

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellee	:	
	:	
v.	:	No. MD-248-2018
	:	
DASHONA NICO HIGHTOWER,	:	
	:	
Appellant	:	
	:	
Joseph Perilli, Esquire	:	Counsel for Appellee
Assistant District Attorney	:	
	:	
Timera Bullock, Esquire	:	Counsel for Appellant

**MEMORANDUM OPINION**

Serfass, J. - March 7, 2019

Dashona Nicho Hightower, hereinafter "Appellant", has taken this appeal from our order entered on December 11, 2018, denying her request to file an appeal of summary conviction *nunc pro tunc*. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and respectfully recommend that the aforesaid order be affirmed for the reasons set forth hereinafter.

**FACTUAL AND PROCEDURAL HISTORY**

On June 18, 2018, Appellant filed a "Petition to Appeal Summary Finding of Guilt Nunc Pro Tunc" seeking leave to appeal default judgments of guilt entered against her on December 18,

2017, and February 1, 2018, for a violation of 75 Pa. C.S.A. § 3362(a)(1.1), Exceed 65 or 70 MPH for all vehicles by 33 MPH.

On December 7, 2018, a hearing on Appellant's petition was held before the undersigned and this Court denied said petition based upon a lack of evidence regarding the reasons for her delay in filing the appeal.

On January 9, 2019, Appellant filed notice of the instant appeal along with her "Matters Complained of on Appeal" in which she raises the merits of her argument regarding the underlying summary appeal but fails to address why she was unable to file a timely appeal.

#### **DISCUSSION**

Rule 460(A) of the Pennsylvania Rules of Criminal Procedure provides, in pertinent part, that "[w]hen an appeal is authorized by law in a summary proceeding . . . an appeal shall be perfected by filing a notice of appeal within thirty (30) days after the entry of the guilty plea, the conviction, or other final order from which the appeal is taken. The notice of appeal shall be filed with the clerk of courts."

*Nunc pro tunc* appeals may be filed beyond the thirty (30) day time period and are generally appropriate when the failure of a party to file a timely appeal can be attributed to extraordinary circumstances involving fraud or some breakdown in the court's operations through a default of its officers. West Penn Power Co.

v. Goddard, 333 A.2d 909, 912 (Pa. 1975). Mere neglect or mistake of the appellant or his or her counsel is not considered a sufficient excuse for failure to file a timely appeal. See State Farm Mut. Auto Ins. Co. v. Schultz, 421 A.2d 1224, 1227 n.7 (Pa.Super. 1980). Moreover, we note that the appellant bears the heavy burden of proving an adequate excuse for failing to file a timely appeal. See Cook v. Unemployment Comp. Bd. Of Review, 671 A.2d 1130, 1132 (Pa. 1996). The allowance of appeal *nunc pro tunc* is within the sound discretion of the trial court, and the trial court's decision will not be overruled absent an abuse of discretion or an error of law. Commonwealth v. Yohe, 641 A.2d 1210, 1211 (Pa.Super. 1994). The timeliness of the petition is among the factors which the trial court must consider in exercising its discretion when deciding a petition for leave to appeal *nunc pro tunc*. Amicone v. Rok, 839 A.2d 1109, 1113-14 (Pa.Super. 2003).

[I]t is clear that, whatever extraordinary circumstance is alleged as the reason for the late filing of the appeal—fraud, breakdown of the court's operation through default of its officers, or non-negligent conduct on the part of the appellant, appellant's attorney, or the attorney's staff—the petition to file the appeal *nunc pro tunc* must be filed within a reasonable time after the occurrence of the extraordinary circumstance.

Id. at 1114.

Appellant alleged fraud as a defense for the underlying summary speeding violation, but she fails to provide sufficient reason for the delay in filing her appeal. Specifically, Appellant

claims that she first became aware of the December 18, 2017 summary conviction when she received a notice, sometime in January 2018, from the Pennsylvania Department of Transportation (hereinafter "PennDOT") advising her of a five (5) point assessment to her driving record as a result of the conviction. Appellant next claims that she contacted the magisterial district court and was informed that a payment plan had been established concerning the fine imposed as a result of the December 18, 2017 conviction. Apparently, she then requested a hearing and the magisterial court scheduled a proceeding to commence on February 1, 2018. Appellant did not appear for the hearing on February 1, 2018 and she was convicted of the underlying summary offense on that date. The instant "Petition for Leave to Appeal Summary Finding of Guilt Nunc Pro Tunc" was filed in the office of the clerk of courts on June 18, 2018. Again, we note that "[a]n appellant seeking permission to file a nunc pro tunc appeal must proceed with reasonable diligence once [s]he knows of the necessity to take action." Ness v. York Township Board of Commissioners, 81 A.3d 1073, 1082 (Pa.Comm. 2013).

During the hearing on Appellant's petition before this court, she introduced no documents from either the magisterial district court or PennDOT to support her claims. Even if we were to find that there was fraud in the instant matter, we would still deny Appellant's petition since she did not file for *nunc pro tunc*

relief within a reasonable time. The record establishes that Appellant did not act promptly to assert her right to seek leave to appeal *nunc pro tunc* upon learning of the conviction and the existence of the grounds relied upon in her petition. She received PennDOT's notice of the assessment of points as a result of the December 18, 2017 conviction in January of 2018, did not appear on February 1, 2018 for the summary hearing she had requested, and did not petition for leave to appeal to the court of common pleas until June 18, 2018.

**CONCLUSION**

For the reasons set forth hereinabove, we respectfully recommend that the instant appeal be denied and that our order of December 11, 2018 be affirmed accordingly.

**BY THE COURT:**

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**Steven R. Serfass, J.**