206 N.C.App. 330
Unpublished Disposition
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Court of Appeals of North Carolina.

Eduviges Garcia GUZMAN, Petitioner,

v.

William C. GORE, Jr., Commissioner of the North Carolina Division of Motor Vehicles, Respondent.

No. COA09-1241. | Aug. 3, 2010.

Opinion

***1** Appeal by petitioner from order entered 10 July 2009 by Judge Anderson D. Cromer in Stokes County Superior Court. Heard in the Court of Appeals 25 March 2010.

Attorneys and Law Firms

The Dummit Law Firm, by E. Clarke Dummit, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Christopher W. Brooks, for respondent-appellee.

JACKSON, Judge.

Eduviges Garcia Guzman ("petitioner") appeals from the trial court's order affirming the revocation of his driver's license for willful refusal to submit to a breathalyzer test. For the reasons set forth below, we affirm.

On the evening of 5 July 2008, police officer N.R. Wall ("Officer Wall") from the King, North Carolina Police Department, responded to a request for backup from Officer Harrison, on Highway 52 North in Stokes County, North Carolina. Officer Harrison advised Officer Wall that he had observed a red pickup truck that matched the description of a Stokes County dispatch alert for a possible intoxicated driver pulled over on the side of the highway. Officer Harrison approached the truck and observed petitioner sitting in the driver's seat with the engine running. Officer Harrison asked petitioner for his license, and petitioner responded by giving the officer his bank card. Officer Harrison then asked petitioner if he had had anything to drink and petitioner responded "a few."

Officer Wall arrived at the scene as Officer Harrison was speaking with petitioner. Officer Wall spoke with petitioner, noting that his eyes were glassy and bloodshot and that he smelled strongly of alcohol. Petitioner submitted an AlcoSensor sample, which produced a positive result. Officer Wall then had petitioner perform several field sobriety tests. Officer Wall testified that petitioner performed poorly on all tests. Officer Wall then arrested petitioner for driving while intoxicated.

After petitioner was arrested, Officer Wall transported him to the police department and asked him to submit to an Intox-CCR2 test. Officer Wall read petitioner's chemical analysis rights to him, and petitioner signed the rights form. Officer Wall then explained the testing procedure to petitioner and demonstrated how to give a proper sample. Petitioner had five opportunities to provide a sample, but he did not blow sufficient air into the machine to produce a valid reading. At that time, Officer Wall determined that petitioner had refused the test. Officer Wall submitted a signed affidavit dated 6 July 2008, attesting that petitioner willfully had refused to submit to chemical analysis.

Based upon Officer Wall's affidavit, the North Carolina Department of Transportation, Division of Motor Vehicles ("DMV") sent petitioner official notice that his driving privileges had been revoked pursuant to North Carolina General Statutes, section 20-16.2. Petitioner requested and was granted a hearing with the DMV on 28 August 2008, which was continued until 18 September 2008. Petitioner filed a second motion to continue until after the criminal proceedings resulting from the same incident were resolved. Hearing Officer P.M. Snow ("Hearing Officer Snow") denied petitioner's motion for another continuance, and the hearing took place as scheduled on 18 September 2008.

***2** At the hearing, Officer Wall testified to the facts of the case. Petitioner did not testify at the hearing or offer any evidence. Counsel for petitioner stated that his client could not testify, "because there is a pending criminal case," and counsel feared that any testimony or evidence presented at the hearing would be used against petitioner in the criminal case.

On 18 September 2008, Hearing Officer Snow issued an order sustaining the revocation of petitioner's driving privileges pursuant to North Carolina General Statutes, section 20-16.2. On 1 October 2008, petitioner filed a petition for review of the revocation with the Superior Court of Stokes County. On 8 July 2009, the trial court held that the DMV did not err in revoking petitioner's driving privileges. On 20 July 2009, petitioner gave written notice of appeal from the trial court's order.

Petitioner first argues that Hearing Officer Snow lacked competent evidence to support a finding that petitioner willfully refused to provide a breath sample for chemical analysis and that the trial court erred in affirming Hearing Officer Snow's decision. Petitioner specifically challenges Hearing Officer Snow's findings of fact numbered fourteen, "Officer Walls's opinion based on his experience was that the petitioner was not trying to submit a proper sample," and fifteen, "petitioner willfully refused to submit to a chemical analysis of his breath upon request of the law enforcement officer." We disagree with petitioner's contention.

Pursuant to North Carolina General Statutes, section 20-16.2(a), when a law enforcement officer that has reasonable grounds to believe that a person driving a vehicle on a highway or public vehicular area "has committed the implied-consent offense [the law enforcement officer] may obtain a chemical analysis of the person." Refusal to submit to a chemical analysis results in the suspension of the refusing person's driver's license for a twelve-month period. N.C. Gen.Stat. § 20-16.2(d) (2007). The person charged may request a hearing before the DMV to contest the suspension. N.C. Gen.Stat. § 20-16.2(e) (2007). "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" where the charges were made, however

> [t]he 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) (2007).

When this Court reviews decisions in which the trial court sits without a jury, " 'the court's findings of fact are conclusive on appeal if supported by competent evidence, even though there may be evidence to the contrary.' " *Gibson v. Faulkner*, 132 N.C.App. 728, 732-33, 515 S.E.2d 452, 455 (1999) (quoting *Gilbert Engineering Co. v. City of Asheville*, 74 N.C.App. 350, 364, 328 S.E.2d 849, 858, *disc. rev. denied*, 314 N.C. 329, 333 S.E.2d 485 (1985)).

***3** This Court has determined that

> [a] "willful refusal" to submit to a chemical test within the meaning of G.S. 20-16.2(c) occurs where a motorist: "(1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test."

White v. Tippett, 187 N.C.App. 285, 290, 652 S.E.2d 728, 731 (2007) (quoting *Mathis v. Division of Motor Vehicles*, 71 N.C.App. 413, 415, 322 S.E.2d 436, 437-38 (1984)). We also have held that "[f]ailure to follow the instructions of the breathalyzer operator is an adequate basis for the trial court to conclude that petitioner willfully refused to submit to a chemical analysis." *Tedder v. Hodges*, 119 N.C.App. 169, 175, 457 S.E.2d 881, 885 (1995) (citing *Bell v. Powell*, 41 N.C.App. 131, 135, 254 S.E.2d 191, 194 (1979)). *See Bell v. Powell*, 41 N.C.App. 131, 254 S.E.2d 191 (1979) (explaining that the petitioner's failure to follow instructions to provide a sufficient sample of breath provided adequate basis for the trial court to determine that he willfully refused to take the test); *Poag v. Powell*, 39 N.C.App. 363, 366, 250 S.E.2d 93, 96 (1979) ("The plaintiff was three times instructed in using the machine and told that a failure to give a sufficient sample would be treated as a willful refusal.").

In the case *sub judice*, petitioner was read his rights and signed the form acknowledging that refusing to submit to a breath analysis would result in the suspension of his driving privileges. Officer Wall testified that he demonstrated the appropriate technique for providing a sufficient breath analysis sample and that petitioner had five opportunities to do so. In the opinion of Officer Wall, a certified chemical analyst, petitioner did not follow the instructions given to provide a sufficient sample. Consequently, Officer Wall determined that petitioner willfully refused to provide a sample for chemical analysis.

We hold that the evidence presented at the 18 September 2008 hearing was sufficient to support Hearing Officer Snow's challenged findings of fact. These findings of fact support the

conclusion of law that petitioner willfully refused to submit to chemical analysis. Accordingly, petitioner's assignment of error is overruled.

Next, petitioner argues that because he had pending criminal charges against him, he was unable to testify or provide evidence in his defense because of his fear that it would be used against him in the criminal proceedings. Petitioner claims that Hearing Officer Snow improperly denied his motion to continue the hearing until after the criminal proceedings resulting from the same incident were resolved and violated his right to a fair hearing guaranteed by the Due Process Clause of the United States Constitution. We disagree.

***4** Generally, this Court reviews denial of a motion to continue for abuse of discretion. *Morin v. Sharp*, 144 N.C.App. 369, 373, 549 S.E.2d 871, 873 (2001). " 'A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Pellom v. Pellom*, 194 N.C.App. 57, 62, 669 S.E.2d 323, 325 (2008) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). " 'The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.' " *Morin*, 144 N.C.App. at 373, 549 S.E.2d at 873 (quoting *Wachovia Bank & Trust Co. v. Templeton Olds.-Cadillac-Pontiac*, 109 N.C.App. 353, 356, 427 S.E.2d 629, 631 (1993)). Our Supreme Court has held that "[c]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976).

The DMV, as a division of an agency of the State of North Carolina, is charged by statute "with the duty of administering and enforcing ... all laws regulating the operation of vehicles or the use of the highways." N.C. Gen.Stat. § 20-39(a) (2007). As such, the DMV is compelled to revoke the driver's license of an individual charged with refusing to submit to chemical analysis. N.C. Gen.Stat. § 20-16.2(d) (2007). We have held "that the penalty of license revocation for willful refusal of a chemical test is rationally related to furthering the legitimate goal of public safety." *Ferguson v. Killens*, 129 N.C.App. 131, 141, 497 S.E.2d 722, 727, *disc. rev. denied and appeal dismissed*, 348 N.C. 496, 510 S.E.2d 382 (1998); *see also Rice v. Peters*, 48 N.C.App. 697, 700, 269 S.E.2d 740, 742 (1980) ("The administrative procedures provided for in G.S. 20-16.2 are designed to promote breathalyzer tests as a valuable tool for law enforcement officers in their enforcing the laws against driving under the influence while also protecting the rights of the State's citizens.") It is in the interest of the DMV's duties, the purpose of North Carolina General Statutes, section 20-16.2, and substantial justice to proceed with hearings of those charged with not complying to the State's implied consent statute to determine if their driving privileges should be suspended.

Here, petitioner already had received one continuance of his requested hearing before the DMV. Counsel for petitioner submitted another motion to continue at the 18 September 2008 hearing, asking that the hearing be continued until after the criminal proceedings were resolved. Hearing Officer Snow denied the second motion for continuance, ruling that "[n]o further continuance was granted as the date of the petitioner's criminal trail [sic] has no direct barring [sic] on the administrative hearing." During its record review, the trial court agreed to hear petitioner's argument that the motion to continue improperly had been denied. The trial court found that petitioner's due process rights were not violated because he had been afforded an opportunity to dispute the rescinding of his driver's license in a hearing before the DMV. The trial court also found that criminal and civil proceedings are separate actions, "and the outcome of one is no consequence to the other." *Joyner v. Garrett*, 279 N.C. 226, 238, 182 S.E.2d 553, 562 (1971) (internal citations and quotations omitted). [1]

***5** Accordingly, petitioner's motion to continue properly was reviewed, and the trial court did not abuse its discretion in affirming the DMV's denial of that motion.

In his final assignment of error, petitioner argues that he did not receive a fair hearing before the DMV. Petitioner alleges that Hearing Officer Snow failed to act as an impartial fact finder by leading and correcting witness testimony and that the trial court erred in affirming Hearing Officer Snow's decision. We disagree.

Pursuant to North Carolina General Statutes, section 20-16.2(d), the hearing officer is responsible for conducting hearings, upon the request of the person charged, to determine whether a willful refusal has occurred. As part of this process, the hearing officer may "subpoena any witnesses or documents that the hearing officer deems necessary." N.C. Gen.Stat. § 20-16.2(d) (2007).

We do not question that it is the right of a party "to be tried before a judge whose impartiality cannot reasonably be questioned." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). However, this Court has noted that

> [t]he United States Supreme Court has held 'that there is no *per se* violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter.' We held in *Hope* that a petitioner's mere allegations that the role of the attorneys in the investigatory process denied him due process were insufficient to overcome the presumption that the Board acted correctly, and that '[a]bsent a showing of actual bias or unfair prejudice petitioner cannot prevail....' Here, petitioner has brought forth only mere allegations that respondent's board acted with bias in affirming petitioner's warning, and the record contains insufficient evidence to overcome the assumption that respondent acted correctly throughout the appeals process. Petitioner received a fair and impartial hearing.

Avant v. Sandhills, 132 N.C.App. 542, 549, 513 S.E.2d 79, 84-85 (1999) (quoting *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C.App. 599, 604, 430 S.E.2d 472, 474-75 (1993)).

Here, the trial court found that, like a trial judge, a hearing officer "may direct questions to a witness for the purpose of clarifying his testimony." *State v. Jackson*, 306 N.C. 642, 651, 295 S.E.2d 383, 388 (1982) (citing *State v. Pearce*, 296 N.C. 281, 250 S.E.2d 640 and *State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972)). There is no evidence from the transcript of the 18 September 2008 hearing that Hearing Officer Snow did more than ask clarifying questions and summarize Officer Wall's statements for clarification purposes. Furthermore, petitioner only makes "mere allegations" that Hearing Officer Snow acted impartially. *Avant*, 132 N.C.App. at 549, 513 S.E.2d at 85. The purpose of the hearing pursuant to North Carolina General Statutes, section 20-16.2(d) is for the administrative officer to determine whether a willful refusal occurred. Petitioner fails to establish that Hearing Officer Snow exceeded his statutorily prescribed duties.

***6** Accordingly, we hold that petitioner received a fair and impartial hearing and that the trial court did not err upon affirming Hearing Officer Snow's decisions.

For the foregoing reasons, we affirm trial court's order affirming Hearing Officer Snow's order.

Affirmed.

Judges ELMORE and STROUD concur.
Report per Rule 30(e).

Parallel Citations

698 S.E.2d 557 (Table), 2010 WL 3002017 (N.C.App.)

Footnotes

1 Although not controlling to our decision, we note that numerous other jurisdictions already have considered and rejected petitioner's argument that a denial of a continuance deprives one of his due process protections. *See, e.g., Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-25 (9th Cir.1995), *cert. denied*, 516 U.S. 827, 116 S.Ct. 94, 133 L.Ed.2d 49 (1995); *Wimmer v. Lehman*, 705 F.2d 1402, 1407 (4th Cir.1983) ("difficult choices are imposed upon defendants and litigants in many situations"); *Jackson v. Johnson*, 985 F.Supp. 422, 424 (S.D.N.Y.1997); *S.E.C. v. Incendy*, 936 F.Supp. 952, 955 (S.D.Fla.1996); *S.C. Dep't of Soc. Servs. v. Walter*, 369 S.C. 384, 631 S.E.2d 913, 914 (S.C.Ct.App.2006) (citing numerous state and federal decisions); *Tyler v. Shenkman-Tyler*, 115 Conn.App. 521, 973 A.2d 163 (Conn.App.Ct.), *appeal denied*, 293 Conn. 920, 979 A.2d 493 (Conn.2009); *People v. Houar*, 365 Ill.App.3d 682, 302 Ill.Dec. 890, 850 N.E.2d 327 (Ill.App.Ct.2d Dist.2006); *Bell v. Todd*, 206 S.W.3d 86 (Tenn.Ct.App.2005), *appeal denied*, 2006 Tenn. LEXIS 214 (Tenn.2006); *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 22 P.3d 124, 137 (Kan.2001) (citing numerous state and federal decisions); *Fuller v. Superior Court*, 87 Cal.App.4th 299, 104 Cal.Rptr.2d 525 (Cal.Ct.App.2001); *King v. Olympic Pipeline Co.*, 104 Wash.App. 338, 16 P.3d 45, 53 (Wash.Ct.App.2000); *State v. Steenberg Homes*, 552 N.W.2d 900 (Wis.Ct.App.1996); *Ex parte Pegram*, 646 So.2d 644, 645-46 (Ala.1994) ("[T]he Fifth Amendment does not mandate a stay of civil proceedings pending the outcome of criminal proceedings...."); *State ex rel. Oklahoma Bar Ass'n v. Gasaway*, 863 P.2d 1189, 1196-98 (Okla.1993) (citing numerous state and federal decisions); *Commonwealth v. Lutz*, 152 Pa.Cmwlth. 377, 618 A.2d 1254, 1255-56 (Pa.Comm.Ct.1992) (No error in denying continuance of administrative hearing based on pending DWI charges); *Rosenberg v. Bd. of Educ. Of Sch. Dist. No. 1, Denver Pub. Sch.*, 710 P.2d 1095, 1101 (Colo.1985) (en banc) ("There is no right to a continuance of administrative proceedings pending the outcome of parallel criminal proceedings."); *In re Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 203 N.J.Super. 297, 496 A.2d 1111, 1133-34 (N.J.Super.Ct.App.Div.1985), *cert. denied*, 102 N.J. 352, 508

A.2d 223 (N.J.1985), *cert. denied*, 475 U.S. 1085, 106 S.Ct. 1467, 89 L.Ed.2d 723 (1986). *See generally United States v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970).

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