

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DURANT J. JOHNSON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 958 MDA 2013

Appeal from the Order of April 25, 2013  
In the Court of Common Pleas of Franklin County  
Criminal Division at No.: CP-28-SA-0000027-2013

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DURANT J. JOHNSON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 959 MDA 2013

Appeal from the Order of April 25, 2013  
In the Court of Common Pleas of Franklin County  
Criminal Division at No.: CP-28-SA-0000028-2013

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DURANT J. JOHNSON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 960 MDA 2013

Appeal from the Order of April 25, 2013

In the Court of Common Pleas of Franklin County  
Criminal Division at No.: CP-28-SA-0000029-2013

BEFORE: MUNDY, J., WECHT, J., and FITZGERALD, J.\*

DISSENTING MEMORANDUM BY MUNDY, J.: **FILED APRIL 23, 2014**

I respectfully dissent from the Majority's conclusion that this case presents the extraordinary circumstances necessary to award *nunc pro tunc* relief. Majority Memorandum at 14. Herein, the trial court concluded Appellant did not meet his burden in proving he should be awarded *nunc pro tunc* relief based upon his claim that "he lacked funds to pay filing fees for [his] appeals on or before the day of the deadline[.]" *Id.* at 6; **see also** Trial Court Opinion, 7/22/13, at 5. After a thorough review of the certified record, I believe the trial court appropriately refused to award Appellant *nunc pro tunc* relief and dismissed his appeal as untimely.

Pennsylvania Rule of Civil Procedure 460 provides that "an appeal [from a summary proceeding] shall be perfected by filing a notice of appeal within 30 days after the entry of ... the conviction... from which the appeal is taken." Pa.R.Crim.P. 460(A).

[Yet] when a party has filed an untimely notice of appeal, ... appellate courts **may** grant a party equitable relief in the form of an appeal *nunc pro tunc* in certain extraordinary circumstances. ***Commonwealth v. Stock***, 679 A.2d 760, 763-64 (Pa. 1996) [(granting appeal *nunc pro tunc* because

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\* Former Justice specially assigned to the Superior Court.

appellant's counsel failed to file a requested notice of appeal)]. Initially, an appeal *nunc pro tunc* was limited to circumstances in which a party failed to file a timely notice of appeal as a result of fraud or a breakdown in the court's operations. **West Penn Power Co. v. Goddard**, 333 A.2d 909, 912 (Pa. 1975) (the time for taking an appeal will not be extended as a matter of grace or mere indulgence). In **Bass v. Commonwealth Bureau of Corrections, et al.**, 401 A.2d 1133 (Pa. 1979), however, [our Supreme] Court found that where an appellant, an appellant's counsel, or an agent of appellant's counsel has failed to file a notice of appeal on time due to non-negligent circumstances, the appellant should not lose his day in court. [**Bass, supra**] at 1135. Therefore, the **Bass** Court expanded the limited exceptions for allowing an appeal *nunc pro tunc* to permit such an appeal where the appellant proves that: (1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay. [**Id.**] at 1135-36 (allowing appellant to appeal *nunc pro tunc* where appeal was filed four days late because appellant's attorney placed the notice of appeal on the desk of the secretary responsible for ensuring that appeals were timely filed and the secretary became ill and left work, not returning until after the expiration of the period for filing an appeal); **see also Cook v. Unemployment Comp. Bd. of Review**, 671 A.2d 1130, 1132 (Pa. 1996) (granting appeal *nunc pro tunc* where claimant filed appeal four days late because he was hospitalized).

...

The exception for allowance of an appeal *nunc pro tunc* in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that [he] attempted to file an appeal, but unforeseeable and

unavoidable events precluded [him] from actually doing so. **See Cook**, 671 A.2d at 1132; **Perry v. Unemployment Comp. Bd. of Review**, 459 A.2d 1342, 1143 (Pa. Commw. 1983) (fact that law clerk's car broke down while he was on route to the post office, precluding him from getting to the post office before closing time, was a non-negligent happenstance for granting appeal *nunc pro tunc*); **Tony Grande, Inc. v. Workmen's Comp. Appeal Bd. (Rodriquez)**, 455 A.2d 299, 300 (Pa. Commw. 1983) (hospitalization of appellant's attorney for unexpected and serious cardiac problems ten days into twenty day appeal period was reason to allow appeal *nunc pro tunc*); **Walker v. Unemployment Comp. Bd. of Review**, 461 A.2d 346, 347 (Pa. Commw. 1983) (U.S. Postal Service's failure to forward notice of referee's decision to appellant's address, as appellant had requested, warranted appeal *nunc pro tunc*). **But cf. In re: In the Interest of C.K.**, 535 A.2d 634, 639 (Pa. Super. 1987) (appeal *nunc pro tunc* denied where counsel was absent from office and did not learn of appellant's desire to appeal before expiration period because counsel negligently failed to make arrangements to look over his professional obligations); **Moring v. Dunne**, 493 A.2d 89, 92-93 (Pa. Super. 1985) (although death of appellant's attorney may have qualified as a non-negligent circumstance, appellant failed to prove that he attempted to appeal on time but was precluded from doing so as a result of receiving late notice of his attorney's death).

**Criss v. Wise**, 781 A.2d 1156, 1159-1160 (Pa. 2001) (parallel citations omitted) (denying *nunc pro tunc* relief because mail delay cannot be construed to be a non-negligent circumstance). Accordingly, "an appeal *nunc pro tunc* is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances."

**Commonwealth v. Williams**, 893 A.2d 147, 150 (Pa. Super. 2006)

(denying *nunc pro tunc* relief because appellate received the requisite notice of his appellate rights when he received his initial, written citation), *appeal denied*, 921 A.2d 497 (Pa. 2007), quoting **Stock, supra** at 764. Therefore, we review a trial court's decision to deny *nunc pro tunc* relief for an abuse of discretion. **See Williams, supra**.

Instantly, Appellant does not contest that he filed his appeal untimely. Majority Memorandum at 5. Rather, Appellant argues that the trial court should have awarded him *nunc pro tunc* relief and reinstated his direct appeal rights because "he lacked funds to pay the filing fees for [his] appeals on or before the day of the deadline." **Id.** at 6. Additionally, Appellant claims that the failure of the trial court to advise him of an "unwritten rule" that defendants may appeal their summary convictions within Franklin County without paying the applicable filing fees consists of "negligence on the part of a court official." Appellant's Brief at 10. Accordingly, Appellant asserts that the trial court abused its discretion when denying him *nunc pro tunc* relief. Appellant's Brief at 11.

In the instant matter, the trial court concluded that Appellant did not demonstrate an extraordinary circumstance to warrant *nunc pro tunc* relief. Trial Court Opinion, 7/22/13, at 5. Specifically, the trial court concluded Appellant's proffered rationale for his late filing, *i.e.*, lack of monetary funds on the date of the appeal deadline, does not support a request for *nunc pro tunc* relief. **Id.; cf. Williams, supra**. I agree.

Herein, Appellant was fully aware of the 30-day appeal deadline. Additionally, Appellant admits that he was denied both a public defender, and arguably *in forma pauperis* status, in the past based upon his income. Majority Memorandum at 6. Presently, Appellant asserts that he could not obtain the funds to pay his filing fees until the day after the appeal deadline. However, Appellant fails to set forth any specific allegations to support this conclusory claim and, as such, his extraordinary circumstance assertion. While I have empathy for Appellant, I agree with the trial court that he cannot be afforded *nunc pro tunc* relief absent “extraordinary circumstances[,]” which cannot be construed to include poor financial planning. **See id.** Moreover, as filings fees are foreseeable and allegedly avoidable in Franklin County, Appellant’s failure to anticipate this situation is not such a non-negligent circumstance for which an appeal *nunc pro tunc* may be granted. **See Criss, supra** at 1160. Accordingly, I would affirm the trial court’s July 22, 2013 order dismissing Appellant’s appeal as untimely. I respectfully dissent.