NO. COA13-1245
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

ANTHONY ALESSANDRO PASUT,
Petitioner,

v.

Pitt County
No. 12 CVS 2523

MIKE ROBERTSON, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES, DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY, STATE OF NORTH CAROLINA,
Respondent.

Appeal by petitioner from judgment entered 15 July 2013 by Judge Gary E. Trawick in Pitt County Superior Court. Heard in the Court of Appeals 9 April 2014.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for respondent-appellee.

GEER, Judge.

Petitioner Anthony Alessandro Pasut appeals from an order affirming the decision of the Division of Motor Vehicles ("DMV") of the North Carolina Department of Transportation to revoke his license for one year for his willful refusal to submit to a

chemical analysis of his breath after being arrested for impaired driving. On appeal, petitioner primarily challenges the hearing officer's conclusion that the arresting officer had reasonable grounds to believe that petitioner had committed an implied-consent offense.

We agree that the evidence does not support the hearing officer's finding that petitioner returned a positive result on an Alco-Sensor test and that the remaining findings -- that petitioner had been speeding, had slurred speech, and had an odor of alcohol -- are insufficient, without more, to establish that the officer had reasonable grounds to believe that petitioner was appreciably impaired. However, because the record contains evidence not addressed by the hearing officer that, if credited, could support the conclusion that the officer had reasonable grounds to believe that petitioner was impaired, we remand to the trial court for remand to the DMV for further findings of fact.

Facts

The evidence presented by respondent tended to show the following facts. On 14 March 2012, Trooper William Hardison of the North Carolina State Highway Patrol stopped petitioner's vehicle for speeding and seatbelt violations. Upon approaching petitioner's vehicle, Trooper Hardison detected an odor of

alcohol and, when talking to petitioner, noticed that petitioner had slurred speech and glassy eyes. When Trooper Hardison asked petitioner to submit to an Alco-Sensor test, petitioner stated that he wanted to speak to his lawyer. Trooper Hardison then placed petitioner under arrest for driving while impaired and took him to the Pitt County Detention Center.

Trooper Hardison read petitioner his Intoxilyzer rights and provided petitioner with a written copy of those rights that petitioner signed at 7:46 p.m. Trooper Hardison waited approximately 30 minutes while petitioner called several people to serve as a witness for the test, but no witnesses came. At 8:18 p.m., Trooper Hardison asked petitioner to take the test. Petitioner stated that he wanted to talk to his lawyer before he took the test and that he would rather have a refusal on his record than a DWI. Petitioner did not make any attempts to take the test, so Trooper Hardison documented petitioner as having refused the test.

On 30 April 2012, the DMV sent petitioner an official notice that, in accordance with N.C. Gen. Stat. § 20-16.2, his driving privileges would be revoked for 12 months, effective 10 May 2012, for refusing to submit to a chemical test. Petitioner timely filed a request for a hearing to contest the revocation, and the suspension was rescinded pending the outcome of the

hearing. A hearing was held on 24 August 2012 at which only Trooper Hardison testified.

In a decision dated the same day as the hearing, the hearing officer upheld the revocation of petitioner's license. On 17 September 2012, petitioner filed a petition for review of the hearing officer's decision in Pitt County Superior Court. On 15 July 2013, the trial court entered a judgment affirming the hearing officer's revocation of petitioner's driver's license. Petitioner timely appealed the judgment to this Court.

Discussion

On appeal from a DMV hearing, the superior court sits as an appellate court and determines "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) (2013). This Court, in turn, reviews the superior court's decision to "'(1) determin[e] whether the trial court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.'" *Johnson v. Robertson*, ___ N.C. App. ___, ___, 742 S.E.2d 603, 607 (2013) (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

The only issues for consideration at the DMV hearing were whether:

(1) Petitioner was charged with an implied-consent offense;

(2) Trooper Hardison had reasonable grounds to believe that petitioner had committed an implied-consent offense;

(3) Petitioner was notified of his rights as required by N.C. Gen. Stat. § 20-16.2(a); and

(4) Petitioner willfully refused to submit to a chemical analysis.

See N.C. Gen. Stat. § 20-16.2(d).

Admission of Evidence

Petitioner first argues that respondent's exhibits 1 through 4 should not be considered as part of the agency record because the hearing officer failed to admit the exhibits into evidence in the presence of petitioner at the DMV hearing. The exhibits included the documents mailed by Trooper Hardison to the DMV: two copies of Trooper Hardison's Affidavit and Revocation Report, the Chemical Test Rights form signed by petitioner, and the Intox EC/IR-II Test Ticket.

The hearing officer's decision expressly states that "Department Exhibits number 1 through 4 were admitted and made part of the record" and includes the exhibits in its "List of Exhibits." However, petitioner asserts, and the hearing

transcript confirms, that the exhibits were not mentioned, marked for identification, offered, or admitted into evidence during the hearing.

Petitioner argues that these exhibits should not have been a part of the agency record for consideration by the trial court or this Court because petitioner was not given the opportunity to object to and address the exhibits or to confront and cross-examine Trooper Hardison about the preparation, contents, accuracy, or execution of the exhibits. We agree.

Although the DMV, citing *Lee v. Gore*, 365 N.C. 227, 717 S.E.2d 356 (2011), correctly points out that the exhibits are jurisdictional documents required for the DMV to have authority to revoke petitioner's license or conduct the hearing, the issue is not whether the exhibits should be included in the record on appeal, but rather, whether the exhibits should have been considered as substantive evidence by the hearing officer.

This Court has held that "the Rules of Evidence do not apply to DMV hearings held pursuant to § 20-16.2." *Johnson*, ___ N.C. App. at ___, 742 S.E.2d at 606. Nevertheless, our Supreme Court has recognized that

> [a] license to operate a motor vehicle is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon

> which licenses may be issued and revoked. However, once issued, a license is of substantial value to the holder and may be revoked or suspended only in the manner and for the causes specified by statute.

Joyner v. Garrett, 279 N.C. 226, 235, 182 S.E.2d 553, 559 (1971). Therefore, at a hearing under N.C. Gen. Stat. § 20-16.2(d), "the licensee has the right to be confronted by any witness whose testimony is used against him and to cross-examine the witness if he so desires." *Joyner*, 279 N.C. at 235, 182 S.E.2d at 560.

The issue in *Joyner* was whether the arresting officer's affidavit and revocation report could be considered as *prima facie* evidence that the petitioner willfully refused to submit to a chemical test. *Id.* at 234, 182 S.E.2d at 559. The only evidence presented by the DMV at the administrative hearing in *Joyner* was the arresting officer's affidavit -- the officer did not testify. *Id.* The Court in *Joyner* held that if the petitioner objects to its introduction, the affidavit cannot be used as evidence against the petitioner because N.C. Gen. Stat. § 20-16.2 "does not make the law-enforcement officer's sworn report *prima facie* evidence that the arrested person wilfully refused to submit to the Breathalyzer test." *Joyner*, 279 N.C. at 234, 182 S.E.2d at 559. However, because the record failed to show that the petitioner either objected to the introduction

of the sworn report or asserted his right to cross-examine the charging officer, the evidence was properly considered by the hearing officer. *Id.*

Here, in contrast to *Joyner*, Trooper Hardison did testify and petitioner was able to cross-examine him. However, because the exhibits were never offered into evidence at the hearing, petitioner was never given the opportunity to object to their admission or otherwise defend against them. We hold that under these circumstances it was error for the hearing officer to consider the exhibits. As requested by petitioner, we, therefore, limit our review of the DMV's decision to whether Trooper Hardison's testimony -- the only evidence properly admitted at the hearing -- supports the hearing officer's findings of fact and whether those findings support his conclusions of law.

Findings of Fact and Conclusions of Law

Under the "Findings of Facts" heading, the hearing officer's decision stated the following:

> After consideration, I find that the following facts are not [sic] supported by substantial evidence:
>
> 1. Trooper William Hardison was traveling on 10th St. when he saw a vehicle driving 55/45.
>
> 2. Trooper Hardison stopped the vehicle for speeding.

3. Trooper Hardison approached the vehicle and noted the odor of alcohol.

4. [Petitioner's] speech was slurred and was given the alco censor [sic] test that was a positive reading.

5. [Petitioner] was placed under arrest and transported to the Pitt County intox room.

6. [Petitioner] was read his rights at 7:46 pm and given a copy of the same.

7. [Petitioner] was allowed 30 minutes for witness.

8. Trooper Hardison explained [sic] [petitioner] on how to take the test.

9. Trooper Hardison requested [petitioner] to take the test at 8:18 pm.

10. [Petitioner] advised Trooper Hardison that he did not want to take the test.

11. [Petitioner] made no attempts to take the test.

12. [Petitioner] was advised that he would be written up as a refusal.

13. Trooper Hardison wrote [petitioner] up as a refusal.

Based upon these findings, the hearing officer concluded:

1. [Petitioner] was charged with an implied-consent offense.

2. Trooper Hardison has reasonable grounds to believe that [petitioner] had committed an implied-consent offense.

> 3. The implied-consent offense charged did not involve death or critical injury to another person.
>
> 4. [Petitioner] was notified of chemical test rights as required by N.C.G.S. 20-16.2(a).
>
> 5. [Petitioner] did willfully refuse to submit to a chemical analysis of his breath or blood.

Petitioner first argues that the hearing officer's findings of fact do not support his conclusions of law because the findings of fact section begins with the assertion that "[a]fter consideration, I find that the following facts are *not* supported by substantial evidence[.]" (Emphasis added.) It is apparent, however, that this was merely a clerical error.

"'Clerical error has been defined . . . as an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.'" *State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)). In this case, the hearing officer's conclusions of law are expressly "[b]ased on the foregoing findings of facts," and the decision concludes that "I find that all [the] elements of proof necessary to sustain a revocation for refusing to submit to a chemical analysis of his breath or blood under GS 20-16.2 *are*

supported by substantial evidence." (Emphasis added.) Thus, when reading the decision as a whole, it is apparent that the hearing officer intended to find that the facts were supported by substantial evidence and that the inclusion of the word "not" was inadvertent.

Petitioner next argues that conclusion of law number 1 -- that petitioner was charged with an implied-consent offense -- and conclusion of law number 4 -- that petitioner was notified of chemical test rights as required by N.C. Gen. Stat. § 20-16.2(a) -- are not supported by the findings of fact. Regarding conclusion of law number 1, petitioner argues that finding of fact 5 that petitioner was "placed under arrest" was insufficient to support the conclusion of law because it fails to specify the nature of the charge. Similarly, regarding conclusion of law number 4, petitioner argues that finding of fact 6 that petitioner was "read his rights" and was "given a copy of the same" is insufficient to support the conclusion of law because it fails to indicate the substance of the rights read and whether they were the rights set forth in N.C. Gen. Stat. § 20-16.2(a).

Petitioner fails to recognize, however, that the hearing officer's designations of "findings of fact" and "conclusions of law" are not binding on this Court. *See Pittman v. Thomas &*

Howard, 122 N.C. App. 124, 133, 468 S.E.2d 283, 288 (1996) (considering Commission's "finding" as a conclusion of law). To the extent that conclusions of law 1 and 4 involve factual determinations instead of conclusions of law, we treat them as findings of fact. *See Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36, 40 n.1 (1996) ("Although denominated as a conclusion of law, we treat this conclusion as a finding of fact because its determination does not involve the application of legal principles."). *See also Tolbert v. Hiatt*, 95 N.C. App. 380, 385, 382 S.E.2d 453, 456 (1989) (holding that "trial court's finding that petitioner willfully refused 'without just cause or excuse' to submit to a chemical analysis upon the request of the charging officer was an ultimate fact finding indicating the trial court rejected all opposing inferences raised by petitioner's evidence" and was not a conclusion of law).

Here, conclusion of law number 1 that petitioner was charged with an implied-consent offense and conclusion of law number 4 that petitioner was notified of chemical test rights as required by N.C. Gen. Stat. § 20-16.2(a) contain the factual determinations that petitioner alleges the hearing officer failed to make: the nature of the offense for which petitioner was arrested and the substance of the rights he was read and

given. Conclusions of law 1 and 4 are, therefore, findings of ultimate facts that are supported by evidence in the record.

Finally, petitioner challenges the hearing officer's conclusion that Trooper Hardison had reasonable grounds to believe that petitioner committed an implied consent offense. In the context of a license revocation hearing, "the term 'reasonable grounds' is treated the same as 'probable cause.'" *Rock v. Hiatt*, 103 N.C. App. 578, 584, 406 S.E.2d 638, 642 (1991) (quoting *State v. Eubanks*, 283 N.C. 556, 559, 196 S.E.2d 706, 708 (1973)). "[P]robable 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.*

A person commits the implied consent offense of impaired driving if he drives any vehicle on a public road while under the influence of an impairing substance or after having consumed sufficient alcohol to have an alcohol concentration of 0.08 or more. N.C. Gen. Stat. § 20-138.1 (2013). As explained by this Court in *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985):

> Under our statutes, the consumption of alcohol, standing alone, does not render a person impaired. An effect, however slight, on the defendant's faculties, is not enough

> to render him or her impaired. Nor does the fact that defendant smells of alcohol by itself control. On the other hand, the State need not show that the defendant is "drunk," i.e., that his or her faculties are *materially* impaired. The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired.

(Internal citations omitted.) On the other hand, our Supreme Court has held that "[t]he fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. § 20-138." *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965).

Petitioner first contends that the evidence does not support the finding of fact that petitioner returned a positive result on an Alco-Sensor test. We agree. At no point in Trooper Hardison's testimony does he testify that petitioner returned a positive result on an Alco-Sensor test. Therefore, we hold that the portion of finding of fact 4 regarding positive Alco-Sensor results is not supported by competent evidence.

Nevertheless, given the unchallenged finding that Trooper Hardison noted an odor of alcohol when he approached petitioner's vehicle, a finding regarding a positive Alco-Sensor test is immaterial. N.C. Gen. Stat. § 20-16.3(d) (2013)

provides that a law enforcement officer may, in determining whether reasonable grounds exist to believe that an individual has committed an implied consent offense, rely upon (1) "[t]he fact that a driver showed a positive or negative result on an alcohol screening test" or (2) "a driver's refusal to submit" to an alcohol screening test. The officer may not rely upon "the actual alcohol concentration result" of a screening test. *Id.* A positive or negative result on an Alco-Sensor test reveals only one thing: Whether the petitioner has consumed alcohol. Trooper Hardison's testimony regarding the odor of alcohol, under the circumstances of this case, was sufficient to support a finding that petitioner had consumed alcohol even though the finding of fact regarding a positive Alco-Sensor test was not supported.

The question remains whether the hearing officer's findings of fact are sufficient to support the conclusion that Trooper Hardison had reasonable grounds to conclude that petitioner committed an implied-consent offense. The hearing officer's findings establish only that at some time before 7:46 p.m., petitioner's vehicle was stopped for driving 55 miles per hour in a 45 mile per hour zone. Trooper Hardison approached

petitioner's vehicle and noted an odor of alcohol and that petitioner's speech was slurred.[1]

Respondent, quoting *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (quoting *Hewitt*, 263 N.C. at 764, 140 S.E.2d at 244), asserts that the hearing officer's findings that the petitioner was speeding and had slurred speech constitute "'faulty driving [and] other conduct indicating an impairment of physical or mental faculties'" such that, when combined with the finding that Trooper Hardison "noted the odor of alcohol," are sufficient to support the conclusion that there were reasonable grounds to believe petitioner was driving while impaired.

In the event that an arresting officer detects an odor of alcohol on a driver, North Carolina Courts have found that probable cause existed to arrest the driver for impaired driving when the following additional evidence of faulty driving and impairment was present: *Steinkrause v. Tatum*, 201 N.C. App. 289, 295, 689 S.E.2d 379, 383 (2009) (severe one-car accident in which car rolled several times and landed upside down in ditch), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010); *State v. Teate*, 180 N.C. App. 601, 607, 638 S.E.2d 29, 33 (2006) (defendant "drove through a checkpoint, displayed an open

[1]Although Trooper Hardison testified that petitioner's eyes were glassy and that petitioner's impairment was obvious, the hearing officer made no finding to that effect.

container of alcohol in the vehicle, exhibited slurred speech and diminished motor skills, and registered as intoxicated on Alco-Sensor tests"); *State v. Tappe*, 139 N.C. App. 33, 35, 533 S.E.2d 262, 263 (2000) (trooper observed defendant cross center line of highway, and defendant had open container of beer in passenger area of car and glassy, watery eyes); *Moore v. Hodges*, 116 N.C. App. 727, 728, 449 S.E.2d 218, 219 (1994) (single car accident at 1:30 a.m., positive Alco-Sensor results, driver admitted drinking liquor, and driver was talkative and speech mumbled); *Rock*, 103 N.C. App. at 584-85, 406 S.E.2d at 642 (driver speeding out of hotel parking lot around time hotel bar closed and vehicle "'hit [a] dip, . . . bounced up hard, [and] made a right turn . . . .'"; driver also had slurred speech, glassy eyes, and was swaying unsteadily on his feet); *Richardson v. Hiatt*, 95 N.C. App. 196, 200, 381 S.E.2d 866, 868 (one-car accident in middle of afternoon on clear day), *modified*, 95 N.C. App. 780, 384 S.E.2d 62 (1989).

We have not found any North Carolina opinion addressing whether an odor of alcohol combined with relatively modest speeding -- traveling only 55 m.p.h. in a 45 m.p.h. zone -- and slurred speech, without more, is sufficient to give an officer reasonable grounds to believe the driver was driving while impaired. Essentially, the only indication of impairment, as

opposed to mere consumption of alcohol, was the finding that petitioner had slurred speech.

As stated in *Harrington*, "[a]n effect, however slight, on the defendant's faculties, is not enough to render him or her impaired." 78 N.C. App. at 45, 336 S.E.2d at 855. Rather, "[t]he effect must be appreciable, that is, sufficient to be recognized *and estimated*[.]" *Id.* (emphasis added). The finding that petitioner's speech was slurred recognized one effect on defendant's faculties, but gives no indication of whether the effect was sufficient to render him appreciably impaired.

In the absence of evidence of any other manifestation of impairment, or information regarding the severity of the sole impairment recognized in the findings, we do not believe that the findings provide a sufficient basis for determining that Trooper Hardison had reasonable grounds to believe that petitioner was appreciably impaired while driving. Significantly, respondent has cited no case in which reasonable grounds have been found based on evidence comparable to the findings in this case.

However, even though the hearing officer made no further findings, the record contains evidence of supporting facts, which if found by the hearing officer, would in turn support the hearing officer's conclusion that Trooper Hardison had

reasonable grounds to believe that an implied-consent offense had occurred. Trooper Hardison indicated additionally that petitioner had glassy eyes, his conversation with petitioner suggested impairment even apart from the slurred speech, and his impairment was obvious. Moreover, the hearing officer could also have found that petitioner refused to submit to an Alco-Sensor test. The fact that a person refused to submit to an alcohol screening test may support an inference that the defendant is impaired. *See State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 870 (2002) (evidence defendant refused to take Alco-Sensor test supported jury's verdict of guilty of DWI). Here, Trooper Hardison's testimony is ambiguous regarding whether an Alco-Sensor test was administered.

On direct examination, when asked about what kind of field sobriety tests he performed, Trooper Hardison testified that he "just talked to [petitioner] . . . while in my patrol car." Trooper Hardison then elaborated that he

> [a]sked [petitioner] to submit to an Alco-Sensor. He stated that he wanted his lawyer. He had slurred speech and glassy eyes. Obvious impairment. Um, at that time, I went ahead and placed him under arrest for driving while impaired.

At the close of direct examination, the hearing officer summarized Trooper Hardison's testimony to make sure he understood it correctly:

> [You] [a]pproached the car and you noticed the odor of alcohol. Asked him to take the Alco-Sensor, Alco-Sensor test and he said he wasn't going to take it. He wanted to have his attorney there. That's fine. You also noted that he had sl-, slurred speech. At that time after he told you he wasn't going to take the test without talking to his attorney, you placed him under arrest and transported him to the uh, Pitt County Intoxilyzer Room?

Trooper Hardison confirmed that the hearing officer's summary was "[c]orrect."

On cross examination, however, the following exchange occurred:

> [Counsel]: In formulating your opinion to place him under arrest, I believe you indicated to the Hearing Officer that you asked for, asked [petitioner] to perform a field sobriety test, is that correct?
>
> Trooper Hardison: I asked him to blow an Alco-Sensor, that's true.
>
> [Counsel]: Is that the only test you did?
>
> Trooper Hardison: I talked to him a little while and smelled the odor of alcohol on him uh, and glassy eyes and it was obvious impairment.
>
> [Counsel]: Okay. So you . . .

Trooper Hardison: That is the only test I did. Yes sir.

Thus, Trooper Hardison testified consistently that he *asked* petitioner to submit to an Alco-Sensor test, but it is not entirely clear whether petitioner actually submitted to the test. Trooper Hardison's direct testimony -- including his response to the hearing officer's summary of that testimony -- suggests that petitioner refused to submit to the Alco-Sensor test because his attorney was not present. At no point in Trooper Hardison's testimony does he state the results of any test whether positive or negative -- an omission that further suggests that no test was administered. On cross-examination, however, the statement regarding "That is the only test I did" could refer to an Alco-Sensor test or to Trooper Hardison's conversation and observations of petitioner while in the patrol car. The transcript, therefore, gives rise to an issue of fact regarding whether the Alco-Sensor test was administered or refused.

Although the record would support a finding that petitioner refused the Alco-Sensor test, the hearing officer did not make such a finding. Because the hearing officer erroneously found that the Alco-Sensor test results were positive, he did not consider the possibility that petitioner refused the test and did not resolve this conflict in the evidence. We note that if

petitioner refused to submit to the Alco-Sensor test, that fact may explain the absence of evidence of other failed field sobriety tests -- upon petitioner's refusal, the officer would have had no need to conduct any further field sobriety tests prior to arresting petitioner.

Accordingly, we reverse and remand to the trial court for further remand to the DMV for further findings of fact to resolve the question whether petitioner was appreciably impaired, including whether petitioner refused to submit to the Alco-Sensor test. On remand, we leave it to the hearing officer's discretion whether to resolve this conflict on the record or to take additional evidence.

Reversed and remanded.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).