[J-191-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

GERALD JACKSON, a/k/a GERALD DAY, CHARLES S. BEAUFORT, EMMANUEL GARDNER, ANTHONY SANDERS, a minor, by ALICE SANDERS, his guardian, and WILLIAM RESPASS, on behalf of themselves and all others similarly situated,	:	No. 3 E.D. Appeal Dkt. 1999
	:	Appeal from the Order of the Commonwealth Court entered March 27, 1998, at No. 767 C.D. 1997, quashing the appeal from the Orders of the Court of Common Pleas of Philadelphia County dated March 11, 1997 and October 2, 1996 at No. 2437 February Term, 1971
v.	:	
EDWARD J. HENDRICK, individually and as Superintendent of Philadelphia Prisons, et al.,	:	710 A.2d 102 (Pa. Cmwlth. 1998)
	:	ARGUED: October 18, 1999
APPEAL OF: CITY OF PHILADELPHIA	:	

CONCURRING OPINION

MR. JUSTICE ZAPPALA **DECIDED: February 22, 2000**

I join in vacating the order quashing the City's appeal and remanding this matter to the Commonwealth Court for disposition of the appeal on the merits. However, rather than basing the decision on broad equitable principles, I would resolve the matter within the framework of the Rules of Appellate Procedure.

This case arises out of a consent decree governing the operation of Philadelphia's prisons. On October 2, 1996, the common pleas court entered an order holding the City in contempt and imposing a fine of $2,252,500. On October 25th, the City filed a motion for reconsideration. Three days later, it filed a notice of appeal. The common pleas court heard argument on the motion for reconsideration on October 31st, and at the conclusion of the

hearing stated “We are today vacating our order and taking the petition for reconsideration under advisement for a period of 30 days . . . .” On November 19th, the court entered a written order stating that the order of October 2, 1996 was “vacated for a period of sixty (60) days pending reconsideration of said adjudication and order.” On December 5th, the City withdrew its appeal. On March 11, 1997, however, the common pleas court reinstated the original finding of contempt, although it reduced the fine slightly. The City filed another notice of appeal.

Commonwealth Court sua sponte quashed the appeal and reinstated the order of October 2nd. The court held that the October 31st oral order was of no effect because it was not entered on the docket, and the November 19th order was of no effect because it was entered more than thirty days after the order it purported to vacate. Since no order granting reconsideration had been properly entered, the court’s order of March 11, 1997, was a nullity, and thus the attempted appeal from that order was quashed.

Section 5505 of the Judicial Code authorizes a trial court to modify an order within thirty days, but by its terms only applies when no appeal has been taken. Pa.R.A.P. 1701 becomes operative when an appeal has been taken, and establishes the premise that the very taking of the appeal removes the case beyond the authority of the trial court to act, with several exceptions. The exception at issue here, contained in Rule 1701(b)(3), authorizes the trial court to grant reconsideration of the order that is the subject of the appeal, and establishes certain conditions for the exercise of that authority. The first condition is the timely filing of an application for reconsideration. The second condition is that “an order expressly granting reconsideration . . . [be] filed in the trial court . . . within the time prescribed by these rules for the filing of a notice of appeal . . . .” The rule goes on to explain the effect when these conditions are satisfied: the notice of appeal is “rendered inoperative”. The rule further states that “the petitioning party shall and any party may file a praecipe with the prothonotary of any court where such an inoperative notice . . . is filed

or docketed and the prothonotary shall note on the docket that such notice . . . has been stricken under this rule."

The problem in this case arises from the fact that both the City and the common pleas court made procedural errors in the steps they took, making it difficult to recognize whether the requirements of Rule 1701(b)(3)(ii) were met. The ultimate question we must decide is whether the City's procedural missteps are necessarily fatal to its appeal, particularly in light of the trial court's errors.

The common pleas court's first error was in the language used at the hearing on the City's petition for reconsideration. The court stated, "We are today vacating our order and *taking the petition for reconsideration under advisement* for a period of 30 days." (Emphasis added.) By itself, the emphasized language does not "expressly grant reconsideration." Rather, it indicates only that the court is reserving judgment *on the request that it reconsider* its original order. This is significantly different from stating that it *will reconsider* the original order and reserving judgment on whether it will reaffirm that order or enter a different order.

Notwithstanding this imprecise use of language where precision is especially called for, there are two indications in the record that the court understood its action as in fact granting the City's petition for reconsideration. First, the statement that the court was "taking the petition for reconsideration under advisement" did not appear in isolation. The court began by stating that it was vacating its original order. Pursuant to Pa.R.A.P. 1701, a court does not generally have authority to vacate an order once a notice of appeal has been filed. A decision to grant reconsideration, however, has the effect of vacating the original order; until the court enters its decision on reconsideration, the status of the case is as if no order had been entered. Second, the order the court entered on March 11, 1997, differed from the original order of October 2, 1996, reducing the fine by about $160,000. If the court were only making the preliminary inquiry of whether or not it should embark on

considering the matter again, it would not have made a different ruling on the merits. Thus we may conclude that by simultaneously stating that it was vacating its order and taking the petition for reconsideration under advisement, the court believed it was "expressly granting reconsideration" in accordance with Pa.R.A.P. 1701(b)(3).

The court's second error was in not immediately having its order entered on the docket. It was not until November 19, 1996, that the court had the prothonotary docket a written order stating that the order of October 2, 1996 was "vacated for a period of sixty (60) days pending reconsideration of said adjudication and order."[1] Commonwealth Court held that the November 19th order was of no effect because (1) it was entered more than thirty days after the order it purported to vacate, contrary to 42 Pa.C.S. § 5505, and (2) it was entered beyond the time prescribed for filing a notice of appeal, contrary to Pa.R.A.P. 1701(b)(3).

As previously noted, Section 5505 applies only where no appeal has been taken. Accordingly, in this case, since a notice of appeal from the October 2nd order was filed on October 28th, Section 5505 does not enter into the analysis of the effect, if any, of the common pleas court's written order of November 19th. Only Pa.R.A.P. 1701(b)(3) is implicated in that analysis. [2]

This appeal, then, involves interpretation of two aspects of Rule 1701(b)(3). The first is whether an order delivered in open court can satisfy the condition of subsection (ii) that

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[1] This language is more nearly an "express grant of reconsideration" as required by Rule 1701(b)(3) than was the order in open court on October 31, 1996, although a simple statement that reconsideration is granted is to be preferred.

[2] The lead opinion cites several cases for the proposition that courts have modified and rescinded orders beyond the normal time limits where it would have been inequitable for parties to suffer the consequences of the court's errors. See Opinion Announcing the Judgment of the Court at 5-6. In none of those cases, however, had an appeal been taken at the time the common pleas court attempted to alter its initial order. Because they relate more to a court's inherent authority vis a vis the time specified in Section 5505 (or in earlier days beyond the term of court), they shed no light on the issue here.

an order expressly granting reconsideration be "*filed* in the trial court . . . within the time prescribed . . . for filing a notice of appeal." (Emphasis added.) If it can, under the interpretation of the court's statement above, reconsideration was timely granted on October 31st when the court orally vacated its order and took the matter under advisement, and the City properly appealed from the order of March 11, 1997. If it cannot, the second issue, which directly implicates the question of timeliness, comes to the fore: whether the requirement of subsection (ii) that the order expressly granting reconsideration be "filed in the trial court . . . *within the time prescribed . . . for filing a notice of appeal*" (emphasis added), states a time limit that is jurisdictional and thus not subject to extension.

As to the first question, I would hold that an order placed on the record in open court expressly granting reconsideration can satisfy the "filing" requirement of Rule 1701(b)(3)(ii).[3] Pa.R.A.P. 108, which speaks to the entry dates of orders, controls in this regard. Rule 108(a)(1) establishes the "general rule" that, "Except as otherwise prescribed in this rule, in computing any period of time under these rules involving the date of entry of an order by a court . . . the day of entry shall be the day the clerk . . . mails or delivers copies of the order to the parties . . . ." Subsection (b) states one of the exceptions referred to in the opening clause, that in a matter subject to the Rules of Civil Procedure, the date of entry of an order "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)."

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[3] It should first be noted that the use of the term "filed" is itself misleading. Elsewhere in the rules the term "enter" is employed to refer to the action of a court, see Pa.R.A.P. 108, "filing" being used to designate the actions of a party, see Pa.R.A.P. 121. In fact, the second paragraph of (b)(3) uses the term "entered" in explaining the effect of the grant of reconsideration ("When a timely order of reconsideration is entered under this paragraph the time for filing a notice of appeal begins to run anew after the entry of the decision on reconsideration . . . .")

It cannot be overlooked, however, that Pa. R.A.P. 108(a)(1) also states that "The day of entry of an order *may be the day of its adoption by the court* . . . or any subsequent day, *as required by the actual circumstances.*" (Emphasis added). As I read it, despite its placement in subsection (a), this qualification applies not only with respect to the general rule["day of entry" equals "day of mailing"] but also to the exception for civil orders ["day of entry" equals "day of docket notation that notice has been given"]. In this case, I believe that the actual circumstances, i.e., the apparent reliance of the parties and the court, require that the "day of entry" of the order granting reconsideration be the day of its adoption by the court, i.e., October 31st, at the hearing on the City's petition for reconsideration. I note additionally that this interpretation is consistent with Pa.R.A.P. 105(a) ("These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable. . . . [A]n appellate court may . . . disregard the requirements or provisions of any of these rules in a particular case . . . on its own motion . and may order proceedings in accordance with its direction.")

In the alternative, if the October 31st oral order is not interpreted as a properly "filed" order expressly granting reconsideration under Rule 1701(b)(3)(ii), I would hold that the written order entered on the docket on November 19th should be given effect. Again, Pa.R.A.P. 105 states that the rules of appellate procedure shall be liberally construed. Rule 105(b) provides that an appellate court "may permit an act to be done after the expiration of such time [as prescribed by the rules or the court's order], but the court may not enlarge the time for filing a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review." Here, the question is whether the trial court should have been "permitted" (after the fact) to enter an order granting reconsideration on November 19th. Although the time period in Rule 1701(b)(3)(ii) is stated in terms of "the time prescribed by these rules for the filing of a notice of appeal or petition for review," this is a descriptive reference only. In other words, the rule establishes that the time frame for the

court to grant reconsideration is the same time frame as a party has for filing a notice of appeal. Extending the time for *the court* to act, however, would not be extending the time for filing a notice of appeal in violation of Rule 105(b).

Since I would hold that either the October 31st or the November 19th order was an order granting reconsideration under Rule 1701(b)(3)(ii), the trial court's order of March 11, 1997, constitutes the final order and the City's appeal filed on March 13th would be timely.

In addition to analyzing the effects of the trial court's errors, I must also comment on the City's failure to follow the rules. As previously indicated, Rule 1701(b)(3) provides that after reconsideration has been granted, a notice of appeal is inoperative, "the petitioning party shall . . . file a praecipe with the prothonotary of any court in which such an inoperative notice . . . is filed or docketed and the prothonotary shall note on the docket that such notice . . . has been stricken under this rule." The City, however, *withdrew* its appeal to Commonwealth Court on December 5, 1996. Had the City followed Rule 1701(b)(3) and praeciped the prothonotary of the common pleas court to strike the notice of appeal and/or the prothonotary of the Commonwealth Court to strike the appeal that had been docketed, specifying that the court had granted reconsideration under the Rule, the question of whether a valid order granting reconsideration had been entered might have come to the attention of the parties and the courts *before the appeal was terminated*.

Notwithstanding that the City contributed to the difficulties, I attribute greater significance to the errors of the court and, according to the reasoning stated, would hold that, consistent with the Rules of Appellate Procedure, the City's appeal can and should be decided on the merits rather than being quashed.

Messrs. Justice Cappy and Castille join this Concurring Opinion.