

Reversed and Remanded and Opinion filed September 23, 1999.



In The

## Fourteenth Court of Appeals

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NO. 14-97-01357-CV  
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**THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant**

V.

**JIMMIE LADELL BREAZEALE, Appellee**

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**On Appeal from the County Court at Law No. 3 and Probate Court  
Brazoria County, Texas  
Trial Court Cause No. 22,790B**

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### OPINION

The Texas Department of Public Safety (DPS) appeals from an order of the county court at law, reversing an administrative finding to sustain a suspension order to suspend the driver's license of Jimmie Ladell Breazeale (Breazeale). *See* TEX. TRANSP. CODE ANN. § 724.043(a) (Vernon 1999). The DPS assigns four points of error, contending that the county court at law erred because (1) it complied with all notice requirements, (2) Breazeale waived any error relating to improper notice by failing to request a continuance, (3) any error in providing notice did not substantially prejudice Breazeale's rights, and (4) the proper remedy to cure the

error in notice, if any, was to remand the case to the State Office of Administrative Hearings for a new administrative hearing on the merits. We reverse and remand.

#### BACKGROUND

On April 9, 1997, Police Officer Ronald Gentry, of the Angleton Police Department, stopped Breazeale after the officer observed Breazeale traveling in his automobile at a speed of 71 miles per hour in a zone with a maximum posted speed limit of 45 miles per hour. The officer detected an odor of alcohol emanating from Breazeale's breath. Officer Gentry administered field sobriety tests to Breazeale, which indicated that he was intoxicated. Breazeale was placed under arrest for suspicion of driving while intoxicated. At the police station, Breazeale refused to submit a breath specimen to confirm whether he was intoxicated. He signed a DIC-24 form affirming such refusal. Officer Gentry served Breazeale a notice of suspension of his driver's license for his failure to submit a breath specimen.

Pursuant to his request, on May 2, 1997, Breazeale's official notification of his driver's license suspension was mailed. The notice indicated that a hearing concerning such suspension was scheduled on May 14, 1997.

In response, Breazeale filed a motion for proper notice of hearing, contending that because he did not receive the notice until May 5, 1997, that the date of the hearing scheduled in the notice failed to comply with the eleven-day rule of section 724.041(b) of the Texas Transportation Code. At the scheduled hearing, the administrative law judge overruled Breazeale's motion and suspended his driver's license.

Breazeale sought judicial review of the administrative law judge's decision in the county court at law. Following a hearing, on September 4, 1997, the county court at law entered its order reversing the administrative law judge because it found that "section 724.041(b) of the Transportation Code was not complied with which substantially prejudiced the rights of [Breazeale] and that this violated a statutory provision."

#### STANDARD OF REVIEW

The provisions of chapter 724 of the Texas Transportation Code apply to the suspension of a driver's license for refusal to submit to the taking of a specimen. TEX. TRANSP. CODE ANN. § 724.002 (Vernon 1999). Section 724.047 provides that chapter 524 of the Texas Transportation Code governs an appeal from an action of the DPS following an administrative hearing. TEX. TRANSP. CODE ANN. § 724.047 (Vernon 1999). Section 524.002(b) of the Texas Transportation Code provides that the Administrative Procedures Act (APA), TEX. GOV'T CODE ANN. ch. 2001 (Vernon Pamph. 1999), applies to a proceeding under chapter 524 to the extent it is consistent with chapter 524. TEX. TRANSP. CODE ANN. § 524.002(b) (Vernon 1999). Under the APA, a trial court may reverse an agency determination only if the substantive rights of the appellant have been prejudiced because the administrative findings are: (A) "in violation of a constitutional or statutory provision," (B) "in excess of the agency's statutory authority," (C) "made through unlawful procedure," (D) "affected by other error of law," (E) "not reasonably supported by substantial evidence," or (F) "arbitrary or capricious." TEX. GOV'T CODE ANN. § 2001.174(2) (Vernon Pamph. 1999). Each of these grounds for reversal presents a question of law. *Texas Dep't of Pub. Safety v. Stanley*, 982 S.W.2d 36, 37 (Tex.App.–Houston [1<sup>st</sup> Dist.] 1998, no pet.). We exercise *de novo* review over questions of law in an APA appeal. *Id.*

#### THE ELEVEN-DAY RULE

In its first point of error, the DPS contends that the county court at law erred in reversing the decision of the administrative law judge on the ground that DPS did not comply with section 724.041(b) of the Texas Transportation Code. We agree.

Section 724.041(b) provides that "[a] hearing shall be held not earlier than the 11th day after the date the person is notified, unless the parties agree to waive this requirement, but before the effective date of the notice of suspension or denial." TEX. TRANSP. CODE ANN. § 724.041(b) (Vernon 1999). This provision is silent on whether the 11 days is calculated from the time the notice is mailed or from the time the notice is received. However, this identical issue was addressed by the court in *Stanley*. See 982 S.W.2d at 38.

Section 724.003 of the Texas Transportation Code provides that “[t]he department and the State Office of Administrative Hearings shall adopt rules to administer this chapter.” TEX. TRANSP. CODE ANN. § 724.003 (Vernon 1999). Title 1, chapter 159, of the Texas Administrative Code applies to contested hearings concerning administrative suspension of drivers’ licenses before the State Office of Administrative Hearings. 1 TEX. ADMIN. CODE § 159.1. Section 724 of the Texas Transportation Code requires that the State Office of Administrative Hearings hold a hearing on suspension of a driver’s license if the person who refused to submit a specimen requests one in a timely and correct fashion. *See* TEX. TRANSP. CODE ANN. § 724.041(a) (Vernon 1999). As noted above, section 724.041(b) does not address whether the 11-day notice requirement is calculated from the day the notice of the hearing is sent or received. Section 159 of the Texas Administrative Code, however, addresses this issue:

(d) The hearing shall be scheduled to occur no sooner than ten days after the date the notice of hearing was sent to the defendant unless the parties waive the ten day period. Generally, the hearing shall be scheduled to be held no later than 40 days after the defendant received or is presumed to have received the notice of suspension.

1 TEX. ADMIN. CODE § 159.9(d) (emphasis added).

Section 159.9(d) of the Texas Administrative Code and section 724.041(b) of the Texas Transportation Code are not in conflict. Section 724.041(b) incorporates the minimum 10-day notice requirement set forth in section 159.9 and is, in fact, more restrictive than section 159.9 in that there is a minimum 11-day notice requirement. *Stanley*, 982 S.W.2d at 38. Section 159.9(d) of the Texas Administrative Code simply fills a gap in section 724.041(b) of the Texas Transportation Code as to how the minimum notice of hearing requirement is calculated. *Id.* In other words, a person is notified when the notice of the hearing is sent. *Id.*

Accordingly, we conclude the DPS complied with section 724.041(b). The administrative record indicates that the notice of the hearing was dated April 30, 1997. The notice of the hearing was sent to Breazeale and the State Office of Administrative Hearings,

postmarked May 2, 1997.<sup>1</sup> The hearing was held on May 14, 1997, 12 days after the notice of the hearing was mailed. Thus, the hearing was not held earlier than the 11th day after Breazeale was notified of the hearing. *See id.* We sustain the DPS's first point of error.<sup>2</sup>

The judgment of the county court at law is reversed, and this matter is remanded for further proceedings consistent with this opinion.

/s/ J. Harvey Hudson  
Justice

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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<sup>1</sup> Breazeale received the notice of hearing on May 5, 1997.

<sup>2</sup> Because of our disposition of point of error one, we need not address the DPS's remaining points of error.