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Supreme Court of Texas.
TEXAS DEPARTMENT OF PUBLIC SAFETY, Petitioner,
v.
Ben BARLOW, Respondent.
No. 99-0670.

January 17, 2001.

Appearances:

S. Kyle Duncan, State of Texas, Attorney General's Office, Austin, TX, for Petitioner.

David S. Barron, Law Office of David S. Barron, Bryan, TX, for Respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla R. Owen, Justice Harriet O'Neil, Justice Wallace B. Jefferson.

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JUDGE: The Court is ready to hear argument from petitioner in Texas DPS v. Barlow.

SPEAKER: May it please the Court, Mr. Kyle Duncan will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF S. KYLE DUNCAN ON BEHALF OF THE PETITIONER

MR. DUNCAN: May it please the Court.

The department's ability to suspend a driver's license for alcohol impairment makes Texas roads safer. The legislature intended uniform appellate review of these license suspensions, both through a specific grant of jurisdiction in the transportation code, and also through application of the general jurisdictional statutes.

JUDGE: What are the specifically mentioned in judicial review would mean to a District Court?

MR. DUNCAN: In -- you're referring to the specific ground jurisdiction, Justice Abbott?

JUDGE: Yes.

MR. DUNCAN: The judicial review is created in Chapter 524 and .041, and the review is extended through application of the APA to the -- to the Courts of Appeals from the first judicial review that is provided in Chapter 524, which is admittedly a modified review. Now --

JUDGE: The root of the APA analysis, I mean, it's -- it's obvious through his whole scheme that you can go to [inaudible]. There's no mandate that you must go to District Court.

MR. DUNCAN: That is true.

JUDGE: And until the APA appeals specifically provided only to District Courts.

MR. DUNCAN: That is true Justice Abbott.

JUDGE: So how did it get from the County Court to the Court of Appeals?

MR. DUNCAN: Because when Chapter 524 of the APA is explicitly incorporated into the -- I'm sorry, Chapter 524 of the Transportation Code is explicitly incorporated into the APA. The APA appeals provision, the literal wording of that provision, must be read in context of this modified review procedure that is provided in Chapter 524, and thus through the rules of statutory construction, we can interpret the phrase in the APA final District Court judgment as extending review from all Trial Court determinations under Chapter 524.

JUDGE: No, that's basically rewriting the statute. What it says -- obviously you are aware that the legislature has chosen -- it could have said, "District Court or County Court."

MR. DUNCAN: It could have said that --

JUDGE: It didn't say that.

MR. DUNCAN: It did not say that.

JUDGE: They said, "So with the District Court."

MR. DUNCAN: That is true.

JUDGE: So, why shouldn't we hold them to the words they chose?

MR. DUNCAN: Because that would -- well, first of all, because when considered in the context of Chapter 524, those words in the APA do not have a plain and unambiguous meaning. We must read them in the context of Chapter 524, which may create ambiguity about the legislature's purpose. And second, because reading the literal words in that fashion would create a nonsensical, haphazard, and illogical scheme of appellate review --

JUDGE: Where -- where in 524 does it say you're guaranteed an appeal to the Court of Appeals?

MR. DUNCAN: It -- it does not explicitly say that in the 524.

JUDGE: So I'm -- I'm [inuadible] if -- if under the APA there's only appeal from the District Court not a County Court, and if under Section 524 there's no guarantee the Court of Appeals, there obviously is a huge link missing in the dots you want us to connect.

MR. DUNCAN: Well, the -- the link may be supplied through the rules of statutory construction. Because what we have in Chapter 524 is --

JUDGE: The first rule of statutory construction is to strictly apply the language chosen by the legislature, is it not?

MR. DUNCAN: That -- that is a rule of statutory construction.

JUDGE: Isn't it the most important one for us to apply?

MR. DUNCAN: In this case, no, Justice Abbott, and that is because the word -- the literal words of the APA, which preexisted Chapter 524, must be read in the context of a modified scheme of review. We -- the -- the application of 524 to APA creates an ambiguity in the legislative intent, and in those words because the -- the phrase, "Final District Court and the APA," cannot be read it is -- in the -- in the Chapter 524 context, should not be read by this Court as limiting the extension of review only to this tiny fraction of cases under Chapter 524 that simply doesn't accord with the rational legislative purpose.

JUDGE: But if we -- if we look at the APA alone, the use of the

word "District Court" in that provision of the APA does not create an ambiguity, does it?

MR. DUNCAN: Not if we look at it in the APA alone, Justice Hankinson.

JUDGE: Because typically, we're dealing with review of agency decisions that go to the Travis County District Court.

MR. DUNCAN: That is correct.

JUDGE: So, it is in fact 524 that you're saying creates an ambiguity.

MR. DUNCAN: It is the -- that is close to what I'm saying. I'm saying that the -- the 524 incorporates the APA or the APA incorporates 524. And that's what creates the ambiguity.

JUDGE: Okay, but -- but if the legislature intended, when it drafted the APA, and -- and enacted it to only provide for appeals from District Court judgments, and we have no provision in 524 that indicates any intent on the part of the legislature to guarantee or grant a right to appeal. And even if there is an ambiguity if we are applying rules of statutory construction, why wouldn't we come down on the side of determining that there is no jurisdiction 'coz we can find no legislative intent to guarantee a right to appeal from decisions under Chapter 524?

MR. DUNCAN: Well, I -- I have two responses to that. First of all, I -- I think that it is reading the APA in -- in too much of an inflexible way to say that the legislature intended that there only be District appeals under the APA from the District Court judges. The APA itself recognized that there may be different routes of appeal. In -- in .176 it says, "Unless otherwise provided by law the initial" --

JUDGE: Okay, well then let me ask you this, is there -- is -- is there any case law in which the provision of the APA that we are looking at that uses the words, "District Court judgment," or that language has been interpreted to mean anything but an appeal from a district -- an -- a -- an actual District Court judgment?

MR. DUNCAN: Well, of course, other than the Courts of Appeals cases in these cases --

JUDGE: I understand --

MR. DUNCAN: -- I'm not --

JUDGE: Yeah, I'm just talking about --

MR. DUNCAN: -- I'm --

JUDGE: -- other context.

MR. DUNCAN: I'm not aware -- I'm not aware, Justice Hankinson.

JUDGE: Because there really hasn't been any need to since those decisions come out of District -- District Courts on a regular basis as opposed to County Courts at all.

MR. DUNCAN: That -- that is -- that is perhaps true, and which goes back to my argument that there is a modified scheme that is enacted in Chapter 524. It modifies this first tier of judicial review that we normally have a default under the APA. Under the APA, as you know --

JUDGE: You know what -- what your argument seems to be resting on, not so much the preciseness of what the legislature said, but on what you contend the legislature intended.

MR. DUNCAN: It -- it rests on what the -- what we believe the legislature intended and --

JUDGE: And -- and looking at what the legislature intended, apparently there hasn't been a whole lot of -- of light shed on this but why would it not be fair to conclude that the legislature, knowing how filled the courts are with so many cases altogether, that they want

it to free the courts of appeals from having to deal with potential thousands of appeals from administrative hearings. I -- I wouldn't find that to be a fairly reasonable conclusion by the legislature.

MR. DUNCAN: I have two responses to that. First of all, if the legislature had wanted to alleviate a backlog of cases, it knew how to do so in this context. It could have specifically excluded the appeal provision in 524 from the APA, which it has done in subchapter 5 of the APA entitled "Exclusions." Secondly, it would be unreasonable to --

JUDGE: Would it be unreasonable similar to the handgun laws where they -- it was specifically excluded from the APA?

MR. DUNCAN: Well, in the -- in the Tune case, that scheme of review was specifically excluded from the APA, as this Court recognized in its decision.

JUDGE: But as it winds up and it goes to the Court of Appeals. So even if they specifically excluded it, it doesn't mean that that would've been achieved.

MR. DUNCAN: Well, that -- that is -- that seems true -- by given that Tune deals with the general jurisdictional statutes and not the specific jurisdictional statutes. There is still that distinction. And of course, we make the argument here that the general jurisdictional statutes will achieve the same result.

JUDGE: I wanna ask you that --

MR. DUNCAN: Yes.

JUDGE: We [inaudible] that from controversy is ever a hundred dollars, we don't reach the specific statutory scheme at all.

MR. DUNCAN: That -- that is true, that is an -- a completely independent alternative basis for decision.

JUDGE: Now let's -- let's talk about that under Tune --

MR. DUNCAN: Very well.

JUDGE: What evidence do we have before us in this record as to the value of a driver's license?

MR. DUNCAN: Well, Justice O'Neil, it is our primary contention that you don't need record evidence because the statutory law -- chose that as a matter of law, the value of the privilege at issue here is over a hundred dollars. However, we do have --

JUDGE: [inaudible] statutes. We do have a -- a liability statute -- the liability insurance --

MR. DUNCAN: We do have it --

JUDGE: -- does it specify -- it -- it would strike me that it were dependent on what insurance costs someone not the amount of the insurance. And what evidence do we have of what that cost would be.

MR. DUNCAN: Well, we can, as I've laid out in my brief, the Texas Department -- the Commissioner of Insurance publishes benchmark rates for every Texas County that shows what the average cost for -- well the -- the benchmark cost can be deviated from by insurance companies by 30 percent above or below. But it shows what the most insurable drivers will have to pay for minimum mandatory insurance --

JUDGE: Did we take judicial notice about it in this case in any way?

MR. DUNCAN: I -- I believe the Court can take judicial notice.

JUDGE: No --

JUDGE: Whoa, hold on a second --

JUDGE: -- did -- did you in the Trial Court.

MR. DUNCAN: I -- no, I'm not aware that we did, however --

JUDGE: Then how did you answer Justice O'Neil's question, what is the evidence, where does it come from?

MR. DUNCAN: Well, the --

JUDGE: Other than your argument now.

MR. DUNCAN: Well, we believe that this is a matter of subject matter jurisdiction, and this Court can take judicial notice of benchmark rates set by an agency of this state in order to determine the --

JUDGE: Well, couldn't we just -- say another argument is if you have a driver's license you must have a car, so cars cost more than 20,000 thousand dollars, so therefore, it could be worth 20,000 thousand dollars. You can make any argument for anything that's connected with driving to try to sustain that position.

MR. DUNCAN: We're not opening the door, Justice Baker, that far -- for this reason --

JUDGE: Well, it's gonna have to go a hundred dollars, I understand that so -- but you can make any argument on what the value of the driver's license --

MR. DUNCAN: Well --

JUDGE: -- without any evidence to support it.

MR. DUNCAN: Well, we could make any argument but we haven't. We have made arguments that tie this insurance idea to the value of the privilege in the driver's license is --

JUDGE: But it is literally nothing more than an idea because as Justice Baker was making clear, just because you have a driver's license doesn't mean you have to have insurance. Because you may have a license and never drive --

MR. DUNCAN: That is certainly --

JUDGE: -- some people use it for identification purposes.

MR. DUNCAN: That is certainly true --

JUDGE: So there -- there is no legal nexus --

JUDGE: And a lot of people drive without having insurance on purpose. So, what if you get one of those people with a suspension, how are you gonna use that criteria to say there's jurisdiction in the Court of Appeals?

MR. DUNCAN: I -- I believe this Court's decision in Tune answers that question because we are looking to a general measure of the value of a license. We are not looking to the measure of the value of the license in particular cases -- bless you --

JUDGE: Thank you.

MR. DUNCAN: -- we --

JUDGE: But at -- at least there was something in the record to say that a four-year handgun license cost a -- what, 144 dollars --

MR. DUNCAN: A hundred forty dollars.

JUDGE: -- but there's absolutely nothing in this record, is it, isn't that true?

MR. DUNCAN: No, actually that's not true, Justice Baker, at -- at volume one page 68 of the record, and I -- I apologize if I haven't pointed this out in my brief, it notes a suspension served on Mr. Barlow. And it specifically recognizes that he must pay a 100 dollar reinstatement fee to get his license back. Now, I would add to that -- I would add to that that there are other incidents of financial value in the statutory framework. There are penalties associated --

JUDGE: Let me ask you this 'coz I'm not clear, when and how does the suspended driver's license person pay the hundred dollars, after the 90 days is over?

MR. DUNCAN: I believe so, Justice Baker -- I -- that -- that they must pay that --

JUDGE: So that --

MR. DUNCAN: -- fee in order to get the license --

JUDGE: In order to get it renewed.

MR. DUNCAN: In -- in order to lift the suspension, yes.

JUDGE: It doesn't automatically go away once the 90 days is gone by?

MR. DUNCAN: I'm -- I -- I do not believe that they don't pay the reinstatement but I'm not 100 percent sure and I will certainly answer that --

JUDGE: Another question about the argument of overloading the Courts of Appeals. It -- an argument, seems to me, can be made that you can only go as high as the County Court at Law to avoid creating a backlog of cases in the Courts of Appeals for one reason. And secondly, since these suspensions are only 90-days long, by the time you get to the Court of Appeals, the suspension is over. So why don't we also have a way to define the intent of the legislature when there's no legislative history that's exactly why they moved them to -- to the County Court at Law or it didn't say otherwise.

MR. DUNCAN: Well --

JUDGE: This is over as soon as you get to the County Court at Law. Whatever happens there, that's the end of these.

MR. DUNCAN: Well, that's certainly true in the individual cases but --

JUDGE: And we don't have to add any language to any statute to get to that result, do we?

MR. DUNCAN: Well, if -- no, you don't. But you also don't have to add language to the statutes to get at our result either. You simply have to interpret an incorporated -- statutory condition as enlarging the words in one statute, which is [inaudible] --

JUDGE: You can enlarge something -- well, can we enlarge statutes to accomplish -- fruition of an argument?

MR. DUNCAN: Well, no, the -- the fruition of legislative intent, certainly that -- that --

JUDGE: But you've already answered Justice Abbott that there's no legislative intent that says what you argue today, is that right?

MR. DUNCAN: Well, I think I said there's no explicit -- legislative enactment. But I believe there is legislative intent; we look at the scheme of the law as the legislature has enacted it.

JUDGE: Would -- would you explain --

MR. DUNCAN: Yes.

JUDGE: -- that, but why from the scheme you glean legislative intent that there was right to appeal to the Court of Appeals.

MR. DUNCAN: Because in Chapter in 524, the legislature grants judicial review for the first year, explicitly to one of three courts, the County Courts at Law -- County Courts and District Courts. The legislature did incorporate CAPA, which has an appeals provision. And there's no argument in this case that the appeals provision somehow just doesn't apply. But the legislature incorporates this scheme, this appeals provision that normally allows appeals from Trial Court determinations from an administrative -- contest to administrative hearing. Now, we have that's -- that's the scheme that I'm talking about. Now, to interpret the creation of that scheme to allow only a tiny fraction of the Trial Court determinations to go up on appeal, seems to me to be nonsensical.

JUDGE: Could there arguably be any other reason for the incorporation of the APA?

MR. DUNCAN: I -- the -- certainly, Justice -- Justice Hankinson, if it's in there.

JUDGE: And -- and what other -- what other reasons can we glean

from the incorporation of the APA that go to legislative intent?

MR. DUNCAN: Off the wall, at the top of my head, I would say that the -- the standard of review for the review of -- administrative determination buys the substantial evidence, that's one reason that they can interpret -- incorporate the APA. But it certainly not a -- not -- does not exclude the APA appeals provision.

JUDGE: Right, and -- and what other reasons would there be for incorporating the APA besides the standard of review and the right to appeal to the Court of Appeals? Anything -- any other -- any other specific provisions of the APA that impact upon the structure of the license suspension process provided for at 524?

MR. DUNCAN: None that I can think of right now.

JUDGE: Thank you.

MR. DUNCAN: Thank you.

JUDGE: Any other questions. Thank you, Counsel.

MR. DUNCAN: Thank you.

JUDGE: The Court is ready to hear argument from respondent.

SPEAKER: May it please the Court, Mr. David Barron will present argument for the respondent.

ORAL ARGUMENT OF DAVID S. BARRON ON BEHALF OF THE RESPONDENT

MR. BARRON: May it please the Court, Counsel.

JUDGE: Mr. Barron, do you know how many Counties in Texas do not have County Courts at Law, have only constitutional County Courts who have a Judge who's not a lawyer?

MR. BARRON: I was --

JUDGE: Do you have any idea?

MR. BARRON: I would hazard to guess, probably -- probably 30 to 40. I know when the -- my -- I'm from Bryan, about a hundred-mile radius there are two counties that [inaudible] being Madison and Leon counties. And that -- that is just a ballpark guess.

JUDGE: Okay, so -- so if we were to -- if we were to agree with your position in the lawsuit, we have 30 or 40 counties in Texas where you could appeal, and the remainder of the counties there would be no right to appeal.

MR. BARRON: That's correct.

JUDGE: Okay.

JUDGE: What do you think the legislature's reason was for enacting [inaudible]?

MR. BARRON: I cannot glean at a -- a reason -- a -- a valid reason for that, your Honor. I don't believe that that -- this necessarily should be interpreted as a absurd result.

JUDGE: What's an unreasonable penalty?

MR. BARRON: Well, it -- it -- the legislature does suppose that, you know, appear to be unreasonable on their face.

JUDGE: This is the first time.

MR. BARRON: Since our meeting, I won't say anything more about that.

JUDGE: What's your current state of facts, I mean, your particular case?

MR. BARRON: I'm sorry, sir.

JUDGE: What -- Judge Baker was talking about the length of the suspension indicated as being moot and that being a possible reason for

minimizing the appeal.

MR. BARRON: Yes, sir. He --

JUDGE: What are the state -- what's the -- current situation in your case?

MR. BARRON: His, as I understand it, I was not the trial attorney in the case, my understanding would be the license was suspended, suspension's over with, and to answer your question, Justice, after the 90-day period of suspension, which was true in this case, there is a hundred dollar reinstatement fee in order to get your driver's license.

JUDGE: Why doesn't -- why doesn't that -- that jurisdiction under the general jurisdictional statute?

MR. BARRON: It's my understanding that it's over a hundred dollars.

JUDGE: Well, what if you added the 24-dollar fee to get your license in the first place. Under Tune, we came to say that whatever an [inaudible] is willing to pay, [inaudible] value and in order to get your license back, you pay 24 dollars to get it initially and the hundred dollars to get it back. Why can't we say that in this case?

MR. BARRON: I think the -- the cost could be considered a hundred dollars or 24 but I don't it could be considered both because --

JUDGE: That's what he's out of pocket though.

MR. BARRON: I'm sorry, sir.

JUDGE: I mean, you know, your client is out of pocket 124 dollars plus anything, you know, you might --

MR. BARRON: Correct.

JUDGE: -- charge him but we don't have to --

MR. BARRON: Correct, which is not enough, but no. The -- the -- I would acknowledge the hundred dollar fee can be taken into context if that is the out of pocket expense to -- to him, it's a hundred dollars. But I don't think it goes beyond --

JUDGE: No, when -- when he gets his license renewed, he pays a hundred dollars not a hundred and twenty four dollars.

MR. BARRON: That's correct, that's correct, your Honor.

JUDGE: He'll just pay 124 dollars.

MR. BARRON: Right.

JUDGE: He paid 24 dollars initially.

MR. BARRON: Correct.

JUDGE: And so, to me to say that the amount in controversy, for the hearing of this matter would be the 24 dollars of the cost to get his license or the hundred dollars of this in controversy because arguably this is how [inaudible] he's gonna have to pay in the event that the Court decides that his license has to be suspended.

MR. BARRON: Correct.

JUDGE: But if it's suspended, he doesn't have to pay 124 dollars.

MR. BARRON: No, sir.

JUDGE: I'm still trying to -- this -- the only reason this case is not moot is if he wins on this appeal he gets his hundred dollars back 'coz he'll never get his 90-days.

MR. BARRON: Never get his 90 days back but we're gonna ask for the hundred dollars back.

JUDGE: So that's what -- that's what the wild controversy is, it's the hundred dollars.

MR. BARRON: Yes, sir. That is correct. Whether we'll get it back or not, I don't know, never had to go through that procedure.

But also in -- in -- we're talking about Tune, of course the -- the four justices on this Court that held that in that particular type of situation there is really no amount of controversy. I noticed one of

the justices in the majority is -- wanted to work at White House, so -- so I don't if the Court will re- examine -- will re-examine that issue based upon the new configuration of the Court. But I believe [inaudible] dissented in that case that there is really no amount of controversy in these cases. So, in this driver's license case it didn't --

JUDGE: Well, if that's the case, then what do we do with the -- the decisions that have been made by this Court, that have exercised jurisdiction and other courts that deal with exercise of jurisdiction, again?--

MR. BARRON: Well --

JUDGE: -- you [inaudible] what -- what happens to those judgments?

MR. BARRON: If --

JUDGE: The jurisdiction was never raised.

MR. BARRON: If such a jurisdiction was never raised, I'm not sure the answer the answer. I think if you don't have jurisdiction, it's probably void.

JUDGE: So, there [inaudible] collateral attack, although [inaudible].

MR. BARRON: Subject to -- to that Judge.

JUDGE: How would you do that by [inaudible]?

MR. BARRON: I suppose.

JUDGE: Since a lot of 'em are old, I guess.

MR. BARRON: Yes, sir. And quite frankly I'm a criminal defense attorney, I -- I don't -- I don't know how that would be attacked but I remember from law school the [inaudible] --

JUDGE: Well, if I understand your statements at Justice -- Chief Justice Phillips, all that's left if -- if you win a suspension deal is you go back and try to get your hundred dollars back 'coz the suspension time is gone.

MR. BARRON: Yes, sir. I mean, that's -- that's all we wish and he'd basically been punished, which goes back to one of the questions the Justice has asked. The Transportation Code has set up a review process within a county. The -- at -- the hearing officer that hears the driver's license suspension case says, "That can be appealed by both sides to Country Courts at Law, or the County Court, or the District Court." So there is some judicial review and that -- that review is done very quickly in my experience. And again, that -- that prevents someone's license from being suspended and -- and keeps it from being a moot issue, like -- like basically what I'm arguing before the Court now.

JUDGE: Are there -- collateral effects of having the suspension reversed on appeal or [inaudible] wouldn't be grounds for expungement from the record that -- is there any other tangential benefit you get from the wiping out the suspension?

MR. BARRON: I believe there can be insurance consequences with that.

JUDGE: And what -- what are those insurance consequences?

MR. BARRON: I am not -- I cannot answer [inaudible] at least.

JUDGE: But that would be an evidentiary matter that [inaudible]

MR. BARRON: I would think so. I mean, this -- this was never -- this was never a case about jurisdictional amount under -- under the general provisions of the Constitution.

JUDGE: What is there in the record in this case involving anything concerning the amount of controversy?

MR. BARRON: Nothing, your Honor. It was not planned and there was no evidence at trial concerning the amount of controversy.

JUDGE: Well, there was evidence that he was charged the hundred-dollar fine in payment [inaudible].

MR. BARRON: Well, no, your Honor, that -- that is the reinstatement fee and I --

JUDGE: I'm sorry, the reinstatement fee.

MR. BARRON: -- and -- I believe there was a letter sent to -- to him that it is may be or may be not in evidence. But it was not ever proven at -- at court that was -- in -- in the hearing that was the situation.

JUDGE: Well, what's your response to our ability to take judicial notice of the benchmark insurance rates? Surely there's some value there.

MR. BARRON: I know that the rules of evidence allow a party to object to a -- a Court taking judicial notice of a fact and basically have it litigated. I suppose the Court has the -- has the option of remanding a case to the -- back to the Administrative Law Judge in order to prove or not prove it.

JUDGE: So, you would say we -- that -- the [inaudible] hasn't been there for us to take judicial notice of the benchmark rate.

MR. BARRON: Yes.

The -- try to anticipate some of the rebuttal in the case. The -- petitioner has -- has argued in their brief that because Courts of Appeals have assumed jurisdiction of these cases that therefore -- that -- that is some indication that -- of course, if they do have jurisdiction. I will say that both Waco, [inaudible] Court Waco, and the Fourteenth Court of Appeals in -- in Department v. Calendar, it reexamined their jurisdiction, and basically reversed themselves once faced with -- with this specific argument.

JUDGE: So, there's a split among the Courts of Appeals on this.

MR. BARRON: That's correct, your Honor, the Fourteenth and the Tenth. This case come down in -- in respondent's favor. There three Courts of Appeals to have held contrary, so it's two to three, your Honor.

JUDGE: And then there's a whole lot of other cases that have -- that have never been considered jurisdictional.

MR. BARRON: That's correct, your Honor. I guess you were waiting for a -- novel -- novel argument like I made to reconsider their --

JUDGE: You thought this so.

MR. BARRON: Yes.

JUDGE: Are there other -- I'm trying to think of other examples that would show that the legislature does know the difference between these courts and one, is that we can -- when a judge -- has formerly been a judge and been out of practice, and now wants to come back and sit. If they'd been a former District Judge, we have to screen that they're the right character to sit. But if they're a former County Court Judge only, then it's automatic, they have the right to sit. Are there other places like that where the legislature has -- and the legislature knows that, they call --

MR. BARRON: Right.

JUDGE: -- there are other places where the legislature has sat down and said, "Well here's these two identical courts, let's treat them very differently."

MR. BARRON: As to identical courts, I -- I can't --

JUDGE: Well, I mean there's two rival esteems of courts out there and let's not treat 'em the same. Do you have other examples that would maybe bolster that this is -- that this is not -- well, I mean, if we were really after the intent of the legislature --

MR. BARRON: Right.

JUDGE: -- that this just wasn't pure oversight?

MR. BARRON: I cannot think of another example specifically. I guess you're talking about disparate results.

JUDGE: Yeah.

MR. BARRON: Well, and though by analogy, you know, I could only mention that the -- the Transportation Code prohibits or only allows the department to appeal questions of law to the Courts of Appeals or the Court of Appeals, I mean, excuse me, to the County Court at Law or the constitutional County Court of the District Court, and allows the licensee to appeal factual as well as legal questions that seems to be disparate. And I'm not certain what the reason is for that that department's treated differently as well judicial review of those decisions. That would be the only particular example I can think of, Justice Phillips.

There is also that argument -- I anticipate possibly in rebuttal that the Court will make that the legislature meant in 1999 and before that time, after Transportation Code of APA were joined, other Courts of Appeals assumed jurisdiction on the fact they should have been aware of that, they should've amended the statute. But -- well, our response to that is that it appears, at least to me, that this is as clear a cut -- unambiguous statute. And -- I don't know -- what the legislature could've done to fix what appears to be clear and ambiguous. Other than, you know, perhaps legislation saying that, "When we say District Courts, we mean District Courts."

JUDGE: Well, what other reason -- what other legislative intent can you glean for the -- for Chapter 524 of the -- Transportation Code to incorporate the APA, other than to provide a right for appeal? I mean, why -- why else do -- why do it?

MR. BARRON: The -- I -- I believe Mr. Duncan mentioned the -- the standard approved and there's one other -- and I can't think of any other beyond his explanation.

JUDGE: Does it also sip through a [inaudible] -- evidence and procedure, those kind of things too?

MR. BARRON: Yes, sir.

JUDGE: Did you consider those other reasons why they were incorporated?

MR. BARRON: I do. And of course, judicial economy is certainly a reason that the legislature may have precluded appeals from County Courts of Law.

JUDGE: Since we're making up arguments, what about the one I made up, that they limited the -- the County Courts to get 'em all over before the 90 days was gone.

MR. BARRON: I -- I like that.

JUDGE: You like [inaudible].

MR. BARRON: And I think they could very well be valid but of course, litigators in this [inaudible] still faced with that specific problem and -- and a quick judicial review of -- of these decisions is important, 'coz we don't know what the legislature intended other than for the plain meaning of -- of the statute.

And I will say also that as far as disparate results, in -- in the scheme of things now -- Courts of Appeals only had a jurisdiction to [inaudible] District Court judgment. The department and the licensee are treated equally and that both have, if they lose at administrative hearing level, the right to appeal to the County Courts at Law, and if too the District Court with appeals to the Courts of Appeals, 4so there's no -- divergent treatment --

JUDGE: But -- but there is a -- divergent treatment as to citizens of different counties, under what is a state licensing scheme --

MR. BARRON: Correct.

JUDGE: So, if I live in Dallas County, I don't get to appeal if my license is suspended beyond the -- the County Court at Law. But if I live in one of the counties that -- are the -- are the 30 or 40 that you indicated, then a citizen of that county gets to appeal.

MR. BARRON: That is --

JUDGE: Now, how could the -- I mean, how do we deal with that circumstance when we're dealing with not a local licensing scheme but in fact a state licensing scheme.

MR. BARRON: I think another possible interpretation is when the -- when the code talks about District Courts, you're talking about District Court's. In Travis County, an opinion of -- of the agency decisions.

JUDGE: And so that would mean that even in -- even in the counties where the appeal from the -- on the administrative decision would go to a District Court, it would still stop at that point. Your position would be that there still -- there would be no right to appeal those either.

MR. BARRON: I'm not saying that's my position, your Honor, I'm saying that that is a possible interpretation of -- of that statute and the legislative intent. Several different interpretations but I think we all have to fall back on the plain meaning of the statute.

I notice my green light is on. That's all I have to offer, are there any further questions.

JUDGE: Anything else. Thank you, Counsel.

JUDGE: Mr. Duncan, why should we -- if you -- what -- what is the maximum suspension period under -- under the licensing scheme, 90 days?

REBUTTAL ARGUMENT OF S. KYLE DUNCAN ON BEHALF OF THE PETITIONER

MR. DUNCAN: Ninety days under Chapter 724, which is the chapter that under which he was suspended. I note that in Chapter 524 -- let me -- let me note two things about that, Justice Hankinson, first of all, in the record at volume one page 68, we have the notice of suspension. The last paragraph of the signature block is, "Your driver's license or driving privilege will continue to be suspended beyond its suspension period until a hundred-dollar reinstatement fee is paid to the Department of Public Safety," and it also refers to any other fees required by law.

JUDGE: Well --

MR. DUNCAN: The second is that it -- I'm sorry.

JUDGE: Go ahead.

MR. DUNCAN: Go ahead.

JUDGE: I'm sorry.

MR. DUNCAN: The second is, that under Chapter 524 under Section .022, the period of suspension under that -- under that section, which is admittedly for a different reason, it's for failure to breath test but it's -- the period of suspension may vary depending upon the person's prior alcohol related or drug related enforcement contact during the last five years. So a Chapter five -- 724 suspension can have an impact on the period of suspension in Chapter 524. That's another consequence --

JUDGE: And -- and how -- how long -- what's the maximum suspension period, separate and apart from the failure to pay the reinstatement fee?

MR. DUNCAN: The maximum suspension period? Well, under Chapter 524, are you asking Chapter 724?

JUDGE: Well, either -- either in terms of the types of appeals that we're trying to decide in this case.

MR. DUNCAN: The maximum seems to be 180 days.

JUDGE: Okay. But most the -- and most of them are 90 days.

MR. DUNCAN: Apparently, yes.

JUDGE: Given the normal appellate timetables, allowing time from date of judgment for the record to be filed for each side to brief. We're going to be outside the 90-day suspension period before the Court of Appeals could ever look at the case, much less be able to -- decide that. If that isn't -- if that is in fact the case, then how can we determine that in fact in the absence of explicit statutory language, or specific evidence of legislative intent that the legislature intended, these types of license -- suspensions to go beyond the determination of the County Court at Law. It would seem to me that there's an argument that the intent was that it stops there, given the time period involved.

MR. DUNCAN: I have two responses to that. First, we believe that there is a value served by appellate review, and the legislature may have intended this value to be served, that goes beyond the resolution of a particular case. Obviously, the legislature is concerned about someone whose license is suspended -- expunging that from their record if that is in fact what happens. And -- and also avoiding these future consequences. However, the legislature can also be concerned with the uniformity of legal principle in this very important area of public safety law. This Court's Morales decision shows the value of appellate review in establishing a uniform legal principle, so that the department knows when and how to suspend licenses in the first place. And so that value is also served by appellate review, and we think the legislature can take that into account.

JUDGE: Well, if the legislature -- if that value was so important, it would not have been difficult for the legislature to have specifically provided for appellate review.

MR. DUNCAN: That's absolutely true -- that's absolutely true. The legislature could have done a better job in this case.

JUDGE: Well, Mr. Duncan --

MR. DUNCAN: Yes.

JUDGE: Sorry to interrupt you.

MR. DUNCAN: That's all right.

JUDGE: It seems to me your argument cannot be that there is a reasonable -- there -- there's a -- a reasonable basis for us to say that even though the legislature didn't include County Courts, it really meant to and so we're gonna -- it seems to me that's one argument that --

MR. DUNCAN: And that's not --

JUDGE: -- it's not likely to prevail.

MR. DUNCAN: And -- and that is not my argument.

JUDGE: -- [inaudible] thus more serious argument is by excluding County Courts, it has produced an absurd result, meaning you have in some county, just by the happenstance of where you live and whether or not you elected a [inaudible] lawyer --

MR. DUNCAN: It's actually where you're registered.

JUDGE: -- judge or something and produced this odd result. It

seems to me that's not an absurd result, that's like a -- that's more like an equal protection argument that's not made in this case.

MR. DUNCAN: Well -- first of all, Justice Enoch, the -- the first argument that you made is not our argument. We are not arguing that there is an omission APA 901. Because APA 901 pre-existed Chapter 524 and was then applied or incorporated.

JUDGE: Well, you're arguing that the county -- you're arguing that we ought to interpret "District Court" to mean "County Court."

MR. DUNCAN: No, I'm arguing that "District Court," in the context of Chapter 524 means a final Trial Court determination 'coz that's all that that it really means in terms of the APA framework, given the default place for trial.

JUDGE: Well, the District -- you used the District Court in that statute as not a term of art, it's a generic term.

MR. DUNCAN: Yes, yes it is a generic term that should be interpreted broadly by this Court as meaning a Trial Court determination. Trial Court determination is -- I -- I say I meant.

JUDGE: Except Appellate Courts in Texas are called District Courts too.

MR. DUNCAN: That's very strange.

JUDGE: Well, not exactly the Fifth District of Texas.

JUDGE: Well, that -- that's true.

JUDGE: Now it's a Fifth.

MR. DUNCAN: I see that I'm out of time [inaudible] -- Have I answered your question.

JUDGE: That concludes the argument. And we'll take a brief recess.

SPEAKER: All rise.

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