

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ELWOOD SMALL,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
CHERYL J. STURM, ESQ.,	:	
	:	
Appellee	:	No. 2328 EDA 2012

Appeal from the Order entered on August 7, 2012
in the Court of Common Pleas of Delaware County,
Civil Division, No. 09-053321

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED MAY 16, 2013

Elwood Small ("Small") appeals, *pro se*, from the Order denying his Petition for permission to file an appeal *nunc pro tunc* from the arbitration award in favor of Cheryl Sturm, Esquire ("Sturm"). We affirm.

This Court has set forth the relevant underlying procedural history:

On April 13, 1983, a jury convicted [Small] of second[-]degree murder, aggravated assault, and criminal conspiracy. In June 2003, [Small] retained [Sturm] to assist in the preparation of a motion in response to the federal court's denial of *habeas corpus* relief. Ultimately, the federal court continued to deny relief.

On October 8, 2008, [Small] filed a *praecipe* for writ of summons against [Sturm]. On December 3, 2008, [Small] filed a *pro se* complaint against [Sturm], alleging breach of contract. Although [Small] filed his complaint in the Luzerne County Court of Common Pleas, the court found "the contract for legal representation...was accepted by [Sturm] at her office in Delaware County..." (Order, entered 2/3/09, at 1). Consequently, the court transferred the matter to the Delaware County Court of Common Pleas on February 3, 2009.

On July 13, 2009, the court informed the parties that it had scheduled the matter for arbitration on April 20, 2010. [Sturm] subsequently filed a summary judgment motion, which the court denied on December 29, 2009. [Sturm] filed a second summary judgment motion, which the court denied on March 31, 2010. Thereafter, the parties proceeded to the arbitration hearing on April 20, 2010. [Small], who remains incarcerated, participated in the hearing *via* telephone. At the conclusion of the hearing, the arbitrators entered an award in favor of [Sturm]. No notice of appeal for a trial *de novo* was filed in the common pleas court.

On November 17, 2010, [Small] filed a *pro se* correspondence with the court, requesting a copy of the docketing sheet for his case. On November 29, 2010, [Small] filed a *pro se* [P]etition seeking leave to appeal the arbitration award *nunc pro tunc*. In the [P]etition, [Small] asserted he had timely submitted his notice of appeal and verification of *in forma pauperis* status to prison authorities for mailing. To prove his assertion, [Small's] [P]etition included a copy of the "cash slip," authorizing the release of funds from his prison account. [Small's] [P]etition also included a copy of the notice appeal and verification of *in forma pauperis* status. [Small] insisted a breakdown in the court's operations had prevented it from receiving his otherwise timely filed notice of appeal. [Small] concluded the court should reinstate his appeal rights *nunc pro tunc*.

On February 3, 2011, the court entered an [O]rder denying [Small's] *pro se* [P]etition. [Small] timely filed a *pro se* notice of appeal on February 28, 2011.

Small v. Sturm, 32 A.3d 273 (Pa. Super. 2011) (unpublished memorandum at 1-3) (footnote omitted).

On appeal, this Court vacated the trial court's Order and concluded that Small had presented some evidence to demonstrate that he timely provided a *pro se* notice of appeal to prison officials for mailing. **See id.** at 8-9. This Court remanded the matter to the trial court to conduct a full

evidentiary hearing to determine whether Small's alleged filing was timely under the prisoner mailbox rule. **See id.**

The trial court held an evidentiary hearing on May 21, 2012. Thereafter, the trial court entered an Order denying Small's Petition based upon the absence of any evidence to support Small's claims. Small filed a timely Notice of appeal.

On appeal, Small raises the following question for our review: "Did the [trial court] err when it deny [*sic*] [Small's Petition] for Notice of appeal[?]" Brief for Appellant at 1 (unnumbered).¹

[T]he standard of review applicable to the denial of an appeal *nunc pro tunc* is whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment but is found where the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will as shown by the evidence or the record.

Freeman v. Bonner, 761 A.2d 1193, 1194-95 (Pa. Super. 2000) (citation and quotation marks omitted).

In his single page argument, Small contends that he served upon Sturm and the trial court a Notice of his intention to offer evidence at the

¹ We note that Small's *pro se* brief does not conform to the Pennsylvania Rules of Appellate Procedure. Indeed, Small's brief did not meet the following requirements: Pa.R.A.P. 2111(a)(1) and 2114 (statement of jurisdiction); Pa.R.A.P. 2111(a)(3) (statement of both the scope of review and the standard of review); and Pa.R.A.P. 2111(a)(6) and 2118 (summary of the argument). Nevertheless, despite these defects, we will address the merits of Small's argument. **See Commonwealth v. Adams**, 882 A.2d 496, 498 (Pa. Super. 2005).

May 21, 2012 hearing. Brief for Appellant at 2 (unnumbered). Small specifically argues that in the Notice, he included a copy of

(1) a certify [*sic*] copy of [his] monthly transaction, verifying [*sic*] the date and amount of funds being [] deducted off his account to mail [his] Notice of appeal and application to continue *in forma pauperis* status for appeal; (2) a verify [*sic*] copy of the inmate Cash Slip showing the date and amount deducted, and authority by M. Bentz, the prison accountant officer.

Id. (unnumbered).

The trial court found that Small had not met his burden of proof in that he failed to demonstrate that he had delivered “to prison authorities a properly filed notice of appeal in the format required by the Rules of Civil Procedure.” Trial Court Opinion, 10/26/12, at 2 (unnumbered). On appeal, Small does not dispute this finding, nor does he argue that he had delivered a proper notice of appeal or a certificate to continue *in forma pauperis* to prison authorities in May 2010. Small merely argues that he had presented evidence that he obtained money to send his purported notice of appeal and certificate to continue *in forma pauperis* to the Delaware County Court of

Common Pleas.² However, this Court had previously concluded that evidence of the “cash slip,” along with the notice appeal and verification of *in forma pauperis* status attached to Small’s November 29, 2010 Petition, did not demonstrate that Small filed a timely notice of appeal in May 2010. **See Small**, 32 A.3d 273 (unpublished memorandum at 3, 8-9). Indeed, this Court determined that this evidence only triggered the need for an evidentiary hearing for additional evidence to determine whether Small had filed a timely notice of appeal. **See Small**, 32 A.3d 273 (unpublished memorandum at 8-9); **see also Gorski v. Smith**, 812 A.2d 683, 702 n.8 (Pa. Super 2002) (stating that a three-judge panel of this Court cannot overrule another three-judge panel). Thus, in accordance with this Court’s prior holding and Small’s lack of evidentiary support at the hearing, we must affirm the trial court’s finding that Small did not file a timely notice of appeal. **See Urmann v. Rockwood Cas. Ins. Co.**, 905 A.2d 513, 519-20

² We note that Small has attached two documents to his brief, a notice of appeal, dated April 30, 2010, and a certificate to proceed *in forma pauperis*, dated April 30, 2010, despite the fact that he does not cite to these documents in his argument. Additionally, the notice of appeal attached to Small’s brief is not the same document as the notice of appeal attached to Small’s November 29, 2010 Petition. Indeed, the notice of appeal attached to Small’s brief includes a filing date of April 30, 2010, while the notice of appeal attached to Small’s Petition does not include any date. Further, the wording and dates in the certificate to proceed *in forma pauperis* attached to the brief differ from the certificate attached to the Petition. Thus, because Small does not cite to these documents in his argument on appeal nor were these documents presented before the trial court or made part of the certified record, we will not consider this evidence. **See Pa.R.A.P. 302(a); Hrinkevich v. Hrinkevich**, 676 A.2d 237, 240 (Pa. Super. 1996) (stating that “the Superior Court may only consider documents properly incorporated within the certified record.”).

(Pa. Super. 2006) (concluding that appellant's claims were without merit where appellant failed to present any evidence at the trial court's evidentiary hearing and relied upon evidence that was not presented at an evidentiary hearing on appeal); ***Felix v. Giuseppe Kitchens & Baths, Inc.***, 848 A.2d 943, 950 (Pa. Super. 2004) (concluding that the appellants' claims were without merit where they were afforded ample opportunity to present evidence at an evidentiary hearing, but failed to do so). Accordingly, the trial court did not abuse its discretion in denying Small's Petition to appeal *nunc pro tunc*.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 5/16/2013