

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA12-1097
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Pasquotank County
No. 09-CRS-50937

DENNIS ANTHONY WILLIAMS

Appeal by defendant from order entered 20 March 2012 by Judge Walter H. Godwin, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 26 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Teague & Glover, P.A., by Danny Glover, Jr., for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Dennis Anthony Williams appeals the trial court's order denying his motion to dismiss his driving while impaired ("DWI") charge. On appeal, defendant contends that the trial court erred because: (1) prosecuting him for DWI violated double jeopardy; and (2) disqualification of his commercial driver's license ("CDL") violated due process. Based on our Supreme

Court's opinion in *State v. McKenzie*, __ N.C. __, 748 S.E.2d 145 (2013), we affirm in part and reverse and remand in part the trial court's order.

Background

Defendant was charged with DWI on 23 May 2009. At the time he was charged, defendant was driving his personal vehicle. Defendant was given a chemical analysis test, and he registered a 0.17. Defendant was convicted on 25 February 2010 in Pasquotank County District Court of impaired driving and sentenced to 60 days imprisonment. Defendant appealed to Superior Court.

On 9 April 2010, the Division of Motor Vehicles sent defendant a letter informing him that his CDL would be automatically disqualified for one year pursuant to N.C. Gen. Stat. § 20-17.4(a)(7). The disqualification was effective on 19 April 2010 and would end 19 April 2011.

On 7 March 2011, defendant filed a motion to dismiss in Superior Court alleging that his criminal prosecution for DWI constituted a violation of double jeopardy and contending that the failure to provide him with a method to appeal the CDL disqualification violated due process. The trial court denied defendant's motion to dismiss, concluding that the

disqualification of his CDL constituted a civil revocation, not a criminal punishment, for double jeopardy purposes. Thus, charging him with DWI did not violate the double jeopardy clause. In addition, the trial court concluded that the failure to provide defendant with a method to appeal the disqualification did not violate due process. On 20 March 2012, the jury found defendant guilty of DWI. The trial court sentenced defendant to 60 days imprisonment but suspended his sentence for 12 months of unsupervised probation. Defendant appealed.

Arguments

On appeal, defendant argues that prosecuting him for DWI in addition to revoking his CDL pursuant to N.C. Gen. Stat. § 20-17.4(a)(7) subjects him to multiple punishments for the same offense in violation of the double jeopardy clause. Additionally, defendant contends that disqualification of his CDL without notice and the opportunity for a hearing violates his substantive and procedural due process rights.

Arguments identical to defendant's were recently raised in *State v. McKenzie*, __ N.C. App. __, 736 S.E.2d 591 (2013) (J. Robert C. Hunter dissenting). In *McKenzie*, the defendant's CDL was disqualified after he was charged with DWI. *Id.* at __, 736

S.E.2d at 593-94. A divided panel of the Court of Appeals concluded that the automatic CDL disqualification constituted a prior criminal punishment after applying the two-part test outlined in *Hudson v. United States*, 522 U.S. 93, 99, 139 L. Ed. 2d 450, 459 (1997). *Id.* at ___, 736 S.E.2d at 598. Therefore, prosecuting the defendant for DWI violated double jeopardy. *Id.* However, in his dissent, Judge Robert C. Hunter disagreed, concluding that the CDL disqualification constituted a civil sanction, not a criminal one, under the *Hudson* test. *Id.* at ___, 736 S.E.2d at 603. Thus, the disqualification and the criminal DWI prosecution did not constitute multiple punishments for the same offense, and the defendant's protection against double jeopardy was not violated. *Id.*

With regard to defendant's second argument, the *McKenzie* majority held that the defendant's due process claim was moot because the defendant's period of disqualification had already ended prior to his appeal. *Id.* at ___, 736 S.E.2d at 598-99. However, in the dissent, after applying an exception to the mootness doctrine, Judge Robert C. Hunter noted that the CDL disqualification and the defendant's DWI conviction were two separate and distinct proceedings. *Id.* at ___, 736 S.E.2d at 603. Thus, the defendant was improperly attempting to raise a

civil due process claim in an appeal of his criminal DWI charge, and the trial court erred in ruling on this issue as it had no jurisdiction to address it. *Id.*

Pursuant to N.C. Gen. Stat. § 7A-30(2), the matter was appealed to our Supreme Court. In a *per curiam* opinion, the Supreme Court reversed and remanded the matter back to the Superior Court for the reasons stated in the dissenting opinion. *McKenzie*, __ N.C. at __, 748 S.E.2d at 145.

Therefore, with regard to the issue of double jeopardy, we affirm the trial court's order denying defendant's motion to dismiss because the CDL disqualification constituted a civil sanction, not a criminal punishment. Thus, defendant's DWI conviction did not violate double jeopardy. With regard to defendant's substantive and procedural due process claims, while reiterating the concern noted by both the *McKenzie* majority and dissent that the failure to provide defendant with any mechanism to challenge the CDL disqualification may violate due process, we will not address this issue as it was improperly raised in defendant's criminal trial. Therefore, the Superior Court erred in addressing this argument, and we reverse and remand this matter back to the Superior Court for entry of an order consistent with this opinion.

Conclusion

Based on the foregoing reasons, we affirm the trial court's order denying defendant's motion to dismiss based on double jeopardy. With regard to defendant's due process claims, we reverse and remand the matter back to the Superior Court for entry of an order consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges McCULLOUGH and DAVIS concur.

Report per Rule 30(e).