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NO. COA12-932
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v.

Johnston County
No. 09 CRS 55301

MACUS DONALD JOHNSON

Appeal by defendant from judgment entered 17 January 2012
by Judge Thomas H. Lock in Johnston County Superior Court.
Heard in the Court of Appeals 30 January 2013.

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

*Gerding Blass, PLLC, by Danielle Blass, for defendant-
appellant.*

HUNTER, JR., Robert N., Judge.

Macus Donald Johnson ("Defendant") appeals the judgment
entered after a jury convicted him of Driving While Impaired
("DWI").¹ Defendant contends that his trial for DWI following a

¹ In his appellate brief, Defendant describes his appeal of the trial court's denial of his motion to dismiss. However, his Notice of Appeal designates his appeal as stemming from the trial court's judgment of conviction for DWI. According to the

one-year commercial driver's license ("CDL") disqualification under N.C. Gen. Stat. § 20-17.4(a)(7) (2011) subjected him to double jeopardy. Upon review, we affirm.

I. Facts & Procedural History

Defendant was a truck driver for Logistics Recovery, a Federal Emergency Management Agency program that delivers heavy equipment and generators to storm victims. As part of his job, Defendant held a North Carolina Class A CDL. On 9 August 2009, Defendant was driving his private vehicle, a grey Chevrolet Silverado pickup truck.

In the early morning hours of 9 August 2009, Lieutenant Kenneth Lunger ("Lieutenant Lunger") was on patrol on Highway 70 West in Johnston County. Lieutenant Lunger observed Defendant make a U-turn from Highway 70 West onto Highway 70 East. After Lieutenant Lunger saw Defendant make a wide turn and lose traction with the road, he followed Defendant. Defendant proceeded less than a quarter-mile and turned into a shopping center, hitting a curb in the process. Lieutenant Lunger then

North Carolina Rules of Appellate Procedure, the Notice of Appeal must designate "the judgment or order from which appeal is taken[.]" N.C. R. App. P. 3(d). Therefore, we construe the instant case as an appeal of the trial court's judgment of conviction for DWI.

activated his lights, and Defendant pulled into a McDonald's parking lot.

When Lieutenant Lunger approached Defendant's truck and began to talk to Defendant, he smelled alcohol. Lieutenant Lunger also noticed Defendant had red, glazed eyes. Upon questioning, Defendant told Lieutenant Lunger he had consumed several alcoholic beverages that night. Lieutenant Lunger then had Defendant undergo several field sobriety tests. At Lieutenant Lunger's request, Defendant also submitted to an Alco-Sensor portable breath test. The test indicated Defendant had a blood alcohol concentration above the legal limit. Based on the field sobriety tests and the preliminary breath test, Lieutenant Lunger arrested Defendant for DWI shortly after 1:00 A.M. Lieutenant Lunger took Defendant to the Clayton Police Department, where Defendant submitted to an Intoximeter breath test. This test indicated Defendant had a blood alcohol concentration of 0.09.

Defendant then appeared before Johnston County Magistrate S.A. Wood ("Magistrate Wood"). Based on the breath test results, Magistrate Wood issued a Revocation Order When Person Present (the "Revocation Order") pursuant to N.C. Gen. Stat. § 20-16.5. Magistrate Wood then seized Defendant's personal

driver's license and CDL. The Revocation Order "remain[ed] in effect at least thirty (30) days" from its issuance. According to the Revocation Order, Defendant could reclaim his license at the end of the thirty-day period if he paid a \$100.00 civil revocation fee to the Johnston County Clerk of Superior Court. The Revocation Order also described Defendant's "right to a hearing to contest the validity of this Revocation before a magistrate or judge. To do so, a written request must be made within ten (10) days of the effective date of the revocation." Defendant did not contest the 30-day revocation. At the end of the 30-day period, Defendant paid \$100.00 to the Clerk of the Johnston County Superior Court and regained his personal driver's license and CDL.

On 13 April 2010, the North Carolina Division of Motor Vehicles ("DMV") notified Defendant that based on his 30-day civil license revocation, he was now disqualified from holding a CDL for one year pursuant to N.C. Gen. Stat. § 20-17.4(a)(7). The disqualification period ran from 23 April 2010 to 23 April 2011. The letter also stated "a hearing is not authorized by statute." Based on his one-year CDL disqualification, Defendant subsequently lost his job as a truck driver.

On 9 January 2012, Defendant filed a Motion to Dismiss his DWI charge in Johnston County Superior Court. He alleged that prosecution for DWI after a one-year CDL disqualification constituted impermissible double jeopardy. The Johnston County Superior Court denied his motion on 25 January 2012.

Defendant received a jury trial during the 17 January 2012 Criminal Session of Johnston County Superior Court. On 17 January 2012, the jury found Defendant guilty of DWI. Defendant again received a 60-day suspended sentence with 12 months of unsupervised probation.² On 17 January 2012, Defendant gave timely written notice of appeal. On 2 May 2013 this Court, *ex mero motu*, held the matter in abeyance until resolution of *State v. McKenzie*, 52A13, 2013 N.C. LEXIS 1019 (N.C. Oct. 4, 2013).

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(b) (2011). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. rev. denied*, 363 N.C.

² As a special condition of probation, the superior court also required Defendant to: (i) obtain a substance abuse assessment; (ii) surrender his driver's license; and (iii) serve an active term of one day imprisonment on 21 January 2012.

857, 694 S.E.2d 766 (2010); see also *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated."). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

On appeal, Defendant argues his DWI conviction after a one-year CDL disqualification constitutes impermissible double jeopardy. Upon review, we affirm.

Our Supreme Court decided the exact same legal issue in *McKenzie*, 52A13, 2013 N.C. LEXIS 1019. The Supreme Court, per curiam, adopted the dissent filed in this Court's opinion. *Id.* (citing *State v. McKenzie*, ___ N.C. App. ___, ___, 736 S.E.2d 591, 599, writ allowed, 366 N.C. 423, 736 S.E.2d 184 and rev'd, 52A13, 2013 N.C. LEXIS 1019 (N.C. Oct. 4, 2013) (Hunter, J. Robert C., dissenting)). By adopting the dissent, the Supreme Court reversed our decision that prosecution for DWI after a one-year CDL disqualification constitutes impermissible double

jeopardy. *Id.* The dissent applied the *Hudson* test to determine: (i) one-year CDL disqualification under N.C. Gen. Stat. § 20-17.4(a)(7) is a civil penalty; and (ii) one-year CDL disqualification is not so punitive as to become a criminal punishment for double jeopardy purposes. *McKenzie*, ___ N.C. App. at ___, 736 S.E.2d at 601-03 (Hunter, J. Robert C., dissenting).³ See *Hudson v. United States*, 522 U.S. 93, 99-100 (1997) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

Therefore, based on our Supreme Court's decision in *McKenzie*, we conclude Defendant's DWI conviction after a one-year CDL disqualification did not constitute impermissible double jeopardy.

IV. Conclusion

Based on our Supreme Court's reasoning in *State v. McKenzie*, we affirm Defendant's conviction.

AFFIRMED.

³ *Hudson* first requires us to "ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" See *Hudson v. United States*, 522 U.S. 93, 99 (1997). Next, "[e]ven in those cases where the legislature has indicated an intention to establish a civil penalty," we will consider seven factors to determine whether the penalty is so punitive it amounts to a criminal punishment. *Id.*

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Judges STEELMAN and GEER concur.

Report per Rule 30(e).