



**THE ATTORNEY GENERAL
OF TEXAS**

September 29, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Honorable John L. Barnhill
County Attorney
Crosby County
Crosbyton, Texas 79322

Opinion No. JM-959

Re: Authority of a justice of
the peace to probate suspension
of a driver's license when an
individual refuses to take a
breathalyzer test (RQ-1419)

Dear Mr. Barnhill:

You ask whether a justice of the peace has the authority to probate the suspension of a driver's license when the defendant has refused to take a breathalyzer test.

Article 67011-5, V.T.C.S., governs the administration of breath tests and the suspension of licenses for refusal to take the same. Section 2(b) requires that an arresting officer advise a person arrested for driving while intoxicated that refusal to submit to the test may result in the driver's license being automatically suspended for 90 days. Section 2(d) requires the arresting officer to immediately make a report to the Department of Public Safety if the person refuses to submit to a breath test.

Section 2(f) provides that upon receipt of the report the director of the department of public safety shall suspend the person's license for 90 days and notify the driver of the suspension.

Within a specified time the driver may request an administrative hearing. The hearing shall be set "in the same manner as a hearing under section 22(a)" of article 6687b, V.T.C.S. If upon hearing the court finds that probable cause existed that the person was driving while intoxicated, that the driver was offered an opportunity to give a specimen, and that there was a refusal to give a specimen upon the request of the officer, the director of the department of public safety shall suspend the person's license for a period of 90 days. If the court finds in the negative on any of the issues, the director shall return the license. V.T.C.S. art. 67011-5, § 2(f).

Section 22(a) vests jurisdiction of the administrative hearing in "the mayor of the city, or judge of the police court, or a Justice of the Peace in the county where the operator or licensee resides." Section 22(a) further provides in pertinent part:

Such hearing shall be had not less than ten (10) days after notification to the licensee or operator under any of the provisions of this section, and upon charges in writing, a copy of which shall be given to said operator or licensee not less than ten (10) days before said hearing, except as otherwise provided by this subsection. . . . It shall be the duty of the court to set, the matter for hearing upon ten (10) days' written notice to the Department. . . . Notice by registered mail to the address shown on the license of the licensee shall constitute service for the purpose of this section.

6687b, V.T.C.S. § 22(a).

In Texas Department of Public Safety v. Preston, 727 S.W.2d 325 (Tex. App. - Houston [1st Dist.] 1987, writ ref'd n.r.e.), the court held that the county civil court had authority to probate the 90 day suspension of a drivers license for refusal to give a breath specimen. The court rejected the conclusion reached in Attorney General Opinion JM-250 (1984) that section 2(f) of article 67011-5 incorporates section 22(a) of article 6687b only for determining the manner in which breath test refusal cases are set. In rejecting Attorney General Opinion JM-250, the court stated that the opinion disregarded section 4 of article 67011-5 which incorporates other provisions of article 6687b. The court concluded that section 22(c) of article 6687b governs every appeal of a drivers license suspension, whether under section 22(a) or under section 31.

In holding that the court could grant probation of the suspension for refusal to take the test, the court found it significant that "had appellee been convicted of the offense of driving while intoxicated, the criminal court would clearly have had the authority to probate the suspension of his license" under article 42.12 of the Code of Criminal Procedure. Preston, 727 S.W.2d 325, 327.

Section 22(e) of 6687b as amended, effective October 20, 1987, provides:

(e) The judge or officer holding a hearing under Subsection (a), (b) or (d) of this section, or the court trying an appeal under Section 31 of this Act, on determining that the License shall be suspended or revoked, may, when it appears to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, recommend that the revocation or suspension be probated on terms and conditions deemed by the officer or judge to be necessary or proper. The report to the department of the results of the hearing must include the terms and conditions of such probation. When probation is recommended by the judge or officer presiding at a hearing, the department shall probate the suspension or revocation. This subsection does not apply to an appeal under Section 31 of this Act for suspension of a driver's license or denial of operating privileges under Section 2, Chapter 434, Acts of the 61st Legislature, Regular Session, 1969 (Article 67011-5, Vernon's Texas Civil Statutes). (Emphasis reflects portion added by amendment.)

Acts 1987, 70th Leg., 2d C.S., ch. 41, § 2, at 130.

Section 31 of article 6687b as amended, effective September 1, 1987, provides in pertinent part:

Any person whose driver's license has been suspended or revoked after an administrative hearing under Section 22(a) of this Act, any person whose license suspension has been probated under Section 22(e) of this Act, and any person denied a license or whose driver's license has been cancelled by the Department, except where such cancellation, suspension, or revocation is automatic under the provisions of this Act, shall have the right to file a petition within thirty (30) days after the date the order of the Department was entered for a hearing in the matter in the County Court at Law in the county wherein such person shall reside, or if there be no County Court at Law therein, then in the county court of said county. . . . (Emphasis added.)

The legislature by the 1987 amendment added the sentence that prohibits the granting of probation under a section 31 appeal to the county court. Acts 1987, 70th Leg., ch. 1127, § 6, at 3861. Section 31 does not apply to the administrative hearing in the justice of the peace court. See Coody, Probation of Driver's License Suspensions for Breath Test Refusals, Voice for the Defense (March 1988), at 6.

S U M M A R Y

The justice of the peace has the authority to probate the suspension of a drivers license in an administrative proceeding where the defendant has been found to have refused to take a breathalyzer test.

Very truly yours,



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