

THE COMMONWEALTH COURT OF PENNSYLVANIA

Jason Logue :
 :
 v. : No. 2477 C.D. 2010
 : Submitted: August 5, 2011
 Commonwealth of Pennsylvania, :
 Department of Transportation, :
 Bureau of Driver Licensing, :
 Appellant :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: November 21, 2011

The Department of Transportation, Bureau of Driver Licensing (PennDOT) appeals an order of the Court of Common Pleas of Philadelphia County (trial court) sustaining Jason Logue's (Licensee) driver's license suspension appeal upon his motion for reconsideration. PennDOT argues that the trial court lacked jurisdiction to grant reconsideration, because the motion was untimely. Therefore, the trial court should never have considered the merits of the license suspension. Because the trial court did not address the question of whether there were compelling circumstances to justify changing its order more than 30 days after its issuance, we now vacate and remand.

This case presents a peculiar procedural history. In December 2008, Licensee received a notice from PennDOT that his driving privilege was being suspended for one year, based on his refusal to undergo a chemical test. Licensee

timely appealed. The trial court rescheduled the hearing three times before setting a date of February 11, 2010. Because of weather reports of an impending snowstorm, the trial court advanced the February 11th hearing date to January 28, 2010.

On January 28, 2010, the case was called by the trial court. Licensee's counsel, Daniel Delaney, was present, but Licensee was not. Attorney Delaney requested that Licensee's appeal be withdrawn. The trial court granted the request, and the suspension was reinstated.

On April 7, 2010, Attorney Joseph Kelly filed a motion for reconsideration on behalf of Licensee. The motion asserted that Licensee never received notice that his case had been rescheduled to January 28, 2010. Attorney Kelly explained that Licensee's hearing was not on Attorney Delaney's calendar for January 28th and that Attorney Delaney only learned that the hearing was being held when he appeared in the courtroom on another matter. Attorney Delaney withdrew the appeal because Licensee was not present. The reconsideration motion also asserted that Licensee learned that the courthouse was closed on February 11th because of snow and expected that the trial court would reschedule his hearing. On February 27, 2010, Licensee received notification from PennDOT that his driving privilege had been suspended.

The trial court granted reconsideration on May 5, 2010, and scheduled a hearing for July 21, 2010. However, at the hearing, counsel for Licensee¹ requested that the motion for reconsideration be withdrawn, and the request was

¹ Counsel for Licensee at this hearing is only referenced as "Mr. Barnes." Reproduced Record at 23a (R.R. ___). From a reading of the record it appears that Attorneys Delaney, Kelly and Barnes are members of the same law firm.

granted. This was followed on August 4, 2010, with a second motion for reconsideration by Licensee. In the second motion, Licensee averred that the first motion for reconsideration had been withdrawn on a mistaken view of the law and requested a hearing on the merits of his appeal.

The trial court scheduled a hearing for October 27, 2010, to consider Licensee's second motion for reconsideration. The scheduling order stated that the parties had not been notified that the February 11th hearing had been advanced to January 28th, and it also stated that Licensee did not appear on February 11, 2011, because the courthouse was closed. The trial court ordered that if reconsideration was granted at the October 27, 2010, hearing, the case would proceed directly to the merits of PennDOT's suspension of Licensee's driving privileges.

On October 27, 2010, a hearing was held. At that time, Attorney Delaney appeared on behalf of Licensee. He explained that another lawyer in his firm had withdrawn the first motion for reconsideration on advice of PennDOT's counsel that the trial court lacked jurisdiction to grant reconsideration. Attorney Delaney argued that regardless of "whoever is to assume the blame or if blame is to be put on an individual," Licensee has not had his day in court. R.R. 22a. In the meantime, Licensee's driving privileges had been suspended through no fault of his own. PennDOT argued that the trial court lacked jurisdiction to grant the motion for reconsideration because it was filed more than 30 days after the order of January 28, 2010.

The trial court decided that a "bad faux pas" was made and that Licensee had done nothing wrong. R.R. 28a. The trial court found Licensee did not receive notice of the January 28th hearing date and that the statutory deadlines were subject to construction.

The trial court then turned to the merits of the case. However, PennDOT was not prepared to present witnesses and claimed that it had not received notice of the October 27, 2010, hearing. The trial court had the prothonotary testify that notice of the hearing had been given to PennDOT, which asked for a continuance. The trial court denied the continuance. In the absence of evidence from PennDOT, the trial court rescinded the license suspension.

PennDOT now appeals to this Court and raises one issue for our review.² PennDOT contends that the trial court lacked jurisdiction to grant reconsideration because the request was untimely presented. Reconsideration had to be granted within 30 days of the trial court's order of January 28, 2010, and it was not. Licensee responds that equity and fairness demand that he should get his day in court.

Section 5505 of the Judicial Code provides that

[e]xcept as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa. C.S. §5505. In *Fulton v. Bedford County Tax Claim Bureau*, 942 A.2d 240, 242 n.3 (Pa. Cmwlth. 2008), we explained that a trial court has broad discretion to modify its order within the 30-day period. However, a motion for reconsideration must be filed within 30 days of the disputed order and granted within that same time period. *Fulton*, 942 A.2d at 242 n.3. After the 30-day period has expired, the

² Our scope of review of a trial court's determination is limited to concluding whether the findings of fact are supported by the evidence of record, whether an error of law was committed or whether an abuse of discretion occurred. *Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 521 Pa. 242, 248, 555 A.2d 873, 875 (1989).

trial court may modify an order only “upon a showing of extrinsic fraud, lack of subject matter jurisdiction, a fatal defect on the face of the record or some other evidence of „extraordinary cause justifying intervention by the court.”” *Id.* (emphasis omitted) (quoting *Stockton v. Stockton*, 698 A.2d 1334, 1337 (Pa. Super. 1997)). Thus, notwithstanding Section 5505 of the Judicial Code, a court may modify its order outside the 30-day appeal period if extraordinary cause exists.

We have considered “extraordinary cause” and explained it as follows:

Only grave and compelling circumstances provide “extraordinary cause” to justify court intervention after expiration of the appeal period. Such circumstances have customarily entailed an oversight or act by the court, or failure of the judicial process, which operates to deny the losing party knowledge of entry of final judgment and commencement of the running of the appeal period.

Department of Transportation, Bureau of Driver Licensing v. Duncan, 601 A.2d 456, 459 (Pa. Cmwlth. 1991) (quoting *DeMarco v. Borough of East McKeesport*, 556 A.2d 977, 979 n.4 (Pa. Cmwlth. 1989)). “[E]xtraordinary circumstances [equal] the *sine qua non* of any *nunc pro tunc* appeal.” *In Re: Appeal of Tenet HealthSystems Bucks County, LLC.*, 880 A.2d 721, 727 (Pa. Cmwlth. 2005).

Here, Licensee contends he was not present at the January 28th hearing because he did not receive notice the hearing had been rescheduled to that date. Licensee’s counsel also claimed not to have known of the January 28th hearing. This suggests a breakdown, or oversight, in the court’s system, which would justify a court intervention after 30 days. *Duncan*, 601 A.2d at 459. The trial court actually made the finding that Licensee did not receive notice of the January 28th hearing, but no evidence of record supports that finding. *Nunc pro tunc* relief

includes the non-negligent failure of an attorney to file an appeal and the non-negligent failure of a litigant in making a timely appeal. *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979); *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996). Whether non-negligent conduct of Licensee or his attorneys can be shown to explain the events that took place in this case cannot be determined without an evidentiary hearing.

PennDOT counters that “[a]n attorney is the agent of his client and, as such, acts he performs and statements he makes within the scope of his employment and authority are binding on his client.” *Walck v. Department of Transportation, Bureau of Driver Licensing*, 625 A.2d 1276, 1279 (Pa. Cmwlth. 1993). However, without an evidentiary hearing this Court cannot decide this contention.

Accordingly, the order of the trial court is vacated and the matter remanded to the trial court for an evidentiary hearing to determine whether extraordinary cause justifying reconsideration exists.

MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jason Logue	:	
	:	
v.	:	No. 2477 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

ORDER

AND NOW, this 21st day of November, 2011, the order of the Court of Common Pleas of Philadelphia County, dated October 27, 2010, is VACATED and REMANDED in accordance with the attached opinion.

Jurisdiction relinquished.

MARY HANNAH LEAVITT, Judge