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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-310

Filed 31 December 2024

Bertie County, No. 21 CVS 112

JEFFREY GRANT GARNER, Petitioner,

v.

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

Appeal by Respondent from order entered 9 May 2022 by Judge L. Lamont  
Wiggins in Bertie County Superior Court. Heard in the Court of Appeals 31 October  
2023.

*Higgins Benjamin, PLLC, by Attorney Robert N. Hunter, Jr., for the petitioner-  
appellee*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General  
Christopher W. Brooks, for the respondent-appellant*

STADING, Judge.

**I. Background**

This matter concerns an administrative hearing at the Division of Motor  
Vehicles (“DMV” or “Respondent”) due to Jeffrey G. Garner’s (“Petitioner”) license

revocation contest. On 25 August 2020, Petitioner was arrested for the implied-consent offense of Driving While Impaired (“DWI”). Pursuant to that arrest, Trooper Mizelle—the law enforcement officer and chemical analyst in this case—submitted an “Affidavit and Revocation Report”<sup>1</sup> (“Affidavit”) notifying the DMV of Petitioner’s “willful refusal” to submit to a chemical test. Trooper Mizelle also submitted a form signed by Petitioner entitled “Rights of Person Requested to Submit to a Chemical Analysis”<sup>2</sup> (“Rights Form”), and the associated Intoxilyzer EC/IR-II test ticket (“Test Ticket”). Thereafter, the DMV notified Petitioner of the revocation of his driver’s license for twelve months, beginning 11 December 2020, in accordance with N.C. Gen. Stat. § 20-16.2 (2023). Petitioner timely requested an administrative hearing before a DMV hearing officer (“Hearing Officer”) to contest the revocation.

#### **A. DMV Hearing**

On 30 March 2021, the Hearing Officer presided over a civil administrative hearing. Petitioner and his counsel were the only parties to the proceeding in attendance. At the outset of the hearing, the Hearing Officer received the following exhibits into evidence: the Affidavit as “Exhibit 1,” the Rights Form as “Exhibit 2,” and the Test Ticket as “Exhibit 3.” The Hearing Officer next inquired of Respondent’s counsel “do you have any preliminary issues you wish to address before testimony begins?” In response, Respondent’s counsel objected to “the introduction of any

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<sup>1</sup> Form AOC-CVR-1A/DHHS 3907, Rev. 2017 December.

<sup>2</sup> Form DHHS 4081, Rev. 2013 August.

affidavits in light of the fact that [Trooper] Mizelle is not here.” The Hearing Officer took the objection under advisement and read the documents into the record. As read into the record, Exhibit 1 included the trooper’s statement that he stopped a truck for speeding and approached Petitioner who “smelled of alcohol, stated he had been drinking . . . [w]as positive on the [preliminary breath test] and had poor [field sobriety tests]. Exhibits 2 and 3 noted Petitioner refused to submit to a chemical analysis. The Hearing Officer next asked if Petitioner wished to testify, provide other statements or a closing argument. Petitioner did not put on evidence or give a closing argument. The hearing concluded, and the Hearing Officer informed Petitioner that he would receive written notification of the decision.

Based on the evidence adduced at the hearing, the Hearing Officer issued his written decision and found in relevant part that:

1. Division Exhibits 1 through 3 were objected to by counsel on the basis that Trooper Mizelle was not present to testify to their validity.

. . . .

3. The objection to the introduction of Exhibits 1 through 3 is overruled as the petitioner, on advice of counsel, did not testify to any errors or omissions in these documents and provided no factual basis for their disqualification.

4. Division Exhibit 1 noted the petitioner was stopped on August 25, 2020 for Speeding.

5. Division Exhibit 1 noted the petitioner admitted to drinking, had a strong odor of alcohol on his breath,

provided a positive Preliminary Breath Test (PBT) and was ‘poor’ on the Standard Field Sobriety Tests (SFSTs).

. . . .

7. Division Exhibit 2 noted the petitioner was advised of his rights on the standard form and signed the form indicating his acknowledgement of his rights and responsibilities.

8. Division Exhibit 1 noted the petitioner was given written notice of his rights and responsibilities.

. . . .

10. Division Exhibits 2 and 3 noted the petitioner refused to submit to analysis of his breath at 7:38 pm.

Based on these findings, the Hearing Officer concluded that:

1. [Petitioner] was charged with an implied-consent offense.
2. Trooper Mizelle had reasonable grounds to believe that [Petitioner] had committed an implied-consent offense.
3. The implied-consent offense charged did not involve death or critical injury to another person.
4. Petitioner was notified of his rights as required by [N.C. Gen. Stat.] § 20-16.2(a).

The Hearing Officer therefore decided revocation was appropriate since “all elements necessary to sustain a revocation for refusing to submit to a chemical analyst (sic) of his breath or blood under GS 20-16.2 are supported by substantial evidence.” Petitioner sought review in the superior court.

## **B. Superior Court Hearing.**

On 9 May 2022, the superior court reviewed the DMV Hearing Officer's findings of fact and conclusions of law in accordance with N.C. Gen. Stat. § 20-16.2(e). It entered an order reversing the revocation of Petitioner's license, finding in relevant part:

9. That the hearing, pursuant to [N.C. Gen. Stat.] § 20-16.2 and conducted by a Hearing Officer, is an adversarial proceeding wherein the parties [ ], through the testimony of [Trooper Mizzelle,] may present evidence and offer exhibits.

10. [O]n March 30, 2021, a hearing was held after notice to the parties. The charging officer, Trooper Mizzelle, did not appear.

11. [T]here were several exhibits in the court file: [Division Exhibit 1:] Form AOC-CVR-1A DHHS 3907, Charging Officer/Chemical Analyst Affidavit and Revocation Report. [ ] Division Exhibit 2: [ ] Form DHHS 4081, Rights for Chemical Test[.] [ ] Division Exhibit 3: [ ] [F]orm DHHS 4082, Intoximeter EC/IR-II Test Ticket.

12. [Petitioner], through counsel, objected to the introduction of the exhibits because Trooper Mizzelle was not present to be questioned on the veracity of the exhibits.

13. [T]here were no stipulations as to admissibility and no one to offer evidence on behalf of the Department of Motor Vehicles.

. . . .

15. [Petitioner], through counsel, did not testify or offer any exhibits into evidence.

. . . .

17. [T]he record contains evidence that was not properly admitted, pursuant to the findings of [*Joyner v. Garrett*,

279 N.C. 226, 182 S.E.2d 553 (1971)] and [*Pasut v. Robertson*, 237 N.C. App. 399, 767 S.E.2d 151 (2014) (unpublished table decision)].

18. [Petitioner] should have had the right to confront the witnesses against him and cross-examine [them].

19. The Administrative Hearing Officer John D. Grant upheld the DMV suspension of [Petitioner's] license after considering the objected evidence and improperly making it part of the record.

20. [T]he Findings of Fact and Conclusions of Law found by the Hearing Officer John D. Grant were based on inadmissible evidence.

....

24. [E]ven though the hearing procedures have modified since the initial hearing of [*Joyner* and *Pasut*,] [they] [reaffirm] that the DMV hearings are still adversarial, requiring a showing by the [DMV] and the constitutional right to confront witnesses is still required.

Based on these findings of fact, the superior court concluded that:

1. [Petitioner] . . . was present at the Department of Motor Vehicle hearing and was entitled to confront the witnesses against him.

2. [T]he issue of the absence of the witness was made timely by [Petitioner] through counsel at the March 30, 2021 hearing.

3. [T]he Hearing Officer committed error by admitting and considering the evidence that was placed in the record over the objection of [Petitioner's] counsel.

The State appealed the superior court's order reversing the Hearing Officer's revocation.

## II. Jurisdiction

The superior court's reversal of the DMV Hearing Officer's revocation of Petitioner's driving privileges is a "final judgment of a superior court," and review properly lies with this Court. N.C. Gen. Stat. § 7A-27(b)(1) (2023).

## III. Analysis

On appeal, the State asks this Court to address (1) whether Petitioner preserved his constitutional due process confrontation rights at the DMV hearing; (2) whether the superior court erred in finding the affidavit inadmissible as evidence against Petitioner; (3) whether sufficient evidence supported the DMV Hearing Officer's factual findings that, in turn, supported its legal conclusions; and (4) whether superior court erred in reversing the revocation of Petitioner's driver's license under N.C. Gen. Stat. § 20-16.2. We begin by addressing this last concern raised by Respondent.

### A. Superior Court Reversal

Respondent argues that the superior court erred in reversing the Hearing Officer's revocation of Petitioner's license under N.C. Gen. Stat. § 20-16.2. "On appeal from a North Carolina Division of Motor Vehicle 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 (citing N.C. Gen. Stat. § 20-16.2(e)). In this context, N.C. Gen. Stat. § 20-16.2(e) expressly limits the superior court's review to three issues: (1) "whether there is sufficient evidence in the record to support the [Hearing Officer's]

findings of fact, . . .” (2) whether those findings of fact support the Hearing Officer’s “conclusions of law, . . .” and (3) “whether the [Hearing Officer] committed an error of law in revoking the license.” N.C. Gen. Stat. § 20-16.2(e). On appeal to this Court, we assess only (1) “whether the [trial] court exercised the appropriate scope of review . . .” and (2) “whether [it] did so properly.” *Johnson*, 227 N.C. App. at 286–87, 742 S.E.2d at 607.

The trial court’s order’s relevant findings of fact address the hearing’s evidence only to the extent of evidentiary admissibility. Of its three designated conclusions of law, none address whether the Hearing Officer complied with N.C. Gen. Stat. § 20-16.2(d)’s five legal elements. Section 20-16.2(d) limits the hearing officer’s decision-making authority to 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 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 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 [§ 20-16.2](a); and
- (5) The person willfully refused to submit to a chemical analysis.

To the extent that the Hearing Officer did reach certain findings and



conclusions, the superior court did not apply the proper standard of review that N.C. Gen. Stat. § 20-16.2(e) requires. Accordingly, we vacate the trial court's order and remand for entry of an order consistent with the requirements of N.C. Gen. Stat. § 20-16.2.

Since we vacate and remand based on this assignment of error, we decline to address Respondent's remaining assignments of error.

#### **IV. Conclusion**

For the reasons above, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges GORE and THOMPSON concur.

Report per Rule 30(e).