

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

GREGORY J. GALLAGHER,
Plaintiff,

vs.

DEPARTMENT OF MOTOR VEHICLES,
STATE OF NEBRASKA,
Defendant.

Case No. CI98-80

JUDGMENT ON APPEAL

DATE OF HEARING: March 4, 1999.

DATE OF DECISION: March 11, 1999.

APPEARANCES:

For plaintiff: Forrest F. Peetz without plaintiff.
For defendant: Avery L. Gurnsey, Special Holt County Attorney, on behalf of the Attorney General.

SUBJECT OF ORDER: Petition for review pursuant to Administrative Procedures Act.

FINDINGS: The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. For the court's convenience, the court incorporates by reference the factual findings of the director, which are not disputed. However, the court reaches such factual findings independently following its own de novo review.

2. In his petition for review, the plaintiff (appellant) asserts:

a. The department failed to hold the administrative hearing in the county in which the arrest occurred, as mandated by NEB. REV. STAT. § 60-6,205 (6)(a) (Reissue 1998).

b. The arresting officer's sworn report, contrary to NEB. REV. STAT. § 60-6,205(4) (Reissue 1998) ("[i]f the [motorist] has an operator's license, the . . . officer shall take possession of the license and *issue a temporary operator's license valid for thirty days*") (emphasis supplied), issued a sworn report and temporary license form stating that it was *not valid as a temporary license*, which the plaintiff asserts:

(1) was contrary to law;

(2) deprived the plaintiff of a remedy by due course of law guaranteed by article 1, § 13 of the Nebraska Constitution;

(3) deprived the plaintiff of due process of law guaranteed by article 1, § 3 of the Nebraska Constitution; and,

(4) deprived the plaintiff of due process of law guaranteed by the Fifth Amendment to the U.S. Constitution as applied to the State by the 14th Amendment to the U.S. Constitution.

3. The court first addresses the plaintiff's claim regarding the hearing location. In *Matthews v. Abramson*, District Court of Cherry County, Nebraska, Case No. 10693 (Jan. 14, 1999), this court reversed an administrative revocation and remanded for a new hearing because, over the motorist's objection to a telephonic hearing, the telephone conference hearing was not held in the county in which the arrest occurred.

a. In *Kimball v. Nebraska Dept. Of Motor Vehicles*, 255 Neb. 430, ___ N.W.2d ___ (1998), the Nebraska Supreme Court held that telephonic hearings are permitted in proceedings under the Administrative Procedures Act (NEB. REV. STAT. § 84-901 *et seq.* (Reissue 1994 & Cum. Supp. 1998)) when a formal "rules of evidence" hearing is requested. The Supreme Court did not, however, address the interplay of § 84-913.03 with § 60-6,205(6)(a).

b. NEB. REV. STAT. § 60-6,205(6)(a) requires that the director's hearing "shall be conducted in the county in which the arrest occurred or *in any other county agreed to by the parties.*" NEB. REV. STAT. § 60-6,205(6)(a) (Reissue 1998) (emphasis supplied).

c. In *Matthews*, this court determined that a telephonic hearing occurs in the county in which the hearing officer was located. *Sleeth v. Department of Public Aid*, 125 Ill. App. 3d 847, 852, 466 N.E.2d 703, ___ (1984); *Detroit Base Coalition for the Human Rights of the Handicapped v. Department of Social Services*, 431 Mich. 172, 428 N.W.2d 335 (1988) (en banc); *Evans v. State, Taxation & Rev. Dep't*, 122 N.M. 216, 922 P.2d 1212 (Ct. App. 1996). The hearing therefore occurred in Lancaster County, where the hearing officer was situated, rather than Holt County in which the arrest occurred.

d. Unlike *Matthews*, the plaintiff in this case did not object to a telephonic hearing or to the location of the hearing, and participated in the telephonic hearing provided by the director. In so

doing, the plaintiff has either waived the requirement by his failure to object or “agreed” to a hearing in another county within the meaning of the statute. The plaintiff’s first claim is without merit.

4. The plaintiff’s second claim rests upon the undisputed fact that the arresting officer took possession of the plaintiff’s operator’s license, and erroneously issued the plaintiff a “temporary license” that stated on its face that it was not valid as a temporary license because of “refusal.”

a. The defendant concedes that the officer acted erroneously.

b. The defendant argues, and this court finds, as a matter of fact, that the officer acted in a mistaken belief that his action was properly required by law. Such action was taken in good faith and without malice or other improper intent.

c. The question becomes, what is the effect in law of the arresting officer’s erroneous failure to issue a temporary license.

5. In circumstances remarkably similar to the present case, the Supreme Court of Montana stated that an error in enforcing a statute does not immediately preclude enforcement of the entire statute. *In re Vinberg*, 216 Mont. 29, 699 P.2d 91 (1985). The court observed that the motorist would only be entitled to relief if he was prejudiced by a denial of due process. *Id.* The court did not reach the issue of whether a denial of due process precludes suspending a driver’s license because the court found that the motorist received due process. *Id.* The court analyzed applicable precedent of the United States Supreme Court, and concluded that due process did not require a presuspension hearing and was satisfied by a prompt postsuspension hearing. *Id.*

6. The U.S. Supreme Court has considered what process was due in several cases.

a. In *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), the Supreme Court held that before a state could suspend a driver’s license for lack of financial responsibility after an accident, procedural due process required a determination of whether there was a reasonable possibility of a judgment being rendered against the driver.

b. In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court identified three factors bearing on the due process analysis: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, (3)

the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedures would entail.

c. In *Dixon v. Love*, 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977), the Supreme Court upheld an Illinois statute against a due process challenge. The Illinois statute permitted suspension or revocation without preliminary hearing upon sufficient evidence of repeated traffic convictions demonstrating lack of ability to safely operate a motor vehicle. The Supreme Court reasoned that: (1) the private interest in a driver's license was not so great as to require a presuspension administrative hearing; (2) the risk of an erroneous deprivation was not great and the additional procedures were unlikely to significantly reduce the number of erroneous deprivations; and, (3) the public interests in highway safety and prompt removal of safety hazards justified suspension prior to a full administrative hearing. *Id.*

d. In *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979), the Supreme Court held that a Massachusetts statute mandating suspension of a driver's license for refusal to submit to breath test analysis, without providing for a presuspension hearing, did not violate the due process clause of the Fourteenth Amendment. The Supreme Court utilized the factors from *Mathews v. Eldridge*, finding that: (1) the prompt availability of a postsuspension hearing easily initiated by the driver significantly reduced any impact upon the driver's private interest; (2) the risk of erroneous observation or deliberate misrepresentation of the facts by a police officer reporting a refusal to take a breath test was insubstantial; and, (3) the state's interest in public safety was substantially served by the summary suspension of licenses of those who refuse to take a breath analysis test upon arrest. *Id.*

7. This court agrees with the analysis of the Montana Supreme Court concerning the applicable decisions of the United States Supreme Court. Although it has not considered the specific issue, in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996) and *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996), the Nebraska Supreme Court emphasized that the important remedial purpose of the administrative license revocation statute is to protect the public from the health and safety hazards of drunk driving by quickly getting DUI offenders off the road. This recognition of an important state interest suggests that the Supreme Court would weigh the *Mathews v. Eldridge* factors consistently with this analysis.

8. This court concludes that the hearing provided to Gallagher after suspension did not deprive him of his federal constitutional right to due process. Accord, *Peretto v. Department of Motor*

Vehicles, 235 Cal. App. 3d 449, 1 Cal. Rptr. 2d 392 (Ct. App. 1991); *Broughton v. Warren*, 1971 Del. Ch. 128, 281 A.2d 625 (1971); *Kurtzworth v. Illinois Racing Bd.*, 92 Ill. App. 3d 564, 415 N.E.2d 1290 (1981).

9. The next issue is whether article 1, § 3 of the Nebraska Constitution (the Nebraska Due Process Clause) affords greater relief than that provided by the federal constitution.

a. In *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), the Nebraska Supreme Court observed that states are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal constitution. The Supreme Court rejected the Court of Appeals' presumption that the Supreme Court would automatically limit due process protection to the limits of the federal constitutional protection.

b. In *State v. LeGrand*, the Supreme Court provided a limited avenue through which a defendant can mount a *Boykin* challenge to a prior offense sought to be used for enhancement, but carefully circumscribed the procedures by which a defendant could mount such a challenge in enhancement proceedings. *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997) (declining to extend *LeGrand* to subsequent case in which prior conviction is element of crime charged). See also *State v. Davenport*, 5 Neb. App. 355, 559 N.W.2d 783 (1997), (declining to extend *LeGrand* to postconviction proceedings).

c. In *State v. Champoux*, 5 Neb. App. 68, 555 N.W.2d 69 (1996), *aff'd*, 252 Neb. 769, 566 N.W.2d 763 (1997) (upholding municipal zoning ordinance limiting rental of property zoned for single-family or two-family use to "families"), the Nebraska Court of Appeals found no greater due process protection under the state constitution.

d. This court finds no indication in these cases that the Nebraska Supreme Court would afford greater protection under our state constitution in this instance. Accordingly, the court finds that the plaintiff has failed to establish a state constitutional due process violation.

10. The plaintiff cites no authority to support his claim that the administrative license revocation in this case violates article 1, § 13 of the Nebraska Constitution ("every person . . . shall have a remedy by due course of law, and justice administered without denial or delay").

a. The Nebraska Supreme Court observed, in denying an analogous claim in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), that this constitutional provision does not imply that the Legislature is without power to impose a special procedure before access to the courts.

b. In the present context, the Legislature imposed a special procedure. However, the statutory scheme does not significantly limit access to the courts, providing prompt administrative review and a right to review in district court. That conclusion is particularly compelling where judicial review is de novo on the record. Under the de novo standard, this court is not bound by any factual or legal determinations of the director.

c. The plaintiff received prompt and comprehensive consideration of his claim in this court. This state constitutional provision requires nothing more.

11. The court finds, by the greater weight of the evidence, that:

a. The officer had probable cause to believe that the plaintiff was operating or in the actual physical control of a motor vehicle in violation of NEB. REV. STAT. § 60-6,196 (Reissue 1998); and,

b. The plaintiff refused to submit to or failed to complete a chemical test after being requested to do so by the officer.

12. The decision of the director should be affirmed.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation entered on December 14, 1998, is affirmed.

2. The suspension of such revocation on appeal under § 60-6,208 is dissolved.

3. Costs on appeal are taxed to the plaintiff.

Entered: March 11, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties, **including both the Special Holt County Attorney and the Attorney General for defendant.**

Done on _____, 19__ by _____.

: Mail postcard/notice required by § 25-1301.01 within 3 days.

Done on _____, 19__ by _____.

: Note the decision on the trial docket as: 3/11/99 Signed "Judgment on Appeal" entered affirming order of revocation, dissolving suspension of revocation on appeal, and taxing costs to plaintiff.

Done on _____, 19__ by _____.

Mailed to:

BY THE COURT:

William B. Cassel, District Judge