IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. SA-81-2008
	:	
MICHAEL FLEMING HILL,	:	
Defendant	:	1925(a) OPINION

Date: April 15, 2009

OPINION IN SUPPORT OF THE ORDER OF JANUARY 13, 2009 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This order is entered in reference to Defendant Michael Fleming Hill's appeal of this Court's order of January 13, 2009, in which we found Defendant guilty of violating section 1543(b)(1), driving while under suspension relating to chemical test refusal, and sentenced Defendant accordingly. N.T., January 13, 2009, pp. 17-18. In his Statement of Matters Complained of on Appeal, Defendant asserted that this court erred in the above adjudication of guilt, specifically by determining that the Defendant had received notification of a license suspension. The Defendant's appeal should be denied and this Court's order of January 13, 2009 affirmed for the reasons we stated on the record in making our finding of guilt, in which we stated why we were not convinced by Defendant's testimony that he had not received notice of his license suspension. ***Ibid***. This opinion will further articulate this Court's rationale in making that determination.

At his summary appeal hearing before this Court on January 13, 2009, Defendant acknowledged driving his automobile on a public highway on August 12, 2008, the day in question. Defendant stipulated to the validity of the motor vehicle stop and that his operating privileges were under suspension from the Pennsylvania Department of Transportation

(hereinafter "Penn DOT") at the time of the stop, contending only that the citation was not valid because Defendant had not received notice of the license suspension from Penn DOT. ***Id***. pp. 4, 5, 14-15. Defendant admits that the records reflect that he was sent mail notification by Penn DOT on November 7, 2007 that his license was under suspension. ***Id***. p. 7. ***Commonwealth's Exhibit #1***.

In attempting to prove lack of notice, the Defendant presented the following testimony: On August 19, 2007, Defendant got into an accident on a four-wheeler in which he sustained injuries requiring hospitalization for three or four days. ***Id***. pp. 10-11. He does not remember much from the accident. ***Ibid***. The Defendant's mailbox has a history of being destroyed. ***Id***. p. 11. In particular, in the past two years, Defendant's mailbox has been knocked off its post five times, in his opinion by minors armed with baseball bats. ***Ibid***. Also, Defendant's mail historically has at times been mixed-up with his neighbor's, and at one point in 2007 the postal route where he lived changed. ***Id***. p. 12. On August 12, 2008, at 12:08 p.m. when he was stopped by Trooper Doebler, the Defendant had not received any mail from Penn DOT that indicated he was under suspension for chemical test refusal and was not aware that his license was under suspension. ***Id***. pp. 9-10, 12-13.

It is a well settled presumption regarding receipt of materials from Penn DOT that mail duly sent is deemed received, and Defendant acknowledged that such is the applicable legal principle. ***Id***. pp. 14-15. ***Commonwealth Dep't of Transp., Bureau of Driver Licensing v. Grasse***, 606 A.2d 544 (Pa. Commw. Ct. 1991) "Under the mailbox rule, proof of mailing raises a rebuttable presumption that the mailed item was received and it is well-settled that the presumption under the mailbox rule is not nullified solely by testimony denying receipt of the

item mailed." ***Grasse***, 606 A.2d 545 (citing ***Commonwealth Dep't of Transportation v. Brayman Construction Corp.-Bracken Construction Co.***, 513 A.2d 562 (Pa. Commw. Ct. 1986)). ***Commonwealth Dep't of Transportation v. Brayman Construction Corp.-Bracken Construction Co.*** states that the presumption in the mailbox rule may not be nullified by denial of receipt of an item mailed as a matter of law. ***Brayman***, 513 A.2d 566 (citing ***Berkowitz v. Mayflower Securities, Inc.***, 317 A.2d 584 (1974)).

Exploration of further case law determining the relative strength of such a presumption in our circumstances is helpful. In ***Berkowitz v. Mayflower Securities, Inc.***, a case involving the mailing and presumed receipt of a confirmation notice, the Supreme Court of Pennsylvania stated that "denial of receipt is not sufficient, in itself, to rebut this presumption." ***Berkowitz***, 317 A.2d 585 ***citing Meierdierck v. Miller***, 147 A.2d 406 (1959). ***Meierdierck v. Miller***, was a jury trial case in which, addressing whether denial of receipt of a letter by the addressee nullifies the presumption that sent mail is duly received thus leaving the question of notice open to the jury, the Supreme Court of Pennsylvania answered "[w]e think not." ***Meierdierck***, 147 A.2d 408. Instead, the testimony of denial was admissible only for the issue of whether the letter was mailed. ***Ibid***. In the matter of notices sent by Penn DOT, "the Department's certification of a driving record showing that notice was given is competent to establish that notice was sent[; t]he Department is not required to show that the licensee actually received the notice." ***Grasse***, 606 A.2d 545-546; ***citing Commonwealth Dep't of Transp., Bureau of Driver Licensing v.Petrucelli***, 543 A.2d 213 (Pa. Commw. Ct. 1988) ***and Commonwealth Dep't of Transp., Bureau of Driver Licensing v. Fundenberg***, 561 A.2d 84 Pa. Commw. Ct. 1989).

Kulick v. Commonwealth Dep't of Transp., Bureau of Driver Licensing, 666 A.2d 1148, 1150 (Pa. Commw. Ct. 1995) is a case with similar facts to our present adjudication in which appellant argued he did not receive notice properly sent by Penn DOT in that he was involved in a property line feud with his neighbors, and his neighbors had repeatedly barricaded his driveway using boulders causing the post office to forward his mail to his wife's business address. The Commonwealth Court upheld the trial court's findings that appellant had received the notice that Penn DOT mailed to appellant's address of record based upon the fact that, apart from his own testimony, he had not presented any evidence that a third party had interfered with the receipt of his mail. ***Ibid***. Defendant presently before us similarly failed to present any evidence, apart from his own testimony, that any third party, be it minors armed with baseball bats or his neighbor, interfered with the receipt of his mail.

Defendant's argument that he had met his burden of showing that he did not receive the Penn DOT notice of suspension is solely based on his own testimony of mail disturbance and his actions of hiring an attorney and pursuing a summary appeal. N.T., January 13, 2009, pp.14-16. We found at trial and continue to find that Defendant's testimony lacked sufficient credibility to support a finding that he did not receive notice. Defendant did not present any supporting physical evidence or testimony to corroborate his own statements. Ultimately, this Court did not find Defendant's testimony convincing, even if it alone could support a finding that he was not in receipt of notice he admitted was sent to a proper address. The lack of credibility applies to all of Defendant's various contentions.

In the first instance, although Defendant may have had memory problems in August 2007, it is not clear these problems continued into November, but if Defendant's memory was

impaired in November, it would support a finding that he did in fact receive the suspension notice but was not able at sometime thereafter to remember receiving the notice. Such loss of memory does not justify his continued ignoring of the suspension.

Defendant testified that he and his neighbor typically exchanged mail and only threw away each other's "junk mail." N.T., January 13, 2009, pp. 12, 14. Defendant's case would have been bolstered had his neighbor appeared to testify that he had thrown away Defendant's mail in late 2007, without knowing whether or not the trashed mail was "junk," or that the neighbor may have mistaken the Penn Dot mail for junk mail.

Although Defendant testified that sometime in 2007 the postal route where he lived changed, he could not affirm that he had any difficulty receiving mail in the latter part of 2007, when Defendant should have received notice of his license being under suspension, only that his mail in general "off and on… gets mixed up once in a while." ***Id***. p. 12. Instead, the uncontradicted evidence supports a finding that Penn DOT used the correct address.

When the Defendant's mailbox was destroyed, he picked his mail up at the post office, which held his mail for him under the occasional circumstance that his mailbox was destroyed. ***Id***. pp. 11, 12. Again, Defendant's neighbor did not testify that he remembered a specific instance in late 2007 in which the Defendant's mailbox was destroyed. Defendant's neighbor did not provide any testimony on behalf of Defendant at the hearing, nor did anyone besides Defendant for that matter. Defendant did not even assert that when his mailbox was destroyed it was at times when it would have been expected to contain the suspension notice or even full of other mail. Absent such testimony as to the date and time of day, judicial experience as well as common sense leads us to believe if the mailbox was indeed destroyed by minors armed with

baseball bats, such conduct would probably have been perpetrated at night, after mail is typically already pulled from a mailbox.

In conclusion, the bare allegations that sometime in the last two years the Defendant's mailbox has been destroyed five times, that sometime in 2007 postal routes changed, and that his neighbor sometimes receives his mail and they may mutually throw away what they perceive as junk mail was insufficient to rebut the presumption of receipt of mail deemed sent. Because Defendant offered only uncorroborated testimony and Defendant's testimony was, in itself, unconvincing, Defendant's testimony did not satisfy the burden of proof required to rebut the presumption of receipt of mail deemed sent. Therefore, Defendant's appeal should be denied.

BY THE COURT,

William S. Kieser, Senior Judge

cc: George Lepley, Jr., Esquire
DA
Judges
Gary L. Weber, Esquire (Lycoming Reporter)