

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

ROBERT J. BLANQUE,)
)
Plaintiff/Appellee,)
)
vs.)
)
STATE OF OKLAHOMA, ex rel.)
DEPARTMENT OF PUBLIC SAFETY,)
)
Defendant/Appellant.)

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

FEB 8 2005

MICHAEL S. RICHIE
CLERK

Case No. 100,751

APPEAL FROM THE DISTRICT COURT OF
McCURTAIN COUNTY, OKLAHOMA

HONORABLE GARY L. BROCK, TRIAL JUDGE

AFFIRMED

Mike O'Brien
Stephen G. Fabian
FABIAN & ASSOCIATES
Oklahoma City, Oklahoma

For Appellee

Kevin L. McClure
DEPARTMENT OF PUBLIC SAFETY
Oklahoma City, Oklahoma

For Appellant

OPINION BY JOHN F. REIF, PRESIDING JUDGE:

This appeal arises from a district court proceeding brought by Robert J. Blanque to set aside the revocation of his driver's license. Mr. Blanque sought relief from the district court after the administrative hearing he requested to review the revocation was postponed "ad infinitum" by the hearing officer. This indefinite continuance was granted because the arresting officer was on military duty in Iraq and it was not certain when he would return. The district court ruled that this indefinite postponement of the administrative hearing violated the Department of Public Safety rules and regulations governing administrative hearings and denied Mr. Blanque due process. Based on this ruling, the district court set aside the revocation and ordered the Department of Public Safety to return Mr. Blanque's plastic license bearing his photograph and identifying information. Following an unsuccessful quest for the trial court to reconsider its judgment, the Department of Public Safety filed its petition in error on appeal.

In its first proposition of error, the Department of Public Safety asserts that the district court lacked jurisdiction because the postponement order was not an appealable order. The Department relies on 47 O.S. Supp. 2004 § 6-211(F), which states that the trial court shall not consider the merits of a revocation action unless the Department has entered an order sustaining the revocation. This portion of

section 6-211(F) is inapplicable, because the trial court did not consider the merits of the action. “Merits” are the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, especially of procedure. BLACK’S LAW DICTIONARY 1003 (7th ed. 1999). The hearing officer made no decision on the merits of the suspension, and neither did the trial court.

Instead, the appeal was properly brought under section 6-211(D), which states that appeals relating to blood test refusals can be brought if driving privileges have been revoked or denied or where a hearing has been denied. In delaying the case indefinitely, the hearing officer effectively denied Mr. Blanque a hearing on the merits.

We also reject the Department’s related argument that Mr. Blanque failed to exhaust his administrative remedies. We first note that exhaustion of remedies is a prudential rule and not a jurisdictional bar. In addition, “[w]hen an administrative remedy is unavailable, ineffective or futile to pursue, the policy justifications for invoking the exhaustion of administrative remedies doctrine are no longer compelling.” *Waste Connections, Inc. v. Oklahoma Dept. of Environmental Quality*, 2002 OK 94, ¶ 8, 61 P.3d 219, 222. The decision to indefinitely delay a final determination of Mr. Blanque’s case has the practical effect of making an administrative remedy unavailable.

With regard to the two reasons given by the trial court for vacating the driver's license revocation, we agree with both of them. First, the trial court held the postponement of the case indefinitely violated Department of Public Safety rules governing administrative hearings, in particular, the "Procedures for telephonic implied consent hearings." OAC 595:1-3-19. Subsection (h)(2) of 595:1-3-19 provides:

Where a necessary witness adverse to the licensee, such as an officer, fails to provide a telephone number or to answer or the line is busy, after the above procedure has been followed [involving a three-minute wait and a second call] the case *will be set aside*.

(Emphasis added.)

Though admitting the officer was unavailable, the Department relies on the final sentence of section 595:1-3-19(g) covering the rescheduling of a hearing. This provision states: "Only necessary and unavoidable reasons will be considered for rescheduling on the hearing date." The Department asserts that the officer's military duty in Iraq obviously qualifies as a necessary and unavoidable reason for rescheduling.

Undoubtedly, the arresting officer's absence due to military duty is an unavoidable absence; however, subsection (g) must be read in context of the entire text of subsection (g), which states:

If the date and time designated by the Department of Public Safety for the hearing is not suitable, the Legal Division must be notified immediately in writing upon receipt of the notice of hearing. Hearing will be rescheduled if the Department is informed of a conflict by noon on the date preceding the hearing. Only necessary and unavoidable reasons will be considered for rescheduling on the hearing date.

The final sentence clearly applies to last-minute reasons for cancellation. The record reveals that the arresting officer received notice of the hearing more than a month before it was to take place, and was deployed to Iraq well before the date of the hearing. For whatever reasons, no written notice of his unavailability was made. Under these specific facts, the hearing officer should have set the revocation aside. The trial court's decision vacating the driver's license revocation should be affirmed on this ground.

Additionally, the trial court reasoned that the Department's indefinite delay of the case amounted to a denial of Mr. Blanque's due process rights. Oklahoma courts apply a two-step inquiry to determine if a plaintiff is denied due process: "(1) did the individual possess a protected [property] interest to which due process protection was applicable? and (2) was the individual given an appropriate level of process?" *Barnthouse v. City of Edmond*, 2003 OK 42, ¶ 11, 73 P.2d 840, 846 (citation omitted).

Concerning the first factor, a claim to a driver's license is a protectable property interest that may not be terminated without due process guaranteed by the Fourteenth Amendment. *Price v. Read*, 1986 OK 43, ¶ 11, 725 P.2d 1254, 1260. While the Department has issued Mr. Blanque a temporary driver's license, we agree with his argument that the standard, plastic license is a necessary, important form of identification, especially in post-9/11 society. There is limited authority for the proposition that a person does not have a protectable property interest in the plastic driver's license itself, *McGraw v. State*, 498 S.E.2d 314 (Ga. Ct. App. 1998); however, that case is dissimilar to the instant case, and was decided before September 11, 2001.

With regard to the second factor, the statutes provide for a relatively quick resolution of driver's license revocation cases. Title 47 O.S. Supp. 2004 § 6-211(E) requires a petition relating to an implied consent revocation to be filed within 30 days after the administrative revocation, and even imposes a duty on the trial court to set the matter for hearing not less than 15 days and not more than 30 days after the petition is filed. While the hearing officer's "ad infinitum" delay in this case is due to factors outside the control of any of the parties, it nonetheless frustrates the statute's purpose.

The case of *State v. Digger Slot Machines*, 1990 OK CIV APP 103, 802 P.2d 652, also involved undue delay in the face of a statute calling for expeditious review. There the trial court dismissed the State's attempt to forfeit a coin-activated amusement machine allegedly used as a gambling device. Three and one-half months passed between the seizing officer's report to the prosecution and the service of forfeiture notice on the machine's owner. This court affirmed the dismissal, stating that in cases of undue delay, the aggrieved party is due "an appropriate remedy to redress denial of due process and to promote strict compliance with the statutory procedure in future cases." *Id.* at ¶ 4, 802 P.2d at 653 (footnote omitted). Given the fact that the "ad infinitum" postponement of the administrative proceeding denied Mr. Blanque even minimal due process review of the revocation, vacation of the revocation was an appropriate remedy for that denial of due process.

We again note that this appeal follows the trial court's denial of the Department's motion for reconsideration/new trial. A trial court is vested with broad legal discretion in granting or denying a new trial, and its judgment will not be disturbed on appeal unless it clearly appears the court erred in some pure simple question of law or acted arbitrarily. *Poteete v. MFA Mutual Ins. Co.*, 1974 OK 110, ¶ 24, 527 P.2d 18, 22. The trial court did not abuse its discretion in denying

the Department's motion for new trial, and correctly set aside the driver's license revocation.

AFFIRMED.

TAYLOR, J., and STUBBLEFIELD, J. (sitting by designation), concur.

February 8, 2005