

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEVEN L. ROMANSKY,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
BRANDON R. REISH,	:	
	:	
Appellee	:	No. 3365 EDA 2013

Appeal from the Order Entered October 31, 2013
In the Court of Common Pleas of Monroe County
Civil Division No(s): 11657-Civil-2010

BEFORE: BENDER, P.J.E., SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JUNE 24, 2014**

Appellant, Steven L. Romansky, appeals *pro se* from the order entered in the Monroe County Court of Common Pleas denying his *pro se* Motion to Make Rule Absolute, which denied his petition for leave to file an appeal *nunc pro tunc* from the order entered on September 7, 2012.¹ Appellant contends the trial court erred in denying his petition to strike off and open judgment of *non pros* prior to the resolution of his post-conviction criminal proceedings. He avers the court erred in denying his petition for leave to file an appeal *nunc pro tunc*. We affirm.

* Former Justice specially assigned to the Superior Court.

¹ Appellant purported to appeal from both the September 7, 2012 order and the October 31, 2013 order.

The trial court summarized the facts and procedural history of the instant case as follows:

This matter comes before the Court on [Appellant's] *Pro Se* Petition to Strike Off and Open Judgment. [Appellant] commenced this action by filing a Complaint alleging legal malpractice. In his Complaint, [Appellant] averred that [Appellee, Brandon R. Reish] was appointed by the Pike County Court of Common pleas to serve as [Appellant's] counsel. [Appellant] further alleged that a five (5) year delay in litigating his Post Conviction Relief Act ("PCRA") petition was a result of [Appellee's] incompetence, and lack of knowledge and skill required to litigate a PCRA petition. . . . [Appellant] concluded the Complaint by requesting a declaratory judgment finding [Appellee's] actions outside acceptable professional standards, an award of compensatory and punitive damages, an award of fees, costs, and expenses associated with the prosecution of the lawsuit, and any other remedial relief the Court deemed appropriate.

On January 21, 2011, [Appellant] filed a Notice of Praecipe to Enter Judgment by Default. Thereafter, on January 31, 2011, [Appellee] filed Preliminary Objections to [Appellant's] Complaint and a supporting brief. [Appellee] raised six (6) preliminary objections On March 10, 2011, this Honorable Court overruled [Appellee's] fourth and fifth preliminary objections, and sustained the remaining objections. [Appellant] was given twenty (20) days in which to file an Amended Complaint in conformity with the Court's Order.

On February 2, 2011, [Appellee] filed a Notice of Intent to Enter Judgment of *Non Pros* of Professional Liability Claim pursuant to Pa.R.C.P. 1042.7. Additionally, this notice informed [Appellant] that if he did not file a legally sufficient certificate of merit pursuant to Pa.R.C.P. 1042.3. [Appellee] would enter a Judgment of *Non Pros*. On April 8, 2011, [Appellant] filed a "Professional Liability Action Legal Malpractice Complaint."

On May 5, 2011, [Appellant] filed a Motion for Appointment of Counsel. . . . Also, [Appellant] filed a

Motion to Appoint Appropriate Licensed Professional, requesting an expert be appointed after this Court ruled that his Certificate of Merit pursuant to Pennsylvania Rule of civil Procedure § 1042.3(a)(3) was improper. Both Motions were denied by this Court's Orders dated May 20, 2011.

[Appellant] then filed a Notice of Appeal to the Superior Court on May 19, 2011, appealing our two May 10, 2011 Orders. . . .

[Appellant] filed his Concise Statement [of Errors Complained of on Appeal] arguing that the Court erred by "prematurely granting preliminary objections without jurisdiction in the nature of a demurrer and violated **Bailey v. Tucker**, [] 621 A.2d 108 (Pa. 1993)" By Order dated August 19, 2011, the Superior Court of Pennsylvania quashed [Appellant's] appeal. [**Romansky v. Reish**, 1598 EDA 2011, unpublished Order, Aug. 19, 2011.]

On August 29, 2011, [Appellee] filed a Praecipe for entry of Judgment of *Non-Pros* Pursuant to Pa.R.C.P. 1042.7; the Monroe county Prothonotary subsequently entered a Judgment of *Non Pros* in this case on August 29, 2011. Thereafter, [Appellant] filed a Petition to Strike Off and Open Judgment on October 7, 2011.

Trial Ct. Op., 9/7/12, at 1, 2-4 (unpaginated). On September 7, 2012, the trial court denied the petition to strike off and open the judgment of *non pros*.² On September 25, 2013, Appellant filed a "Petition for Leave to File Appeal *Nunc Pro Tunc*." The trial court entered the following order stating, *inter alia*,

² We note that the court denied the petition finding that Appellant's "claims clearly sound in legal malpractice, and as such, he was required to file a Certificate of Merit pursuant to the applicable rules of civil procedure. Since [Appellant] has failed to comply, it would be inappropriate to Strike Off and Open the Judgment of *Non Pros*." **Id.** at 11 (unpaginated).

And Now this 30th day of September, 2013, upon consideration of the attached [Appellant's] Petition for Leave to File Appeal *Nunc Pro Tunc*, **A RULE IS HEREBY ISSUED** upon [Appellee] to show cause why the Petition or Motion should not be granted.

Rule Returnable for Answer in the Office of the Prothonotary of Monroe County on or before the 23rd day of October, 2013

If an Answer to the Rule is filed, either party may file a Motion for a hearing or praecipe the case for Argument, as appropriate. If no Answer is filed on or before the return date, the moving party may file a Motion to Make the Rule Absolute.

Order, 9/30/13.

On October 21, 2013, Appellee filed a response to Appellant's petition for leave to file an appeal *nunc pro tunc*. On October 28, 2013, Appellant filed a Motion to Make Rule Absolute. On October 31, 2013, the court denied Appellant's motion based upon the fact that Appellee filed a response to the motion. On December 2, 2013, Appellant filed a notice of appeal from the September 7, 2012 and the October 31, 2013 orders.³ Appellant filed a

³ At first glance, the appeal appears to be untimely. Notice of entry of the order docketed on October 30, 2013, was sent to Appellant on October 31, 2013. "The date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of entry of the order has been given as required by Pa.R.Civ.P. 236(b)." Pa.R.A.P. 108(b). "[T]he notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). Appellant filed his notice of appeal on December 2, 2013. The thirtieth day fell on a Saturday. **See** 1 Pa.C.S. § 1908 (providing that when last day of any period of time referred to in any statute falls on Saturday,

timely court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the trial court filed a responsive opinion.

Appellant raises the following issues for our consideration:

[1.] Whether the trial court committed reversible error of law, abused its discretion and denied Appellant his state and federal constitutional due process rights under Article V. Section 9 of the Pennsylvania Constitution as well as the First and Fourteenth Amendments to the United States Constitution in refusing to grant Appellant's petition to file an appeal *nunc pro tunc*.

[2.] Whether the lower court abused its discretion and committed an error of law in granting preliminary objection (sic) on the grounds of demurrer in violation of **Bailey** which held that said objections should be reserved until the resolution of post-conviction criminal proceedings.

Appellant's Brief at 4.

First, Appellant claims the trial court erred in denying his petition for leave to file an appeal *nunc pro tunc*.⁴ Appellant contends that "under Article V. Section 9 of the Pennsylvania constitution every person has a right to appeal." **Id.** at 11. He claims that the SCI-Greene⁵ Inmate Privileged Mail Log "leaves no doubt" that he did not receive the September 7, 2012

Sunday, or legal holiday, such day shall be omitted from computations). Therefore, this appeal is timely.

⁴ We note "[i]n Pennsylvania, both trial and appellate courts have jurisdiction to determine whether an appeal *nunc pro tunc* should be granted." **Towey v. Lebow**, 980 A.2d 142, 144 (Pa. Super. 2009).

⁵ Appellant is an inmate in the State Correctional Institution at Greene. **See** Trial Ct. Op. at 3.

order until August 27, 2013.⁶ **Id.** at 18. Appellant argues that an appeal *nunc pro tunc* should be granted because the delay in filing was caused by a breakdown in the court system. **Id.** Appellant avers that he “cannot definitively state whether the breakdown was caused by trial court officers or SCI-Greene personnel” **Id.**

This Court has stated that

[t]he denial of an appeal *nunc pro tunc* is within the discretion of the trial court, and we will only reverse for an abuse of that discretion. **Freeman v. Bonner**, 761 A.2d 1193, 1194 (Pa. Super. 2000). In addition to the occurrence of “fraud or breakdown in the court’s operations,” *nunc pro tunc* relief may also be granted where the appellant demonstrates that “(1) [his] notice of appeal was filed late as a result of nonnegligent circumstances, either as they relate to the appellant or the appellant’s counsel; (2) [he] 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, 1159 (2001).

Cases involving a breakdown in court operations often involve a failure on the part of the prothonotary to fulfill his or her ministerial duties, such as the filing of dispositions and other relevant information on the appropriate docket, or giving notice of these dispositions to interested parties.

Rothstein v. Polysciences, Inc., 853 A.2d 1072, 1075 (Pa. Super. 2004).

Instantly, the trial court opined:

[Appellant] appeals from this Court’s October [31], 2013 Order in which we denied his Petition to File an Appeal

⁶ This log was attached to Appellant’s Petition for Leave to File Appeal *Nunc Pro Tunc*. **See** Ex. A to Pet. for Leave to File Appeal *Nunc Pro Tunc*, 9/25/13.

Nunc Pro Tunc. While [Appellant] has raised this issue in his Statement of Errors, we find that this argument lacks any merit. [Appellant] has attached to his Petition a copy of what is alleged to be the legal mail log for August 27, 2013. The document only substantiates that [Appellant] obtained two letters on that date, one from the US District Court, and one from the Clerk of Court. The log does not identify from which Clerk of Court [Appellant] received mail, nor does it identify the documents received. Moreover, on September 10, 2012, an affidavit of mailing was filed evidencing service to [Appellant] and counsel for [Appellee] of the September 7, 2012 Order. Further, no evidence exists that [Appellant] received mail from the Monroe County Prothonotary on August 27, 2013.

Trial Ct. Op., 1/28/14, at 2. The court concluded that Appellant “failed to provide any acceptable legal reason why his Petition to Appeal *Nunc Pro Tunc* should be granted.” We agree.

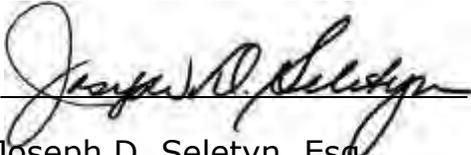
Appellant has not satisfied any of the criteria for which *nunc pro tunc* relief can be granted. **See Rothstein**, 853 A.2d at 1075. We discern no abuse of discretion. **See id.** Accordingly, we affirm the trial court’s October 31, 2013 order denying Appellant’s Petition to File an Appeal *Nunc Pro Tunc*.⁷

Order affirmed.

⁷ We need not reach Appellant’s second issue on appeal, having found that the trial court did not err in denying his petition to appeal *nunc pro tunc* from the September 7, 2012 order.

J. S26036/14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014