Reversed and Remanded and Opinion filed February 21, 2002.

In The

Fourteenth Court of Appeals

NO. 14-98-00810-CV

TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant

V.

KYLE JENKINS CALLENDER, Appellee

On Appeal from the County Court at Law No. 1
Brazos County, Texas
Trial Court Cause No. 4603-B

O P I N I O N

Appellant, the Texas Department of Public Safety ("DPS"), appeals from a county court at law's reversal of an administrative decision suspending appellee Kyle Jenkins Callender's driver's license. We hold that the county court at law erred in reversing the administrative decision; however, we reverse and remand for two issues left unresolved in the county court at law.

BACKGROUND

On November 21, 1997, Callender was arrested for driving while intoxicated. After his arrest, he refused to provide a sample of his breath for analysis to determine the alcohol concentration in his body. Under Chapter 724 of the Transportation Code, when a person is arrested for an offense involving the operation of a motor vehicle, the refusal to provide a breath or blood sample results in the suspension of the driver's license. TEX. TRANS. CODE ANN. § 724.035 (Vernon 1999). Callender was served with notice of the suspension that same day. *See id*. § 724.032(a)(1). A person may challenge such a suspension by requesting a hearing before an administrative law judge ("ALJ"). TEX. TRANS. CODE ANN. § 724.041 (Vernon 1999). A request for a hearing stays the suspension or denial until the date of the final decision of the ALJ. TEX. TRANS. CODE ANN. § 724.041(c).

Callender timely requested a hearing, which was held before ALJ Robert Harris of the State Office of Administrative Hearings on January 7, 1998, 47 days after Callender was notified of the suspension. At the hearing, Callender moved to dismiss the case on the grounds that the Transportation Code mandated that the hearing be held within forty days of the notice of suspension. The ALJ overruled the motion, and the case proceeded to the merits. At the conclusion of the hearing, the ALJ issued an administrative decision sustaining the suspension of Callender's driver's license. Callender appealed the administrative decision to County Court at Law No. 1 in Brazos County, Texas on the grounds that he was not given an administrative hearing within forty days of the notice of his license suspension. The court agreed and reversed the administrative decision.

The DPS appealed the court's order to this court, which dismissed the appeal for want of jurisdiction in *Texas Dep't of Public Safety v. Callender*, 14 S.W.3d 319 (Tex. App.—Houston [14th Dist.] 2000). The DPS sought a review of the dismissal by the Texas Supreme Court. While the petition for review was pending, the Court decided *Texas Dep't of Safety v. Barlow*, 48 S.W.3d 174 (Tex. 2001), in which it resolved the jurisdictional issue by holding that the courts of appeal have jurisdiction over appeals from county courts at law

in license suspension cases arising from a driver's refusal to submit to a blood alcohol concentration test. Consequently, the Court vacated this court's judgment dismissing Callender's appeal and remanded the case for further proceedings in *Texas Dept' of Public Safety v. Callender*, 51 S.W.3d 296 (Tex. 2001). We now address the merits.

ISSUES ON APPEAL

The DPS raises two issues in its appeal from the order of the county court at law: (1) the county court at law erred as a matter of law when it reversed the administrative decision on the ground that the hearing was not held within forty days of the notice of suspension; and (2) the county court at law erred as a matter of law in failing to affirm the administrative decision because it was supported by substantial evidence. Callender responded that (1) this court lacked jurisdiction to hear the appeal because the Texas Government Code did not provide for appeals from the county court at law, and (2) the court did not err in reversing the administrative decision because the requirement that a hearing be held within forty days of the notice of suspension is mandatory and the DPS failed to show good cause for failing to timely hold the hearing.

Because the Texas Supreme Court has resolved the jurisdictional issue and held that this court has jurisdiction to hear this appeal, we now address the county court at law's reversal of the ALJ's decision on the ground that the hearing was untimely. This is a question of law that is subject to de novo review. *In re Humphreys,* 880 S.W.2d 402, 404 (Tex. 1994), *cert. denied*, 513 U.S. 964 (1994); *Texas Dep't of Public Safety v. Dear*, 999 S.W.2d 148, 150 (Tex. App.—Austin 1999, no pet.).

Section 724.041(b) of the Transportation Code provides: "A hearing shall be held … before the effective date of the notice of suspension or denial." TEX. TRANS. CODE ANN. § 724.041(b). A suspension or denial takes effect on the fortieth day after the date on which the person receives notice of suspension or denial. TEX. TRANS. CODE ANN. § 724.035(d). In the interim between the filing of this appeal and our consideration of the issue, several

courts have held that these provisions indicate a legislative intent to require administrative hearings on license suspensions within forty days of the notice of suspension, but that the forty-day provision is directory, rather than mandatory. Therefore, the failure to hold the hearing within that time period does not automatically deprive the administrative agency of jurisdiction. *See Balkum v. Texas Dep't of Public Safety*, 33 S.W.3d 263, 268 (Tex. App.—El Paso 2000, no pet.); *Texas Dep't of Public Safety v. Dear*, 999 S.W.2d at 153; *Texas Dep't of Public Safety v. Vela*, 980 S.W.2d 672, 674 (Tex. App.—San Antonio 1998, no pet.); *see also Texas Dep't of Public Safety v. Guerra*, 970 S.W.2d 845, 648-49 (Tex. App.—Austin 1998, no pet.) (holding that similarly worded provisions requiring administrative hearings on license revocations based on failed breath tests to be held within forty days of notice of suspension were directory).[1]

In *Balkum* and *Dear*, the El Paso and Austin courts of appeal have also determined that, in the absence of a clear showing of bad faith by the DPS, a violation of the forty-day provision does not invalidate the suspension. *Balkum*, 33 S.W.3d at 268; *Dear*, 999 S.W.2d at 153. The *Balkum* and *Dear* courts reached this conclusion based upon the considerations that (1) the laws subjecting intoxicated motorists to suspension of driving licenses are intended to remove dangerous drivers from roadways to protect both themselves and other motorists, and (2) the purpose of the forty-day requirement is to promote the proper, orderly, and prompt conduct of business. *Balkum*, 33 S.W.3d at 268; *Dear*, 999 S.W.2d at 152. We agree with the reasoning of these courts and hold that the violation of the forty-day provision does not invalidate a license suspension under Chapter 724 in the absence of a clear showing of bad faith by the DPS.

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[1] We note that this court has previously held that Transportation Code section 724.032, which provides that an officer shall forward a copy of the notice of suspension and the refusal report to the department "not later than the fifth business day" after the date of the arrest, was directory, rather than mandatory. *Texas Dep't of Public Safety v. Repschleger*, 951 S.W.2d 932, 934-35 (Tex. App.—Houston [14th Dist.] 1997, no writ).

Here, Callender alleged only that the DPS failed to show that it acted with good cause. The *Dear* court expressly rejected the contention that the department was burdened with an affirmative duty to show good cause before it could avail itself of the directory nature of the provision, and that without such showing, any proceedings are void for lack of jurisdiction. *Dear*, 999 S.W.2d at 151. The *Dear* court reasoned that, if the legal consequence of failing to comply with a directory provision were the same as that for failing to comply with a mandatory provision, there would be no meaningful distinction between the two. *Id*. at 152. We agree. Because Callender did not allege or establish any bad faith on the part of the DPS, we sustain the DPS's first issue.

We decline to address the DPS's second issue. The petition for appeal Callender filed in the county court at law alleged not only that the forty-day provision was mandatory, but also that the ALJ erred in finding that the DPS proved the elements of its case. In addition, the petition included a request for an occupational driver's license in the event the administrative decision was sustained. The trial court's order does not specify the reasons for its reversal of the ALJ's decision, but the transcript of the hearing in the county court at law reveals that the only issue addressed was the forty-day provision. Therefore, we will assume that Callender's alternative ground for reversal and the request for an occupational driver's license were not addressed by the judge. Accordingly, we reverse the order of the county court at law and remand for further proceedings consistent with this opinion.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed February 21, 2002.
Panel consists of Justices Hudson, Fowler, and Edelman.
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