

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1200

Filed: 6 August 2019

Union County, No. 18 CVS 524

ROY EUGENE COUICK, Petitioner

v.

TORRE JESSUP, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES,
STATE OF NORTH CAROLINA, Respondent.

Appeal by respondent from order entered 25 May 2018 by Judge Jeffery K. Carpenter in Superior Court, Union County. Heard in the Court of Appeals 24 April 2019.

James J. Harrington for petitioner-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for respondent-appellant.

STROUD, Judge.

Respondent Commissioner of the Division of Motor Vehicles appeals an order vacating a decision of the Division of Motor Vehicles, rescinding its previously imposed revocation and reinstating petitioner's driving privilege. Because the affidavit and amended affidavit both showed the arresting officer designated a blood test but petitioner refused a breath test, neither was a properly executed affidavit showing petitioner willfully refused blood alcohol testing under North Carolina

General Statute § 20-16.2. The trial court correctly concluded DMV did not have jurisdiction to revoke petitioner's license upon receipt of the affidavits, so we affirm.

I. Background

On 7 July 2017, petitioner was charged with driving while impaired and allegedly refused to submit to a chemical analysis. Deputy Justin Griffin of the Union County Sheriff's Office, the law enforcement officer, filed an "Affidavit and Revocation Report of Law Enforcement Officer" form (DHHS 3907) ("Affidavit"). The Affidavit noted Deputy Griffin requested petitioner submit to a blood analysis and had specifically *marked out* the word "breath" for the type of chemical analysis designated. Attached and incorporated into the affidavit was the "Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S. §20-16.2(a)" form (DHHS 4081) ("Rights Form"), which noted "Breath" as the type of analysis refused by petitioner.

On 14 November 2017, Deputy Griffin amended both the Affidavit and Rights Form. The amended Affidavit now noted that Deputy Griffin was both the law enforcement officer and chemical analyst but again he *marked out* the word "breath" and *circled* blood as the type of analysis designated. The amended Rights Form still reflected "Breath" as the type of analysis refused.

Petitioner was notified that his driving privilege would be suspended in December of 2017 for his refusal to submit to a chemical test. Petitioner requested a

hearing on the matter, and in February of 2018 the Division of Motor Vehicles (“DMV”) decided “petitioner’s refusal to submit to a chemical analysis is sustained.” Petitioner’s driving privilege was suspended effective 18 February 2018.

On 2 March 2018, petitioner filed a petition for a hearing in the trial court regarding his suspended driving privilege. The trial court found “the Division seeks to revoke the Petitioner’s driving privilege for willfully refusing a chemical analysis (specifically a breath analysis) that the Petitioner was not requested to submit to” because the Affidavits indicate “Petitioner was requested to submit to a blood analysis and only a blood analysis[.]” Relying on *Lee v. Gore*, 365 N.C. 227, 717 S.E.2d 356 (2011), the trial court determined the DMV did not have the authority to revoke defendant’s privilege because “the affidavits signed on July 7, 2017 and on November 9, 2017 are not ‘properly executed affidavits’ to give rise to a revocation of the Petitioner’s driving privilege for failing to submit to a chemical analysis of his breath.” The trial court vacated the prior decision of the DMV, revoked the DMV’s previously imposed revocation, and reinstated petitioner’s driving privilege. Respondent appeals.

II. Properly Executed Affidavit

Respondent contends that its “receipt of a properly executed affidavit under N.C. Gen. Stat. § 20-16.2(d) provided the requisite jurisdiction for respondent to revoke petitioner’s license under N.C. Gen. Stat. § 20-16.2.” (Original in all caps.)

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[O]n 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 trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. . . . We hold that these cases provide the appropriate standard of review for this Court under the amended provisions of N.C. Gen. Stat. § 20-16.2.

Johnson v. Robertson, 227 N.C. App. 281, 286–87, 742 S.E.2d 603, 607 (2013) (citations and quotation marks omitted). Furthermore, “[q]uestions of statutory interpretation of a provision of the Motor Vehicle Laws of North Carolina are questions of law and are reviewed *de novo* by this Court.” *Id.* at 283, 742 S.E.2d at 605 (citation and quotation marks omitted).

Respondent contends that it had authority to revoke petitioner’s license upon receipt of the Affidavit because the Affidavit “contained all requisite jurisdictional elements – boxes 1, 4, 7 and 14.” As *Lee* emphasizes, respondent must receive “a properly executed affidavit meeting all of the requirements set forth in N.C. Gen. Stat. § 20-16.2(c1) before the DMV is authorized to revoke a person’s driving privileges.” 365 N.C. at 233, 717 S.E.2d at 360-61 (quotation marks omitted). Specifically, Respondent argues the affidavit must allege that:

- (1) The person was charged with an implied-consent offense or had an alcohol concentration restriction on the driver’s license[, Box 4 of the Affidavit];
- (2) A law enforcement officer had reasonable grounds

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to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the driver's license[, Box 1 of the Affidavit];

.....

- (5) The results of any tests given or that the person *willfully refused to submit to a chemical analysis*[, Box 14 of the Affidavit].

N.C. Gen. Stat. § 20-16.2(c1) (2017) (emphasis added). In other words, respondent contends box 9 of the form is “immaterial” to its jurisdiction to revoke but acknowledges that box 14 is essential. The problem here is that box 14 conflicts with box 9 on this Affidavit and the Affidavit on its face did not establish jurisdiction. *See generally Lee*, 365 N.C. at 233, 717 S.E.2d at 360-61. Respondent relies upon *Lee* for its argument that the Affidavit was sufficient to confer jurisdiction for revocation, but Respondent overlooks the factual differences between *Lee* and this case as well as the additional statutory requirement relevant to this case. *See generally* N.C. Gen. Stat. § 16.2; *Lee*, 365 N.C. 227, 717 S.E.2d 356.

In *Lee*, the Supreme Court considered a case where a police officer stopped a driver for speeding and the officer believed the driver was driving while impaired. *Id.* at 228, 717 S.E.2d at 357. The officer took the driver to an intake center to “undergo chemical analysis by way of an Intoxilyzer test.” *Id.* The officer told the driver “several times that his failure to take the Intoxilyzer test would be regarded as a refusal to take the test” and would “result in revocation of petitioner’s North Carolina driving privileges.” *Id.* The driver still refused to take the test, and the officer noted

“on form DHHS 3908” that the driver had “refused’ the test at 12:47 a.m. on 23 August 2007.” *Id.*

Later that day the officer appeared before a magistrate and executed an affidavit regarding petitioner’s refusal to submit to chemical analysis. Form DHHS 3907, entitled “Affidavit and Revocation Report,” was created by the Administrative Office of the Courts for this purpose. The form includes fourteen sections, each preceded by an empty box. The person swearing to the accuracy of the affidavit checks the boxes relevant to the circumstances and then signs the affidavit in the presence of an official authorized to administer oaths and execute affidavits.

Section fourteen of form DHHS 3907 states: “The driver willfully refused to submit to a chemical analysis as indicated on the attached form DHHS 3908. DHHS 4003.” The officer did not check the box for section fourteen. The officer then mailed both the DHHS 3907 and DHHS 3908 forms to the DMV. Neither form indicated a willful refusal to submit to chemical analysis.

Nevertheless, upon receiving the forms, the DMV suspended petitioner’s North Carolina driving privileges for one year, effective 30 September 2007, for refusing to submit to chemical analysis.

Id. at 228, 717 S.E.2d at 357-58.

The driver requested a hearing to contest the license revocation, and at the November 2007 hearing

it came to light that the copy of form DHHS 3907 on file with the DMV had an ‘x’ in the section fourteen box. All the other boxes marked on the form DHHS 3907 contained check marks, not xs. Petitioner’s copy of form DHHS 3907 did not contain an x in the box preceding section fourteen.

Id. at 228-29, 717 S.E.2d at 358. The hearing officer upheld the license revocation, and the driver appealed to Superior Court, which affirmed. *Id.* at 229, 717 S.E.2d at 358. The driver then appealed to the Court of Appeals, which reversed the Superior Court because “DMV never received the statutorily required affidavit indicating that petitioner had willfully refused to submit to a chemical analysis of his blood alcohol level.” *Id.* Based upon a dissent which considered the error in the DHHS 3907 Affidavit as “an inconsequential violation of administrative procedure, rather than a violation of petitioner’s right to due process[,]” DMV appealed. *Id.*

Our Supreme Court agreed with the majority opinion that DMV had no jurisdiction to revoke the license because the Affidavit did not show the driver had willfully refused the Intoxilyzer test. *Id.* at 365 N.C. at 229-34, 717 S.E.2d at 358-61. The Court then explained that its “disposition of this case turns on the limited authority of the DMV.” *Id.* at 230, 717 S.E.2d at 359.

The DMV is a division of the North Carolina Department of Transportation (“DOT”), which has been described by this Court as an inanimate, artificial creature of statute whose form, shape and authority are defined by the Act by which it was created and which is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. Chapter 20 of our statutes creates the DMV, sets out its powers and duties, and delineates the DMV’s authority to discharge these duties. As such, the DMV possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority.

N.C.G.S. § 20–16.2, the statutory grant of authority at issue here, enables the DMV to act when a driver is

charged with an implied-consent offense, such as driving while impaired, and the driver refuses to submit to chemical analysis. Under subsection (a) of the statute, drivers on our highways consent to a chemical analysis test if charged with an implied-consent offense. Before the test is administered, however, a chemical analyst who is authorized to administer a breath test must give the person charged both oral and written notice of his rights as enumerated in that subsection, including his right to refuse to be tested.

Subsections (c) and (c1) then address the refusal to submit to chemical analysis, providing as follows:

(c) Request to Submit to Chemical Analysis.—*A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.*

(c1) Procedure for Reporting Results and Refusal to Division.—Whenever a person refuses to submit to a chemical analysis the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating that:

(5) The results of any tests given or that the person willfully refused to submit to a chemical analysis.

The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.

N.C.G.S. § 20–16.2(c), (c1) (2006).¹

Next, subsection (d) addresses the consequences stemming from a driver’s refusal to submit to chemical analysis and provides for administrative review:

(d) Consequences of Refusal; Right to Hearing before Division; Issues.—Upon receipt of a properly executed affidavit required by subsection (c1), the Division shall expeditiously notify the person charged that the person’s license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division.

Id. § 20–16.2(d) (2006).

Last, subsection (e) authorizes superior court review.

(e) Right to Hearing in Superior Court.—If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing on the record. The superior court review shall be 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. § 20–16.2(e) (2006).

Our appellate courts have had a number of opportunities to consider N.C.G.S. § 20–16.2. These decisions confirm that a person’s refusal to submit to chemical analysis must be willful to suspend that person’s driving privileges.

Here the Court of Appeals concluded that the DMV

¹ North Carolina General Statute § 20-16.2 has been amended since 2006, but none of the amendments effect the substance of this case. See N.C. Gen. Stat. § 20-16.2 (2017) (History).

did not receive a properly executed affidavit required by subsection (c1) indicating petitioner's willful refusal to submit to chemical analysis. Consequently, the Court of Appeals held that the DMV lacked authority to revoke petitioner's driving privileges under N.C.G.S. § 20-16.2(d). The Court of Appeals further held that, absent this authority, there was also no authority in N.C.G.S. § 20-16.2 for a review hearing or superior court review.

Echoing the dissent, however, the DMV contends that the Court of Appeals erred in reaching these conclusions. The DMV argues that it has the authority to revoke petitioner's driving privileges because petitioner was charged upon reasonable grounds with the implied-consent offense of driving while impaired, was notified of his rights under N.C.G.S. § 20-16.2(a) and willfully refused to submit to chemical analysis, and thus was subject to the consequences outlined in N.C.G.S. § 20-16.2(d). We disagree that the DMV had the authority to revoke petitioner's license under these circumstances, absent an affidavit indicating that petitioner willfully refused to submit to chemical analysis.

N.C.G.S. § 20-16.2(c1) is clear and unambiguous. When a person refuses to submit to chemical analysis the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating the results of any tests given or that the person willfully refused to submit to a chemical analysis. In the instant case the officer swore out the DHHS 3907 affidavit and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was "refused." Yet, neither document indicated that petitioner's refusal to participate in chemical analysis was willful. As such, the requirements of section 20-16.2(c1) have not been met.

Additionally, the requirements of N.C.G.S. § 20-16.2(d) have not been satisfied. The plain language of subsection (d) requires that the DMV receive "a properly executed affidavit" meeting all the requirements set forth in N.C.G.S. § 20-16.2(c1) before the DMV is authorized to revoke a person's driving privileges under N.C.G.S. § 20-

16.2. *Here neither the DHHS 3907 affidavit submitted to the DMV, nor the attached DHHS 3908 form indicating a refusal, states that the refusal was willful. Consequently, the DMV lacked authorization to revoke petitioner's license.*

....
[W]hile we are cognizant of the strong public policy favoring the removal of unsafe drivers from our roads, *the DMV's burden here was light. The DMV could have cured the deficiency in the affidavit by simply inquiring of the officer whether the affidavit contained an omission. If so, the DMV could have requested that the officer swear out a new, properly executed affidavit. Instead, the DMV took the position that the error described here was cured through a hearing the DMV lacked the authority to conduct.* To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason. The DMV's interpretation would also permit suspension of driving privileges for willful refusal without an evidentiary predicate. The suspended driver would then have to request a hearing to contest the State's actions. Yet, if the driver failed to request a hearing, his driving privileges likely would be suspended even though the DMV never received evidence of willful refusal. This result is not contemplated in N.C.G.S. § 20–16.2. Simply put, the DMV lacks the authority to suspend driving privileges, or revoke a driver's license, without some indication that a basis for suspension or revocation as required by N.C.G.S. § 20–16.2(c1) has occurred.

Finally, to hold otherwise essentially adopts a "no harm, no foul" analysis. Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the DMV's authority to act. This is not a case that turns upon prejudice to the petitioner.

Id. at 229-234, 717 S.E.2d at 358-61 (emphasis added) (citations, quotation marks, ellipses, brackets, and footnotes omitted). The Supreme Court affirmed the Court of

Appeals opinion and held “that the DMV lacked the authority to revoke the driving privileges of petitioner[.]” *Id.* at 227, 717 S.E.2d at 357. Based on *Lee*, respondent contends, “Information contained in Box #9 of the Affidavit regarding the type of chemical test requested is immaterial to a determination of whether the Petitioner’s license should be revoked pursuant to N.C. Gen. Stat. § 20-16.2.”

Respondent initially contends that marking “blood” instead of “breath” was merely a clerical error. To be clear, this is not simply a matter of checking boxes where a box was missed and later filled in, as in *Lee, id.* at 228, 717 S.E.2d at 358, or a misplaced mark could be misunderstood as a strikeout when it was intended as a checkmark to indicate just the opposite of what a strikeout would accomplish. Box 9 leaves blanks for the date and time to be filled in by hand and then the preprinted text on the form states, “I requested the driver to submit to chemical analysis of his/her breath/ or blood/ or urine.” On both Affidavits “breath” and “urine” are both marked out and the word “blood” is circled. This is not merely a clerical error indicating a “minor mistake” but rather a purposeful choice to mark out “breath” and “urine[.]” and to designate “blood[.]” *See State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (“A clerical error is defined as, an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record[.]” (citation, quotation marks, and brackets omitted)). Further, the same “error” as to the type of test designated occurs on both the original and amended Affidavits. And

without the correct designation of the test requested in box 9, box 14 cannot support the claim of a willful refusal.

Respondent also argues that the correct type of test, breath, was noted on the attached DHHS Form 4081, “Rights of Person Requested to Submit to Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance under N.C.G.S. 20-16.2(a)[.]” But Form 4081 was actually part of the Affidavit. Box 14 of the Affidavit states: “The driver willfully refused to submit to a chemical analysis *as indicated on the attached*: DHHS 4082 DHHS 4081.”² Both the originally filed and amended DHHS 4081 forms were the same. At the top of the attached form, three options are printed:

“ Breath Blood Subsequent Test[.]”

“Breath” is checked as the test refused on both the original and amended forms. Thus, on its face, the Affidavit showed that Deputy Griffin requested a blood test and petitioner refused a breath test.

But as noted, respondent also contends that the error was immaterial and does not affect whether the Affidavit was properly executed to invoke the DMV’s authority. We turn to the applicable version of North Carolina General Statute § 20-16.2 which addresses the requirements for request for a chemical analysis. *See generally* N.C. Gen. Stat. § 20-16.2. One requirement is that the officer or analyst “designate the

² On both the original and amended affidavit both boxes are checked, but only one form, DHHS 4081 was attached.

type of test or tests to be given”:

(c) **Request to Submit to Chemical Analysis.**

-- A law enforcement officer or chemical analyst *shall designate the type of test or tests to be given* and may request the person charged to submit *to the type of chemical analysis designated*. *If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section*, but the refusal does not preclude testing under other applicable procedures of law.

N.C. Gen. Stat. § 20-16.2 (emphasis added). Box 9 of the Affidavit form is the portion of the Affidavit where the officer designates the “type of test or tests to be given[.]” *Id.* The statute requires the officer or analyst to “designate the type of test or tests to be given” and the person charged must submit “to the type of chemical analysis *designated*.” *Id.* (emphasis added). If the person refuses “to submit to that chemical analysis” the officer could then designate another type of testing, but the type of test designated and the type of test refused must be the same for the driver’s refusal to be willful. *See id.* Thus, the *type* of chemical analysis requested and refused is an essential element showing that the driver willfully refused testing and is a necessary part of a properly executed affidavit. *Id.*

Respondent’s reading of *Lee* as holding only four specific sections of the Affidavit are relevant to invoke for jurisdiction is not entirely incorrect but focuses only on the facts in the *Lee* case. *See generally Lee*, 365 N.C. 227, 717 S.E.2d 356. In *Lee*, the officer requested and the driver refused a breath test, but the box regarding willful refusal was not checked at all. *See id.* at 228, 717 S.E.2d at 357-58. Here, the

issue is whether petitioner willfully refused to take the type of test designated by Deputy Griffin, and based upon both the original Affidavit and the amended Affidavit, the officer “designated” one type of test – blood -- and petitioner refused another type of test -- breath. Under North Carolina General Statute § 20-16.2, this is not a willful refusal of a chemical analysis. *See* N.C. Gen. Stat. § 20-16.2.

In *Lee*, the Supreme Court noted the “particularly disturbing” fact that the affidavit as originally completed did not have the block for box 14 checked, but the version of the affidavit presented at the hearing had an *x* mark in that block. *Lee*, 365 N.C. at 229-233, 717 S.E.2d at 358-61. The Court noted that DMV could have corrected the problem but this correction would have to be done *before* revocation of the license, not at the hearing, because DMV would have no jurisdiction either to revoke the license or to hold a hearing without a properly executed affidavit:

The DMV could have cured the deficiency in the affidavit by simply inquiring of the officer whether the affidavit contained an omission. *If so, the DMV could have requested that the officer swear out a new, properly executed affidavit. Instead, the DMV took the position that the error described here was cured through a hearing the DMV lacked the authority to conduct.* To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason. The DMV’s interpretation would also permit suspension of driving privileges for willful refusal without an evidentiary predicate.

Id. at 234, 717 S.E.2d at 361 (emphasis added) (citations omitted).

Here, on 14 November 2017, Deputy Griffin prepared the amended Affidavit form, including the amended attached DHHS 4081 form, but the amended forms still included the exact same information in Section 9 as the original forms. We assume the only reason for the Amended Affidavit was to show that Deputy Griffin was the law enforcement officer and the chemical analyst. Since the Affidavit still states that Deputy Griffin designated one type of test and petitioner refused another type of test, the refusal was not willful under North Carolina General Statute § 20-16.2. *See generally* N.C. Gen. Stat. § 20-16.2.

Respondent also argues that any deficiency in the Affidavit was corrected by Deputy Griffin's testimony at the hearing because Deputy Griffin testified that he requested that respondent submit to a breath test and he refused. Deputy Griffin also testified that respondent asked for a blood test but he did not offer a blood test because "I have to go with my discretion" and "most of the time when I do a blood draw it's for . . . substances, illegal drugs and/or alcohol." But as our Supreme Court stressed in *Lee*, the error in the Affidavit cannot be "cured through a hearing the DMV lacked the authority to conduct. To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason." *Lee*, 365 N.C. at 234, 717 S.E.2d at 361. The respondent's argument ignores DMV's "limited authority" to suspend a driver's license. *Id.* at 230, 717 S.E.2d at 359. As

the Supreme Court noted, “Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the DMV’s authority to act. This is not a case that turns upon prejudice to the petitioner.” *Id.* at 234, 717 S.E.2d at 361.

III. Conclusion

Because the Affidavit submitted to DMV did not show that petitioner had willfully refused chemical analysis under North Carolina General Statute § 20-16.2, it was not a “properly executed affidavit” which conferred jurisdiction upon DMV to revoke petitioner’s license. We therefore affirm the trial court’s order.

AFFIRMED.

Judges BRYANT and COLLINS concur.