NO. COA14-568
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

WILLIAM JAMES BECKER,
Petitioner,

v. Edgecombe County
No. 13 CVS 106

N.C. CRIMINAL JUSTICE EDUCATION
AND TRAINING STANDARDS COMMISSION,
Respondent.

Appeal by petitioner from order entered 2 December 2013 by Judge Shannon R. Joseph in Edgecombe County Superior Court. Heard in the Court of Appeals 9 October 2014.

David C. Sutton for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Lauren Tally Earnhardt, for respondent-appellee.

GEER, Judge.

Petitioner William James Becker appeals from the trial court's order upholding the decision of respondent, the North Carolina Criminal Justice Education and Training Standards Commission ("the Commission"), to suspend petitioner's correctional officer certification for three years. Because the record contains substantial evidence to support the Commission's

finding that petitioner committed two misdemeanor offenses of assault on a female, we affirm.

Facts

All correctional officers who work for the North Carolina Department of Corrections ("DOC") are required to be certified by the Commission in accordance with the rules set forth in the North Carolina Administrative Code. 12 N.C. Admin. Code 9G.0301 (2014). Petitioner began working as a certified correctional officer for the DOC in 1994. On 30 April 2001, petitioner was arrested and charged with assault on a female after a domestic dispute with his wife, Tammy Becker. Mrs. Becker was also charged with simple assault as a result of the dispute. On 1 May 2001, petitioner notified his supervisor of his arrest. The charges were dropped on 22 October 2001, and no disciplinary action was taken by petitioner's employer.

On 15 August 2009, petitioner was arrested after another domestic dispute with Mrs. Becker at their home. Petitioner was charged with felony assault by strangulation and misdemeanor assault on a female. The charges were dismissed on 26 March 2010 because Mrs. Becker refused to testify.

On 20 July 2011, the Commission notified petitioner that a hearing was scheduled on 25 August 2011 before the Probable Cause Committee to determine whether there was probable cause to

revoke or suspend petitioner's certification based on (1) petitioner's commission of felony assault by strangulation in 2009, (2) petitioner's commission of misdemeanor assault on a female in 2001 and in 2009, and (3) petitioner's failure to properly notify the Criminal Justice Standards Division of the 2001 assault on a female charge. Plaintiff appeared pro se at the probable cause hearing, and Mrs. Becker did not testify. On 12 September 2011, the Probable Cause Committee determined that there was probable cause to suspend petitioner's certification pursuant to 12 N.C. Admin. Code 9G.0504(b)(3) for his commission of two misdemeanor offenses of assault on a female in 2001 and 2009. The Committee determined that there was no probable cause to suspend petitioner's certification for the commission of felony assault by strangulation or for petitioner's failure to provide notification of the 2001 arrest.

Petitioner requested an administrative hearing, and, in accordance with N.C. Gen. Stat. § 150B-40(e), an Administrative Law Judge ("ALJ") was designated to preside at a contested case hearing of the matter on 22 March 2012. On 16 August 2012, the ALJ filed her Proposal for Decision which concluded that substantial evidence existed to suspend petitioner's certification for two commissions of assault on a female. The ALJ recommended that the Commission suspend petitioner's

certification for no less than three years, but additionally recommended that "given the circumstances of the subject assaults, and Petitioner's employment history, [the Commission] suspend that suspension, and place Petitioner on probation for a term certain."

On 16 November 2012, the Commission entered its Final Agency Decision. It adopted the findings and conclusions of law of the ALJ, and ordered that the Commission suspend petitioner's correctional officer certification for three years based upon petitioner's commission of two class B misdemeanors. Petitioner sought judicial review and the matter came on for hearing in Edgecombe County Superior Court on 28 October 2013. In an order entered 2 December 2013, the trial court affirmed the Final Agency Decision. Petitioner timely appealed the order to this Court.

Standard of Review

"'Where there is an appeal to this Court from a trial court's order affirming an agency's final decision, we must (1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this standard.'" *Krueger v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 198 N.C. App. 569, 575, 680 S.E.2d

216, 220 (2009) (quoting *Blalock v. N.C. Dep't of Health & Human Servs.*, 143 N.C. App. 470, 473, 546 S.E.2d 177, 180 (2001)).

The trial court's review of a final agency decision is governed by N.C. Gen. Stat. § 150B-51(b) (2013), which provides that the reviewing court may affirm the decision of the agency or remand the case for further proceedings.

> It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
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> (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
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> (6) Arbitrary, capricious, or an abuse of discretion.

Id.

Alleged errors of law are reviewed de novo, whereas issues whether the agency decision was supported by the evidence or was

arbitrary and capricious are reviewed using the whole record standard of review. N.C. Gen. Stat. § 150B-51(c).

> Under the *de novo* standard of review, the trial court consider[s] the matter anew[] and freely substitutes its own judgment for the agency's. When the trial court applies the whole record test, however, it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence -- that which detracts from the agency's findings and conclusions as well as that which tends to support them -- to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (internal citations and quotation marks omitted).

Discussion

Initially we note that the majority of petitioner's arguments on appeal are not supported by citations to any relevant authority. Petitioner cites only one case in his entire brief, and it is a juvenile delinquency proceeding with no relevance to the issues in this appeal. As the Rules of Appellate Procedure require that a party's brief "contain citations of the authorities upon which the appellant relies[,]" we decline to address petitioner's arguments for which no

authority is cited. N.C.R. App. P. 28(b)(6). Our Supreme Court has emphasized that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). For this Court to review petitioner's issues, we would have to do the research and analysis that he did not bother to undertake -- in other words, we would have to create an appeal for him. *See also Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."). We decline to do so.

The issue on appeal is whether the Commission erred in suspending petitioner's correctional officer certification. The Commission acted pursuant to 12 N.C. Admin. Code 9G.0504(b)(3) (2014), which provides that "[t]he Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer . . . has committed or been convicted of a misdemeanor as defined in 12 NCAC 9G.0102 after certification[.]" 12 N.C. Admin Code 9G.0102(9) (2014) defines "[m]isdemeanor" as "those criminal offenses not classified under the laws, statutes, or ordinances

as felonies" and includes assault on a female in violation of N.C. Gen. Stat. § 14-33(c) (2013). *See* 12 N.C. Admin Code 9G.0102(9)(g) (listing "14-33(c) Assault, battery with circumstances" as misdemeanor offense).

Petitioner first points out that the criminal charges against him for assault on a female were dismissed and asserts that a person "has committed" a misdemeanor offense within the meaning of 12 N.C. Admin. Code 9G.0504(b)(3) only if he "has been convicted of" the offense. However, the Code defines "[c]onviction" and "[c]ommission of an offense" separately. "Conviction" is defined as "the entry of: (a) a plea of guilty; (b) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established adjudicating body, tribunal, or official, either civilian or military; or (c) a plea of no contest, nolo contendere, or the equivalent." 12 N.C. Admin Code 9G.0102(2). In contrast, the code defines the "[c]ommission of an offense" as "a finding by [the Commission] or an administrative body that a person performed the acts necessary to satisfy the elements of a specified offense." 12 N.C. Admin Code 9G.0102(1).

Thus, the Commission may revoke a correctional officer's certification if it finds that the officer committed a misdemeanor, regardless whether he was criminally convicted of

that charge. *See Mullins v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 125 N.C. App. 339, 348, 481 S.E.2d 297, 302 (1997) (upholding revocation of police officer's certification based on Commission's finding that officer committed felonies of breaking or entering and larceny even though he pleaded guilty to misdemeanor offenses of breaking or entering and larceny).

Petitioner next argues that 12 N.C. Admin. Code 9G.0504(b)(3) is void for vagueness because it does not define assault or address the standard of proof. Petitioner "[q]uer[ies] whether one can 'commit' a criminal 'offense' unless each element is proven beyond a reasonable doubt." Relatedly, petitioner argues that the statute as applied violated his due process rights because the Commission failed to prove beyond a reasonable doubt that petitioner did not act in self defense. The only authority cited by petitioner in support of these arguments is *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). However, *In re Winship* involved a juvenile delinquency proceeding, and is, therefore, not relevant to the proceeding in this case. Petitioner cites no relevant authority to support his arguments, and his "[q]uery" does not raise an adequate argument to warrant our review of this issue.

Turning to the sufficiency of evidence to support the Commission's findings, petitioner argues that the Commission improperly considered evidence that petitioner choked his wife in 2009 because the Probable Cause Committee determined that no probable cause existed for the 2009 felony strangulation offense. Petitioner points to the descriptions of the misdemeanor assault on a female and felony assault by strangulation charges in the 2009 arrest warrant and notes that "the misdemeanor (for which probable cause was found) did not include 'choking' and the felony charge (for which probable cause was *not* found) is exclusively for 'choking her.'" Petitioner, however, cites no authority, and we have found none, suggesting that the Commission is limited to consideration of the specific facts described in an arrest warrant.

Petitioner further reasons that the Commission itself prohibited the consideration of evidence of choking in finding of fact 19: "Respondent's Probable Cause Committee determined that no probable cause existed for the strangulation offense, and that matter could not be considered at this hearing." We do not read this finding as prohibiting the Commission from considering evidence that defendant choked Mrs. Becker. Rather, this finding merely states that the issue whether petitioner committed the felony offense of assault by strangulation was not

considered at the hearing. Petitioner cites no authority to support his argument that evidence of choking could not be considered in determining whether he committed the separate offense of assault on a female.

Indeed, as explained by this Court in *State v. West*, 146 N.C. App. 741, 743, 554 S.E.2d 837, 839-40 (2001) (internal citations and quotation marks omitted),

> Assault on a female may be proven by finding either an assault on or a battery of the victim. Assault is defined as an intentional attempt, by violence, to do injury to the person of another. Battery is an assault whereby any force is applied, directly or indirectly, to the person of another.

As choking necessarily involves the application of force to another and evidences an intentional attempt to injure that person, the evidence that petitioner choked his wife is patently relevant to determining whether he committed an assault on a female. Accordingly, we hold that the Commission did not err in considering the evidence of choking.

Petitioner also argues that the police reports relied upon by the Commission were based upon Mrs. Becker's statements to police after the incidents occurred and constituted inadmissible hearsay. Petitioner makes no specific argument and cites no authority in support of this conclusory assertion. It is well established that "it is the *appellant* who has the burden in the

first instance of demonstrating error from the record on appeal." *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 764 (1994). The burden is on petitioner to show, with citation of appropriate authority, that the evidence was hearsay that did not fall within any hearsay exception. Petitioner has made no attempt to do so, and, therefore, we do not address his hearsay contention.

Petitioner next argues that the Commission failed to meet its burden of proving that petitioner was not acting in self defense. We disagree. With respect to petitioner's claim of self defense, the Commission found:

> 23. Petitioner claimed that he was acting in self-defense during both the 2001 and 2009 [incidents]. He claimed that in 2001, his wife struck him on the head with some keys, causing a wound on top of his head. She had injured him on other occasions, but he did not tell anyone about her abuse of him for several reasons, one of which was embarrassment. He also stated that the inter-racial nature of his marriage contributed to his desire to keep these matters private. The fact that his wife was previously employed as a probation officer, and the incidents could have affected her employment was another fact in keeping the incidents private.
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> 24. Petitioner had no explanation for why he never called the police if he was afraid for his safety. Petitioner also claimed that he has never been afraid of Tammy Becker, and would never want to leave her. He had no explanation for why he would not just leave if she had a knife.

Petitioner denied ever putting his hands on Tammy Becker's neck and throat, and claimed to have no idea how she received the bruises in 2009. . . .

25. Both Petitioner and Tammy Becker asserted that they had worked through their problems[,] that the incidents were few, and there had been no further encounters since the 2009 incident.

26. At the contested case hearing, [Sergeant LaNorris] Archer opined that the pictures of Tammy Becker from 2009 show such severe bruising around Tammy Becker's neck, that such bruising was caused by two hands.

27. At the contested case hearing, Tammy Becker explained that she and Petitioner are still married, and his income is the only money coming into the family. She admitted she did not want him to lose his job. Her testimony about the assaults differs greatly from both officers. She claimed she was always the aggressor, and that she pulled a knife on Petitioner during the 2009 incident. Tammy Becker claimed that although she had her two hands on her neck, her arms were free to use the knife she allegedly had in her hand to free herself from Petitioner. However, Petitioner had no marks on his body. Tammy Becker's new story is implausible.

28. Tammy Becker admits being worried about what will happen to their family if Petitioner were to lose his job. At the scene in 2009, neither Tammy Becker, nor Petitioner, nor their daughter mentioned anything to Sgt. Archer about a knife being involved.

29. At the contested case hearing, Investigator Zapolsky acknowledged that he learned of the 2009 incident soon after Petitioner's August 15, 2009 arrest.

> Because of the relative low priority of the case and limited resources, he took no action about the matter until July 20, 2011. Mr. Zapolsky admitted that he did not inform Respondent that the "victim" (Tammy Becker) of the 2001 alleged assault was also arrested for assaulting Petitioner, and that Zapolsky probably should have as that fact was relevant to their determination.
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> 30. The fact that Tammy Becker was also charged with simple assault of Petitioner in 2001 is a very relevant factor in Respondent's determining whether Petitioner committed an assault on a female, and what action, if any, Respondent should take regarding Petitioner's certification for being involved in domestic disputes with his wife.

These findings show that the Commission considered petitioner's and Mrs. Becker's claims that he acted in self defense both in 2001 and 2009, but did not find their testimony credible. Significantly, petitioner "had no explanation for why he never called the police if he was afraid for his safety[,]" and Mrs. Becker's testimony differed greatly from both officers' testimony. Further, petitioner and Mrs. Becker remained married and thus were motivated by a desire to help petitioner keep his job -- the only source of income for their family.

With respect to the 2009 incident, the Commission submitted pictures showing severe bruising around Mrs. Becker's neck that an officer testified was caused by two hands. Despite this evidence, petitioner claimed that he did not choke Mrs. Becker

and that he had no idea what caused the bruising. Although both petitioner and Mrs. Becker claimed that Mrs. Becker had a knife, (1) petitioner had no explanation for why he would not just leave if that were the case, (2) neither petitioner, Mrs. Becker, nor their daughter mentioned a knife to police on the day the assault occurred, and (3) the Commission found implausible Mrs. Becker's claim that she had both hands on her neck and a knife in her hand at the same time.

Although petitioner points out that his testimony was consistent with his wife's testimony and that they are the only two individuals who witnessed what occurred, his argument merely amounts to a request that this Court re-weigh and reassess the credibility of the evidence, which we are not entitled to do. Indeed, even assuming, as petitioner asserts, that "*no evidence* from any source rebuts [petitioner's and Mrs. Becker's claim of] self-defense," the Commission "was entitled to determine the credibility of [their testimony] and the weight to which it was entitled, even in the absence of any opposing evidence." *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs. Div. of Health Serv. Regulation*, ___ N.C. App. ___, ___, 751 S.E.2d 244, 252 (2013). Regardless, we have reviewed the record and hold that there is competent evidence that rebuts petitioner's claim of self defense and supports the Commission's

finding that petitioner committed two misdemeanor assaults on a female in 2001 and 2009.

Petitioner next argues that it was arbitrary and capricious to revoke his certification for three years based upon misdemeanor charges that were dismissed and when one of the charges was more than 10 years old. We recognize that the passage of time between the commission of the offenses, petitioner's compliance with the notification requirements, and the fact that petitioner had been promoted are relevant factors in determining whether the revocation of his certification was arbitrary and capricious.

In *Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 101 N.C. App. 699, 700, 400 S.E.2d 742, 743 (1991), the Commission revoked a police officer's certification, without notice or a hearing, for alleged material misrepresentations regarding his prior drug use that he made in his application for certification. The police officer submitted his application in 1982, but the Commission did not take action to revoke his certification until 1987. *Id.* The superior court reversed on the grounds that the Commission failed to afford the police officer notice and a hearing and acted arbitrarily and capriciously. *Id.* This Court affirmed, explaining that the decision was arbitrary and capricious "[i]n light of the passage

of time since petitioner's original application, respondent's long-term access to the information, petitioner's exemplary service, and the fact that petitioner volunteered to the commission the extent of his drug use near the beginning of the process and prior to the submission of the 30 December 1982 personal history statement[.]" *Id.* at 702, 400 S.E.2d at 744.

Nevertheless, in this case, the Commission based its suspension on two misdemeanor assaults with the second, much more serious assault, having occurred more recently and suggesting a pattern of behavior about which petitioner was not being honest. Petitioner, once again, does not cite any authority in support of his argument that it was arbitrary and capricious to suspend his certification *under the circumstances of this case*. Therefore, we decline to review this argument.

In conclusion, we hold that there was substantial evidence to support the Commission's finding that petitioner committed two misdemeanor offenses of assault of a female in 2001 and 2009. This finding, in turn, supported the Commission's revocation of his certification for three years and was not arbitrary or capricious. Accordingly, we affirm.

Affirmed.

Judges STROUD and BELL concur.

Report per Rule 30(e).