

Franklin County Legal Journal

Volume 30, No. 9, pp. 215 - 219

Estate of Consuella B. Adams

IN RE: ESTATE OF CONSUELLA B. WALLACE

APPEAL OF MARCUS L. WALLACE

Court of Common Pleas of the 39th Judicial District of Pennsylvania,

Franklin County Branch, Orphans' Court Division

Docket No. 102-OC-2011

Filing and Service Requirements under the Rules of Appellate Procedure

1. If a judge orders a Concise Statement of Errors Complained of on Appeal under Pa. R.A.P. 1925(b), there are two distinct steps required of any appellant: 1) the appellant must file the Concise Statement of Errors Complained of on Appeal in the trial court, and 2) serve a copy on the trial judge.
2. Although often accomplished concurrently, filing and service are separate requirements with which the appellant must comply.
3. A pro se prisoner's filing is deemed filed as of the date it was delivered to the prison authorities for mailing or placed in the institutional mailbox but does not satisfy the service requirement.
4. The Prothonotary and Orphan's Court Clerk do not have an affirmative duty under the Rules of Appellate Procedure to serve any filings that are received upon the trial court.
5. *Pro se* appellants pursuing civil actions are expected to comply with the Rules of Procedure and pro se status does not relieve the appellant of any responsibility to comply with procedural rules.
6. Failure to comply with the filing and service requirements of Pa.R.A.P. 1925(b) will result in the automatic waiver of the issues raised.

Appearances:

Marcus Wallace, *Defendant*

Yvette Marks

OPINION

Meyers, J., June 28, 2012

Statement of Facts

By an order of court issued by the Pennsylvania Superior Court on May 21, 2012, the above captioned matter was remanded to the trial court to conduct an evidentiary hearing or to otherwise engage in appropriate fact-finding efforts on the issue of whether or not the Appellant, Marcus Wallace ("Mr. Wallace"), substantially complied with the requirements of Pennsylvania Rule of Appellate Procedure Rule 1925(b)(1); specifically, did Mr. Wallace serve the trial judge with his Statement of Matters Complained of on Appeal. Per the order, "Wallace should be provided with an opportunity to submit evidence in support of the representation and his proof of service form" (order of the Pennsylvania Superior Court, May 21, 2012). Subsequently, on May 2, 2012, upon receipt of the Pennsylvania Superior Court's order, the Court consulted its calendar and determined that the first available date on which it could schedule a hearing was Friday, June 22, 2012, at 11:00 a.m. in the Franklin County Courthouse. This Court issued a scheduling order in which it indicated it would take evidence in support of or contravention of the Defendant's compliance or noncompliance with Rule 1925(b)(1). Furthermore, the Appellant, Marcus Wallace, was advised by the trial court that he would be expected to appear on that date and proceed with the hearing. Finally, as part of the Court's order, the Court ordered that the Defendant would be transported from the Franklin County Jail where he is being held and detained pending trial for allegedly committing the crime of criminal homicide of his mother, Consuella B. Wallace. Subsequent to the issuance of the order on June 7, 2012, Mr. Wallace filed a memorandum with the Prothonotary of the Pennsylvania Superior Court in which he asserted that he complied with the trial court's November 1, 2011 order requiring him to file with the trial court and serve the trial judge with a 1925(b)(1) statement within twenty-one (21) days of the order. Mr. Wallace asserted that the "Prisoner's Mailbox

Rule" would support his claim of service.

Mr. Wallace attached a document evidencing that postage was deducted from his jail account to pay for a mailing to the Honorable Judge Shawn D. Meyers [sic]. At the hearing held on June 22, 2012, the Court summoned judicial assistant, Cheryl Shaw, to offer testimony under oath. Ms. Shaw, the trial court's judicial assistant, confirmed that she is responsible for receipt of all mail addressed to the trial judge and preparation of all case files for preparation of 1925 opinions. She confirmed that a 1925(b)(1) Statement of Matters Complained of on Appeal was not received by the trial judge in the above-captioned matter. This Court has no reason to question the veracity of the judicial assistant's representations and further would find that if such an averment under oath was found to be false, that there would be significant consequences to the Court's employee. (Hearing transcript p. 13, lines 4-15.)

The Court turns to Mr. Wallace's testimony. The Court will note that the record reveals that Mr. Wallace appeared without counsel as this is an Orphans' Court proceeding in which there is no right or guarantee of counsel. All of Mr. Wallace's filings in the case have been filed pro se. Mr. Wallace indicated quite clearly in his testimony that his general practice when filing documents with the Court, (the Court assumes in his pending criminal case as well as Orphans' Court case), is to submit an original and a copy of any document to the Clerk of Courts with an indication that the Clerk of Courts was to ensure delivery of the document to the judge identified in his pleading. In the instant case, Mr. Wallace testified that he filed an original and a copy of the Statement of Matters Complained of on Appeal by addressing same to William Vandrew, the Franklin County Clerk of Courts. (Hearing transcript p. 10, lines 13-25; p. 11, lines 1-13). Mr. Wallace indicated that he placed both the original Statement of Matters Complained of on Appeal and a copy in a single envelope and mailed them directly to the Clerk of Courts, even though the deduction for postage indicated Honorable Shawn D. Meyers. There was no indication in Mr. Wallace's testimony that he could recall specifically separately mailing a Statement of Matters Complained of on Appeal to the undersigned judge at his chambers. Rather, it is clear from Mr. Wallace's testimony that he expected the Clerk of Courts to serve a copy of his Statement of Matters Complained of on Appeal upon the trial court judge.

Discussion

This Court has no reason to doubt that Mr. Wallace complied with the time limit in which he was ordered to file his Statement of Matters Complained of on Appeal. However, this Court does believe it is constrained to conclude that Mr. Wallace did not comply or substantially comply with Pennsylvania Rules of Appellate Procedures 1925(b)(1), nor did he comply with the Court's order issued in conformance with that rule for a lack of service despite the averment in the certificate of service.

Under Rule 1925(b), when the trial court who enters the order giving rise to the Notice of Appeal ("Judge") desires clarification of the Errors Complained of on Appeal, the Judge may enter an order directing the Appellant *to file of record in the trial court and serve on the judge a concise Statement of Errors Complained of on Appeal ("Statement")* Pa. R. App.P. 1925(b) (Emphasis added). It is clear from the rule that there are two steps required of any appellant. First, the appellant must file the Statement of Matters Complained of on Appeal with the trial court, and second, serve the copy on the trial judge. The importance of both filing and service is set forth in subsection 1925(b)(1):

Filing of Service. - Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail as provided in Pa. R.A.P. 121(a) and shall be complete on mailing if appellant obtains a United States Postal Service Form 3817, Certificate of Mailing or other similar United States Postal Service form from which the date of deposit can be verified in compliance with the requirements set forth in Pa. R.A.P. 112(c). Service of parties shall be concurrent with filing and shall be by any means of service specified under Pa. R.A.P. 121(c).

Under Pa. R.A.P. 121(a) "**Filing** - Paper required or permitted to be filed in an appellate court shall be filed with the prothonotary." (Since this is a matter involving the Orphans' Court, the Clerk of Courts is the proper clerk with which matters relating to wills, estates, and trusts would be filed, and thus this court substitutes the Orphans' Court clerk for the prothonotary). Pa. R.App.P. 121 goes on to provide, "Filing may be accomplished by mail addressed to the prothonotary." Id. The second paragraph of subsection (a) indicates that "a pro se filing submitted by a prisoner incarcerated in a correctional facility is deemed *filed* as of the date it is delivered to the prison authorities for the purpose of mailing or placed in the institutional mailbox, as evidenced by a properly executed prisoner cash slip or other reasonably verified evidence of the date that the prisoner deposited the pro se filing with the prison authorities." (Emphasis added.)

This Court previously indicated that it does not dispute that Mr. Wallace has complied with the Mailbox Filing Rule for filing

purposes, as he mailed two copies of his statement to the attention of William Vandrew, Clerk of Courts. However, by Mr. Wallace's own testimony, the trial court finds that he did not serve a copy of the Notice of Matters Complained of on Appeal upon the Court concurrently with the filing of the Statement of Matters Complained of on Appeal. Under Pa. R.A.P. 121(b):

Service of All Papers Required. Copies of all papers, filed by any party and not required by these rules to be served by the Prothonotary shall, concurrently with their filing, be served by a party or person acting on behalf of the party or person on all other parties in the matter. Service on a party represented by counsel shall be made on counsel. (c) **Manner of Service.** Service may be: (1) by personal service which includes delivery of the copy to a clerk of other responsible person at the office of the person served, but does not include interoffice mail; (2) by first class, express, or priority United States Postal Service; (3) by commercial carrier with delivery intended to be as least as expeditious as first class mail that the carrier can verify the date of delivery to it; or (4) by facsimile or email with the agreement of the party being served as stated in the Certificate of Service, service by mail is completed on mailing.

Id.

Mr. Wallace's error is that he assumed that by mailing his Statement of Matters Complained of on Appeal to the Franklin County Clerk of Courts Office with a copy, that he was in turn ensuring service upon the trial court. As Rule 121 specifies, unless there is an affirmative requirement by rule, the prothonotary, or in this case, the Clerk of Courts, has no affirmative duty to serve the trial court. To do so would be to require the prothonotary the Clerk of Courts, or the trial court to constantly be perusing its appeal dockets or files to determine whether or not parties are properly serving the trial court. **Forest Highlands Community Ass'n v. Hammer**, 879 A.2d 223, 228-29 (Pa. Super. 2005). Mr. Wallace's assertion in his Certificate of Service that he had served the trial court would cause the Clerk of Courts to properly assume that Mr. Wallace had in fact mailed the Statement of Matters Complained of on Appeal to the trial court, when it appears he did not. As a result, significant delay can occur and did occur in addressing the substantive or procedural issues by the trial court.

The trial court wishes to point out that both the local docket and the appellate docket can be disrupted because the appellate court should properly assume that the trial court is promptly proceeding with a review of an appellant's Statement of Matters Complained of on Appeal and issuing its 1925(b) opinion in support of the decisions made at the trial court level. The reason for procedural rules and strict adherence is to ensure that there is prompt administration and attention to appellate matter by the trial courts so that cases do not languish before being addressed by the appellate court once a Notice of Appeal is timely and properly filed. However, there is an equally important matter here, and that is counsel representing parties are expected to be able to comply with the rules, and there should be no difference for pro se litigants who choose to pursue civil actions of their own accord. Jones v. Rudenstein, 401 Pa. Super. 400, 404, 585 A.2d 520, 522 (Pa. Super. 1991); Commonwealth v. Abu-Jamal, 521 Pa. 188, 200, 555 A.2d 846, 852 (1989). To permit pro se litigants to fail to comply with rules regardless of their status or situation is to create in turn an undue and unfair consequence to those parties who are not granted the same waiver of rules as a result of being represented by counsel. Either all parties, both those represented by counsel and those who are not, should be excused if there is failure to comply with the procedural rules or else face the same consequence, which in this case requires dismissal of Mr. Wallace's appeal.

In the event the Pennsylvania Superior Court determines that Mr. Wallace, in spite of the evidence of record, has complied with Pa. R.App.P. 1925 and Pa. R.App.P. 121, this Court asks that it be granted reasonable time in which to review his Statement of Matters Complained of on Appeal and be granted a reasonable time in which to issue a 1925(b) brief.

An order is attached.

And Now this 28th day of June, 2012;

It is hereby directed that the Orphans' Court shall transmit the attached Opinion, as well as the transcript of proceedings of hearing of June 22, 2012 to the Superior Court to meet the requirements of the Court's prior order of May 21, 2012.