Lee v. Gore: Averment of Willful Refusal Necessary before DMV Can Revoke

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Categories : Motor Vehicles, Procedure, Uncategorized

Tagged as : affidavits, DWI, impared driving, lee v. gore, revocation

Date : August 31, 2011

The North Carolina Supreme Court decided Lee v. Gore last Friday, affirming the court of appeals and holding that DMV lacked authority to revoke the petitioner's driving privileges pursuant to G.S. 20-16.2 based upon an affidavit that failed to allege that he *willfully refused* to submit to a chemical analysis. I've written about this case before, so I'll skip over the facts (discussed here) and the court of appeals' opinion upon rehearing (discussed here).

The supreme court characterized its disposition of the case as "turn[ing] on the limited authority of the DMV," an agency that "possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority." Slip op. at 6-7. The court considered G.S. 20-16.2, the statute conferring upon DMV the authority to revoke a person's license for willfully refusing a chemical analysis, "clear and unambiguous," thereby leaving no room for judicial construction or deference to the agency's interpretation of its provisions. Slip op. at 5.

The court explained that G.S. 20-16.2 enables DMV to act when a driver charged with an implied-consent offense refuses to submit to a chemical analysis. When such a refusal occurs, G.S. 20-16.2(c1) requires the law enforcement officer and chemical analyst to execute an affidavit averring several facts, among them that the person "willfully refused to submit to a chemical analysis." The officer then must immediately mail the affidavit to DMV. When DMV receives a "properly executed affidavit" pursuant to G.S. 20-16.2(c1), it must notify the person that his or her license is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests, in writing, a hearing before DMV.

The court cited earlier appellate opinions confirming that a refusal "must be willful to suspend that person's driving privileges." The court emphasized the requirement for "a conscious choice purposefully made," though, as I noted in the last post about this case, such a choice apparently also is required for a mere refusal, which has been described as noncompliance stemming from "a positive intention to disobey," see Joyner v. Garrett, 279 N.C. 226, 233 (1971). Though the court recognized that the test record ticket attached to the affidavit in Lee's case indicated the test was "refused," it determined that the requirements of G.S. 20-16.2(c1) were not met as neither the ticket nor the affidavit "indicated that petitioner's refusal to participate in chemical analysis was willful." This missing allegation rendered the affidavit faulty and thus not "properly executed." Without a properly executed affidavit, the court reasoned, DMV had no authority to act.

The court thus made clear that a "willful refusal" must specifically be averred before DMV is authorized to revoke a person's license pursuant to G.S. 20-16.2. Nevertheless, the court's failure to clarify how a willful refusal differs from a refusal leads me to wonder what findings underlie a chemical analyst's allegation that a person has willfully refused a chemical analysis and whether those findings are consistent among analysts.

The high court declined to "determine the outer boundaries of what constitutes 'a properly executed affidavit' under G.S. 20-16.2(d)." Slip op. at 12. Nevertheless, it opined that--in addition to an affidavit that failed to allege a willful refusal--an affidavit that was "materially altered outside the presence of someone authorized to administer oaths," as occurred in *Lee*, was not "properly executed." Thus, affidavits submitted pursuant to G.S. 20-16.2 that fail to allege a

willful refusal or that have been amended after execution do not confer authority upon DMV to act. Other sorts of deficiencies might not deprive DMV of authority. For example, the court of appeals held in Hoots v. Robertson, __ N.C. App. __ (August 2, 2011), that an affidavit that erroneously stated that the petitioner refused testing two minutes before the time listed for the refusal on the test record ticket was properly executed as there is no requirement that the affidavit state when the refusal occurred.

The *Lee* court characterized DMV's burden upon receipt of an improperly executed affidavit as "light," stating that DMV could have asked the officer in *Lee* whether the affidavit omitted information. If the officer responded affirmatively, DMV could then have requested that the officer swear out a new, properly executed affidavit. DMV already utilizes a practice similar to that described by the court. When it receives a facially deficient affidavit, DMV returns the affidavit to the law enforcement officer along with a form DL-168 on which a DMV employee identifies the items that need to be corrected or completed. Obviously, any affidavit amended after its initial execution must be re-executed before being sent to DMV.