NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37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

MEMORANDUM BY WECHT, J.: **FILED APRIL 23, 2014**

Durant Johnson appeals the trial court's order dismissing his summary appeals as untimely.[1] We reverse and remand for the restoration *nunc pro tunc* of Johnson's appellate rights.

The trial court has provided the following factual and procedural background:

> [Johnson] was cited for driving while operating privilege suspended or revoked on August 29, 2012,[1] and improperly signaling[2] and driving while operating privilege suspended or revoked[3] on September 2, 2012. The citations were filed in magisterial district court on August 30 and September 3, 2013[,] respectively. On January 24, 2013, [Johnson] was found guilty of all three summary offenses. The 30[-]day statutory summary appeal period had passed when[,] on February 26, 2013[,] [Johnson] filed two Notices of Appeal [f]rom Summary Criminal Conviction.
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> [1] 75 P.S. § 1543(A).
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> [2] 75 P.S. § 3334(B).
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> [3] 75 P.S. § 1543(A).
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> The Commonwealth, on April 22, 2013, filed a Motion to Dismiss Summary Appeal based on the late filing of [Johnson's] Notices of Appeal. The [c]ourt did not rule on the Commonwealth's

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* Former Justice specially assigned to the Superior Court.

[1] By order entered June 19, 2013, this Court consolidated the three above-captioned appeals, which all concern a single order entered by the trial court.

> Motion to Dismiss prior to the April 25, 2013 hearing.[4] At the hearing, [Johnson] conceded that his Notice of Appeal was untimely filed, but attempted to justify the late filing. [Johnson] relayed that he was unable to pay the fees during the appeal period but paid the fee required to file a notice of appeal once the funds were available in his bank account – two days after the statutory appeal period had run.[2] When questioned why he did not seek *in forma pauperis* status, [Johnson] stated that he had been denied an appointed attorney because of his employment and was unaware that he could file an appeal without paying the fee. Based on this information and without having been requested to consider an appeal *nunc pro tunc*, the [c]ourt dismissed the appeal as to these three summary convictions as being untimely appealed.
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> [4] This hearing addressed the summary appeals now at issue and several others not currently before the Superior Court.
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> [Johnson] filed a Notice of Appeal [on] May 24, 2013 challenging the Order of Court entered April 25, 2013, dismissing [Johnson's] summary appeals in the above[-]captioned cases. The [c]ourt ordered a concise statement of matters complained of on appeal [pursuant to Pa.R.A.P. 1925(b)] on May 29, 2013.

Trial Court Opinion ("T.C.O."), 7/22/2013, at 1-3 (citations modified; footnote omitted). Johnson complied on June 20, 2013, and the trial court prepared the above-excerpted Rule 1925(a) opinion.

Before this Court, Johnson sets forth the following claims of error:

> 1. The Trial Court abused its discretion in dismissing [Johnson's] summary appeal[s] as untimely when [Johnson], proceeding pro se at the time, filed the appeal[s] two [*sic*, ***see*** *supra* at 3 n.2] days late because he was denied a request

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[2] In point of fact, Johnson's appeal was filed only one day late. Thirty days after the January 24, 2013 conviction fell on Saturday February 23, 2013. Thus, by rule, Johnson's appeals were due to be filed no later than Monday February 25, 2013. He filed his appeals on February 26, 2013.

> for a public defender and filed his appeal[s] as soon as he had the funds available to pay the filing fees.
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> 2. The Trial Court abused its discretion in dismissing [Johnson's] summary appeal[s] upon consideration of a Commonwealth motion to dismiss filed several days ahead of the scheduled hearing in a different summary appeals case.

Brief for Johnson at 7.

The trial court aptly set forth the governing legal standard as follows:

> [Johnson] was required to file an appeal from his summary convictions within the 30[-day] appeal period prescribed by Pa.R.Crim.P. 460. "When a defendant appeals after the entry of a guilty plea or a conviction by an issuing authority in any summary proceeding [. . .] the case shall be heard *de novo* by the judge of the court of common pleas sitting without a jury." Pa.R.Crim.P. 462(A). Rule 460 states, *inter alia*, that the notice of appeal must be filed with the clerk of courts "within 30 days after the entry of the guilty plea, the conviction, or other final order from which the appeal is taken." Pa.R.Crim.P. 460(A). The trial court is not permitted to expand the time for filing a notice of appeal. ***Commonwealth v. Yohe***, 641 A.2d 1210, 1212 (Pa. Super. 1994) . . . .
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> Given [Johnson's] untimely filing of the notices of appeal, the [c]ourt considered [Johnson's] explanation for missing the filing deadline to determine the appropriateness of *nunc pro tunc* relief, which is intended to be an extraordinary remedy to vindicate the right to an appeal where that right has been lost due to some extraordinary circumstance. ***See Commonwealth v. Stock***, 679 A.2d 760 (Pa. 1996); ***Commonwealth v. White***, 806 A.2d 45, 46 (Pa. Super. 2002); ***McLean v. Unemployment Comp. Bd. of Review***, 908 A.2d 956 (Pa. Cmwlth. 2006) ("Courts may permit a party to file an appeal *nunc pro tunc* only where fraud or a breakdown in the court's operations has occurred, or where the appellant, his counsel, or a third party's non-negligent actions have caused a delay in the filing of an appeal."). It is [the appellant's] burden to show both the mitigating circumstances and "prompt[] [action] [. . .] upon learning of the existence of the grounds relied on for such relief." ***Commonwealth v. Bassion***, 568 A.2d 1316, 1318-19 (Pa. Super. 1990) (internal citations omitted).

T.C.O. at 3-4 (citations modified). The trial court went on to observe, first, that Johnson had not explicitly sought *nunc pro tunc* relief. ***Id.*** at 5. The court further explained that, in any event, Johnson's "mere allegations would not have met his burden of proving fraud or a breakdown in the court's operations." ***Id.*** Therefore, the court granted the Commonwealth's motion to dismiss Johnson's summary appeals.

We decline to find Johnson's failure to frame his response to the Commonwealth's motion explicitly to invoke the prospect of *nunc pro tunc* relief to require waiver, as the trial court implied in its ruling. Given that Johnson's appeal was undisputedly late, and that the Commonwealth actively sought dismissal of his appeal on that basis alone, there is no other way to construe his argument except as a request that he be permitted to appeal despite his untimeliness, which, unless we are to elevate form over substance, can be construed fairly only as a request for *nunc pro tunc* relief. ***Cf. Commonwealth v. Alaouie***, 837 A.2d 1190, 1193 (Pa. Super. 2003) (deeming appellant's explanation in open court regarding untimeliness of appeal tantamount to request for *nunc pro tunc* relief). Consequently, we review the proceedings below as proceedings in which Johnson explicitly sought *nunc pro tunc* relief.

> A trial court's order denying *nunc pro tunc* relief lies within the sound discretion of the trial court, and our scope of review of a decision of whether to permit an appeal *nunc pro tunc* is limited to a determination of whether the trial court has abused its discretion or committed an error of law. Orders granting or denying a petition to appeal *nunc pro tunc* are reversible only in

> instances where the court abused its discretion or where the court drew an erroneous legal conclusion.

Yohe, 641 A.2d at 1211 (citations, internal quotation marks, and brackets omitted).

In effect, Johnson makes only one argument: He filed his appeals one day late because he lacked funds to pay the filing fees for those appeals on or before the day of the deadline, but such funds became available to him on the first day after the deadline, whereupon he filed the appeals. Brief for Appellant at 9; ***see*** Notes of Testimony ("N.T."), 4/25/2013, at 3-4. When asked by the trial court why he had not sought *in forma pauperis* status to relieve his obligation to pay the fees, Johnson testified as follows:

> Because I tried to file for – to have an attorney appointed right before at the district justice level pertaining to those issues, you know, they are always denying me saying [be]cause I'm working and stuff like that, working at T.B. Woods and everything. So that's what I was going along. I didn't know anything about being able to file anything without having no money because they were denying me.
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> I know in the past I thought if they would have allowed me to file in forma pauperis that would have went along the grounds of when they interpreted that I was working too much. So my mind just totally went blank from just coming in and doing anything because I knew – well, I was thinking the next day that the account would be straightened out.
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> Can I say this, Judge Krom? I called even ahead of time to the creditor that was supposed to debit my account. They said it was going to be okay. Then that day when I went to go get the money to file the appeal I noticed that it was overdraft.
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> I'm very sorry to the Court because this is very important to me but the creditor – they had let me know, I explained, you know, what I needed, because I needed the money to do something [be]cause we did not get this account that day, and then when it

> hit that day I was totally surprised and when I got back to them there was nothing they could do.
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> So I mean, I just – I thought I was doing the best I could. I didn't think I could come to the Court being as though they denied me [the] first one because of my money situation, so I mean, I need this appeal, Judge Krom.

N.T. at 4-5. In response, the court explained, "I don't really have the ability to kind of just look the other way on those deadlines." ***Id.*** at 5. Without further discussion, and with no comment by the Commonwealth, the court dismissed Johnson's appeals.

Pennsylvania courts generally have held that *nunc pro tunc* relief may be granted only when circumstances "such as ineffectiveness of counsel, fraud, or a breakdown in the court's operations" result in the denial of a criminal defendant's constitutional right to an appeal. ***Stock***, 679 A.2d at 762 (quoting ***Commonwealth v. Jarema***, 590 A.2d 310, 311 (Pa. Super. 1991)). However, in ***Stock***, our Supreme Court observed that the standard governing when *nunc pro tunc* relief is appropriate was somewhat more expansive than the above-stated formulation of bases for *nunc pro tunc* relief, and indeed had been "somewhat liberalized." ***Id.*** at 763 (citing cases granting appeals *nunc pro tunc* when, *inter alia*, an appeal was not perfected timely because appellant hospitalized during running of time period; an attorney's non-negligent error resulted in no filing of appeal; and a post-office's failure to forward a referee's decision to a litigant resulted in untimely filing of appeal). The Court distilled its review of both civil and criminal case law to the proposition that "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 extraordinary circumstances." ***Id.*** at 764. Amplifying this ruling, our Supreme Court in ***Criss v. Wise***, 781 A.2d 1156 (Pa. 2001), held that untimeliness resulting from "non-negligent circumstances, **either as they relate to the appellant or the appellant's counsel**," might warrant *nunc pro tunc* relief. ***Id.*** at 1159 (emphasis added).

In ***Stock***, counsel for the appellant failed to file an appeal in a summary case, and was denied restoration of his right to appeal *nunc pro tunc*. On appeal, the appellant argued that he was entitled to his direct appeal because he was denied the representation of constitutionally effective counsel. The Commonwealth responded that, because the appellant had no constitutional right to counsel under the circumstances presented, the appellant was not entitled to the assistance of counsel at all, let alone the effective assistance of counsel.

Our Supreme Court rejected that argument:

> [T]he question for our present purposes is not necessarily whether ineffective assistance of counsel merits the remedy of an appeal nunc pro tunc where no right to counsel exists; rather, the pertinent inquiry becomes: Does counsel's failure to file an appeal in a summary case where requested which results in a loss of the Appellant's state constitutional right to appeal amount to such extraordinary circumstances so as to merit the remedy of an appeal nunc pro tunc? We conclude that it does.
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> Were we to decide that Appellant could not appeal nunc pro tunc despite the fact that his state constitutional right to appeal was denied him, Appellant would have no other recourse. His conviction would stand and he would be without remedy.
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> * * * *

> [I]f Appellant's state constitutional right to appeal is to have any meaning and is to be vindicated, it can only be vindicated by granting him an appeal nunc pro tunc.

Id. at 764.

With this principle in mind, we must consider whether the instant case presents such extraordinary circumstances that *nunc pro tunc* relief is warranted. Taking at face value Johnson's claims, which are consistent either with the proposition that he was unaware that *in forma pauperis* status existed to save him from the fees associated with filing a summary appeal or that he did not think he could gain such status as someone who did not qualify for a public defender, we must assess whether, under the particular circumstances of this case, his ignorance of this alternative to paying the fees warrants relief from the consequences of that ignorance.

We have identified no case law presenting circumstances on-point with the instant case. However, we often have held that a litigant without legal training may suffer the consequences of representing himself[3]:

> When a party chooses to represent himself, as here, he cannot impose on the necessarily impartial court . . . the responsibility to act as the party's counsel and direct him repeatedly how to proceed or to proceed for him. When a party decides to act on his own behalf, he assumes the risk of his own lack of professional legal training.

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[3] "It is as true to-day as it always was that he who is his own lawyer has generally a fool for a client." ***Brennan v. Franey***, 5 Pa.C.C. 212, 213 (Schuylkill Cty. 1888).

Wiegand v. Wiegand, 525 A.2d 772, 774 (Pa. Super. 1987); ***accord Jones v. Rudenstein***, 585 A.2d 520, 522 (Pa. Super. 1981). That being said, we also have held that a court may "liberally construe materials filed by a pro se litigant." ***Rich v. Acrivos***, 815 A.2d 1106, 1108 (Pa. Super. 2003). In sum, we have held that a *pro se* litigant is responsible for educating himself with the rules of court, and generally for complying with those rules.

This case, however, presents a situation in which no formal rules apply. Our Supreme Court has seen fit to reserve a space in Pennsylvania's Rules of Criminal Procedure for a prospective future rule governing *in forma pauperis* status, but it has yet to promulgate any such rule. ***See*** Pa.R.Crim.P. 124. Presently, it is no more than an empty space, presumably reserved for a rule that might be formulated in the future. Moreover, the Franklin County Court of Common Pleas has no local rule, notice of which we might impute to Johnson, so much as indicating the availability of *in forma pauperis* status for individuals unable to pay filing fees to protect their constitutional rights to appeal a criminal conviction. That is to say, were Johnson punctiliously to recognize and satisfy his responsibility as a *pro se* litigant to safeguard his rights by informing himself of every single rule of procedure governing his circumstance, assuming no prior knowledge, he would have no awareness of the availability of indigent status or of the criteria determining whether he would qualify.

We acknowledge Johnson's vague indication in testimony that he had some general awareness of the availability of *in forma pauperis* relief. However, his testimony is equally clear that he believed that the circumstances that resulted in the denial of his earlier application for a public defender would preclude as a matter of course any request for *in forma pauperis* relief. Moreover, it is impossible to detect from the record how much he actually knew at the time his appeal was due to be filed about how *in forma pauperis* relief worked and when one might be eligible for it.

It is not at all clear that the law governing *in forma pauperis* status is identical to the regulations of the Franklin County public defender's office, and one could scour the law indefinitely without finding a clear answer to that question. Inasmuch as the applicable rules provide no material guidance, we believe that this consideration does not change the fact that Johnson, acting in good faith, should not be held responsible for a lack of official guidance that arguably might reflect a breakdown in the judicial system. If we are to deprive litigants, *pro se* or otherwise, of their constitutional right to file a summary appeal from a criminal conviction when they fail to abide by clear rules, we should not also punish them for failing to learn something that no applicable rules endeavor to teach. To allow undocumented, informal jurisdiction-by-jurisdiction procedures to dictate the ability of diligent, unsuspecting litigants to protect their constitutional rights would be patently unfair when we have mechanisms for the provision of state-wide and local rules governing such matters. ***Cf. Commonwealth v.***

Mitchell, 364 A.2d 406, 408 (Pa. Super. 1976) (rejecting unwritten local rule that summary appeal is perfected only when appellant furnishes $100 in "bail").

We would not relieve Johnson entirely or indefinitely from his general duty of diligence in safeguarding his own rights. ***See Jones***, 585 A.2d 522 (holding that *pro se* litigant's failure to appear was not excused by his incarceration when he failed to take any steps to ensure his availability). However, in this case, Johnson's diligence cannot be questioned. He asserts that he intended to file his notice of appeal and confirmed the availability of the funds necessary to pay the filing fee, but discovered when he was prepared to file that the funds he had been assured were available had since been disbursed elsewhere, leaving him with a negative balance. He testified that he spoke with his "creditor" at least once in advance to confirm the availability of funds available for his appeal, and learned only on the day he intended to file that the funds previously confirmed no longer were available. Finally, he paid his fees and filed his appeal only one day after the deadline.

Of course, our case law is clear that failure to file a summary appeal within the applicable thirty-day time limit typically results in waiver. ***See, e.g., Commonwealth v. Jarema***, 590 A.2d 310, 311-12 (Pa. Super. 1991). However, *nunc pro tunc* relief remains available precisely to safeguard the constitutional right to appeal when extraordinary circumstances result in the untimely filing of an appeal. ***Cf. Alaouie***, 837 A.2d at 1192-93 (reversing trial court in part due to court's failure to

consider prothonotary's erroneous refusal to accept notice of appeal as excuse for untimeliness); ***Walker v. Commonwealth, Unemployment Comp. Bd. of Review***, 461 A.2d 116, 117 (Pa. Cmwlth. 1983) (holding that a hearing was required to address extenuating circumstances of failure to file timely appeal to board of review when post office allegedly failed timely to forward notice of decision to claimant's new address).

In ***Perry v. Commonwealth, Unemployment Comp. Bd. of Review***, 459 A.2d 1342 (Pa. Cmwlth. 1983), our Commonwealth Court held that *nunc pro tunc* relief was appropriate where the appellant's counsel's law clerk's car broke down en route to filing timely appeal; the untimely filing promptly was promptly rectified; and no prejudice resulted to the adverse party. We find similarities in this case, adjusting for a *pro se* versus a represented individual. In each, the record indicated a good-faith effort to file on a timely basis, where circumstances outside the litigant's immediate control interfered. Just as the law clerk in ***Perry*** had reason to believe his or her car successfully would convey him or her to the courthouse, Johnson had assurances from his "creditor" that the funds he required were available. In both instances, unforeseen events intruded to interfere at the last moment. Inasmuch as the trial court did not question Johnson's testimony that he was led to believe that he had sufficient funds to cover the costs immediately in advance of filing his appeal on a timely basis; the error was

corrected one day after the deadline; and the Commonwealth asserted no prejudice, we find that this case warrants the same result as in ***Perry***.[4]

While we do not disturb the trial court's exercise of discretion lightly, we nonetheless hold that it abused its discretion in the instant case. First, we re-emphasize the absence of a criminal procedural rule providing any guidance whatsoever as to a criminal defendant's right to seek *in forma pauperis* relief from fees associated with appealing a conviction, summary or otherwise. We further find that Johnson stated a credible basis for his failure to file his appeal on a timely basis. Moreover, his testimony, viewed in light of his paid-in-full filing only one day after the deadline, establishes his diligence in attempting to perfect his appeal. Notably, the trial court made no comments during the hearing, in its order, or in its Rule 1925 opinion to suggest that it doubted Johnson's testimony in these regards or regarding his inability to obtain the funds necessary to file his appeal within the thirty-day period. The combination of these factors, under the circumstances of this case, constituted extraordinary circumstances warranting *nunc pro tunc* restoration of Johnson's right to file an appeal of his summary convictions. Accordingly, we reverse the trial court's order denying *nunc pro tunc* relief, and remand to the trial court to effectuate

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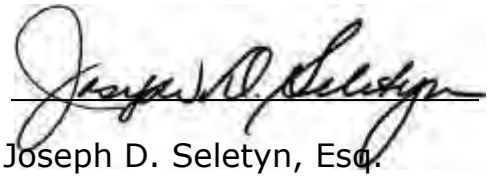
[4] Although the decisions of our Commonwealth Court do not bind us, we may find them persuasive. ***See Petow v. Warehime***, 996 A.2d 1083, 1088 n.1 (Pa. Super. 2010).

nunc pro tunc restoration of Johnson's right to file a summary appeal of his convictions.

Order reversed. Case remanded for further proceedings. Jurisdiction relinquished.

Mundy, J. files a Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/23/2014