

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

IN RE: J.M.

:  
: NO. 19-0290  
: (18 MH 0093)

Civil Law - Mental Health Procedures Act - Section 303 Hearing and Certification - Petition for Review of Hearing Officer's Certification - Time within which to Request Review by Court - Remedy Where Right to Appeal Otherwise Lost Due to Extraordinary Circumstances - *Nunc Pro Tunc* Appeal - Requirement that Petitioner Act with Due Diligence and Reasonable Promptitude

1. Section 303 of the Mental Health Procedures Act ("MHPA") provides for extended involuntary emergency treatment of any person who is being treated pursuant to Section 302 for a period not to exceed twenty days if, after an informal conference where the patient is represented by counsel, a judge or mental health review officer finds that the patient is severely mentally disabled and in need of continued involuntary treatment, and so certifies.
2. A person involuntarily committed to treatment following a Section 303 hearing before a mental health review officer has the right to petition the court of common pleas for review of the certification. 50 P.S. § 7303(g). The MHPA does not state the time period within which this petition is to be filed.
3. The certification of a mental health review officer under Section 303 of the MHPA is a final adjudication or determination of a local agency and, under 42 Pa.C.S.A. § 5571(b), the time for appealing such determination to the court of common pleas is statutorily fixed at thirty days.
4. 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. In civil cases, *nunc pro tunc* relief has been judicially recognized in one of two circumstances: (1) where the cause for a late filing is fraud or a breakdown of court operations; or (2) where the petitioner demonstrates that an appeal was filed late as the result of non-negligent circumstances, either as they relate to the petitioner or his counsel, that the notice of appeal was filed shortly after the expiration

date, and that the appellee or respondent was not prejudiced by the delay.

5. Whether the basis for seeking *nunc pro tunc* relief is a breakdown in the court's operations, or non-negligent conduct of appellant or his counsel, the petition to file the appeal *nunc pro tunc* must be filed within a reasonable time after the occurrence of the extraordinary circumstances presented in support of the late filing.
6. "The correct inquiry in determining whether a petitioner's conduct resulted in a want of due diligence is to focus not upon what the [petitioner] knows, but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him."
7. A person who has been involuntarily committed to a mental health institution for inpatient care and treatment under Section 302 or 303 of the MHPA is prohibited from possessing a firearm in this Commonwealth.
8. The seven month delay between when the Section 303 certification for involuntary emergency treatment of the Petitioner was filed with the court and when the Petition to Appeal *Nunc Pro Tunc* was filed evidences a lack of due diligence and justifies dismissal of the Petition as untimely where (1) Petitioner was present and learned of the Section 303 certification at the time it was issued; (2) Petitioner became aware of the consequences of the certification and the firearm disability within one month of the date of the certification; and (3) Petitioner was advised by counsel of his right to appeal the certification and the thirty day time period by which the certification should have been appealed at least two months prior to the filing of his Petition to Appeal *Nunc Pro Tunc*.

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Kaitlyn Clarkson, Esquire Counsel for Petitioner

Nanovic, P.J. - September 5, 2019

MEMORANDUM OPINION

On August 9, 2018, a mental health review officer (*i.e.*, a hearing officer) certified J.M. as severely mentally disabled and in need of emergency mental health treatment for a period not to exceed twenty days pursuant to Section 303 of the Mental Health Procedures Act ("MHPA"), 50 P.S. §§ 7101-7503.<sup>1</sup> J.M. did not appeal the hearing officer's certification for extended involuntary treatment within the statutory period to file an appeal as of right - thirty days - instead, filing on March 25, 2019, the instant petition now before us seeking permission to appeal *nunc pro tunc* the hearing officer's Section 303 certification.

PROCEDURAL AND FACTUAL BACKGROUND

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<sup>1</sup> In *In re J.M.Y.*, 179 A.3d 1140 (Pa.Super. 2018), *appeal granted*, 194 A.3d 121 (Pa. 2018), an *en banc* panel of the Pennsylvania Superior Court recently summarized Section 303 as follows:

Section 303 of the MHPA provides for extended involuntary emergency treatment of any person who is being treated pursuant to Section 302 for a period not to [exceed] twenty days if, after an informal conference where the patient is represented by counsel, a judge or mental health review officer finds that the patient is severely mentally disabled and in need of continued involuntary treatment, and so certifies. 50 P.S. § 7303(a)-(c).

*Id.* at 1144.

The August 9, 2018, hearing was held upon a request for certification dated the same date by a social service therapist at the facility where J.M. was then being treated to extend J.M.'s period of involuntary treatment under Section 302 of the MHPA, 50 P.S. § 7302, for an additional twenty days. (Court Exhibit 1, Application for Extended Involuntary Treatment (Part I - Request for Certification)).<sup>2</sup> J.M. was present at the hearing and was represented by the Carbon County Public Defender's Office. (N.T., 5/13/19, p.10). The mental health facility was represented by Mary Ann Kresen, Esquire. (Petitioner's Exhibit 1, CD of 8/9/18 hearing).

Immediately following the receipt of evidence, the hearing officer orally announced her decision and completed a written certification finding J.M. was severely mentally disabled and in

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<sup>2</sup> J.M. was involuntarily committed to a mental health facility on or about August 5, 2018 under Section 302 for firing a gun in the air at 10:00 P.M. while walking near a home in the Borough of Weatherly, Carbon County, Pennsylvania. (Court Exhibit 1, Application for Extended Involuntary Treatment (Parts I, III, IV); Petitioner's Exhibit 1, CD of 8/9/18 hearing; N.T., 5/13/19, pp.16-17, 33). At the time, J.M. was suffering from bipolar disorder with psychosis for which he had failed to take his prescribed medication. (Court Exhibit 1 (Application for Extended Involuntary Treatment (Parts III and IV))). A month earlier, in July 2018, J.M. had voluntarily committed himself to a mental health facility in the Borough of Lehigh, Carbon County, Pennsylvania for three to four days. (N.T., 5/13/19, pp.18-19, 21).

Court Exhibit 1 is a four-page form document entitled "Application for Extended Involuntary Treatment," which is divided into four parts, each with a separate heading, and each containing space for the insertion of information specific to the patient involved. In chronological sequence, Part III, Physician's Examination, is dated August 7, 2018; Part II, the Patient's Rights, is dated August 8, 2018; Part I, Request for Certification, is dated August 9, 2018; and Part IV, Certification by the court for Extended Involuntary Emergency Treatment - Section 303, is also dated August 9, 2018. The actual filing of this application with the Carbon County Prothonotary's Office occurred on August 16, 2018.

need of continued inpatient treatment for a period not to exceed twenty days. (Petitioner's Exhibit 1, CD of 8/9/18 hearing). This written certification was filed with the court on August 16, 2018. In accordance with the hearing officer's certification, J.M. continued to receive inpatient treatment until his discharge from inpatient care on August 23, 2018. (N.T., 5/13/19, pp.41-42).

On March 25, 2019, J.M. filed with this court a Petition to Appeal *Nunc Pro Tunc* (the "Petition") from the hearing officer's August 9, 2018 certification. The Petition was filed by privately-retained new counsel. In the unverified Petition, J.M. requests *nunc pro tunc* relief on two bases: (1) where the cause for a late filing is fraud or a breakdown of court operations; and (2) where the petitioner demonstrates that an appeal was filed late as the result of non-negligent circumstances, either as they relate to the petitioner or his counsel, that the notice of appeal was filed shortly after the expiration date, and that the appellee or respondent was not prejudiced by the delay, citing Vietri ex rel. Vietri v. Delaware Valley High School, 63 A.3d 1281, 1284 (Pa.Super. 2013), as authority for granting an appeal *nunc pro tunc* under these two circumstances. (Petition to Appeal *Nunc Pro Tunc*, paragraphs 9-10).

In the Petition, J.M. alleges a breakdown in court operations, asserting he was never informed of his right to

petition the court for review of the hearing officer's decision - *citing* to 50 P.S. § 7303(c), (d)(3) and (g) - and that he was never provided a copy of the written certification. (Petition, paragraphs 11, 13). As to the second basis for appeal, J.M. contends he meets all three elements necessary to excuse the late filing as a result of non-negligent circumstances. (Petition, paragraph 15).

A hearing on the Petition was held on May 13, 2019, with J.M. being the only person to testify. The purpose of the hearing was to determine whether J.M. should be permitted to appeal the hearing officer's Section 303 certification *nunc pro tunc*, more than seven months after the certification hearing was held and the hearing officer's decision announced. Besides J.M. and his counsel, no one else appeared to testify or to represent any other party at this hearing.

#### DISCUSSION

A person involuntarily committed to treatment following a Section 303 hearing before a mental health review officer has "the right to petition the court of common pleas for review of the certification." 50 P.S. § 7303(g). This petition must be filed within thirty days of the entry of the order from which the appeal is taken, in this case, within thirty days of August

16, 2018. 42 Pa.C.S.A. § 5571(b).<sup>3</sup> Because J.M. failed to act within this timeframe, J.M.'s right to a direct review of the procedural and factual propriety of the Section 303 proceeding is admittedly untimely. (Petition, paragraph 7). Therefore, unless his petition for *nunc pro tunc* relief is granted, J.M. will be time barred from challenging the certification.

In Vietri, the Superior Court stated:

Our Supreme Court has characterized the purpose of *nunc pro tunc* restoration of appellate rights as follows:

Allowing an appeal *nunc pro tunc* is a recognized exception to the general rule prohibiting the extension of an appeal deadline. This Court has emphasized that the principle emerges 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 certain extraordinary circumstances. Generally, in civil cases an appeal *nunc pro tunc* is granted only where there was fraud or a breakdown in the court's operations through a default of its officers.

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<sup>3</sup> The certification of a mental health review officer under Section 303 of the MHPA is a "final adjudication or determination of a local agency or a Commonwealth agency as to which jurisdiction is vested in the courts of common pleas." In re J.M.Y., 179 A.3d at 1152 (Olson, J., dissenting) (citation and quotation marks omitted).

Therefore, the mental health review officer's Section 303 certification constitutes a "final adjudication or determination" and, under 42 Pa.C.S.A. § 5571(b), the time for appealing such determination to the court of common pleas is statutorily fixed at 30 days. 42 Pa.C.S.A. § 5571(b) ("[e]xcept as otherwise provided ..., an appeal from a tribunal or other government unit to a court ... must be commenced within 30 days after the entry of the order from which the appeal is taken, in the case of an interlocutory or final order").

*Id.*; see also In re Marone, 2016 WL 5938256 \*1 (Pa.Super. 2016) (Memorandum Opinion).

In addition to the occurrence of "fraud or breakdown in the court's operations," *nunc pro tunc* relief may also be granted where the appellant demonstrates that (1) [his] 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) [he] filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay.

839 A.2d at 1284 (citations and internal quotation marks omitted). While prejudice need not be established when the basis for seeking an appeal *nunc pro tunc* is a breakdown in the court's operations, Fischer v. UPMC Northwest, 34 A.3d 115, 122-23 (Pa.Super. 2011), whether the basis for seeking *nunc pro tunc* relief is a breakdown in the court's operations, or non-negligent conduct of appellant or his counsel, "the petition to file the appeal *nunc pro tunc* must be filed within a reasonable time after the occurrence of the extraordinary circumstances" presented in support of the late filing. Amicone v. Rok, 839 A.2d 1109, 1114 (Pa.Super. 2003).

J.M. in essence claims that there was a breakdown in court operations and that his Section 303 hearing counsel was ineffective because he was never advised of his right to appeal his continued commitment by either the hearing officer or his Section 303 counsel, respectively, and was never provided with a written copy of the hearing officer's certification. (N.T., 5/13/19, pp.3, 12-13, 39-42, 58). Assuming (without deciding)



this to be so,<sup>4</sup> J.M. has failed to offer a satisfactory explanation for the seven-month delay in filing the Petition or that this delay was attributable to something other than his own or counsel's negligence.

J.M. was thirty-four years old at the time of the hearing before the hearing officer, worked as a certified financial planner, and was well-educated. (N.T., 5/13/19, pp.10, 14). He

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<sup>4</sup> The hearing officer's certification appears on a pre-printed form adopted by the Department of Public Welfare. Included in this certification, as part of the pre-printed form, is the following sentence:

I have explained to the patient that if his/her conference was before a Mental Health Review Officer he/she may petition the court for a review of any decisions reached at this conference.

(Court Exhibit 1, Application for Extended Involuntary Treatment (Part IV - Certification for Extended Treatment)). Notwithstanding this statement contained in the certification, after listening to the CD of the commitment hearing (Petitioner's Exhibit 1), we concur with counsel's representation to the court that such explanation does not appear to have been given.

Nevertheless, in Part II of the Application for Extended Involuntary Treatment (Court Exhibit 1), Gwendolyn Logan, a social service therapist at the mental health facility where J.M. was then a patient and who testified at the Section 303 hearing, affirms that she explained to J.M. his rights as described in Form MH 784-A and that he understood them. Paragraph six of this form entitled "Notice of Intent to File a Petition for Extended Involuntary Treatment and Explanation of Rights (303)" states:

If your conference is before a Mental Health Review Officer and if you are not satisfied with the results of your conference, you have the right to ask for a hearing before a judge of the court. The court will hold a conference, review all the evidence presented, and make its own decision as to whether you should be discharged or receive further treatment.

Form MH 784A 7/07, paragraph 6.

Further, since counsel has an ethical obligation to communicate reasonably with a client to ensure effective representation, it is doubtful that the failure of counsel to advise J.M. of his right to appeal the certification would be non-negligent. See, e.g., Rule 1.4(a)(2), (3) and Rule 1.4(b) of the Rules of Professional Conduct which require counsel to (1) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (2) keep the client reasonably informed about the status of the matter; and (3) explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, respectively. Nor are we aware of any legal authority to support the proposition that ineffective assistance of counsel in a civil proceeding is grounds for an appeal *nunc pro tunc*.

received his high school diploma in 2002, a bachelor's degree from Temple University in 2007, and, as of the spring of 2019, completed the requirements to obtain a Master's degree from the University of Missouri. (N.T., 5/13/19, pp.15-16). At the time he was managing a portfolio of twenty million dollars in client assets. (N.T., 5/13/19, p.17). Following his discharge from involuntary commitment on August 23, 2018, J.M. returned to his home and began outpatient treatment. (N.T., 5/13/19, pp.41-42).

Before or soon after his discharge from inpatient treatment, J.M. was contacted by the Carbon County Sheriff, learned he couldn't possess firearms, and was required to relinquish his firearms and gun permit.<sup>5</sup> (N.T., 5/13/19, pp.42-45, 50-51). In September 2018, after his discharge, and again several months later, J.M. conducted on-line research on his own which apparently confirmed this disqualification on his right to carry a firearm, and which prompted J.M. to file his petition seeking *nunc pro tunc* relief in order to restore his right to own and possess firearms. (N.T., 5/13/19, pp.19, 43, 48-50). Notwithstanding this knowledge, J.M. testified he did not seek

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<sup>5</sup> Pursuant to 18 Pa.C.S.A. § 6105(c)(4), a person who has been involuntarily committed to a mental health institution for inpatient care and treatment under Section 302, 303, or 304 of the MHPA is prohibited from possessing, using, controlling, selling, transferring, or manufacturing a firearm in this Commonwealth. Under federal law, such a person is also prohibited from possessing a firearm pursuant to 18 U.S.C. § 922(g)(4).

any legal advice until December 2018 or January 2019,<sup>6</sup> at which time he claims to have learned for the first time that he had had a right to appeal the 303 certification and that this right to file an appeal expired either thirty days after the hearing officer made her decision, or thirty days after the certification was filed. (N.T., 5/13/19, pp.13, 46-47, 50-52). Still, a minimum of another two months passed before the Petition to Appeal *Nunc Pro Tunc* was filed on March 25, 2019.

In accordance with the foregoing timeline, the Petition to Appeal *Nunc Pro Tunc* was filed more than six months after the September 15, 2018 deadline for filing a timely appeal. To explain this delay, J.M. appears to argue that notwithstanding his knowledge of the collateral consequences of his involuntary commitment and the importance to him of having his firearm rights restored, he waited more than four months after his discharge from in-patient care before contacting counsel because he needed to catch up on his work as a financial consultant and did not want to deal with this issue, and then waited another two to three months before filing his Petition even though, by either December 2018 or January 2019, he clearly knew of his right to appeal the hearing officer's decision and the time by

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<sup>6</sup> In a separate petition filed on February 13, 2019, requesting a copy of the recording of the August 9, 2018 hearing, it's averred that J.M. first retained new counsel on November 11, 2018 to review and investigate his 302 and 303 matters to determine possible avenues of relief. J.M.'s request for a copy of the 303 hearing recording was promptly granted by order dated February 15, 2019.

which an appeal should have been taken. (N.T., 5/13/19, pp.44-45, 49-52). Against this background, it should also be noted that the hearing officer's certification was a matter of public record having been filed with the Prothonotary's Office on August 16, 2018 and, while subject to confidentiality concerns, readily available to J.M. Sprague v. Casey, 550 A.2d 184, 188 (Pa. 1988). ("The correct inquiry in determining whether [a petitioner's] conduct resulted in a want of due diligence is to focus not upon what the plaintiff knows, but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him.") (citation and quotation marks omitted).

Under all the circumstances, we are not convinced that J.M. filed his Petition to Appeal *Nunc Pro Tunc* within a reasonable period of time after learning of the hearing officer's decision on August 9, 2018. See Amicone v. Rok, 839 A.2d 1109, 1115-16 (Pa.Super. 2003) (finding that a delay of more than four months in filing a petition to appeal *nunc pro tunc* after the expiration of the appeal period was unreasonable); Commonwealth v. Stadtfeld, 665 A.2d 487, 491 (Pa.Super. 1995) (concluding that a nine month time-lapse between the date a notice of suspension of driving privileges was mailed and when a petition for allowance of appeal *nunc pro tunc* of the underlying summary conviction which resulted in the suspension was filed was not

reflective of the “promptitude” expressed by the Superior Court in affirming the grant of an appeal *nunc pro tunc*).

#### CONCLUSION

Before an appeal *nunc pro tunc* will be granted, the party requesting permission to appeal must establish that the delay in filing a timely appeal was caused by extraordinary circumstances and that he acted with due diligence once he became aware of the consequences of the challenged decision and the need to take action. V.S. v. Department of Public Welfare, 131 A.3d 523, 527 (Pa.Cmwlth. 2015); Stadtfield, 665 A.2d at 490-91. The question of whether the facts as accepted by the factfinder establish extraordinary circumstances is a question of law reviewable on appeal. V.S., 131 A.3d at 527. Even if we were to assume in the instant proceedings that a failure to advise of the right to appeal is such a circumstance,<sup>7</sup> we are not convinced that J.M. acted promptly and with due diligence in the assertion of his rights.

The hearing officer advised J.M. of her decision at the

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<sup>7</sup> This is not a case where J.M. is claiming that the hearing officer had a duty to advise J.M. of the time within which to file an appeal or that the hearing officer misinformed J.M. of the time to take an appeal which J.M. relied upon to his detriment. Cf. Union Electric Corporation v. Board of Assessment, 746 A.2d 581 (Pa. 2000) (holding that a taxpayer’s reliance upon an extended deadline for filing a tax assessment appeal granted by an assessment board which lacked such authority justified a *nunc pro tunc* appeal); Monroe County Board of Assessment Appeals v. Miller, 570 A.2d 1386 (Pa.Cmwlth. 1990) (holding that a taxpayer’s reliance upon erroneous advice given by a county board of appeals justified the grant of a *nunc pro tunc* appeal). J.M. has cited no legal authority imposing a duty on the hearing officer to advise J.M. of the date by which an appeal needed to be taken; nor are we aware of any such obligation. (N.T., 5/13/19, pp.54, 58).

time of the hearing and there can be no question but that J.M. was aware of the decision and disagreed with it. Notwithstanding the certification authorizing his involuntary commitment for up to twenty days, J.M. was released after fourteen days and, within days of his release, if not earlier, was aware that because of his involuntary commitment he was barred from owning or possessing a firearm.<sup>8</sup> Yet, despite adamantly believing that there was no legal basis for his commitment and having researched the consequences of his commitment, J.M. waited at least four months before consulting an attorney and then another two to three months before filing his Petition. This delay, we conclude, is inexcusable.<sup>9</sup>

BY THE COURT:

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P.J.

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<sup>8</sup> J.M. was earlier advised of this collateral consequence of an involuntary commitment when he voluntarily committed himself for treatment at a mental health facility in July 2018. (N.T., 5/13/19, pp.19-21).

<sup>9</sup> As an alternate form of relief potentially available to J.M., see In re J.M.Y., 179 A.3d at 1149 (directing expungement of Section 303 commitment records when the procedural due process requirements of the MHPA were violated). See also In Re Ryan, 784 A.2d 803, 806-808 (Pa.Super. 2001) (finding that an application to extend treatment under Section 303(a) must be filed in the trial court, before the informal hearing under Section 303(b) is held, and concluding that the failure to strictly comply with the time limitations in Section 303 constituted a deprivation of due process requiring the certification for involuntary treatment to be vacated and the records pertaining to the 303 commitment to be expunged).