

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

COMMONWEALTH OF PENNSYLVANIA, :

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Vs. :

No. SA-36-2020

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JOHN P. MISSAL, :

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:

Defendant :

Seth Miller, Esquire

Counsel for Commonwealth

Assistant District Attorney

Eric Winter, Esquire

Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - December 9 , 2020

Before the Court is a "Petition to Permit Summary Appeal Nunc Pro Tunc and/or Enforce Plea Agreement" filed by the Defendant, John P. Missal (hereinafter "Missal"). In this filing, Missal is seeking the right to otherwise appeal previously entered guilty pleas to citations received from the Pennsylvania Game Commission claiming that, as part of the entry of those pleas and in reliance thereon, he was to be provided leniency when it came to the punishment he would receive. Additionally, or in the alternative, Missal requests that the plea agreement he reached with the Game Commission representatives should be enforced: In making this request, Missal claims the penalties imposed were not in accordance with that agreement. For the reasons stated in this opinion, this Court denies the relief requested.

[FM-50-20]

FACTUAL AND PROCEDURAL BACKGROUND

On or about November 8, 2019, representatives of the Pennsylvania Game Commission (hereinafter "The Commission") received information suggesting that Missal was illegally baiting animals on his property at 56 Luther Lane, Albrightsville, Pennsylvania. Upon arriving at this property, Warden Corey Bentzoni (hereinafter "Bentzoni") of The Commission explained to Missal the purpose of his visit. In the course of discussing the events, Bentzoni told Missal that should he be found or plead guilty to citations that Bentzoni would be issuing, he was facing suspensions to his hunting privileges. Bentzoni, further explained to Missal that if he cooperated and pled guilty, he (Bentzoni) would be "lenient" with Missal with regard to the penalties that could be imposed. No other promises nor any specificity with respect to this "leniency" were made by Bentzoni to Missal.

Missal himself, at the hearing of this Petition, testified that the only thing that Bentzoni said to him (Missal) in the way of penalties was that he, (Bentzoni) "would work with me (Missal) on my summaries." As a result of the investigation of November 20, 2019, Bentzoni issued two citations to Missal, one for "UNLAWFUL TAKING OR POSSESSION OF GAME OR WILDLIFE", a violation

of 34 Pa. C.S.A. §2307(a)¹ and the second for "UNLAWFUL DEVICES AND METHODS" pursuant to 34 Pa. C.S.A. §2308(a)(8).²

On or about November 25, 2019, Missal entered guilty pleas to those two citations. As a result, Missal was fined by Magisterial District Judge Eric Schrantz a total of \$1,150.00 plus costs. Thereafter, on February 2, 2020, Missal received notification that his hunting privileges were being revoked for a period of three (3) years as a result of his guilty plea to the citation issued for violating §2307(a). Thereafter, Missal filed a timely request for a review of that license revocation. On or about May 20, 2020, a hearing was held before Hearing Officer, John A. Abom who recommended that the revocation should be upheld. On June 8, 2020, Bryan Burhaus, the executive director of the Commission sent notification to Missal that included Mr. Abom's findings of fact, conclusions of law and final recommendations. This notification also indicated that Mr. Burhaus concurred in this recommendation

¹ 34 Pa. C.S.A. §2307(a) reads as follows: "It is unlawful for any person to aid, abet, attempt or conspire to hunt for or take or possess, use, transport or conceal any game or wildlife unlawfully taken or not properly marked or any part thereof, or to hunt for, trap, take, kill, transport conceal, possess or use any game or wildlife contrary to the provisions of this title."

² 34 Pa.C.S.A. §2308(a)(8) reads, in pertinent part, as follows: "General rule. -Except as otherwise provided in this title, it is unlawful for any person to hunt or aid, abet, assist or conspire to hunt any game or wildlife through the use of: . . .any artificial or natural bait, hay, grain, fruit, nut, salt, chemical, mineral or other food as an enticement for game or wildlife, regardless of kind and quantity, or take advantage of any such are or food or bait prior to 30 days after the removal of such material and its residue."

to uphold the revocation as ordered.³ Reconsideration by The Commission itself was denied on or about July 23, 2020.

On August 28, 2020, Missal filed the instant petition. In this Petition, he has requested nunc pro tunc relief to appeal the guilty pleas entered on November 25, 2019 to the Court of Common Pleas and/or enforcement of the plea agreement he had with Bentzoni, which he perceived to be violated by virtue of the penalties imposed by The Commission.⁴

On October 8, 2020, a hearing was held on this Petition. Missal testified that he pled guilty to these citations because of what Bentzoni told him, i.e. that he (Bentzoni) would work with him (Missal) on [his] summaries, in particular, the penalties. Bentzoni also testified at that hearing. Bentzoni confirmed that there were discussions regarding leniency on the possible penalties Missal was facing *vis-à-vis* the **fines** that could be imposed. Bentzoni testified that at no time did he ever mention to Missal anything about the license revocation. When questioned on exactly what penalties Missal could have faced in total for these guilty pleas, Bentzoni testified that for a conviction under §2307(a), Missal faced a fine of anywhere from \$1,000.00 to

³ See Defendant's Exhibit #2.

⁴ Missal references the claims presented as "and/or" claims, however we consider these claims and the relief sought as mutually exclusive and will address them in the alternative.

\$1,500.00⁵ and for a conviction under §2308(a)(8), Missal faced a fine of between \$150.00 and \$300.00.⁶

Bentzoni also testified that as a further penalty for a violation of §2307(a), restitution could be sought for the killing of the bear based upon its weight.⁷ Additionally, Bentzoni testified that Missal could have been subject to separate license revocations for each of the citations. Lastly, Bentzoni testified that, pursuant to 34 Pa. C.S.A. §929(a), Missal could have been facing a five-year revocation for each violation.

Bentzoni also testified that he recommended only a three-year revocation of Missal's hunting privileges for his guilty plea to the §2307(a) violation. This, according to Bentzoni, was in accordance with the standard operating policy of The Commission.

⁵ 34 Pa. C.S.A. §925(b)(5).

⁶ 34 Pa. C.S.A. §925(b)(8).

⁷ Pursuant to 34 Pa. C.S.A. §925(i), "In addition to the fines and costs imposed for violations pursuant to subsection (b), the costs incurred by the commission for the replacement of the species involved in the violation shall be assessed by the magisterial district judge in such amount as is fixed by regulation of the commission. Replacement costs shall only be assessed for violations relating to threatened or endangered species of North American game or wildlife and such other species of Pennsylvania game or wildlife as designated by the commission." According to 58 Pa. Code §131.8, "Under section 925(i) of the act (relating to jurisdiction and penalties), in addition to any fines and costs imposed for violations of the act and this title, any person who unlawfully kills or possesses wildlife may be assessed replacement costs according to the following minimum cost scale: . . . (1) general class . . . (iii) each elk or black bear \$1,500.00 (2) Trophy Class . . . (iii) Each black bear with a field dressed weight of 350 pounds or more, \$5,000.00." The Commission could have sought the imposition of the replacement costs of the bear from Missal but it did not.

Also testifying was Officer Raymond Peters of The Commission. He confirmed that Bentzoni only suggested to Missal that Bentzoni would be lenient with him in consideration of his guilty pleas and that there was no specific mention of any leniency regarding Missal's hunting privileges.

After this hearing, both parties were given the opportunity to lodge briefs and they did. This issue is now ripe for disposition.

LEGAL DISCUSSION

In his petition, Missal makes two requests of the Court, the ability to appeal nunc pro tunc his summary convictions or alternatively, should he not be granted nunc pro tunc relief, order The Commission to enforce the plea agreement. In his brief, under the heading, "Question Presented", Missal suggests there is only one question: "whether petitioner should be permitted to proceed with his summary appeals nunc pro tunc." Preliminarily, it appears that he has abandoned his request to seek enforcement of a plea agreement he claims he reached with Warden Bentzoni, relying instead on a claimed breach of this agreement as a basis for nunc pro tunc. Since the Court is not entirely clear on where Missal stands it will still address both issues independent of one another and collectively, as requested by the Petitioner.

I. NUNC PRO TUNC RELIEF

Pursuant to Pa.R.Crim.P. 490(a), "when an appeal is authorized by law in a summary proceeding, including an appeal following a prosecution for violations of a municipal ordinance that provides for imprisonment upon conviction or upon failure to pay a fine, an appeal shall be perfected by filing a notice of appeal within 30 days after the entry of the guilty plea, the conviction, or other final order from which the appeal is taken." The trial court is not otherwise permitted to extend the time for a person to file an appeal. *Commonwealth v. Vohe*, 641 A.2d 1210,1212 (Pa. Super. Ct. 1994). "An appeal nunc pro tunc 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." *Comm. v. White*, 866 A.2d 45, 46 (Pa. Super. Ct. 2002). "A nunc pro tunc appeal may be allowed where extraordinary circumstances involving fraud or some breakdown in the administrative process caused the delay in filing, or where non-negligent circumstances related to the appellant, his or her counsel or a third party caused the delay." *J.A. v. Dep't of Pub. Welfare*, 873 A.2d 782, 785 (Pa. Cmwlth. 2005) [quoting *Cook v. Unemployment Comp. Bd. Of Review*, 543 Pa. 381, 671 A.2d 1130 (1996)].

"Our Court has held that [i]n proper cases, where a party has been prevented from appealing by reason of fraud or a wrongful or negligent act of a court official, the court may allow enlargement

of time for appeal or appeal nunc pro tunc. It is obviously appellant's burden, however, to show such mitigating circumstances. (citations omitted). Furthermore, the party seeking leave to appeal nunc pro tunc must establish that they acted promptly to assert such right upon learning to the existence of the ground's relief on for such relief." *Commonwealth v. Bassion*, 568 A.2d 1316, 1318 - 1319 (Pa. Super. Ct. 1990).

At the onset, this Court first notes Missal claims that nunc pro tunc relief should be afforded based upon him promptly asserting this right upon learning on February 4, 2020 that his hunting privileges were being revoked for three years. In his brief, Missal states that upon receipt of this notification, he promptly and timely requested a review of this revocation with the Pennsylvania Game Commission and that due to COVID-19 restrictions, a final determination was not rendered by that agency until July 23, 2020. Thereafter, Missal filed this instant petition on August 18, 2020, more than six months after he received notice of his hunting privilege revocation, the event which he claims prompted him to assert his right to seek nunc pro tunc relief. Missal bases his nunc pro tunc relief on the fact that it took this six-month period for The Commission to eventually uphold the revocation. However, the proceeding before The Commission and any appeal rights under Pa. R.Crim.P. 460 are mutually exclusive and could have even occurred simultaneously. Success or failure

in requesting The Commission to review the revocation of Missal's hunting privileges has no impact on whether he should file an appeal pursuant to Pa. R.Crim. P. 460 or seek nunc pro tunc relief. In fact, success obtained through Pa.R.Crim.P. 460 would afford an appellant more relief than could have been obtained through a review of his license revocation through The Commission. Missal is mistakenly relying on the revocation review decision as a basis for his delay in seeking nunc pro tunc relief before this Court. The operable date from which Missal should have filed this petition to obtain nunc pro tunc relief was February 2, 2020. Thus, nunc pro tunc relief would be denied for this reason alone.

Notwithstanding our decision on the lack of prompt filing, this Court will still address Missal's other argument for nunc pro tunc relief: that Warden Bentzoni, acting as a court official, wrongfully or negligently acted in such a way, i.e. not going along with a plea agreement, that nunc pro tunc relief is warranted. However, before this Court answers the question of whether Bentzoni is a "court official" we need to look at what the conduct was that Bentzoni allegedly engaged in that prompted Missal to erroneously rely upon to enter the guilty pleas to the citations in question.

In this case, the credible testimony for consideration is nothing more than that Bentzoni indicating that in consideration of Missal entering guilty pleas, Bentzoni would be "lenient." Even if this Court were to believe that Bentzoni promised leniency as

it related to the revocation of Missal's hunting privileges, we believe, based upon the single three-year revocation versus up to a ten-year revocation, there was leniency. Further, as Bentzoni testified, the penalties imposed on Missal as a result of his pleas was a total of \$1,150.00 in fines and this three-year revocation. It was quite conceivable and possible for Bentzoni to ask for up to \$1,800.00 in fines, up to \$6,500.00 in replacement costs depending upon the weight of the bear and up to ten years revocation of hunting privileges. This Court, therefore, finds that Bentzoni was in fact lenient with Missal in his recommendations of only a three-year revocation of Missal's hunting privileges and in not seeking a higher fine or replacement costs for the illegal baiting and killing of the bear. To the extent that Missal suggests that this is the conduct that leads him to believe that Bentzoni acted negligently or wrongfully vis-à-vis the plea agreement, this Court finds that suggestion meritless.

As this Court has now determined that there was no negligent or wrongful conduct on Bentzoni's part, it finds no reason to even address whether Bentzoni is a "court official" as Missal has alleged.

II. ENFORCEMENT OF PLEA AGREEMENT

As an alternative argument to nunc pro tunc relief, Missal argues that this Court should enforce the plea agreement entered

into between Bentzoni and Missal. In order to first determine whether to direct the enforcement of a plea agreement, this Court must first ascertain what that plea agreement was and how, as alleged by Missal, that agreement was breached. As this Court noted above, it found that the "agreement" proffered by Bentzoni and accepted by Missal was that should Missal enter guilty pleas to these two citations, Bentzoni would be "lenient" with regards to penalties. Here, Missal faced the minimal fines and only one of two possible license revocations, revocations which could have been enhanced to five years each. Additionally, Missal was not obligated to pay any replacement costs for the bear. Based upon this testimony, this Court finds "leniency" in exchange for guilty pleas in the agreement. This Court further finds that the penalties imposed by statute by the Magisterial District Judge in the way of minimal fines and the revocation of hunting privileges for three out of a possible ten years by The Commission appear lenient in light of the possible penalties that could be sought and/or imposed. Accordingly, this Court does not see any need to direct, the Commonwealth of Pennsylvania to comply with a plea agreement which they had already done.

CONCLUSION

For the foregoing reasons, this Court enters the following Order:

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JOHN P. MISSAL, :

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Defendant :

Seth Miller, Esquire

Counsel for Commonwealth
Assistant District Attorney
Counsel for Defendant

Eric Winter, Esquire

ORDER OF COURT

AND NOW, this 9TH day of December, 2020, upon consideration of the "Petition to Permit Summary Appeal Nunc Pro Tunc and/or Enforce Plea Agreement" the brief lodged in support thereof and the Commonwealth brief lodged in opposition thereto, and after argument thereon, it is hereby **ORDERED and DECREED** that said Petition is **DENIED**.

BY THE COURT:



Joseph J. Matika, J.