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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-16

Filed: 7 January 2020

Union County, No. 17 CVS 3144

RAUL CONDE, Petitioner-Appellee,

v.

TORRE JESSUP, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES,
DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY, STATE OF
NORTH CAROLINA, Respondent-Appellant.

Appeal by respondent from order entered 10 July 2018 by Judge Jeffery K.
Carpenter in Union County Superior Court. Heard in the Court of Appeals 19
September 2019.

No brief filed for petitioner-appellee.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E.
Hathcock, for the State.*

*Collins Family Law Group, by Rebecca K. Watts, for amicus curiae petitioner-
appellee.*

ZACHARY, Judge.

Respondent Commissioner of the Division of Motor Vehicles (“DMV”) appeals
from a Union County Superior Court order vacating the one-year revocation of
Petitioner Raul Conde’s driver’s license for his willful refusal to submit to chemical

analysis. After careful review, we reverse the superior court's decision and remand this case with instructions to reinstate the DMV hearing officer's 15 November 2017 order.

Background

On 25 February 2017, Trooper Ronald D. Isaac of the North Carolina State Highway Patrol was driving on US 601 South in Union County. Trooper Isaac observed a Toyota Camry traveling at a high rate of speed, and "clocked" the vehicle traveling 74 miles-per-hour in a 55 miles-per-hour zone. He initiated a traffic stop. Petitioner Raul Conde ("Conde") was the driver, and his son sat in the passenger's seat.

Trooper Isaac approached the vehicle and asked Conde for his driver's license and registration. Trooper Isaac noticed that Conde would not look at him, but rather "look[ed] straight ahead," which Trooper Isaac believed was "unusual." Conde spoke in Spanish and broken English while his son translated. While Conde presented his license and registration, Trooper Isaac "detected a strong odor of alcohol coming from the vehicle[.]" and, after Conde turned to look at him, noticed that Conde's eyes were red and glassy. Trooper Isaac asked Conde "how much he'd had to drink, and . . . [Conde's son] told [Trooper Isaac] that he did not drink." Trooper Isaac asked Conde to submit to a roadside Alco-Sensor test and give a breath sample "multiple times . . . with no success."

The combination of Conde’s “unusual” behavior, the “odor of alcohol” from the vehicle, Conde’s “red glassy eyes,” and Conde’s refusal to take the roadside Alco-Sensor test led Trooper Isaac to form the opinion that Conde was impaired. Trooper Isaac ordered Conde out of the vehicle and arrested him for (i) driving while impaired, and (ii) “speeding 74 in a 55 zone.” Trooper Isaac transported Conde to the Union County jail for a chemical analysis, and, in the process, noticed an odor of alcohol coming from Conde.

After arriving at the jail, Trooper Isaac read Conde his breath rights¹ and provided him with a written copy in Spanish. Conde signed the DHHS Rights form and did not exercise his right to call a witness. Trooper Isaac requested a breath sample from Conde, and demonstrated how to provide a sample for chemical analysis using the EC/IR-II instrument. In Trooper Isaac’s opinion, Conde failed to provide a valid breath sample, in that he “acted like he was blowing,” but “when he put the mouthpiece to his mouth and blew out, it [did] not move the [EC/IR-II’s] meter . . . showing that he was not blowing any air out.”

Trooper Isaac prepared the EC/IR-II a second time, to give Conde “the benefit of the doubt” and “ample opportunity to provide the sample.” Conde again failed to

¹ “Breath rights” refer to the rights of a person who is asked to submit to a chemical analysis to determine alcohol concentration or the presence of an impairing substance under N.C. Gen. Stat. § 20-16.2(a). These rights are set forth in DHHS form 4081. The rights note, *inter alia*, that the person has been charged with an implied-consent offense, and the consequences of refusing to submit to a chemical analysis.

provide a valid breath sample, and Trooper Isaac marked Conde as having “willfully refused the breath test.” That same day, Trooper Isaac submitted an affidavit of refusal in accordance with N.C. Gen. Stat. § 20-16.2(c1).

While at the jail, Conde also “admitted that he had drank a beer” earlier that afternoon.

On 13 March 2017, DMV notified Conde that his driving privilege would be revoked for 12 months pursuant to N.C. Gen. Stat. § 20-16.2 as a result of his refusal to submit to a chemical analysis. Conde requested a hearing to challenge the revocation of his driving privilege. The hearing commenced on 25 October 2017 before DMV Hearing Officer Debra J. Butler. On 15 November 2017, the hearing officer issued a written order sustaining the revocation of Conde’s driver’s license. Conde subsequently petitioned the Union County Superior Court for review of the hearing officer’s decision.

The hearing in superior court commenced on 21 May 2018 before the Honorable Jeffery K. Carpenter. On 10 July 2018, the superior court entered an order (i) vacating the hearing officer’s decision, (ii) rescinding DMV’s revocation, and (iii) reinstating Conde’s driving privilege. DMV timely filed written notice of appeal.

Standard of Review

“[A]s in other cases where the superior court sits as an appellate court,” our review of the superior court’s decision is limited to “(1) determining whether the trial

court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *Johnson v. Robertson*, 227 N.C. App. 281, 286-87, 742 S.E.2d 603, 607 (2013).

Discussion

DMV argues that the superior court erred in reversing the final agency decision revoking Conde’s driving privilege because “there was sufficient evidence in the record to support the Findings of Fact and Conclusions of Law pursuant to N.C. Gen. Stat. § 20-16.2(e).” We agree.

Impaired driving is an implied-consent offense. N.C. Gen. Stat. § 20-16.2(a1) (2017). Any individual “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.” *Id.* § 20-16.2(a). An individual is “charged” with an implied-consent offense if “arrested for it or if criminal process for the offense has been issued.” *Id.* § 20-16.2(a1).

“Any law enforcement officer who has reasonable grounds to believe that the person charged has committed [an] implied-consent offense may obtain a chemical analysis of the person.” *Id.* § 20-16.2(a). “Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst . . . or law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person” orally and in writing, of the rights and consequences of

refusal set forth under N.C. Gen. Stat. § 20-16.2(a)(1)–(6). *Id.* If the individual refuses to submit to a chemical analysis, then the law enforcement officer shall execute an affidavit that states the following:

- (1) The person was charged with an implied-consent offense . . . ;
- (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense . . . ;
- (3) Whether the implied-consent offense charged involved death or critical injury to another person, if the person willfully refused to submit to chemical analysis;
- (4) The person was notified of the rights in [§ 20-16.2(a)]; and
- (5) The results of any tests given or that the person willfully refused to submit to a chemical analysis.

Id. § 20-16.2(c1). Upon receipt of such an affidavit, DMV must notify the individual that the individual's driver's license is revoked for 12 months, unless the individual timely challenges the revocation by filing a written request for a hearing before DMV. *Id.* § 20-16.2(d).

The scope of the DMV hearing officer's review is limited to a consideration of whether

- (1) The person was charged with an implied-consent offense . . . ;

(2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense . . . ;

(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 [§ 20-16.2(a)]; and

(5) The person willfully refused to submit to a chemical analysis.

Id. If the hearing officer “finds that any of the conditions (1), (2), (4), or (5) is not met, [DMV] shall rescind the revocation.”² *Id.* However, if the hearing officer finds that these conditions are met, DMV “shall order the revocation sustained.” *Id.*

If the hearing officer sustains the revocation for the driver's willful refusal to submit to chemical analysis, the individual may petition the superior court for further review. *Id.* § 20-16.2(e). “[O]n appeal from a DMV hearing, the superior court sits as an appellate court, and no longer sits as the trier of fact.” *Johnson*, 227 N.C. App. at 286, 742 S.E.2d at 607. The superior court's review is limited to whether: (1) “there is sufficient evidence in the record to support the [hearing officer's] findings of fact”; (2) “the conclusions of law are supported by the findings of fact”; and (3) “the [hearing

² The third condition—that “[t]he implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit,” N.C. Gen. Stat. § 20-16.2(d)(3)—is not required for the hearing officer to sustain a revocation. However, if the hearing officer finds that “condition (3) is alleged in the affidavit but is not met, [the hearing officer] shall order the revocation sustained if that is the only condition that is not met[.]” *Id.* § 20-16.2(d).

officer] committed an error of law in revoking the license.” N.C. Gen. Stat. § 20-16.2(e).

It is evident that Judge Carpenter understood the limited scope of the superior court’s review in sitting as an appellate court. He stated, “My understanding as my role in this is to determine whether or not there’s sufficient evidence to support the findings of fact, whether the findings of fact support the conclusions of law and to make sure that the elements required by the statute are there.” The superior court’s written order also indicates that it adhered to the correct standard of review set forth in N.C. Gen. Stat. § 20-16.2(e). Thus, the only issue remaining for our determination is whether the superior court properly applied its limited review.

I. Findings of Fact

Again, the superior court’s review of a DMV hearing officer’s findings of fact is limited to “whether there is sufficient evidence in the record” to support them. *Id.* “Factual findings that are supported by evidence are conclusive, even though the evidence might sustain findings to the contrary.” *Brackett v. Thomas*, 371 N.C. 121, 126, 814 S.E.2d 86, 89 (2018) (internal quotation marks omitted). “It is the role of the [hearing officer], rather than a reviewing court, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.” *Id.* at 126-27, 814 S.E.2d at 89 (citation and internal quotation marks omitted).

On appeal to the superior court, Conde maintained that “[t]here [wa]s not sufficient evidence in the record to support the findings of fact and the findings of fact do not support the conclusions of law . . . and, as such, the [hearing officer] committed an error of law in revoking [Conde’s] driver’s license.” In vacating the hearing officer’s order, the superior court determined that the following findings of fact were not supported by the record:

4. Trooper Isaac asked the petitioner for his driver’s license and vehicle registration and the petitioner would not look at him; he was looking straight ahead, which is unusual.

. . . .

10. Trooper Isaac formed his opinion that the petitioner was impaired and placed the petitioner under arrest for driving while impaired and speeding seventy-four miles per hour in a fifty-five miles per hour zone.

. . . .

16. At the jail the petitioner stated he had drank a beer between twelve and one o’clock in the afternoon. He appeared to understand better than he had on the scene.

In making its determination, the superior court found and concluded:

FINDINGS OF FACT

. . . .

15. There is no evidence in the record to support the conclusion stated by Trooper Isaac and found as a fact in Paragraph #4 of the Findings of Fact section of the decision rendered by the [hearing officer] that not looking at the Trooper and looking straight ahead are “unusual” actions or inactions.

. . . .

CONCLUSIONS OF LAW

. . . .

4. The record does not support the conclusion contained in Finding of Fact #4 (that looking straight ahead is unusual).

5. Finding of Fact #10 and Finding of Fact #16 are not supported by the record.

Though the superior court might have found otherwise, it is evident that there was sufficient evidence in the record to support the hearing officer's findings. *See Brackett*, 371 N.C. at 126, 814 S.E.2d at 89 ("Factual findings that are supported by evidence are conclusive, *even though the evidence might sustain findings to the contrary.*" (emphasis added) (internal quotation marks omitted)).

The hearing officer's finding of fact #4 is based upon Trooper Isaac's testimony. During the revocation hearing, Trooper Isaac explained that he "requested a driver's license, . . . registration . . . [and] observed at that point that [Conde] wouldn't look at [him], [Conde] was looking straight ahead . . . which is unusual." The hearing officer's finding of fact #10—that "Trooper Isaac formed his opinion that [Conde] was impaired and placed [Conde] under arrest for driving while impaired and speeding seventy-four miles per hour in a fifty-five miles per hour zone"—is also based upon Trooper Isaac's testimony. DMV noted this testimony before the superior court.

During the revocation hearing, the hearing officer asked Trooper Isaac about when he formed the opinion that Conde was impaired. Trooper Isaac responded that he formed his opinion “due to [Conde’s] person or his actions, . . . his physical stuff, . . . odor of alcohol, . . . red glassy eyes and . . . not . . . submitting to the . . . Alco-Sensor.” Trooper Isaac also testified that he “charged [Conde] with DWI and . . . speeding 74 in a 55 zone.” DMV noted this testimony before the superior court.

The hearing officer’s finding of fact #16—that “[a]t the jail [Conde] stated he had drank a beer between twelve and one o’clock in the afternoon” and that he “appeared to understand better than he had on the scene”—is also taken directly from Trooper Isaac’s testimony at the hearing.

When asked whether the language barrier “continued to exist[,]” Trooper Isaac testified that Conde “seemed to do a little better” at the jail, with the EC/IR-II, “because he made a statement . . . that he drank a beer about 12 or 1 o’clock.” Again, DMV also noted this testimony before the superior court.

There was therefore sufficient evidence in the record to support the hearing officer’s findings. *See Burris v. Thomas*, 244 N.C. App. 391, 397, 780 S.E.2d 885, 889 (2015) (noting that the hearing officer’s findings of fact were “taken directly from [the law enforcement officer’s] testimony at the revocation hearing” and were “therefore supported by the record”), *disc. review denied*, 368 N.C. 818, 784 S.E.2d 471 (2016).

Accordingly, the superior court improperly applied the standard of review in determining that the above findings of fact were not supported by the record. *See id.*

Moreover, the superior court further erred by “invad[ing] the province of the factfinder[.]” *See Brackett*, 371 N.C. at 128, 814 S.E.2d at 90. The superior court failed to properly apply the appropriate standard of review under N.C. Gen. Stat. § 20-16.2(e) by substituting its own findings of fact and conclusions of law pertaining to Trooper Isaac’s reasonable grounds to believe that Conde was impaired, for those of the hearing officer. The superior court determined:

FINDINGS OF FACT

. . . .

26. At best, the record will only support that at the time Trooper Isaac presented the alcohol screening device to [Conde] Trooper Isaac had only an unparticularized hunch or suspicion and could not comply with the requirements of reasonable grounds or articulable and reasonable suspicion set forth in N.C. Gen. Stat. §[]20-16.3(a) in order to require [Conde] to submit to the alcohol screening test.

. . . .

CONCLUSIONS OF LAW

. . . .

3. At the time Trooper Isaac presented the alcohol screening device to [Conde,] the Trooper had only an unparticularized hunch or suspicion and could not comply with the requirements of N.C. Gen. Stat. §[]20-16.3(a) in order to require [Conde] to submit to the alcohol screening test.

The superior court incorrectly applied the standard of review in reaching these determinations in that it improperly undertook the role of factfinder. *See id.* at 126-27, 814 S.E.2d at 89 (“It is the role of the [hearing officer], rather than a reviewing court, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.” (citation and internal quotation marks omitted)). Again, because there is sufficient evidence in the record to support the hearing officer’s findings, the superior court erred by making its own findings of fact. *See id.* (“Factual findings that are supported by evidence are conclusive, even though the evidence might sustain findings to the contrary.”).

For these reasons, the superior court incorrectly applied the standard of review.

Conclusion

There is sufficient evidence in the record to support the hearing officer’s findings of fact, and those findings of fact support its conclusions of law. Thus, the hearing officer did not err in sustaining DMV’s revocation of Conde’s driver’s license. The superior court incorrectly applied the standard of review in reaching its determinations in that it improperly undertook the role of factfinder. Accordingly, we reverse the superior court’s order and remand this case to the superior court with instructions to reinstate DMV’s 15 November 2017 order.

CONDE V. JESSUP

Opinion of the Court

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DILLON concur.

Report per Rule 30(e).