IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-224

Filed: 19 December 2017

Hertford County, No. 16 CVS 46

DENNIS JENKINS, Petitioner

v.

KELLY J. THOMAS, Commissioner of the Division of Motor Vehicles, DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY, STATE OF NORTH CAROLINA, Respondent

Appeal by respondent from order entered 22 November 2016 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 6 September 2017.

Petitioner Dennis Jenkins, pro se.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State.

CALABRIA, Judge.

Kelly J. Thomas, former Commissioner of the Division of Motor Vehicles ("DMV"), and the North Carolina Department of Transportation and Highway Safety (collectively, "respondent"), appeals from the superior court's order reversing the

DMV's revocation of the driving privilege of Dennis Jenkins ("petitioner").[1] After careful review, we conclude that the superior court employed an erroneous standard of review following petitioner's appeal of the DMV's order. Accordingly, we reverse the superior court's order and remand for rehearing.

I. Background

On 19 February 2015, Trooper Jason G. Williams ("Trooper Williams") of the North Carolina State Highway Patrol responded to the scene of a one-car accident on Blue Foot Road in Hertford County, North Carolina. When Trooper Williams arrived, he observed a white Ford Ranger turned on its side. Petitioner, the car's sole occupant, was already seated in the back of an ambulance. Petitioner told Trooper Williams that he was driving home alone when his car hit some ice and flipped. Although he had a bump on his head and was bleeding severely from a cut on his lip, petitioner stated that he did not want to go to the hospital. After Trooper Williams detected a strong odor of alcohol on petitioner's breath, he asked petitioner when he last consumed alcohol. Petitioner stated that his last drink was two days prior. Trooper Williams requested that petitioner submit to a portable breath test ("PBT"). At 9:12 p.m., petitioner provided one breath sample, which yielded a positive reading for alcohol. Following the positive PBT reading, Trooper Williams repeated the same

[1] Thomas served as Commissioner of the DMV on 23 March 2015, when respondent notified petitioner that his driving privilege was scheduled for suspension.

question by asking petitioner when he last consumed alcohol, and petitioner responded, "about ten or eleven hours ago or about a day ago."

Emergency Medical Services transported petitioner to Roanoke-Chowan Hospital. After Trooper Williams finished investigating the scene, he went to the hospital to continue questioning petitioner. Upon his arrival, two nurses informed Trooper Williams that petitioner was attempting to leave the hospital against medical recommendations. However, when he saw Trooper Williams, petitioner turned around and returned to the emergency room. When Trooper Williams subsequently interviewed petitioner in the hospital, petitioner stated that his cousin, and then his brother, had been driving prior to the accident.

At 10:19 p.m., Trooper Williams requested that petitioner submit to a second PBT. Petitioner refused, and Trooper Williams charged him with driving while impaired and exceeding a safe speed for conditions. At 10:40 p.m., Trooper Williams, a certified chemical analyst, informed petitioner of his implied-consent rights, pursuant to N.C. Gen. Stat. § 20-16.2(a) (2015). After petitioner indicated that he desired legal advice, his uncle unsuccessfully attempted to contact two attorneys on his behalf. At 11:16 p.m., Trooper Williams asked petitioner to submit to a blood test. Petitioner refused, stating that he would not submit without advice from counsel. Trooper Williams subsequently repeated the request twice more, and petitioner refused both requests.

On 23 March 2015, respondent notified petitioner that his North Carolina driving privilege was subject to suspension for one year as a result of his willful refusal to submit to chemical analysis. Following a hearing, on 11 February 2016, the DMV entered an order sustaining the revocation of petitioner's license. On 22 February 2016, petitioner filed a request for a hearing in Hertford County Superior Court. In addition, petitioner moved the court to issue an order restraining the DMV from suspending his driver's license, asserting that he "is employed with a CDL license and drives for a living [and] would be irreparably and immediately harmed if the revocation order of DMV is upheld." That day, the superior court entered an order granting petitioner's motion and request for a hearing.

The superior court held a hearing on 31 October 2016. Following arguments from both parties, the court entered an order reversing the DMV's decision and "permanently enjoin[ing]" the suspension of petitioner's driving privilege. Respondent appeals.

II. Analysis

On appeal, respondent contends that the superior court erred in reversing the DMV's final agency decision because the court utilized an incorrect standard of review. We agree.

> On appeal from a DMV hearing, the superior court sits as an appellate court, and no longer sits as the trier of fact. Accordingly, our review of the decision of the superior court is to be conducted as in other cases where the superior

> court sits as an appellate court. Under this standard we conduct the following inquiry: (1) determining whether the court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Burris v. Thomas, __ N.C. App. __, __, 780 S.E.2d 885, 887-88 (2015), *disc. review denied*, 368 N.C. 818, 784 S.E.2d 471 (2016).

In North Carolina, any person who willfully refuses to submit to chemical analysis after being charged with an implied-consent offense automatically loses his or her driving privilege for one year. N.C. Gen. Stat. § 20-16.2(d). Before the revocation becomes effective, the person may request a hearing before the DMV. *Id.* At the hearing, the issues are limited to consideration of whether:

> (1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to [N.C. Gen. Stat. §] 20-19;
> (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
> (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 DMV finds that all of these conditions are met, it must sustain the license revocation. *Id.*

If the DMV sustains the revocation, the person whose license has been revoked may petition the superior court "within 30 days . . . for a hearing on the record." N.C. Gen. Stat. § 20-16.2(e). At the hearing, the superior court's review is "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." *Id.*

In the instant case, the superior court's order indicates that the court erroneously conducted a *de novo* review pursuant to N.C. Gen. Stat. § 20-25, which provides a right of appeal for "[a]ny person denied a license or whose license has been canceled, suspended or revoked by the [DMV], *except where such cancellation is mandatory* . . . ." *Id.* (emphasis added). Here, the DMV was statutorily required to revoke petitioner's license for 12 months, due to his willful refusal to submit to a chemical analysis. N.C. Gen. Stat. § 20-16.2(d). Therefore, upon petitioner's appeal from the DMV hearing, the superior court's review was "limited to whether there [wa]s sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law [we]re 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).

The superior court did not address the DMV's findings of fact or conclusions of law. Instead, the court made new findings of fact, including:

> 6. That at the time of the request Trooper Williams; [sic] had not seen the Petitioner drive any vehicle, and had no independent knowledge of the Petitioner driving any vehicle, could not determine what time, if any the Petitioner drove a vehicle upon the highways of North Carolina.
>
> 7. That Petitioner denied driving . . . .
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> 8. That the Trooper had no reasonable grounds to determined [sic] that the Petitioner had been operating a motor vehicle on the highways of North Carolina of [sic] reasonable time after consuming any alcohol, because the officer had no knowledge of when the defendant drove on the highways of North Carolina.
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> . . .
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> 15. That the affidavit of the charging officer and chemical Trooper JG Williams stated a time that was not based on any personal knowledge or reasonable hearsay . . . .
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> . . .
>
> 18. There is no way to establish when or if, the petitioner drove on the Highways of North Carolina.

Based on its own findings, the superior court concluded that the DMV "wrongfully suspended the Petitioner['s] Driving privilege" and ordered that the suspension be "permanently enjoined."

Rather than holding a hearing on the record as required by N.C. Gen. Stat. § 20-16.2(e), the superior court conducted *de novo* review pursuant to N.C. Gen. Stat. §

20-25. In doing so, the superior court failed to exercise the appropriate standard of review. *Contra Johnson v. Robertson*, 227 N.C. App. 281, 287, 742 S.E.2d 603, 607 (2013) (determining that "the superior court employed the correct standard of review since the order affirming the decision of the hearing officer cites N.C. Gen. Stat. § 20-16.2(e) and states the proper standard: 'this Court does not conduct a *de novo* review of the facts and instead reviews the record to determine whether there is sufficient evidence in the record to support the Commissioner's findings of fact' ").

Since the superior court utilized an erroneous standard of review, our analysis is complete. *See Burris*, __ N.C. App. at __, 780 S.E.2d at 888 (stating that this Court "(1) determin[es] whether the [superior] court exercised the appropriate scope of review and, *if appropriate*, (2) decid[es] whether the court did so properly" (emphasis added)). Accordingly, we reverse the superior court's order and remand for rehearing.

REVERSED AND REMANDED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).