NO. COA08-205

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2008

MELTON-RIDDLE FUNERAL HOME,
INCORPORATED AND
RONNIE AUSTIN RIDDLE,
Petitioners,

v. Wake County
No. 07 CVS 1888

NORTH CAROLINA BOARD
OF FUNERAL SERVICE,
Respondent.

Appeal by Petitioners from judgment entered 15 November 2007 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 27 August 2008.

Young Moore and Henderson P.A., by John N. Fountain and Reed N. Fountain, for Petitioners-Appellants.

Allen and Pinnix, P.A., by M. Jackson Nichols and Anna Baird Choi, for Respondent-Appellee.

ARROWOOD, Judge.

Petitioners appeal from an order granting in part and denying in part their motion for judicial review of a decision by the Board. We affirm.

Petitioners are Melton-Riddle Funeral Home, a funeral home in Sylva, North Carolina, and Ronnie Riddle, its manager and president. Respondent is the North Carolina Board of Funeral Service (the Board), a state agency that regulates funeral

services. The present appeal arises from the Board's revocation of certain licenses held by Petitioners. Riddle previously held a preneed sales license and a funeral director's license. Melton-Riddle previously was licensed as a funeral establishment and as a preneed establishement. N.C. Gen. Stat. § 90-210.60(8) (2007) defines preneed funeral planning in pertinent part as "offering to sell or selling preneed funeral contracts, or making other arrangements prior to death[.]"

In March 2006 Petitioners and Respondent entered into a Consent Order in which Petitioners admitted to violation of the statutes governing funeral services as well as violation of the Board's laws and rules. The Board revoked Melton-Riddle's funeral establishment and preneed establishment licenses, and revoked Riddle's funeral director and preneed sales licenses. Under the terms of the Consent Order, the Board stayed the revocations and placed Petitioners' licenses on probation for a period of three years for Petitioners' preneed licenses and one year for Petitioners' at-need licenses. As a condition of probation, Petitioners agreed that if the Board received evidence that Petitioners had violated the Board's rules during the terms of probation, it would hold a show cause hearing. If the Board determined at the hearing that Petitioners had violated its rules, the Board might "lift the stay [of revocation] or impose such disciplinary action as it determines is appropriate and is authorized by law."

In September 2006, the Board notified Petitioners that a show cause hearing was scheduled for 26 September 2006 to determine whether Petitioners had violated the Board's rules. On 26 September the hearing was continued until 15 November 2006, when it was continued again until 14 December 2006. The Board conducted a hearing on 14 December 2006, at which Petitioners did not appear. Following the hearing, the Board filed a final agency decision revoking Riddle's preneed sales license and funeral director's license; revoking Melton-Riddle's preneed establishment license; and extending the period of probation of Melton-Riddle's funeral establishment license.

On 5 February 2007 Petitioners filed a petition for judicial review of the Board's decision, and a motion for a stay of the decision and for remand to the Board for additional evidence. Petitioners alleged that the Board had violated their statutory and constitutional rights, on the grounds that Petitioners did not receive notice of the December 2006 hearing. They asked the trial court to reverse and remand the Board's decision and to stay its execution. On 15 November 2007 the trial court entered an order finding in pertinent part that:

> 2. The Affidavit of [the Board's counsel] indicates that the Board served:
> (a) the Notice of Hearing for the September 26, 2006 Show Cause Hearing by personal service and certified mail;
> (b) the Notice of Hearing for the November 15, 2006 Show Cause Hearing by certified mail;
> (c) the Notice of Hearing for the December 14, 2006 Show Cause Hearing by certified mail; and

3. In his Affidavit, Ronnie Riddle . . . denied receipt of notice of the date of the December Show Cause Hearing.

4. The Petitioners produced numerous affidavits denying receipt or signature of the November 27, 2006 Certified Mail Receipt with respect to the date of a December Show Cause proceeding.

5. The signature 'T. Riddle' on the November 27, 2006, Certified Mail Receipt is different from the signature of 'Thomasine Riddle' on the October 26, 2006 [receipt].

6. The Court finds, consistent with G.S. § 150B-51(b), that the substantial rights of Petitioners may have been prejudiced inasmuch as the Petitioners may not have had notice of the date of the hearing before the Board.

7. By reason of the foregoing, the Order of the Board is affected by other error of law pursuant to G.S. § 150B-51(b)(4).

On the basis of its findings the court entered the following order:

> [I]t is hereby Ordered . . . that this matter be remanded to the Board solely on the basis that the signature 'T. Riddle' on the November 27, 2006, Certified Mail Receipt is different from 'Thomasine Riddle.' It is further ordered that the Board's Final Agency Decision is stayed pending issuance of another Final Agency Decision, except that the portion of the Board's Final Agency Decision regarding revocation of the preneed establishment license of Melton-Riddle Funeral Home and the individual preneed sales license of Ronnie Riddle is not stayed and both the funeral home and Mr. Riddle. Mr. Riddle shall not be authorized to engage in any presales activities until further order by the Board.

From this order, Petitioners have appealed.

Standard of Review

N.C. Gen. Stat. § 150B-51 (2007), which governs a trial court's judicial review of a final agency decision, provides in relevant part that:

> (b) . . . [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency . . . for further proceedings. It may also reverse or modify the agency's decision . . . if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> (6) Arbitrary, capricious, or an abuse of discretion.

On appeal, the "scope of review to be applied by the appellate court under this section is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2007). "In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006) (citing *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004)).

Petitioners argue first that the trial court erred by "staying only a portion" of the Board's final decision. The trial court found that Petitioners might not have received notice of the hearing and remanded the matter to the Board. Petitioners argue

that, upon remanding the case to the board, the court "could not properly fail to stay the revocation of the pre-need establishment license or the individual pre-need sales license of the Appellants." We disagree.

N.C. Gen. Stat. § 150B-38(b) (2007), provides in pertinent part that "[p]rior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing." Petitioners sought reversal of the Board's final decision on the grounds that they did not have the statutorily required notice of the hearing. They submitted affidavits tending to show that they did not receive notice of the 14 December 2006 show cause hearing. The Board offered evidence tending to show that notice was properly given. Consequently, the trial court was presented with conflicting evidence on this issue.

"It is for the agency, not a reviewing court, 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence[,] if any.' . . . Ordinarily, when an agency fails to make a material finding of fact or resolve a material conflict in the evidence, the case must be remanded to the agency for a proper finding." *N.C. Dep't of Env't & Natural Res.*, 358 N.C. at 674, 599 S.E.2d at 904 (quoting *State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982)) (citation omitted). We conclude that the trial court properly remanded to the Board.

Petitioners argue that, by not staying the Board's revocation of Petitioners' preneed licenses, the trial court was enforcing an "invalid" order. This incorrectly construes the proceedings. The trial court did not find as a fact that Petitioners did not have notice of the hearing or declare the Board's decision to be invalid. Rather, the trial court found that because Petitioners may not have received notice their rights may have been violated. Thus, Petitioner's statement that the trial court "enforce[d] a portion of the invalid order" is an inaccurate characterization of the court's decision to stay only part of the Board's decision. The validity of the Board's decision will be determined by the Board on remand.

Moreover, Petitioners fail to address the proper standard of review of a court's decision to issue or deny a stay. N.C. Gen. Stat. § 150B-48 (2007), which addresses issuance of a stay of an agency decision, provides that:

> At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65.

The statute places the decision to grant or deny a request for a stay in the court's discretion. Discretionary decisions of the trial court are reviewed for abuse of discretion. *See, e.g., American Motors Sales Corp. v. Peters*, 58 N.C. App. 684, 294 S.E.2d 764 (1982), *rev'd in part on other grounds*, 311 N.C. 311, 317 S.E.2d 351 (1984) (finding no abuse of discretion in trial court's

decision under former N.C. Gen. Stat. § 150A-48 (identical to present N.C. Gen. Stat. § 150B-48) to deny Petitioner's motion for a stay of an agency decision).

Petitioners neither discuss the abuse of discretion standard nor argue that the trial court abused its discretion in failing to stay all parts of the Board's decision pending its issuance of a new final agency decision. Nor do Petitioners cite any authority for their assertion that, upon finding that there was a possibility of error, the trial court was then required to stay all parts of the agency decision. We conclude that the court did not err or abuse its discretion either by remanding to the Board or by not staying the revocation of Petitioners' preneed licenses. This assignment of error is overruled.

Petitioners argue next that the trial court erred by staying any of the Board's decision. Petitioners contend that (1) the stay was entered under N.C. Gen. Stat. § 150B-52 (2007); (2) the trial court lacks authority to enter a stay under G.S. § 150B-52 in the absence of a request by the appellants to do so; and (3) they never requested a stay. On this basis, Petitioners assert that the trial court erred by entering even a partial stay. We disagree.

Petitioners' underlying premise, that the trial court entered a stay under G.S. § 150B-52, is inaccurate. N.C. Gen. Stat. § 150B-52 allows an appealing party to request a stay of the order in question pending appeal to this Court. However, the trial court's order was entered before Petitioners appealed. In its order, the

trial court states that its review was conducted pursuant to G.S. § 150B-48, which authorizes the court to grant or deny a request for a stay. In the instant case, Petitioners clearly requested a stay. Petitioners' motion sought a stay of the Board's decision. They also submitted Riddle's affidavit averring that a stay was needed to protect Petitioners' financial interests.

Because there is no indication that G.S. § 150B-52, was the basis of the court's ruling, we find it unnecessary to consider the scope of the statute. Further, Petitioners do not allege any prejudice from the entry of a partial stay and we find none, particularly in view of their argument that the court erred by not staying the entire decision. This assignment of error is overruled.

Finally, Petitioners argue that the trial court erred by failing to make "the findings required under N.C. Gen. Stat. § 1A-1, Rule 65 for a grant of injunctive relief." Petitioners did not apply for an injunction; nor did the trial court enter an injunction. Petitioners offer no support for grafting the requirements of N.C. Gen. Stat. § 1A-1, Rule 65 (2007) onto G.S. § 150B-48. This assignment of error is overruled.

Respondent's Cross-Assignment of Error

Respondent asserts as a cross-assignment of error that "the evidence of Record before the Board indicated [that Petitioners] received proper notice of all three Show Cause hearings." We conclude that this issue is not properly before us.

Cross-assignments of error are governed by N.C.R. App. P. 10(d), which states in pertinent part that:

> Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment . . . from which appeal has been taken. . . .

Rule 10(d) sets out two requirements for a valid cross-assignment of error: (1) that the issue raised constitute "an alternative basis in law for supporting the judgment"; and (2) that the appellee "cross-assign as error" the issue raised. We conclude that Respondent has not met either of these requirements.

Respondent failed to file any cross-assignments of error, and thus did not cross-assign error to the trial court's ruling on the sufficiency of Petitioners' notice of the show cause hearings. Therefore, Respondent has not preserved this issue for appellate review. *See, e.g., Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) ("In the instant case, the additional arguments raised in plaintiff-appellee's brief, if sustained, would provide an alternative basis for upholding the trial court's determination[.] . . . However, plaintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these alternative grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds.").

Moreover, the issue that Respondent attempts to raise is not appropriate for a cross-assignment of error. The trial court ruled

that Petitioners might not have received notice, and remanded for the Board's determination of this issue. Respondent does not present an alternative basis for remand, but argues that instead of remanding the case, the trial court should have ruled that Petitioners had sufficient notice. "Because plaintiff's cross-assignment of error does not present an alternative basis upon which to support the judgment, the question argued therein is not properly before this court. The proper method to have preserved this issue for review would have been a cross-appeal. Plaintiff's cross-assignment of error is overruled." *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 117, 314 S.E.2d 775, 781 (1984).

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

Affirmed.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).