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IN THE
COURT OF APPEALS OF INDIANA

INDIANA STATE POLICE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1104-MI-304
	)	
TYJUAN MAYES,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Ronalds Walker, Judge Pro Tempore
Cause No. 49D04-1002-MI-5172

September 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Mayes filed a petition for review of an administrative agency action under the Indiana Administrative Orders and Procedures Act (AOPA). Specifically, he sought judicial review of the revocation of his license to carry a handgun by the Indiana State Police (ISP). After initially dismissing the action upon motion by the ISP, the trial court later granted Mayes's motion to reconsider the dismissal and ordered the ISP to reissue the handgun permit. On appeal, the ISP presents the following restated issue for review: Did the trial court err in granting the motion to reconsider where Mayes failed to file the original or a certified copy of the agency record as required by Ind. Code Ann. § 4-21.5-5-13(a) (West, Westlaw through 2011 1st Regular Sess.)?

We reverse.

On February 5, 2010, Mayes filed a verified petition for judicial review from an ISP administrative hearing.[1] Mayes did not file the agency record within thirty days of filing his petition, nor did he seek an extension of time in which to submit the record. On April 5, 2010, ISP filed a motion to dismiss based upon Mayes's failure to file the original or a certified copy of the agency record. The trial court dismissed the action on May 7, 2010.

Mayes filed a motion to reconsider on May 14, 2010, to which he appended an uncertified copy of the three-page decision of the administrative law judge (the ALJ decision). Mayes argued that the decision to dismiss for failure to file the agency record is discretionary. Given his belated "submission of the Indiana State Police ruling," Mayes

[1] Mayes attached one exhibit to the petition. This exhibit is a notice of intent not to file charges, filed in the Marion Superior Court, Criminal Division, Room 3, by the Marion County Prosecutor's Office on September 3, 2009. There is no indication whether this document was presented in the administrative hearing. *See Izaak Walton League of Am., Inc. v. DeKalb County Surveyor's Office*, 850 N.E.2d 957, 965 (Ind. Ct. App. 2006)

requested that the court "reconsider the Order granting [ISP's] request for dismissal, and allow this matter to proceed on its merits." *Appendix* at 33. Following a hearing on the motion to reconsider and briefing by both parties, the trial court granted Mayes's motion to reconsider on March 22, 2011 and included a sua sponte order terminating the revocation of Mayes's permit to carry a handgun.[2] In reaching its decision, the trial court expressly considered the petition for review, the ALJ decision, and the notice of intent not to file charges.

On appeal, ISP argues, among other things, that the trial court erred in considering the ALJ decision, which was improperly and untimely filed by Mayes. Moreover, ISP contends that under the circumstances the trial court was required to dismiss the action.[3]

In *Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367 (Ind. 2010), our Supreme Court addressed the effect of a petitioner's failure to follow AOPA's requirements regarding the filing of the agency record. I.C. § 4-21.5-5-13 provides in relevant part as follows:

> (a) Within thirty (30) days after the filing of the petition, or within further time allowed by the trial court or by other law, the petitioner shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action ...

("parties cannot attempt to include in the record materials and evidence that supports their position but that was not previously introduced during the challenged agency proceeding"), *trans. denied*.

[2] Directly contrary to the findings of the ALJ, the trial court found that Mayes acted in self-defense when he fired his handgun twice during the incident that led to the revocation of his permit. As a result, the court concluded that "the initial revocation of January 4, 2010, was without any basis or proof and was therefore both arbitrary and capricious." *Appendix* at 60.

[3] We note that Mayes has not filed an appellate brief in this matter. "When an appellee fails to submit a brief, we do not undertake the burden of developing arguments on the appellee's behalf, and we apply a less stringent standard of review with respect to showings of reversible error." *Christy v. Sebo*, 930 N.E.2d 1154, 1158 (Ind. Ct. App. 2010). Thus, ISP may prevail by establishing prima facie error, which is "error at first sight, on first appearance, or on the face of it." *Id*.

> (b) ... Failure to file the record within the time permitted by this subsection, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.

The Supreme Court explained that this statute squarely places on the petitioner the responsibility to timely file the agency record. *Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367. "Although the statute allows a petitioner to seek extensions of time from the trial court,…the statute does not excuse untimely filing or allow nunc pro tunc extensions." *Id.* at 370. The Court held that a trial court has "no authority to grant an extension of time to file the record in a petition for review of an administrative agency action under [AOPA] if the record is not filed within the required statutory period or any authorized extension of this period." *Id*. at 368.

In the instant case, Mayes has never disputed that he failed to timely file the agency record. Despite this, the trial court accepted and considered the ALJ decision, which Mayes appended to his motion to reconsider. The trial court had no authority to effectively allow Mayes to file the agency record outside of the statutory deadline. *See Indiana Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367.

An issue left undecided by the Supreme Court in *Meyer* is whether the trial court has discretion to allow the case to proceed where a complete record of the proceedings has not been filed. Only four justices participated in the decision.[4] Justices Boehm and Rucker were of the opinion that the documents attached to the petitioner's timely petition for judicial review, taken together with the respondent's answer, were "sufficient to decide the principal

issue presented for judicial review." *Id*. at 371. The justices observed:

> Generally, submitting only selected documents from the agency record does not comply with the requirement of Indiana Code § 4-21.5-5-13(a) that the agency record be filed. But imperfect compliance with the filing requirement is not always fatal. A petition for review may be accepted if the materials submitted provide the trial court with "all that is necessary ... to accurately assess the challenged agency action."

Id. (citations omitted). Because the respondent had admitted the valuation error ("[t]he only issue the [petitioner] raised requiring any information from the record"), the justices concluded that the record as it stood at the time of the motion to dismiss was sufficient to resolve the issue presented in favor of the petitioner. *Id*.

On the other hand, Chief Justice Shepard and Justice Dickson were of the mind that a petitioner's failure to file the original or a certified copy of the complete agency record within the period provided by AOPA requires dismissal of the petition for judicial review. They explained in part as follows:

> Whether under some theory a judicial review might proceed with a minimalist record, such a concept is plainly a slippery slope, setting in motion regular satellite litigation (like the present case) in which private citizens and the taxpayers will spend time and money contesting whether a record is "complete enough." It is not a good idea[.]

Id. at 374.

We need not decide the question left open in *Meyer* because under either analysis dismissal of Mayes's action is required. As we have already determined above, the trial court could not consider the belatedly filed ALJ decision. This is not a situation, like in *Meyer*, where the petitioner failed to file a complete agency record. Rather, this petitioner failed to

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4 Justice Sullivan did not participate.

timely file one at all. Moreover, in contrast to the unusual circumstances in *Meyer*, the respondent did not admit the alleged error in its answer before seeking dismissal.

In sum, there was simply nothing before the trial court upon which the agency action could be accurately reviewed or the relief sought could be granted. In other words, even if a trial court has discretion to hear a case where a full record has not been filed, the materials before the trial court in this case did not provide it with "'all that is necessary ... to accurately assess the challenged agency action.'" *Id*. at 371 (quoting *Izaak Walton League of Am., Inc. v. DeKalb County Surveyor's Office*, 850 N.E.2d at 965). The trial court erred in granting Mayes's motion to reconsider.

Judgment reversed.

DARDEN, J., and VAIDIK, J., concur.