

**JENA MELISSA SPENCE v. COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION and DONALD O’SHELL, CLERK OF  
COURTS OF YORK COUNTY PENNSYLVANIA**

**No. 2014-SU-03410-27**

**No. 2014-SU-03969-27**

**License Suspension Appeal**

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**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**

<b>JENA MELISSA SPENCE,</b>	<b>:</b>	<b>No. 2014-SU-03410-27</b>
<b>Appellant</b>	<b>:</b>	<b>No. 2014-SU-03969-27</b>
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>COMMONWEALTH OF</b>	<b>:</b>	
<b>PENNSYLVANIA DEPARTMENT</b>	<b>:</b>	
<b>OF TRANSPORTATION and</b>	<b>:</b>	
<b>DONALD O’SHELL, CLERK OF</b>	<b>:</b>	<b>License Suspension Appeal</b>
<b>COURTS OF YORK COUNTY</b>	<b>:</b>	<b>75 P.S. §1550</b>
<b>PENNSYLVANIA</b>	<b>:</b>	<b>Judge: L. F. Clark, Jr., S.J.</b>

**APPEARANCES:**

**For the Appellant: Richard H. Mylin, III, Esquire**

**For the Commonwealth: Christopher J. Johnson, Esquire**

# **OPINION**

This matter is presently before the Court on the Amended Petition for Statutory Appeal of Jena Melissa Spence (hereinafter “Ms. Spence” or Appellant), pursuant to the provisions of Title 75 P.S. §1550, as amended. Said statute provides for an automatic supersedeas upon filing of a Petition, which effectively stays the proposed administrative actions of the Pennsylvania Department of Transportation (hereinafter the “Department” or “PennDOT”) in the case. Ms. Spence, through her counsel, initially filed such a Petition on September 30, 2014, thus invoking the powers of the Court of Common Pleas to review the proposed actions of PennDOT.

## **I. BACKGROUND**

The Appellant is appealing two separate Notices of driver’s license suspensions arising from two separate incidents and violations. The parties appeared before the undersigned for a Hearing on those appeals on June 24, 2015. (Transcript of Proceedings, June 24, 2015.)

The first violation occurred on March 4, **2004**, which was a violation of Section 1543(a) of the Vehicle Code, driving with a suspended license. The date of conviction for the offense was July 27, **2005**. Inexplicably, the notice of the conviction was **not** certified and submitted to the Department by the York County Clerk of Courts until approaching a decade later on October 10, **2014**. Such an inordinate delay by the Clerk

of Court in reporting such a conviction to PennDOT is contrary to the laws of the Commonwealth, as hereinafter discussed.

The second violation occurred on October 13, **2006**, which was a violation of the Drug Act for possession of a small amount of marijuana. The date of conviction was January 17, **2007**, with the conviction certified and transmitted to the Department on September 2, **2014**. This almost eight (8) year delay in reporting such a conviction to PennDOT is likewise contrary to law.

At the time of the Hearing the Appellant, Ms. Spence, testified regarding the convictions and the status of her life since 2006. She admitted to the charges at issue, and described how her initial license suspension dated back to 2001 when it was suspended for failure to pay a fine. (Transcript of Proceedings, p. 16-18.) Due to a failure to properly surrender her driver's license to the Department, she did not receive credit for that initial suspension and lost her license for an additional period of time. Appellant stated that, with the additional charges in 2004 and 2006, she did not have her driver's license restored for approximately twelve years. *Id.* at 17-18. Part of that time included a year suspension for driving with a suspended license and a year for driving under the influence ("DUI"), stemming from the 2006 incident, which also included a charge for possession of marijuana. She successfully had her driver's license returned in June of 2013, and had it for over a year before receiving the instant Notices of the additional suspensions in the fall of 2014. *Id.* at 18. The latest Notices of suspension received from PennDOT are the basis for this Statutory Appeal.

Appellant stated that after the 2006 convictions and serving a period of incarceration, she moved to Delaware County in an effort to get her life in order. She returned to York County when her father's health declined, and graduated from cosmetology school. She currently holds two jobs. She works at a local Country Club and cleans houses on weekdays. She also performs some hairdressing work in her spare time. *Id.* at 19.

Ms. Spence also stated that her nine-year-old son has Attention Deficit Disorder and Oppositional Defiant Disorder (“ADHD” and “ODD”), for which he takes medication and attends counseling. Her other child, a daughter, was nineteen at the time of the Hearing, and was attending nursing school. *Id.* at 19-20.

Appellant expressed her belief that she was not the same person that she was in 2006, and stated that she has had no other contact with law enforcement or the police since that time, including minor parking tickets. *Id.* at 19-20. In addition, she stated that the instant and seriously belated proposed additional suspensions of her driving privileges issued by PennDOT would now result in a significant hardship on her, as she has no alternative forms of transportation and she would be unable to take herself to work or to provide necessary transportation for her son.

These seven to nine year delays in certifying and transmitting Appellant's convictions to the Department of Transportation are but just two of the thousands of such cases (approximately 5000+) that the York County Clerk of Courts failed to transmit to the Department over a period of approximately **ten years**. This complete and total failure

to comply with the requirements of Pennsylvania law is nothing short of breathtaking and clearly a travesty of justice for those citizens who are now suffering from those delays. 75 Pa.C.S.A. § 6323(1)(i).<sup>1</sup> We expressed this opinion at the time of the Hearing, but also noted that we were constrained by statute and the unyielding appellate court precedent *prevailing at the time of that Hearing (but now changed)*, which established unequivocally that *only* delays *caused by the Department* were grounds for granting an appeal under these types of circumstances. (Transcript at 6-16.) We also noted similar large-scale and well-known reporting failures by Clerks of Court for other counties in the Commonwealth, namely Philadelphia and Lebanon Counties, and expressed our view as to the fundamental unfairness that resulted with regard to numerous individuals in these thousands upon thousands of delayed reporting cases. We likewise noted that the laws of our Commonwealth have long-provided for statutory sanctions against any Clerk of Court who fails through neglect, refusal or other failure to comply with those laws with regard to this mandatory reporting to the Department.<sup>2</sup> *Id.*; 75 Pa.C.S.A. § 6324.

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<sup>1</sup> This section states as follows:

Subject to any inconsistent procedures and standards relating to reports and transmission of funds prescribed pursuant to Title 42 (relating to judiciary and judicial procedure):

(1) The following shall apply:

(i) **The clerk of any court of this Commonwealth, *within ten days after final judgment of conviction or acquittal or other disposition of charges* under any of the provisions of this title or under section 13 of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, including an adjudication of delinquency or the granting of a consent decree, shall send to the department a record of the judgment of conviction, acquittal or other disposition.**  
(emphasis added)

<sup>2</sup> This section states as follows:

Notably, it does *not* appear that any enforcement of those statutory penalties was ever instituted in the instant cases or their thousands of companion cases. From the perspective of those previously convicted, it was irrelevant whether the delay was caused by the Clerk or the Department, since the constitutional due process violation and unfairness was still the same, and we noted the conflict in the Department's long-held and unyielding position of no compromise/no exception with regard to this issue as well. *Id.* at 14-15.

We allowed the Appellant and the Department to submit Briefs with regard to their respective positions following the Hearing, which they did in July of 2015. Thereafter, and while we were considering our decision in this matter, Ms. Spence joined with several other individuals, whose cases involved similar delays, in a mandamus action against the York County Clerk of Courts before the Commonwealth Court of Pennsylvania. *Smires et. al. v. O'Shell*, 126 A.3d 386 (Pa. Cmwlth. 2015). The Petition for Writ of Mandamus appears to have been filed in the Commonwealth Court on or about March 24, 2015, with Ms. Spence joining the Petitioners on or about July 17, 2015. Ms. Spence was represented by the other Petitioners' counsel in that action, Attorney John M. Ogden. The Respondents (PennDOT & Mr. O'Shell) filed Preliminary Objections to the Petition, which were granted by Order and Opinion of the

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(a) General rule. -- Failure, refusal or neglect of any issuing authority or clerk of court to comply with any of the requirements of this subchapter *is* a summary offense punishable:

(1) For a first offense, by a fine of \$100.

(2) For a subsequent offense, by a fine of not less than \$200 nor more than \$500.

(b) Removal from office. -- Conviction shall be grounds for removal from office.

Commonwealth Court filed on October 26, 2015, and the matter was remanded to the York County Court of Common Pleas to be disposed of through the regular statutory appeals process.

On remand, our distinguished and now-retired colleague, the Honorable John W. Thompson, Jr., issued a decision with regard to the mandamus Petitioners' cases, except for Ms. Spence who was represented by counsel first named above, Attorney Richard H. Mylin, III. Judge Thompson determined that, because the Commonwealth Court essentially affirmed prior unyielding precedent with regard to delays in certifying and transmitting notices of convictions, that he had no choice but to deny the appeals. *David J. Glatfelter et. al. v. Commonwealth of Pennsylvania, Department of Transportation*, No. 2014-SU-003125-27 (York Co. November 10, 2015). However, in his *Glatfelter* decision, Judge Thompson most eloquently and passionately urged our appellate courts to consider the possibility of revising past precedents and posed the following rhetorical questions: "... are not the Courts the independent insulation between the citizenry and government actions or prejudicial inactions? Can this not be viewed as such a breakdown of the Court's and enforcement system that a citizen should have court intervention to undo the resulting prejudice?" *Id.* at 3. There is no question in the mind of the undersigned that had Judge Thompson had the benefit of a landmark case (*Gingrich, infra*) issued by the Commonwealth Court on March 30, 2016 (unanimous and *en banc*) at the time he (Judge Thompson) was constrained to rule against the Petitioners in the *Glatfelter* case, a much different result would have occurred in favor of the Petitioners,

and that such result would have been very consistent with this writing. Judge Thompson, your plea for fundamental justice was not an unheard cry in the wilderness!!

Appellant Spence's counsel, prior to the decision of the Commonwealth Court, had filed an Amended Appeal of Driver's License Suspension on October 9, 2015, adding a count in Equity against the Clerk of Courts, Donald O'Shell. Prior to this Court ruling on the Amended Appeal, Mr. O'Shell took a one year leave of absence for National Guard duty overseas, which placed the matter on further hold. However, in early April of 2016, we received notice of a landmark decision from the Commonwealth Court, *Gingrich v. Commonwealth Department of Transportation*, 748 C.D. 2015, 2016 WL 1232735 (Pa. Cmwlth. 2016). It is vitally important to note that PennDOT (to its everlasting credit in that case) chose **NOT** to further appeal the decision in *Gingrich* to the Pennsylvania Supreme Court, thereby solidifying the law of our Commonwealth with regard to the equitable matters associated with these types of delayed reporting cases. Interestingly, even though the *Gingrich* case arose from a conviction in York County, the resulting Statutory Appeal took place in our neighboring Cumberland County due to the residence of Ms. Gingrich. The Commonwealth Court's *Gingrich* Opinion makes specific reference to the colossal number of delayed reporting cases in York County over a period of **ten years**, and even quotes the language of the Cumberland County Court in describing such wholesale delays as "truly unconscionable." Obviously, the delayed reporting situation in York County was squarely on the mind of the Commonwealth Court when it issued its *Gingrich* Opinion, and was at least partially the foundation for an

exception to the previously stringent case line in delayed reporting cases. Based upon our review of the Commonwealth Court's *Gingrich* Opinion, which we will discuss below, we find that it is now appropriate to move forward to dispose of Appellant Spence's case at this time.

## **II. DISCUSSION**

In the *Gingrich* Opinion, the Commonwealth Court first discussed its recent decision in *Smires, supra*, and the line of precedent cases with regard to delays in driver's license suspension matters. In *Department of Transportation, Bureau of Driver Licensing v. Green*, ... 546 A.2d 767 (Pa.Cmwlt.1988), *affirmed without opinion*, ... 569 A.2d 350 (Pa.1990)(involving a 14-month delay), the Court explained that the Department is responsible for imposition of the legislatively mandated array of sanctions which the law uses to keep unsafe drivers off the roads for stated periods, and that a material breach of that non-discretionary duty by PennDOT of its statutory responsibility would "invalidate the legal effectiveness of such a sanction." *Id.* at 769. The Court further explained that if the effectiveness of the Vehicle Code sanctions became dependent upon "scores of court clerks and hundreds of functionaries within the minor judiciary", then the vehicle safety laws would be vulnerable to delays within a system "where detection and correction of official failure would be much more difficult." *Id.*

In 1998, the Commonwealth Court had early-on established a two-prong test for these types of delayed reporting cases in *Pokoy v. Department of Transportation, Bureau*

of *Driver Licensing*, 714 A.2d 1162 (Pa.Cmwlth.1998)(involving a four-year delay in notifying the Department):

In order for Appellant to successfully challenge [PennDOT's] license suspension, she bears the burden of establishing: (1) that there was an unreasonable delay *that was attributable to [PennDOT]*; and (2) that the delay caused her to believe that her operating privileges would not be impaired and that she relied on this belief to her detriment.

*Id.* at 1164 (emphasis supplied). Because the licensee could not meet the first prong of the two-part test, the Commonwealth Court upheld the license suspension in *Pokoy*.

In *Department of Transportation, Bureau of Driver Licensing v. Claypool*, 618 A.2d 1231 (Pa.Cmwlth.1992)(23-day delay), the Court determined that the 10-day deadline for a Clerk of Court to notify the Department of a conviction is directory, not mandatory, and that there is a distinction between the mandatory and directory use of the word “shall”:

To hold that a provision is directory rather than mandatory, does **not** mean that it is optional—to be ignored at will. ***Both mandatory and directory provisions of the legislature are meant to be followed.*** It is only in the ***effect*** of non-compliance that a distinction arises. A provision is mandatory when failure to follow it renders the proceedings to which it relates illegal and void; it is directory when the failure to follow it does not invalidate the proceedings. (emphasis supplied)

*Claypool*, 618 A.2d at 1232–33 (quoting *Pleasant Hills Borough v. Carroll*, 125 A.2d, 466, 469 (Pa.Super.1956) (emphasis in original and supplied).

The reason for the Court’s decision to grant the Preliminary Objections in *Smires* was explained in part as follows:

Licensees may challenge their suspensions for any reason, including the Clerk's delay in reporting them to PennDOT. Unfortunately for Licensees, the precedent has established that PennDOT cannot be faulted for delays not within its control. Simply because the case law is not in Licensees' favor does not mean they are entitled to more than their statutory appeal. It does mean they do not have a clear right to relief. Mandamus does not lie where the petitioner has another appropriate and adequate remedy, which Licensees have in the statutory appeal. ***This is the appropriate vehicle by which Licensees can raise all of their constitutional and statutory claims.*** Licensees' statutory appeal includes appellate review. In sum, the statutory appeal is the vehicle by which they can challenge their license suspensions.

*Smires*, 126 A.3d 388-90 (emphasis supplied).

What is critical to observe in *Smires*, as set forth above, is it is the very first time that an Appellate Court has clearly stated that the Statutory Appeal of 75 P.S. §1550 is capable, ***as a matter of law***, to address ***all*** constitutional and statutory claims of a Petitioner in one, unified proceeding at the Court of Common Pleas level. This clarification as to the scope of the Statutory Appeal is very significant and obviously set the stage for the subsequent decision in *Gingrich, supra*.

In *Gingrich*, the Court began by affirming its general rule that a delay must be attributable to the Department before it becomes actionable, but then most importantly concluded that “there may be limited extraordinary circumstances where the suspension loses its public protection rationale and simply becomes an additional punitive measure resulting from the conviction, but imposed long after the fact.” *Gingrich*, 2016 WL 1232735 at 6. The Court then established a three-part test for determining when there may be an exception to its general rule regarding delay:

Where a conviction is not reported for an extraordinarily extended period of time, the licensee has a lack of further violations for a significant number of years before the report is finally sent, and is able to demonstrate prejudice, it may be appropriate for common pleas to grant relief.

*Id.* The Court then looked to the factual background of the appellant/licensee's case in *Gingrich*, and found that she met all three parts of the test. Jaclyn Gingrich had a **2004** conviction that was not reported for nearly *ten years* afterwards in **2014**, and while the Court did not establish a bright line for determining when a delay becomes "extraordinary," it concluded that the delay in the *Gingrich* case met the standard. The Court also found that Ms. Gingrich did not have further violations for a significant number of years before the report was sent. Her license was suspended due to a 2006 conviction and reinstated in 2010, after which she installed an ignition interlock on her vehicle, and renewed her license in 2013. *Id.* She earned an associate's and bachelor's degree, got married, and obtained employment with the United States Department of Agriculture. She also had a five-year-old daughter whom she drove to school. *Id.* With regard to the third part of the test, the Court determined that Ms. Gingrich would be prejudiced if her driver's license was suspended again after such a long delay, because she would no longer be able to transport her daughter to school or herself to work, and she would likely lose her job. Ms. Gingrich also testified that if she had known she would be subject to an additional suspension during the time her license was reinstated, it would have impacted her decisions with regard to marriage and where her child attended school. Having met all three parts of the new test, the Commonwealth Court reversed the

decision of the trial court and vacated Ms. Gingrich's license suspension. The underlying decision by the Cumberland County Court, wherein Ms. Gingrich's Petition was constrained to be denied, was due to the previous line of unyielding cases, as discussed above.

We find the record in Appellant Spence's instant cases to be extremely similar to that of *Gingrich*. The delay after her **2005** conviction was over *nine years*, and the delay after her **2007** conviction was over *seven years*. We find that both delays were for extraordinary periods of time and also contrary to law.

Next, we find that Ms. Spence did not have any further violations for a significant number of years before the reports finally were sent to PennDOT. In fact, Ms. Spence, who we found to be very credible and whose testimony was not contradicted by any other evidence, did not receive so much as a minor traffic ticket since her conviction in 2007. Also, similar to *Gingrich*, Ms. Spence testified with regard to the ways that she has improved herself since her last conviction. She graduated from cosmetology school and holds two regular jobs in addition to performing cosmetology work in her spare time. One of her children has already graduated high school and is attending college, while her younger child has special needs and is still grade school age.

Finally, we find that Ms. Spence would be prejudiced if she were to have her license suspended again. She testified that she does not have alternative transportation, she is a single parent, and she would likely lose her employment and be unable to provide transportation for her son.

Since we find that Appellant meets each element of the three-part *Gingrich* test, and the limited extraordinary circumstances described therein, we will **GRANT** her appeal. Also, since we are granting her the requested relief pursuant to her Statutory Appeal, we collaterally find that the Count in Equity against the Clerk of Courts is unnecessary to properly afford such relief to Ms. Spence, and is therefore deemed **MOOT**, and consequently **DISMISSED**.

### **III. CONCLUSION**

**BASED UPON THE FOREGOING**, we will **GRANT** the Appellant the relief she seeks and **SUSTAIN** her appeal.

**FURTHERMORE**, an Order reflecting the above relief will issue of even date herewith.

**ISSUED AT YORK**, this 10<sup>th</sup> day of May, 2016.

**BY THE COURT:**

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**LAWRENCE F. CLARK, JR., S.J.**

**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**

<b>JENA MELISSA SPENCE,</b>	:	<b>No. 2014-SU-03410-27</b>
<b>Appellant</b>	:	<b>No. 2014-SU-03969-27</b>
	:	
<b>v.</b>	:	
	:	
<b>COMMONWEALTH OF</b>	:	
<b>PENNSYLVANIA DEPARTMENT</b>	:	
<b>OF TRANSPORTATION and</b>	:	
<b>DONALD O'SHELL, CLERK OF</b>	:	<b>License Suspension Appeal</b>
<b>COURTS OF YORK COUNTY</b>	:	<b>75 P.S. §1550</b>
<b>PENNSYLVANIA</b>	:	<b>Judge: L. F. Clark, Jr., S.J.</b>

**APPEARANCES:**

**For the Appellant: Richard H. Mylin, III, Esquire**  
**For the Commonwealth: Christopher J. Johnson, Esquire**

**COURT ORDER**

**AND NOW**, to wit, this 10th day of May, 2016, it is hereby **ORDERED** and **DECREED** that Appellant's Statutory Appeals of her driver's license suspensions are **SUSTAINED**, for the reasons stated in the Opinion that accompanies this Order. The Count in Equity contained in Appellant's Amended Appeal is **DISMISSED** as moot.

The Prothonotary shall provide notice of this Order, together with the accompanying Opinion, as required by law.

**ISSUED AT YORK**, the date first above written.

**BY THE COURT:**

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**LAWRENCE F. CLARK, JR., S.J.**

