[Cite as 5455 Clarkins Drive, Inc. v. Ohio Liquor Control Comm., 2012-Ohio-1375.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| 5455 Clarkins Drive, Inc. [et al.], | : | |
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| Appellants-Appellants, | : | |
| v. | : | No. 11AP-568 (C.P.C. No. 10CVF-03-3347) |
| Ohio Liquor Control Commission, | : | (REGULAR CALENDAR) |
| Appellee-Appellee. | : | (REGULAR CALENDAR) |

DECISION

Rendered on March 29, 2012

James Vitullo, for appellants.

Michael DeWine, Attorney General, and Paul Kulwinski, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

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{¶ 1} Appellants, 5455 Clarkins Drive, Inc. ("Clarkins") and Vitturo Rucci ("Vitturo"), appeal from a judgment rendered by the Franklin County Court of Common Pleas dismissing the administrative appeal challenging two orders of appellee, the Ohio Liquor Control Commission ("Commission"), which affirmed two orders of the Ohio Department of Commerce, Division of Liquor Control ("Division"). The orders regard the nonrenewal of liquor permit No. 2759612, a class D-5A-D-6 liquor permit once held by Clarkins, and the denial of an application for a change in corporate stock ownership. For the reasons that follow, we affirm.

{¶ 2} Permit No. 2759612 was issued to Clarkins in December 2007. The permit premises is an adult entertainment establishment known as The Go-Go Cabaret in Austintown Township, Mahoning County, Ohio. Clarkins leased the premises from Chatur Corporation. Attached to the cabaret were a hotel, restaurant, and a bar. Robert Neill ("Neill") was the sole shareholder of Clarkins's stock and also served as the manager of the cabaret. Financing for the cabaret was provided by Sebastian Rucci ("Sebastian").

{¶ 3} In October 2008, Clarkins applied to renew permit No. 2759612 for the 2009-2010 period. At the time, it also applied to change its corporate stock ownership from Neill to Vitturo. The Board of Trustees for Austintown Township ("Austintown") filed a resolution objecting to these applications. The matters presented to the Division for a hearing on March 16, 2009. On June 12, 2009, the Division issued an order denying both applications. Clarkins and Vitturo appealed to the Commission. On February 8, 2010, the matters presented to the Commission for a hearing ("nonrenewal hearing"). On February 10, 2010, the Commission affirmed the Division's orders, and appellants appealed to the Franklin County Court of Common Pleas.

{¶ 4} Therefore, the instant matter regards applications for a permit renewal and for a change in corporate stock ownership.¹ However, permit No. 2759612 was also the subject of a prior administrative citations action. Indeed, that matter presented before the Commission for a hearing on November 16 and 17, 2009 ("administrative citations hearing"). At the conclusion of the administrative citations hearing, permit No. 2759612 was revoked. An administrative appeal to the common pleas court was dismissed because Clarkins failed to comply with R.C. Chapter 119. An appeal to this court was dismissed because clarkins failed to comply with R.C. Chapter 119. An appeal to this court was dismissed because no timely notice of appeal supported it. *See 5455 Clarkins Drive, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 10AP-339 (May 12, 2010) (journal entry), *reconsideration denied*, 10th Dist. No. 10AP-339 (June 24, 2010) (memorandum decision). The Ohio Supreme Court declined to undertake a discretionary review. *See 5455 Clarkins Drive, Inc. v. Ohio Liquor Control Comm.*, 126 Ohio St.3d 1585, 2010-Ohio-4542, *reconsideration denied*, 127 Ohio St.3d 1449, 2010-Ohio-5762.

 $\{\P 5\}$ Following the conclusion of the administrative citations action, the Commission filed a motion to dismiss this nonrenewal action. It argued that the issue of

¹ Because the arguments do not separate these two applications in any way, we will analyze them together.

nonrenewal was moot because the liquor permit was defunct, and nothing was left to renew. On December 22, 2010, the trial court agreed and issued a judgment dismissing this action. Clarkins has appealed and raises the following six assignments of error:

1. The Trial Court Erred in Not Considering Appellants' Motions Because the Time to Appeal Had Not Run.

2. The Trial Court Erred in Finding the Case Moot Because There Are Collateral Consequences to the Revocation Being Appealed.

3. The Trial Court Erred in Finding the Case Moot Because the Evidence at the Administrative Hearing Postdates the Objections Specified in the Resolution.

4. The Trial Court Erred in Finding the Case Moot Because the Record Lacks a Request for a Citation by the Township Police to Initiate the Citations.

5. The Trial Court Erred in Finding that it Lacked Jurisdiction to Hear the Timely Filed Motion to Suppress the Warrantless Electronic Evidence.

6. The Trial Court Erred in Holding That the Case Is Moot Because the Commission[']s Conduct Violated a Federal Injunction.

 $\{\P 6\}$ For ease of discussion, we will address these assignments of error out of order. Where assignments of error are interrelated, we will address them together. Initially, we address appellants' first assignment of error, which regards the trial court's denial of appellants' post-judgment motions.

{¶ 7} As background, the Commission filed its motion to dismiss on December 2, 2010. On December 22, 2010, the trial court dismissed this matter. Then, on January 5, 2011, appellants filed a motion for leave to file a response to the Commission's motion to dismiss. Also, on January 5, 2011, appellants' filed a motion to suppress evidence presented during the hearing before the Commission. Finally, on January 24, 2011, appellants filed a motion for leave to file a reply in response to the Commission's motion to dismiss. On June 21, 2011, the trial court denied appellants' post-judgment motions.

{¶ 8} In support of their first assignment of error, appellants note that the trial court's December 22, 2010 judgment did not expressly direct the clerk of courts to serve the parties with the judgment. Appellants also note that the docket does not expressly demonstrate service of the judgment on the parties. As a result, appellants argue that the time for filing an appeal was tolled.

{¶ 9} While this argument is legally sound, it nevertheless has no application to appellants' first assignment of error. Civ.R. 58(B) provides: "The failure of the clerk to serve notice [of the judgment] does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A)." Under App.R. 4(A), an appeal is timely if a notice of appeal is filed "within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." Thus, if the clerk fails to timely serve the parties, then App.R. 4(A) tolls the time period for filing a notice of appeal until the clerk accomplishes service. *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008-Ohio-1444, ¶ 16, citing *In re Anderson*, 92 Ohio St.3d 63, 67 (2001). If the clerk never accomplishes service under Civ.R. 58(B), then the 30-day time period never begins to run. *Frazier v. Cincinnati School of Med. Massage*, 1st Dist. No. C-060359, 2007-Ohio-2390, ¶ 25; *see also Huntington Natl. Bank v. Zeune*, 10th Dist. No. 08AP-1020, 2009-Ohio-3482, ¶ 12 (the 30-day appeal period is indefinitely tolled if the clerk never accomplishes service).

{¶ 10} As is clear, the clerk's failure to accomplish service under Civ.R. 58(B) affects the timeliness of an appeal. Therefore, based upon the record before us, appellants' appeal was timely. Nowhere is this disputed. Importantly, however, in no way does this demonstrate error on the part of the trial court. Further, nowhere within appellants' first assignment of error is there an argument challenging the trial court's denial of appellants' post-trial motions. Appellants simply state that the trial court did not consider their motions. In fact, however, the trial court did consider appellants' post-judgment motions and denied them after noting that it had already dismissed this matter. Rather than demonstrating error on the part of the trial court in denying appellants' post-judgment motions, appellants merely present baseless accusations and cite procedural

rules regarding the timeliness of the appeal. Because their first assignment of error does nothing more, appellants have failed to satisfy their burden of affirmatively demonstrating error on the part of the trial court. *See Wray v. Parsson*, 101 Ohio App.3d 514, 518 (9th Dist.1995), *appeal not allowed*, 73 Ohio St.3d 1413, *reconsideration denied*, 73 Ohio St.3d 1455, (observing that an appellant bears the burden of affirmatively demonstrating error on appeal); *see also US Bank Natl. Assn. v. Collier*, 10th Dist. No. 08AP-207 2008-Ohio-6817, ¶ 25.

{¶ 11} We next address appellants' third assignment of error, which regards the evidence presented during the Commission hearing. Appellants argue that the evidence presented during the hearing went beyond the statutory confines of R.C. 4303.271. According to appellants, the evidence should have been limited to the reasons for refusal specified in R.C. 4303.292(A) and in Austintown's objections. The focus of appellants' argument is that the Commission relied upon events that occurred after Austintown's objections.

{¶ 12**}** R.C. 4303.271 provides:

(A) Except as provided in divisions (B) and (D) of this section, the holder of a permit issued under sections 4303.02 to 4303.232 of the Revised Code, who files an application for the renewal of the same class of permit for the same premises, shall be entitled to the renewal of the permit.

With respect to the permits Clarkins once held, D-5A permits are issued under R.C. 4303.181, while D-6 permits are issued under R.C. 4303.182.

 $\{\P \ 13\}$ R.C. 4303.271(B) allows a board of township trustees to file objections to an application to renew a liquor permit for premises located within the township. *Id.* Objections must be made by a resolution of the board, must be based upon reasons contained within R.C. 4303.292(A), and must specifically state those reasons in the resolution. *See* R.C. 4303.271(B).

{¶ 14} R.C. 4303.292 lists the potential grounds for refusing to issue, transfer, or renew a permit and provides in pertinent part:

(A) The division of liquor control may refuse to * * * renew * * * any retail permit issued under this chapter if it finds[:]

(1) That the applicant * * * or, if the applicant is a corporation * * *, any shareholder owning five per cent or more of the applicant's capital stock in the corporation[:]

* * *

(b) Has operated liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state[.]

{¶ 15} On December 22, 2008, Austintown adopted a resolution within which it objected to the renewal of permit No. 2759612 for the 2009-2010 period. One of the stated reasons for objecting was that Clarkins had operated the cabaret in a manner demonstrating a disregard for the laws, regulations, and local ordinances of Ohio.

{¶ 16} During the February 8, 2010 nonrenewal hearing, the transcript from the administrative citations hearing was offered into evidence. No objection was raised by appellants at that time. (February 8, 2010 Tr. 13.) Thus, appellants have waived any purported error on the part of the Commission in relying on this evidence. Moreover, the evidence revealed that Clarkins had operated the cabaret in a manner demonstrating a disregard for the laws, regulations, and local ordinances of Ohio. Indeed, the evidence generally demonstrated that crimes had been committed within the cabaret. While appellants note that these crimes occurred after Austintown's objections, this is immaterial to our analysis. Indeed, the relevant analysis regards the permit holder's operations at the time of the application and rejection. *In re Mendlowitz*, 9 Ohio App.2d 83, 87 (10th Dist.1997). In this regard, the rejection occurred on June 12, 2009. The evidence in dispute preceded this rejection and helped illustrate how the cabaret was being operated. For the foregoing reasons, we reject appellants' argument that this evidence could not be considered by the Commission.

{¶ 17} We next address appellants' second, fourth, fifth, and sixth assignments of error. In their second assignment of error, appellants argue that they may experience collateral consequences as a result of the revocation of their liquor permit. More specifically, appellants suggest that the revocation might be used to deny a liquor permit

in the future. In appellants' fourth assignment of error, they suggest that procedural irregularities occurred during the administrative citations action. Appellants' fifth assignment of error regards the trial court's denial of a motion to suppress evidence presented during the administrative citations action. Finally, in appellants' sixth assignment of error, they argue that the Commission violated a federal injunction during the administrative citations.

{¶ 18} None of these assignments of error regard the nonrenewal of appellants' liquor permit. As is clear, appellants repeatedly attempt to inject issues that have no relevance to the instant proceedings. Each of these assignments of error regards the administrative citations action and the resulting revocation of appellants' permit. These issues are not properly before us. Importantly, appellants already had the opportunity to present these challenges, and res judicata prevents us from considering them at this time. As is clear, at the conclusion of the administrative citations action, appellants' permit was revoked. Consequently, there is no liquor permit to renew. Appellants are no longer a "holder of a permit" under R.C. 4303.271. We therefore conclude that the trial court properly dismissed this challenge to the nonrenewal of appellants' permit. For these reasons, we reject the arguments supporting appellants' second, fourth, fifth, and sixth assignments of error.

{¶ 19} Based upon the foregoing, we overrule each of appellants' six assignments of error and affirm the judgment rendered by the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.