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NO. COA11-144
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

CHRISTOPHER KERRY MOSS
Petitioner

v.

Lincoln County
No. 10 CVS 377

STATE OF NORTH CAROLINA
Respondent

Appeal by respondent from order entered 30 September 2010 by Judge F. Lane Williamson in Lincoln County Superior Court.¹ Heard in the Court of Appeals 6 June 2011.

No brief filed for petitioner.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State.

THIGPEN, Judge.

The State of North Carolina ("the State") appeals from an order reversing the revocation of Christopher Moss' ("Petitioner") driving privileges pursuant to N.C. Gen. Stat. § 20-16.2 (2009). Because there is sufficient evidence in the record to support the administrative hearing officer's findings

¹We note that the caption on the Order incorrectly lists the court as Lincoln County District Court.

of fact and the findings of fact support the conclusions of law, we conclude the trial court erred by reversing the revocation of Petitioner's driving privileges.

On 10 February 2009, Trooper Jonathan Futrell ("Trooper Futrell") of the North Carolina State Highway Patrol was called to the scene of a motor vehicle accident. Trooper Futrell received reports that a white male was seen walking away from the accident, and the badly damaged truck involved in the accident was registered to a person named "Moss." As he neared the intersection of the accident, Trooper Futrell observed a small four-door passenger vehicle and stopped the vehicle to check for injuries related to the accident. When Trooper Futrell stopped the car, Justin Beam was driving, and Petitioner was the only passenger. Trooper Futrell observed that Petitioner had fresh cuts that were still bleeding, smelled strongly of alcohol, was sweating profusely, and could not stand up without leaning against the car.

Beam told Trooper Futrell that Petitioner had come to his door asking for a ride because he had just been in an accident. Beam then got into his car to drive Petitioner home. Petitioner admitted he was in the truck involved in the accident, but claimed Allen Roberts had been driving his truck when the

accident occurred. Trooper Futrell contacted the Cherryville Police Department and learned that Roberts was intoxicated at home at the time of the accident. When Trooper Futrell told Petitioner that Roberts was at home and could not have been driving, Petitioner said he did not know who was driving the truck. Trooper Futrell placed Petitioner under arrest for driving while impaired, and Petitioner refused to submit to an onsite alcosensor test. At the police station, Petitioner also refused to sign a rights form and refused to submit to a chemical analysis of his breath.

The Division of Motor Vehicles ("DMV") revoked Petitioner's driving privileges pursuant to N.C. Gen. Stat. § 20-16.2 after it received affidavits in which Trooper Futrell claimed to have reasonable grounds to believe Petitioner operated a vehicle on the public highway while committing the implied consent offense of impaired driving and willfully refused to submit to a chemical analysis of his breath. Petitioner requested an administrative hearing to contest the revocation of his driving privileges, and on 16 February 2010, an Administrative Hearing Officer of the DMV ("hearing officer") filed an order upholding the revocation of Petitioner's driving privileges because Petitioner willfully refused to submit to a chemical analysis.

Petitioner initiated a civil action seeking judicial review of the hearing officer's decision. After a hearing, the trial court entered an order on 30 September 2010 reversing the hearing officer's revocation of Petitioner's driving privileges. The trial court found there was insufficient evidence from which Trooper Futrell could have properly established probable cause that Petitioner was the operator of the motor vehicle. The trial court determined it could not conclude probable cause existed that Petitioner had committed an implied-consent offense prior to being asked to submit to a chemical breath analysis. The State appeals from this order.

The State argues on appeal the trial court erred by reversing the hearing officer's decision to revoke Petitioner's driving privileges because the hearing officer's findings of fact were supported by competent evidence and the findings in turn support the conclusions of law. We agree.

North Carolina General Statutes section 20-16.2(a) provides that "[a]ny law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense² may obtain a chemical analysis of the person."

²N.C. Gen. Stat. § 20-16.2 defines "implied-consent offense" as "an offense involving impaired driving or an alcohol-related offense made subject to the procedures of this section. A

If the person charged refuses to submit to a chemical analysis, his or her license will be revoked for twelve months. N.C. Gen. Stat. § 20-16.2(d). However, the person charged may request a hearing before the DMV to contest the revocation. *Id.* The hearing before the DMV shall be limited to consideration of whether:

- (1) The person was charged with an implied-consent offense . . . ;
- (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense . . . ;
- (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;
- (4) The person was notified of the person's rights as required by subsection (a); and
- (5) The person willfully refused to submit to a chemical analysis.

Id.

If the revocation is sustained following the DMV hearing, the person whose license has been revoked has the right to file a petition in the superior court whereupon "[t]he superior court

person is 'charged' with an offense if the person is arrested for it or if criminal process for the offense has been issued." N.C. Gen. Stat. § 20-16.2(a1).

review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e). Our review on appeal from a trial court order in a revocation proceeding is the same standard of review employed at the superior court level. *Hartman v. Robertson*, __ N.C. App. __, __, 703 S.E.2d 811, 813 (2010). Because the superior court acts as an appellate court, we do not review additional findings of fact made by the superior court. *Lee v. Gore*, __ N.C. App. __, __, 698 S.E.2d 179, 184 (2010) (citations omitted).

A. Findings of Fact

The State first argues the trial court erred by determining that "[t]here is insufficient evidence in the record from which Trooper Futrell could have properly established probable cause that the Petitioner was the operator of the motor vehicle in question." We agree.

"In the license revocation context, the term 'reasonable grounds' is treated the same as 'probable cause.'" *Hartman*, __ N.C. App. at __, 703 S.E.2d at 814 (citations omitted). "Probable cause exists if the facts and circumstances at that

moment and within the arresting officer's knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the suspect had committed or was committing a crime." *Id.* (citations omitted).

In this case, Trooper Futrell testified as follows at the hearing:

When he was walking, uh, [Petitioner] did state that . . . Allen Roberts was driving the vehicle. While on the scene I contacted my com[munication] center and had them contact Cherryville PD. Cherryville PD went to [the] home of Allen Roberts and Allen Roberts was passed out on the couch impaired. Uh, so it was obvious that Mr. Roberts was driving the truck.³ When I

³Although Trooper Futrell stated, "[I]t was obvious that Mr. Roberts was driving the truck," when we consider this comment in its broader context, we conclude it was likely either a transcriber's error or a *lapsus linguae*. See *State v. Gray*, 292 N.C. 270, 286, 233 S.E.2d 905, 915 (1977) (holding that the defendant's statement that his birthday was "February 17, 1974," was either a *lapsus linguae* or a typographical error where it was clear from the defendant's own testimony that he was more than sixteen years old); *State v. Kandies*, 342 N.C. 419, 445, 467 S.E.2d 67, 81 (1996) (holding that the expert witness' testimony that blood found in the laundry room of the defendant's house was "Hemoglobin Type 1" blood was a *lapsus linguae* because there is no such thing as Hemoglobin Type 1 blood and the expert later stated the blood found in the laundry room was "Hemoglobin Type A"), *cert. granted and judgment vacated on other grounds*, 545 U.S. 1137, 125 S. Ct. 2974, 162 L.Ed.2d 884 (2005). Trooper Futrell testified the Cherryville Police Department informed him that Roberts was intoxicated and at home during the time of the accident, and he then confronted Petitioner with this information. Trooper Futrell's statement that Roberts was the driver does not logically follow from his testimony that Roberts was at home and does not make sense in

confronted, uh, well actually they went to Mr. Roberts's house and Mr. Roberts['] mother's house. And Mr. Roberts's mother stated that she had just left her son['s] house and uh he was impaired passed out on the couch. So when I confronted [Petitioner] about it the information I had just obtained[,] [Petitioner] then just stated, well I don't know. I don't know who was driving. So that's when I concluded that [Petitioner] was the driver of the truck because he couldn't give me a proper explanation of what was going on [and] he [had a] strong odor of an alcoholic beverage from his breath, [his] eyes [were] red and glassy and he could bare[ly] walk.

A review of the hearing transcript shows that Trooper Futrell also testified that: his communication center said the truck involved in the accident was registered to a person named "Moss"; he stopped Beam and Petitioner as they drove away from the area where the accident occurred; Beam told Trooper Futrell Petitioner had come to his door asking for a ride because he had just been in an accident; Petitioner told Trooper Futrell he was in the truck at the time of the accident; and Trooper Futrell observed fresh cuts on Petitioner's arms that were still bleeding.

The hearing officer made the following findings of fact related to whether Trooper Futrell had reasonable grounds to believe Petitioner had committed an implied-consent offense:

the context of Trooper Futrell's additional testimony.

7. Trooper Futrell observed [Petitioner] with fresh cuts that were still bleeding and a strong odor of alcohol on his person and when [he] removed him from the car he could not stand[.] [Petitioner] had to lean against the car to hold himself up.

8. Trooper Futrell questioned Mr. Beam, telling him he needed to tell him the truth and Mr. Beam . . . reported that [Petitioner] had come to his home beating on his door, telling him he needed a ride home he had just had an accident in his truck.

. . .

12. Trooper Futrell then questioned [Petitioner] who told the trooper that Allen Roberts was the driver of the vehicle.

13. [Petitioner] admitted to being in the vehicle at the time of the accident.

14. Trooper Futrell contacted Cherryville Police Dept. and requested that they go to Mr. Roberts' address where they found him passed out on his couch, intoxicated.

15. Cherryville Police also checked at Mr. Roberts['] mother's home who verified that Mr. Roberts had been intoxicated and she had been with him at his home and he had not been out of his house.

16. Trooper Futrell informed [Petitioner] that Mr. Roberts was at home and physically unable to have been at the scene as [Petitioner] had told the trooper and [Petitioner] then said he did not know who was driving.

. . .

19. Trooper Futrell reported that . . . the

pickup truck [involved in the accident] . .
. was registered under the name Moss.

We conclude there is sufficient evidence in the record to support the hearing officer's findings of fact.

B. Conclusions of Law

The State also contends the trial court erred by determining that the hearing officer's findings of fact did not support the conclusion that Trooper Futrell had reasonable grounds to believe Petitioner had committed an implied-consent offense. We agree.

We have reviewed the hearing officer's findings of fact, and conclude the findings support the conclusion that "Trooper Futrell did have reasonable grounds to believe that [Petitioner] had committed an implied-consent offense." "In the license revocation context, the term 'reasonable grounds' is treated the same as 'probable cause.'" *Hartman*, __ N.C. App. at __, 703 S.E.2d at 814 (citations omitted). "Probable cause exists if the facts and circumstances at that moment and within the arresting officer's knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the suspect had committed or was committing a crime." *Id.* (citations omitted).

The hearing officer found as fact that Trooper Futrell stopped Petitioner and Beam near the site of the accident; Trooper Futrell observed fresh cuts on Petitioner and Petitioner smelled like alcohol; Beam told Trooper Futrell that Petitioner had come to his door asking for a ride because he had just been in an accident; Petitioner admitted to being in the truck at the time of the accident; Petitioner first told Trooper Futrell that Roberts was driving, but later said he didn't know who was driving when Trooper Futrell told Petitioner Roberts was at home at the time of the accident; and Trooper Futrell knew the truck involved in the accident was registered to a person named "Moss." These findings of fact are sufficient to establish that Trooper Futrell had probable cause such that a reasonably prudent person would believe that Petitioner had committed an implied-consent offense. See *Hartman*, __ N.C. App. at __, 703 S.E.2d at 814.

Because there is sufficient evidence in the record to support the hearing officer's findings of fact and the findings of fact support the conclusions of law, the trial court erred by reversing the hearing officer's revocation of Petitioner's driving privileges. Accordingly, we reverse the trial court's order.

REVERSED.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30 (e).