as follows:

On the morning before trial [that was scheduled] in the afternoon, this Court received a Motion from the Appellant. The Motion was classified as Routine and requested a continuance of the trial. Neither the Appellant nor his attorney, who to the best of this Court's knowledge is licensed to practice law only in the State of Washington, not in Pennsylvania, appeared during Motions Court to present the Motion. The Commonwealth objected to any continuance.

The Court denied the Motion for failure to comply with the local rules. On the face of the Appellant's Suggested Order, which the Appellant received a copy, the Court wrote: "DENIED for failure to comply with local rules of presentation in Motions Court, as filed routine and not as a priority motion requesting immediate relief." [Order, 11/21/11.]

The Appellant, who resides in the State of Washington, failed to appear for the Summary Appeal Trial held that afternoon. Consequently, the Court dismissed the appeal and reinstated the judgment of the Magisterial District Court. On December 19, 2011, the Appellant filed a Notice of Appeal.

¹ The citations underlying this appeal are but two of a total of about 13 similar citations issued to Appellant since his purchase of the property. We note that in the factual summary provided by Appellant in his brief, he asserts that the previous property owner should be held accountable for the code violations issued in 2010 and 2011. The basis for this claim rests on Appellant's allegation that there were outstanding violations from 2008, which were issued just shortly before Appellant purchased the property and he was not apprised of that information at the time of purchase.

Trial Court Opinion (T.C.O.), 2/22/12, at 2.²

In his brief to this Court, Appellant raises the following issues for our review:

1. Whether the trial court manifestly abused its discretion when it denied Mr. Djuned's motion for a continuance and/or stay of the summary appeal trials, which was based on good cause.
2. Whether the trial court committed an abuse of discretion by belatedly asserting it denied Mr. Djuned's motion for a continuance and/or stay because his counsel of choice is not a member of the Pennsylvania bar only after receiving Mr. Djuned's Pa.R.A.P. 1925(b) "Statement of Errors Complained of on Appeal" despite no objection from the Commonwealth to such representation and although the trial court permitted Mr. Djuned's Washington State counsel to file pleadings on his behalf during the course of the case below, notwithstanding the fact that Mr. Djuned signed the pertinent pleadings in this case with his counsel.
3. Whether the trial court abused its discretion and denied Mr. Djuned's right to a summary de novo trial by dismissing his appeal for purported "failure to appear" despite good cause for his and his counsel's unavailability in person and their diligent attempts to appear telephonically.
4. Whether Mr. Djuned is entitled to a new summary appeal de novo trial because it appears that no transcript and no evidence were presented or preserved at the summary appeal trials such that there apparently is no record which this Court can review to determine whether or not the Commonwealth provided the required proof beyond a reasonable doubt at the summary appeal de novo trial that Mr. Djuned committed the alleged property maintenance violations for which he was charged.

² Appellant timely responded to the trial court's order requiring the submission of a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

Appellant's brief at 5 (court's responses to each issue omitted).

In addressing the appeal in this matter, we are guided by the following:

Our standard of review from an appeal of a summary conviction following *de novo* trial is whether there was an error of law or whether the findings of the court are supported by the record. ***Commonwealth v. Marizzaldi***, 814 A.2d 249, 251 (Pa. Super. 2002). The trial court's verdict will only be disturbed if there was a manifest abuse of discretion. ***Id.***

Commonwealth v. Akinsanmi, 55 A.3d 539, 540 (Pa. Super. 2012).

Moreover, “[g]ranted or denying a motion for continuance is within the discretion of the trial court; only where denial of the request is arbitrary will it be held to be a violation of due process.” ***Commonwealth v. Appleby***, 856 A.2d 191, 198 (Pa. Super. 2004).

Appellant first argues that the trial court abused its discretion by denying his motion for a continuance and/or stay due to his and his counsel's unavailability. He also asserts error because the court did not consider that pending cases that were before the trial court and/or this Court could have potentially been dispositive of the outcome here.³ Specifically,

³ Appellant states that his motion to consolidate requested that the “Court of Common Pleas Case Nos. 122 SA 2010, 176 SA 2010, 110 SA 2010 and 135 SA 2011 be consolidated and the November 21, 2011 summary trials in Case Nos. 122 SA 2010 and 176 SA 2010 [the instant cases] be continued and/or stayed until the consolidated cases [at] 5 SA 2010 and 40 SA 2010 and this Court's Case No. 1666 WDA 2011, which was an appeal of Court of Common Pleas Case No. 100 SA 2010[] were resolved...” Appellant's brief at 7. ***See Commonwealth v. Djuned***, No. 1666 WDA 2011, unpublished (Footnote Continued Next Page)

Appellant argues that the court did not properly exercise its discretion and grant a continuance “based on what was right and equitable under the circumstances....” Appellant’s brief at 18. Appellant quotes what he identifies as Pa.R.Crim.P. 301, but actually the language is part of the local rule of criminal procedure for Fayette County, which provides:

(a) The court may, in the interest of justice, grant a continuance, on its own motion, or on the motion of either party. The court shall on the record identify the moving party and state for the record the court’s reasons justifying the granting or denial of the continuance.

(b) A motion for continuance of trial made on behalf of the defendant shall be made to the assigned Plea Judge no later than forty-eight hours before the time set for trial. A later motion shall be entertained only when the opportunity therefor did not previously exist, or the defendant was not aware of the grounds for the motion, or the interests of justice require it.

(c) The absence of an attorney shall not be deemed to be grounds for a continuance unless such absence is caused by an engagement in Federal Court, a Pennsylvania Appellate Court, a previously scheduled Common Pleas Court hearing, by the attorney's illness, or by some special or unexpected circumstance rendering the attorney's absence practically involuntary. ...

F.C.R.Crim.P. 301 (a) – (c).⁴

(Footnote Continued) _____

memorandum (Pa. Super. filed August 13, 2012) (appeal quashed for lack of jurisdiction because the appellant had not yet been sentenced for his summary conviction).

⁴ The concomitant Pennsylvania criminal rule of procedure is Rule 106. On April 1, 2001, Pa.R.Crim.P. 301 was renumbered as Pa.R.Crim.P. 106 and was amended. Rule 106 states:

(Footnote Continued Next Page)

Here, the trial court based its decision to dismiss Appellant's motion for continuance on Appellant's failure to comply with the local rules. First, the court cites F.C.R.Crim.P. 575(c), which states:

As used herein, the term "motion" shall include every type of motion, petition, or other application for action by the Court, and shall be designated as either "Priority" or "Routine," presentation of the latter not requiring the presence of the parties or counsel for either side. By definition, a "priority" motion is one which may be subject to contest or is so unusual as to require discussion or explanation, while "routine" motions include all other applications, such as uncontested matters to which the parties have consented in writing, requests for hearing, or requests for later argument.

F.C.R.Crim.P. 575(c) (emphasis added). Based upon this rule, the court determined that Appellant should have designated his motion for a
(Footnote Continued) _____

(A) The court or issuing authority may, in the interests of justice, grant a continuance, on its own motion, or on the motion of either party.

(B) When the matter is before an issuing authority, the issuing authority shall record on the transcript the identity of the moving party and the reasons for granting or denying the continuance. When the matter is in the court of common pleas, the judge shall on the record identify the moving party and state of record the reasons for granting or denying the continuance.

(C) A motion for continuance on behalf of the defendant shall be made not later than 48 hours before the time set for the trial. A later motion shall be entertained only when the opportunity therefor did not previously exist, or the defendant was not aware of the grounds for the motion, or the interests of justice require it.

Pa.R.Crim.P. 106. We note that on July 1, 2013, an amendment to this rule will take effect.

continuance as a “priority” motion, because the Commonwealth was not in agreement. The court further determined that the motion required the presence of the parties and/or counsel pursuant to F.C.R.Crim.P. 301, which in addition to the portion quoted above, further provides:

(d) Except for cause shown as stated in the motion, a motion for continuance shall comply with the following requirements:

. . .

(2) The motion shall be consented to and signed by all counsel, and unrepresented parties of record, or it **must** be presented as a Priority Motion (in accordance with Fayette County Rule 211); and

F.C.R.Crim.P. 301(d) (emphasis added).

As noted by the court, the lack of agreement by the Commonwealth required that the motion be identified as a “priority” motion. For that reason alone, the trial court had the power to dismiss the motion. Furthermore, Appellant’s contention that the court was simply “interested in eliminating the case” is specious at best. Appellant’s brief at 20. The court’s error in mis-identifying the address of the property in its opinion does not reveal disinterest by the trial court and is an insufficient basis on which this Court would reverse the dismissal of a motion to continue when rules of procedure have not been followed.

Appellant further argues that the court abused its discretion by dismissing Appellant’s summary appeal because his Washington state attorney was not admitted to practice law in Pennsylvania, even though she

had represented him without problems in the other cases listed previously. Appellant's reliance on case law providing that a criminal "defendant has the right to assistance of counsel of his choice," Appellant brief at 21, does not support his position.⁵ Appellant's choices are still limited to those attorneys who are admitted to practice in Pennsylvania or who have been granted *pro hac vice* status. **See** 204 Pa. Code § 201;⁶ **see also** Pa.R.C.P. 1012.1 ("Admission Pro Hac Vice"). Furthermore, past actions by Appellant and his

⁵ Appellant relies on ***Faretta v. California***, 422 U.S. 806 (1975); ***Rothgery v. Gillespie County***, 128 S.Ct. 2578, 2583 n.8 (2008); ***Commonwealth v. McDonough***, 812 A.2d 504, 506 (Pa. 2002); and ***Commonwealth v. Randolph***, 873 A.2d 1277, 1282 (Pa. 2005). These cases stand for the proposition that an accused has the right to counsel. However, none of these cases mentions the status of an attorney with regard to their admission to the bar in any particular state.

⁶ This section of the Pa. Code addresses who may practice law in Pennsylvania, stating:

Rule 201. Bar of the Commonwealth of Pennsylvania

(a) General rule. The following are members of the bar of the courts of this Commonwealth and may practice law generally within this Commonwealth:

(1) Persons admitted to the bar pursuant to these rules.

(2) Persons heretofore admitted to practice before any court of record of this Commonwealth pursuant to former Supreme Court Rules 8 or 9 or corresponding provisions of prior law and registered under Enforcement Rule 219 (relating to periodic assessment of attorneys).

204 Pa. Code § 201.

attorney that do not comply with the requirement of bar admission in Pennsylvania do not validate what has occurred previously; nor do their actions rectify the present situation by having Appellant co-sign documents or submit them *pro se*.⁷ Thus, Appellant's second argument provides him no relief.

Appellant's third argument addresses the court's dismissal of his summary appeal due to his failure to appear, despite what Appellant claims to be good cause and his attempt to appear by telephone.⁸ Again, Appellant relies on statements made in the motion for continuance/stay wherein his attorney states that she was unavailable "due to court matters in cases/hearings for which I am responsible and my presence/attention is required in Washington State." Motion to Consolidate, Continue, and Stay, 11/22/11, at 2 (unnumbered). Appellant's counsel further indicates that Appellant "is unable to travel from Washington State to Pennsylvania at this time because of personal matters that if left unattended would cause severe hardship to him and his family." ***Id., but see*** T.C.O. at 4 (stating that "[a]

⁷ We also question whether counsel for Appellant has violated any ethics rules particularly in light of the ease with which an attorney could acquire *pro hac vice* status.

⁸ We note that in his brief Appellant concedes that his attorney was aware that a "priority" motion required the party's and/or the attorney's appearance and that because neither was able to be present, the motion was identified as a "routine" motion "because she had no other option." Appellant's brief at 24.

general assertion of personal hardship is not sufficient justification for failing to appear at trial.”); Pa.R.Crim.P. 462(D) (“If the defendant fails to appear, the trial judge may dismiss the appeal and enter judgment in the court of common pleas on the judgment of the issuing authority.”)

Appellant further claims that he did not “have ‘adequate time’ much less the ability to ‘work out a continuance with the Commonwealth or obtain local counsel to appear and request a continuance.’” Appellant’s brief at 24. Despite acknowledging that the October 28, 2011 order, setting the trial date for November 21, 2011, provided for almost a month of preparation time, Appellant claims that the court did not consider the three to five day mail delivery time. Appellant also contends that the trial court incorrectly stated that Appellant’s counsel “suppl[ied] the motion for continuance/stay to the court on the morning before trial [which was to be held] in the afternoon of November 21, 2011; [rather], she faxed the motion to the court clerk and court administrator on November 18, 2012, which was more than 48 hours before the hearing date.” Appellant’s brief at 24.

With regard to this argument, we note that the trial court’s docket indicates that Appellant’s motion for continuance/stay was filed on November 22, 2011, not on November 18, 2011, as asserted. However, the document itself, which is contained in the certified record, identifies that the motion was faxed at 12:22 p.m. Pacific Standard Time on November 18, 2011, which was a Friday, thus, arriving in Fayette County at 3:22 p.m.

Eastern Standard Time.⁹ Since the trial was scheduled for 2:00 p.m. on Tuesday, November 22, 2011, the arrival of the document was slightly more than the 48 hours required in the above-quoted rules, because Saturday and Sunday are omitted from the calculation. **See** 1 Pa.C.S. § 1908. Therefore, the motion was not timely pursuant to the requirements stated in both the local and state rules of criminal procedure.

Next, relying on **Commonwealth v. Fahy**, 737 A.2d 214 (Pa. 1999), among other cases, Appellant also argues that because he faces “hefty fines and imprisonment if he fails to pay those fines,” Appellant’s brief at 25, his liberty interests are at stake and that due process mandates that he is entitled to be heard. **Id.** at 220 (“Procedural due process requires, at its core, adequate notice, opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case.”). Thus, Appellant claims that because he was prejudiced by not having been “given his day in court,” and having provided good cause for his and his attorney’s absence on the day of trial, the trial court’s orders should be vacated and a new summary appeal trial should be scheduled.

As noted previously, the trial court found that Appellant provided insufficient justification for not appearing at the scheduled trial, despite having had notice almost one month in advance. The court concluded that

⁹ The fax originated from a number with a Washington state area code.

“Appellant had adequate time to work out a continuance with the Commonwealth or obtain local counsel to appear and request a continuance.” We agree. In **Commonwealth v. Lowe**, 698 A.2d 607, 609 (Pa. Super. 1997), this Court reaffirmed that “to perfect an appeal from a summary conviction, a defendant must file a timely notice of appeal and must appear for the trial *de novo*. Failure to appear for the trial *de novo* allows the trial court to dismiss the appeal and re-enter a judgment on the finding of guilt by the issuing authority.” Moreover, we conclude that Appellant’s reliance on **Commonwealth v. Marizzaldi**, 814 A.2d 249 (Pa. Super. 2002), is unavailing, as **Marizzaldi** is readily distinguishable. In **Marizzaldi**, this Court held that the appellant’s absence from trial was not voluntary; he arrived a few minutes late due to a transportation problem. Here, in addition to not abiding by the procedural rules, Appellant provided an inadequate explanation for not attending the scheduled trial. Therefore, we conclude that the trial court did not abuse its discretion in so holding. Appellant’s arguments to the contrary are without merit.

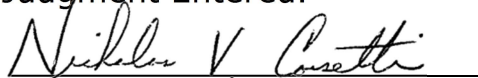
In the last question presented for our review, Appellant contends that he is entitled to a new trial, because there is no transcript from the trial demonstrating that any evidence was presented by the Commonwealth proving beyond a reasonable doubt that Appellant committed the property maintenance violations. He again cites the various procedural rules, appearing to claim his action or his inaction was a mere technicality. He also

reiterates his "timely" request for a continuance, arguing that he and his attorney provided good cause for being physically unable to attend the trial and that he received no response to his request to attend telephonically. Therefore, Appellant asserts that the court abused its discretion "by completely failing to exercise such discretion guided by what was right and equitable under the specific circumstances in this case." Appellant's brief at 27.

Appellant overlooks the statement by this Court in **Lowe** that "[f]ailure to appear for the trial *de novo* allows the trial court to dismiss the appeal and re-enter a judgment on the finding of guilt by the issuing authority." **Lowe**, 698 A.2d at 609. **See also Commonwealth v. Panto**, 913 A.2d 292, 293 (Pa. Super. 2006) (stating "the trial judge may dismiss the appeal and reinstate the judgment of the issuing authority when the defendant fails to appear at the scheduled trial *de novo*, Pa.R.Crim.P. 462(D)"). We conclude that no reversible error occurred.

Judgments of sentence affirmed. Order denying consolidation, continuance and/or stay affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casetta", is written over a horizontal line.

Deputy Prothonotary

Date: 6/4/2013