

IN THE COMMON PLEAS COURT OF FAIRFIELD COUNTY
FAIRFIELD COUNTY, OHIO

FILED
2015 MAY -4 AM 9:51

JOHN WALSH, ATTORNEY GENERAL'S OFFICE

Appellant,

MAY 06 2015

Case No. 15CV143

v.

EXECUTIVE AGENCIES

Judge Berens

OHIO BUREAU OF MOTOR
VEHICLES,

Appellee.

ENTRY – Regarding Appellee's Motion
to Dismiss for Lack of Subject-Matter
Jurisdiction

STATEMENT OF THE CASE

This matter is before the Court upon the Motion of Appellee Ohio Bureau of Motor Vehicles to Dismiss for Lack of Subject-Matter Jurisdiction ("Motion to Dismiss"), filed April 3, 2015. Appellant John Walsh filed a Memorandum Contra on April 22, 2015. Appellee filed a Reply in Support of its Motion on April 28, 2015. For the reasons set forth below, the Court **TAKES UNDER ADVISEMENT** BMV's Motion to Dismiss.

LAW AND ANALYSIS

R.C. 119.12 sets forth the statutory requirements for a party appealing an agency-issued order pursuant to an adjudication that revokes a license. Strict compliance with R.C. 119.12 is "necessary because when the right to appeal is conferred by statute, the appeal can be perfected only in the mode prescribed by statute." *Evans v. Ohio Dep't of Ins.*, 5th Dist. Delaware No. 04 CA 80, 2005-Ohio-3921, ¶ 19. (Citation omitted).

R.C. 119.12 states in relevant part:

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by

*reliable, probative, and substantial evidence and is not in accordance with law. The **notice of appeal shall also be filed by the appellant with the court.** In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice. Unless otherwise provided by law relating to a particular agency, **notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order** as provided in this section.*

“The failure to file a copy of the notice of appeal within the fifteen-day period as set forth in R.C. 119.12 deprives the common pleas court of jurisdiction over the appeal.” *Nibert v. Ohio Dep't of Rehab. & Corr.*, 1998-Ohio-506, 84 Ohio St. 3d 100, 702 N.E.2d 70, 71. “[I]t is clear from the statute's own language that the fifteen-day filing requirement applies to both the notice of appeal and the copy of the notice filed with the court.” *Id.* (Holding that the common pleas court did not have jurisdiction because copy of the notice of appeal was filed with the court beyond the fifteen day requirement, despite the fact that the notice of appeal was timely filed with the agency).

Appellee asserts that the Court lacks subject-matter jurisdiction because Appellant failed to serve the Ohio Bureau of Motor Vehicles with its notice of appeal within the fifteen days required by R.C. 119.12. Although Appellant timely filed his notice of appeal to the Court, Appellee contends that Appellant did not timely file his notice of appeal to the Ohio Bureau of Motor Vehicles as the notice was not received until March 16, 2015, twenty days after the agency's order was mailed—as evidenced by an agency timestamp on the envelope purported to have contained Appellant's notice of appeal.¹ Appellant counters that the notice of appeal was mailed to the Ohio Department of Public Safety on March 3, 2015. He asserts that his notice of appeal was filed with the Court on March 5, 2015 and appears to ask the Court to not hold it against Appellant that there was allegedly an eleven day delay. Finally, Appellant asserts that

¹ Appellee's Reply in Support attaches a purported image of the envelope containing the notice of appeal with a March 12, 2015 post-mark date.

this matter should be decided on the merits and the delay should not operate as an automatic barrier to appeal.

As an initial matter, the Court notes that the Fifth District had the opportunity to decide whether there is a presumption of timely delivery of the mail in *Evans* but appears to have declined to do so. In *Evans* the Fifth District noted that the Seventh District rejected this argument on the basis that it did not constitute strict compliance with a jurisdictional prerequisite. *Evans*, at ¶ 23; *Blasko v. State Bd. of Pharmacy*, 7th Dist. Mahoning No. 00 CA 98, 143 Ohio App.3d 191, 2001-Ohio-3270, 757 N.E.2d 846, 847–48. The Fifth District then went on to “presume a timely delivery of the notice of appeal” and held that the appellant still failed to comply with R.C. 119.12. *Blasko*, at ¶¶ 23-26. Therefore, the Fifth District does not appear to have definitively ruled on this issue, and the Court can look to the opinions of other courts of appeals, issued after May 1, 2002, for legal authority and give those opinions such weight as deemed appropriate. Rep.Op.R. 3.4.

The Tenth District found that “[d]epositing the notice of appeal in the mail does not constitute a filing under R.C. 119.12. To be timely filed, a notice a notice [sic] of appeal must be received within the time period set forth in R.C. 119.12.” *Pole v. Ohio Dept. of Health*, 10th Dist. Franklin No. 08AP-1110, 2009-Ohio-5021, ¶ 14. The Eighth District similarly found that “depositing a notice of appeal in the mail does not satisfy the filing requirement set forth in R.C. 119.12. . . . [T]he filing of the notice of appeal in a timely fashion is a jurisdictional requirement of R.C. 119.12 that cannot be waived and must be strictly followed.” *Watts v. Ohio Dept. of Ins.*, 8th Dist. No. 87849, 2007-Ohio-81, ¶ 12.

The Court notes that Appellant’s Memorandum Contra fails to cite any caselaw supporting the position that depositing the notice of appeal in the mail constitutes a filing under

R.C. 119.12. For that matter, Appellant provides no caselaw whatsoever to support his position. Although the Fifth District does not appear to have taken a stance on the presumption of timely delivery of a notice of appeal under R.C. 119.12, the Court finds the approach taken by other Districts holds great weight.

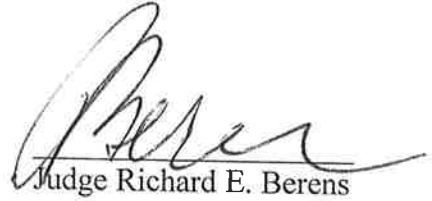
The Court next turns to the matter of Appellee's exhibits. Specifically, Exhibits A(1) and A(2), which purport to show that Appellant's Notice of Appeal was not received by Appellee until March 12, 2015, Appellee's Reply in Support, Exhibits A(1) and A(2), as well as Exhibit 3, Appellee's Motion to Dismiss, Certified Record, Table of Contents, Ex. 3, which purports to show an agency time stamp of March 16, 2015. Even if Appellant had a presumption of timely delivery, this presumption could be rebutted by an actual showing that Appellant's Notice of Appeal was not received within fifteen days of the agency's order. Appellee asserts that the scanned copies of the envelope shows that Notice was not sent until March 12, 2015 and was not received until March 16, 2015. However, the Court is unable to discern clearly the date on copy of the envelope purporting to show the postmark date of March 12, 2015. Moreover, the copied image with an agency timestamp of March 16, 2015, alone, does not show that this was the actual envelope Appellant sent. Therefore, the Court accepts Appellee's offer to make the original envelope available to the Court and **ORDERS** that Appellee make available to the Court the original envelope described in Exhibit A(1) of Appellee's Reply in Support and the Ex. 3 of the Certified Record.

CONCLUSION

For the reasons set forth above, the Court **TAKES UNDER ADVISEMENT** Appellant's Motion to Dismiss. The Court **ORDERS** Appellee to provide the Court with the original

envelope wherein Appellant was alleged to have submitted his Notice of Appeal within 7 days of the filing of this Entry.

IT IS SO ORDERED.



Judge Richard E. Berens

Copies to:

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