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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-474

Filed: 6 February 2018

Pamlico County, No. 16 CVS 101

CATHERINE HUDGINS HOPKINS, Plaintiff,

v.

KELLY J. THOMAS, Commissioner, N.C. Division of Motor Vehicles, Respondent.

Appeal by respondent from order entered on 1 February 2017[1] by Judge Benjamin G. Alford in Pamlico County Superior Court. Heard in the Court of Appeals 15 November 2017.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for petitioner-appellee.

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

ZACHARY, Judge.

Kelly J. Thomas, Commissioner of the North Carolina Division of Motor Vehicles (respondent) appeals from an order that reversed respondent's decision to revoke the driver's license of Catherine Hopkins (petitioner). On appeal, respondent

[1] The order is file stamped "32 January 2017," a nonexistent date. The parties agree that the order was actually filed on 1 February 2017.

argues that the trial court erred by reversing respondent's decision to revoke petitioner's license for refusal to submit to a test of her blood alcohol concentration ("BAC"). After careful review of respondent's arguments, we conclude that respondent's argument has merit and that the trial court's order should be reversed.

Factual and Procedural Background

On 22 August 2015, petitioner was arrested by Trooper R.J. Onofrio of the North Carolina State Highway Patrol, and charged with driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1 (2016). Trooper Onofrio executed an affidavit in which he averred that petitioner had refused to submit to a BAC test. On 27 October 2015, respondent notified petitioner that her driver's license was suspended for one year, effective 6 November 2015, pursuant to N.C. Gen. Stat. § 20-16.2(a) (2016), based on her refusal to submit to a chemical test of her blood alcohol level.

Petitioner requested a hearing to contest the revocation, and a hearing was conducted on 15 June 2016 before Department of Motor Vehicles Hearing Officer Tina Golden. The evidence adduced at this hearing is discussed below. On 8 July 2016, Hearing Officer Golden signed a decision sustaining the revocation of petitioner's driver's license. Petitioner requested judicial review, and on 14 November 2016, a hearing was conducted by the trial court in Pamlico County Superior Court. On 1 February 2017, the court entered an order reversing the revocation of petitioner's driver's license. Respondent noted a timely appeal to this Court.

Revocation of Driver's License for Refusal of BAC Test

Legal Principles

The North Carolina Uniform Driver's License Act provides that "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense." N.C. Gen. Stat. § 20-16.2(a) (2016). Impaired driving is an implied-consent offense. N.C. Gen. Stat. § 20-16.2(a1) (2016). "When a law enforcement officer 'has reasonable grounds to believe that the person charged has committed the implied-consent offense,' the officer 'may obtain a chemical analysis of the person.' § 20-16.2(a)." *State v. Romano*, __ N.C. __, __, 800 S.E.2d 644, 651 (2017).

"If the person charged [with an implied consent offense] refuses to submit to a chemical analysis, his or her license will be revoked for twelve months. N.C. Gen. Stat. § 20-16.2(d) (2007). However, the person charged may request a hearing before the DMV to contest the revocation." *Hartman v. Robertson*, 208 N.C. App. 692, 694, 703 S.E.2d 811, 813 (2010). N.C. Gen. Stat. § 20-16.2(e) provides that "[i]f 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 . . . within 30 days thereafter for a hearing on the record[,]" at which 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." N.C. Gen. Stat. § 20-16.2(e) (2016). In *Johnson v. Robertson*, 227 N.C. App. 281, 742 S.E.2d 603 (2013), this Court explained that:

> [O]n appeal from a DMV hearing, the superior court sits as an appellate court[.] . . . 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."

Johnson, 227 N.C. App. at 286-87, 742 S.E.2d at 607 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

This Court has held that "the Rules of Evidence do not apply to DMV hearings held pursuant to § 20-16.2." *Johnson,* 227 N.C. App. at 284, 742 S.E.2d at 606. Thus, because the Rules of Evidence do not apply at such a hearing, the trial court may consider all evidence presented to the hearing officer, without regard to whether it would be admissible in a trial.

In this case, the trial court found that there was insufficient evidence to support the findings of fact. The findings of fact that are relevant to respondent's decision to uphold the revocation of petitioner's license are those findings that address the issues described in N.C. Gen. Stat. § 20-16.2(d). This statute provides

that in a hearing before a DMV hearing officer, the issues "shall be 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 driver's license pursuant to G.S. 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 driver's 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.

N.C. Gen. Stat. § 20-16.2(d) (2016).

Trooper Onofrio's affidavit did not allege that petitioner had been involved in an incident causing death or critical injury to another person; accordingly, this issue was not before the hearing officer and is not relevant to respondent's appeal. Of the four remaining issues, the only one that is subject to dispute is whether there was evidence before the hearing officer that Trooper Onofrio "had reasonable grounds to believe that [petitioner] had committed an implied-consent offense[.]" Therefore, the focus of our analysis is whether the evidence supported the hearing officer's finding

that Trooper Onofrio had reasonable grounds to believe that petitioner had committed an implied consent offense.

In resolving this issue, it is important to distinguish between the evidentiary standard required for the State to obtain a criminal conviction of a defendant for DWI, and the evidence required to establish that the arresting officer had reasonable grounds to believe that a defendant had driven while impaired. N.C. Gen. Stat. § 20-138.1 (2016) provides in relevant part that a "person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." "The essential elements of DWI are: (1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002). Therefore, in order to convict a defendant of driving while impaired, the State must present competent and admissible evidence sufficient to allow a reasonable juror to find the existence of these elements beyond a reasonable doubt.

In contrast, an arresting officer may ask a defendant to submit to a chemical test of his or her BAC if the officer has reasonable grounds to believe that the defendant has committed the offense of DWI. The "reasonable grounds" standard is

the equivalent of probable cause to arrest, and is a clearly lower standard than "proof beyond a reasonable doubt." In a license revocation hearing, "the term 'reasonable grounds' is treated the same as 'probable cause.' [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." *Hartman*, 208 N.C. App. at 695, 703 S.E.2d at 814 (internal quotation marks and citations omitted). Moreover, the existence of reasonable grounds " 'may be based upon information given to the officer by another, the source of the information being reasonably reliable, and it is immaterial that the hearsay information itself may not be competent in evidence at the [criminal] trial of the person arrested.' " *Gibson v. Faulkner*, 132 N.C. App. 728, 731, 515 S.E.2d 452, 454 (1999) (quoting *Melton v. Hodges*, 114 N.C. App. 795, 798, 443 S.E.2d 83, 85 (1994)).

Discussion

As discussed above, the trial court's review of a decision of the DMV is limited to a determination of whether the Commissioner's findings were supported by the evidence, whether the findings supported the conclusions, and whether the hearing officer committed an error of law. As the finder of fact, the hearing officer was charged with resolving conflicts in the evidence and making determinations as to the weight and credibility of evidence, and "neither the superior court nor this Court is

permitted to weigh the credibility of witnesses." *Combs v. Robertson*, 239 N.C. App. 135, 139, 767 S.E.2d 925, 929 (2015) (citation omitted). We have carefully reviewed the evidence presented at the hearing before the DMV hearing officer, in order to determine whether there was evidence that supported the finding that Trooper Onofrio had reasonable grounds to believe that petitioner had committed the offense of driving while impaired, without consideration of whether such evidence would be admissible at trial or of evidence that might have supported a contrary conclusion.

We conclude that the following evidence, which was adduced at the hearing, was sufficient to support respondent's decision to uphold the revocation of petitioner's driver's license. Trooper Onofrio testified that on the night of 22 August 2015 he was dispatched to a residence near Neuse Road in Pamlico County to investigate a report of careless and reckless driving. When he arrived at the location, petitioner was present, as were Deputy Cook of the Pamlico County Sheriff's Department and Ms. Beverly Titus. Trooper Onofrio spoke with Ms. Titus, who informed him that while driving behind petitioner, she observed petitioner swerve and hit a mailbox, after which she called law enforcement and followed petitioner to the private residence. Trooper Onofrio testified that Ms. Titus had given a written statement to that effect. Ms. Titus's written statement, which was introduced by respondent as Exhibit No. 1, states the following: "On Aug. 22 2015 I witnessed a gray Mazda vehicle swerve and hit mail box on Right hand side of road while traveling on Neuse Rd."

Trooper Onofrio also noted that petitioner displayed signs of intoxication, including an odor of alcohol, swaying, and red, glassy eyes. At 9:45 p.m., Trooper Onofrio asked petitioner to blow into a portable alcohol sensor, which indicated a BAC of .20 at that time. Trooper Onofrio arrested petitioner on charges of DWI and reckless driving and transported her to the law enforcement center, where she was given the opportunity to submit to a breathalyzer BAC test. Trooper Onofrio described petitioner's failure to provide sufficient breath for an adequate sample, which he recorded as a refusal to be tested.

Petitioner testified that on 22 August 2015 she finished work between 6:00 and 6:45 p.m. and then drove to a party at the residence where Trooper Onofrio later arrested her. Petitioner had nothing to drink before she arrived at the party, and did not strike a mailbox while driving to the party. Petitioner also offered the testimony of her daughter, who generally corroborated petitioner's testimony.

To summarize, petitioner testified that after work she drove her car to the party, where she consumed alcoholic drinks. Thus, there is no dispute either that petitioner drove her car to the party, or that by 9:45, when Trooper Onofrio administered a portable BAC test, petitioner was intoxicated. Put simply, the only factual issue was whether Trooper Onofrio had any reasonable grounds to believe that petitioner was impaired when she drove from work to the party. In Trooper Onofrio's determination of whether he had reasonable grounds to believe that

petitioner had committed the offense of DWI, the officer could consider the information provided by Ms. Titus, who told Trooper Onofrio that she had observed petitioner swerve off the roadway and strike a mailbox. "Our Supreme Court has held that 'the [f]act that a motorist has been drinking, when considered in connection with faulty driving . . . 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. Coffey*, 189 N.C. App. 382, 387, 658 S.E.2d 73, 76 (2008) (quoting *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970)). We conclude that Trooper Onofrio's personal observations, in conjunction with his interview of Ms. Titus, was sufficient to support the hearing officer's finding and conclusion that Trooper Onofrio had reasonable grounds to believe that petitioner had committed the offense of driving while impaired.

In urging us to uphold the trial court's order, petitioner notes that Ms. Titus's statement did not state the time of her observations or specifically state that she had personal knowledge that petitioner was impaired when she was observed to swerve and strike a mailbox. These considerations go to the weight of the evidence, but do not preclude either Trooper Onofrio or the hearing officer from considering it in the context of a hearing on a license revocation.

Petitioner also notes that Trooper Onofrio testified that he had no first-hand knowledge of Ms. Titus's reliability. It is true that this Court has held that an officer may consider hearsay evidence where the source of the information is reliable:

> Regarding the smell of alcohol, an arresting officer is permitted to base his determination of reasonable grounds on information given by one known to him to be reasonably reliable. In this case, an officer on the scene smelled an odor of alcohol about the Petitioner. That the arresting officer did not himself make the same observation does not diminish its weight, since a probable cause determination may be based upon the hearsay of a reliable witness. The smell of alcohol could therefore contribute to the officers' determination of probable cause[.]

Steinkrause v. Tatum, 201 N.C. App. 289, 293-94, 689 S.E.2d 379, 382 (2009) (citing *Melton*, 114 N.C. App. at 798, 443 S.E.2d at 85; and *State v. Leonard*, 87 N.C. App. 448, 454, 361 S.E.2d 397, 400 (1987)).

Notwithstanding the inclusion of the word "reliable" in appellate discussions of an arresting officer's reliance upon hearsay evidence, petitioner has not identified any appellate cases, and our own review has not revealed any in which in the context of a review of a license revocation hearing, there was any analysis by the hearing officer, the superior court, or this Court regarding the reliability of a witness who provided information that contributed to an officer's belief that a petitioner had committed an implied consent offense. For example, in *In re Gardner*, 39 N.C. App. 567, 251 S.E.2d 723 (1979), as in the instant case, respondent appealed from an order of the trial court that reversed the revocation of the petitioner's driver's license. The

evidence showed that a law enforcement officer was dispatched to the scene of an accident, where a witness described seeing the petitioner driving erratically before going into a nearby house. The officer approached the petitioner, who was visibly impaired. On appeal, this Court held that:

> Based on his own observations at the scene of the accident, the arresting officer knew the petitioner to be highly intoxicated at the time the officer first saw him. Based on information given him at the scene by a disinterested eye-witness to the accident, the officer had grounds to believe that only a short time previously the petitioner had driven his truck on the highway. Probable cause "may be based upon information given to the officer by another, the source of such information being reasonably reliable." Thus, the arresting officer had information amply sufficient to provide him with probable cause to believe that petitioner had committed the misdemeanor for which the officer arrested him.

Gardner, 39 N.C. App. at 570-71, 251 S.E.2d at 725 (quoting *State v. Roberts*, 276 N.C. 98, 107, 171 S.E.2d 440, 445 (1970)). Although *Gardner* recites the "reasonably reliable" language from an earlier case, the opinion includes no discussion of any circumstances that might be pertinent to a finding that the witness was either "disinterested" or reliable.

Similarly, in *Gibson v. Faulkner*, 132 N.C. App. 728, 515 S.E.2d 452 (1999), the petitioner appealed from the revocation of his license for refusal to submit to a BAC test. On appeal, petitioner argued that the trial court erred in concluding that the arresting officer had reasonable grounds to believe that petitioner committed an

implied consent offense. The petitioner contended that the officer had "based his arrest upon hearsay information submitted to him by [another officer], and that such hearsay testimony is inadmissible in court." *Gibson*, 132 N.C. App. at 731, 515 S.E.2d at 454. The petitioner asked this Court to review its holding in *Melton v. Hodges*, 114 N.C. App. 795, 443 S.E.2d 83 (1994), that "reasonable grounds for belief may be based upon information given to the officer by another, the source of the information being reasonably reliable, and it is immaterial that the hearsay information itself may not be competent in evidence at the [criminal] trial of the person arrested." *Gibson*, 132 N.C. App. at 731, 515 S.E.2d at 454 (quoting *Melton*, 114 N.C. App. at 798, 443 S.E.2d at 85.) We held that " 'Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.' Since our ruling in *Melton* has not been overturned by a higher court, it is binding upon this panel." *Id.* (quoting *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). As in *Gardner*, the reference to "reliable" hearsay testimony was not accompanied by any discussion of the reliability of the witness.

We also note that *Melton* is similar in some respects to the present case. In *Melton*, the petitioner appealed from a judgment that affirmed the revocation of his driver's license based upon "his willful refusal to submit to an intoxilyzer test." *Melton*, 114 N.C. App. at 796, 443 S.E.2d at 84. The evidence showed that a law

enforcement officer was dispatched to a residence, where he spoke with two witnesses who had observed the petitioner driving recklessly and had followed him to his house. The witnesses also told the officer that the petitioner had parked within five minutes of the law enforcement officer's arrival. The officer talked with the petitioner, who had a strong odor of alcohol and was unsteady on his feet. The petitioner contested the revocation of his driver's license, and a hearing was conducted. As quoted above, *Melton* held that an officer's reasonable belief that a petitioner had committed an implied consent offense may be based upon information provided by a reasonably reliable informant. However, *Melton* went even further, holding that such testimony was not hearsay:

> Officer Daniels was the sole witness at the hearing in the court below. He was permitted to testify, over petitioner's objection, as to the information provided him by the two eyewitnesses[.] . . . Petitioner contends that Daniels' testimony concerning what [the witnesses] told him was inadmissible hearsay and erroneously admitted . . . and that the remaining findings are insufficient to support the conclusion that Daniels had reasonable grounds to believe that petitioner had committed an implied consent offense.
>
> Respondent contends that the testimony in question was not hearsay because it was not offered to prove the truth of the matters asserted by Ms. Jewell and Ms. Boeddeker but instead was *offered to show the basis for Daniels' belief that petitioner had been driving while impaired*. We agree with respondent.

Melton, 114 N.C. App. at 797-98, 443 S.E.2d at 85 (emphasis added).

Under this analysis, the truth of the witness's statements to a law enforcement officer is not at issue. While we express no opinion on the veracity of petitioner's testimony in the present case, we note that petitioner testified at the hearing that Ms. Titus had a personal grudge against her related to a prior romantic interest of petitioner's; that petitioner presented 39 exhibits at the hearing consisting of photographs showing that the mailboxes along the road near the party were not damaged; and that Trooper Onofrio acknowledged at the hearing that he had no first-hand knowledge of whether Ms. Titus was reliable. The analysis set forth in *Melton* raises the possibility that anyone who drives to a location before drinking alcohol could be charged with DWI, even if he was sober when he drove to the location where a law enforcement officer interviewed him, merely upon the word of a witness who might not have the petitioner's best interests at heart. Nonetheless, as stated in *Gibson*:

> We are bound by our holding in Melton. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." Since our ruling in Melton has not been overturned by a higher court, it is binding upon this panel.

Gibson at 731, 515 S.E.2d at 454 (quoting *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). Accordingly, we are constrained to hold that Trooper Onofrio could consider the statement of Ms. Titus in his determination that he had a reasonable belief that petitioner had committed an implied consent

offense and that, as a result, the trial court erred by reversing respondent's decision to uphold the revocation of petitioner's driver's license, and its order must be

REVERSED.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).