

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

<b>LYDIA DUPREE,</b> Petitioner,	*	
	*	
v.	*	Docket No.:
	*	OSAH-DPS-ALS-1418678-88-Brown
	*	
<b>DEPARTMENT OF DRIVER SERVICES,</b>	*	Agency Reference No.: 054281594
Respondent.	*	

**FINAL DECISION**

Brown, Judge.

**I. Introduction**

This matter is an administrative review of the decision of Respondent, the Department of Driver Services, to suspend Petitioner’s driver’s license pursuant to O.C.G.A. § 40-5-67.1. The hearing on this matter was held before the undersigned Administrative Law Judge at the Dougherty County Judicial Building in Albany, Georgia on March 19, 2014. Petitioner was represented at the hearing by Mr. Jay Brimberry, Esq. Ms. Dee Brophy, Esq., represented Respondent. Corporal McKenzie of the Georgia State Patrol also appeared and provided testimony at the hearing. For the reasons indicated below, Respondent’s decision to suspend Petitioner’s driver’s license is **AFFIRMED**.

**II. Findings of Fact**

1.

On August 24, 2013 at approximately 12:10 a.m., Corporal McKenzie (Corporal) was alongside Georgia Highway 3 in his patrol car facing northbound when he observed a white Ford Explorer that appeared to be speeding. Using his radar, Corporal McKenzie was able to clock the vehicle’s speed at 55 miles per hour, which was in excess of the posted speed limit of 45

miles per hour. Corporal McKenzie initiated a traffic stop of the vehicle. *Testimony of Corporal McKenzie.*

2.

Corporal McKenzie approached the vehicle and made contact with Petitioner, the vehicle's driver. Corporal McKenzie detected a moderate odor of an alcoholic beverage emanating from the vehicle's interior. He also observed that Petitioner's eyes were bloodshot. When the Corporal asked Petitioner if she had consumed any alcohol that night, Petitioner insisted that she had not been drinking and speculated that the odor of alcohol might have originated from her friend, whom she had just given a ride home to. *Testimony of Corporal McKenzie.*

3.

Corporal McKenzie asked Petitioner to exit her vehicle. As Petitioner exited and walked to the rear of her vehicle, the Corporal observed that Petitioner was unsteady on her feet and at one point placed her hand on her vehicle to steady herself. While Petitioner was standing on the outside of the vehicle, the Corporal was able to determine that a moderate odor of alcohol was emanating from Petitioner's breath. When he mentioned the odor of alcohol to Petitioner, Petitioner said that she had consumed alcoholic beverages earlier that day. *Testimony of Corporal McKenzie.*

4.

Petitioner agreed to submit to standardized field sobriety tests, whereupon Corporal McKenzie administered the horizontal gaze nystagmus (HGN) test.<sup>1</sup> After Corporal McKenzie instructed Petitioner on how to take the HGN test, Petitioner would not follow the stimulus with

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<sup>1</sup> Because the location of the stop was in a high-traffic area, Corporal McKenzie decided not to administer the one-leg-stand or walk-and-turn tests. *Testimony of Corporal McKenzie.*

her eyes, but instead “stared blankly into space.” After several failed attempts to get Petitioner to cooperate, Corporal McKenzie abandoned his efforts to administer the test. *Testimony of Corporal McKenzie.*

5.

Petitioner agreed to submit to a preliminary breath test on an Alco-Sensor. Petitioner indicated to Corporal McKenzie that she had been running, and may have been dehydrated. Initially, Petitioner would not provide an adequate breath sample, and Corporal McKenzie observed that she appeared to “pretend to blow” into the device. Eventually, however, the device obtained an adequate sample, and returned a positive result, indicating the presence of alcohol. *Testimony of Corporal McKenzie.*

6.

After the preliminary breath test, Petitioner became “combative.” She complained of dizziness and told Corporal McKenzie that she was having difficulty breathing. Against Corporal McKenzie’s instructions, Petitioner returned to her vehicle. Corporal McKenzie then called EMS. After EMS arrived, emergency personnel checked Petitioner’s vital signs and concluded that they were normal. EMS personnel remained at the scene as Corporal McKenzie continued his investigation. At one point, Petitioner’s mother and father arrived on the scene. *Testimony of Corporal McKenzie.*

7.

Based upon the foregoing facts, Corporal McKenzie concluded that Petitioner had been operating a motor vehicle while under the influence of alcohol to the extent that it was less safe for her to drive and placed Petitioner under arrest for DUI. The time of the arrest was approximately 12:50 a.m. Corporal McKenzie placed Petitioner in handcuffs and directed her to

stand between the rear of her vehicle and the front of his patrol car, where he attempted to read to her the implied consent notice for drivers over the age of 21. However, as he began to read the implied consent notice, Petitioner suddenly fell backward onto the pavement. Corporal McKenzie immediately removed the handcuffs and EMS personnel intervened. Petitioner was then placed in the ambulance and transported to the hospital. *Testimony of Corporal McKenzie.*

8.

Corporal McKenzie followed the ambulance in his patrol car. He maintained communication with EMS personnel and determined what hospital room Petitioner would be admitted to. When Corporal McKenzie arrived in Petitioner's hospital room, he found that she was uncooperative, and refused to speak to anyone but her personal physician, with whom she and her parents were speaking on the phone, or her parents, who were present in the room. Petitioner and her parents continued to be "combative" and continuously argued with Corporal McKenzie, often yelling over him. At approximately 1:35 a.m., after he felt that he was able to read the implied consent notice without interruption, Corporal McKenzie walked to Petitioner's bedside and properly read to her the implied consent notice for drivers ages 21 and over. Corporal McKenzie requested that Petitioner submit to a blood test. Petitioner eventually agreed to submit to a test of her blood. *Testimony of Corporal McKenzie; Respondent Exhibit 2.*

9.

At approximately 2:10 a.m., a SANE<sup>2</sup> Nurse obtained a blood sample from Petitioner in Corporal McKenzie's presence. This sample was sealed, labeled, and packaged and given to Corporal McKenzie. Corporal McKenzie reminded Petitioner that she was still under arrest and instructed her to turn herself in to the Lee County Sheriff's Office as soon as she was discharged from the hospital. After speaking with Petitioner, Corporal McKenzie transported the blood

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<sup>2</sup> Sexual Assault Nurse Examiner

sample to Georgia State Patrol Post 40, where it was appropriately stored until the following workday, when it was shipped via UPS to a Georgia Bureau of Investigation crime lab. From the sample of Petitioner's blood, the GBI Division of Forensic Sciences obtained the following result: .121 grams. GBI conveyed the results of the lab test in an Official Report, which was submitted into evidence by Respondent at the hearing of this matter over the objection of Petitioner's counsel, who argued that Respondent had failed to establish adequate chain of custody for the blood sample. *Respondent Exhibit 1.*

10.

At the hearing of this matter, Petitioner's counsel contended that Corporal McKenzie failed to read the implied consent notice to Petitioner immediately after the arrest. Petitioner's counsel further argued that the lapse in time between the arrest and the reading of the implied consent notice was not justified by exigent circumstances.

11.

Petitioner's counsel also argued that Respondent had failed to establish that the test was properly administered as provided in O.C.G.A. § 40-5-67.1(g)(2)(D). Petitioner's counsel disputed that the copy of the Official Report from the Division of Forensic Sciences was sufficient for Respondent to meet its statutory burden.

### **III. Conclusions of Law**

Based on the above findings of fact, the undersigned makes the following conclusions of law:

1.

This appeal arises under Georgia’s Motor Vehicle and Traffic laws. O.C.G.A. § 40-5-67.1 (2013). Respondent bears the burden of proof. GA. COMP. R. & REGS. 616-1-2-.07. The standard of proof is a preponderance of evidence. GA. COMP. R. & REGS. 616-1-2-.21.

2.

In Georgia, the Department may suspend a person’s license if the “officer had reasonable grounds to believe the person was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol . . . and [the person] was lawfully placed under arrest” and if “the officer informed the person of the person’s implied consent rights and the consequences of submitting or refusing to submit to [the state-administered chemical test].” O.C.G.A. § 40-5-67.1(g)(2)(A)–(B).

3.

In this case, the arresting officer had reasonable grounds to believe Petitioner was driving a motor vehicle while under the influence of alcohol and lawfully placed her under arrest for violating O.C.G.A. § 40-6-391. Corporal McKenzie had reasonable grounds to believe that Petitioner was driving under the influence based on Petitioner’s bloodshot eyes, the smell of alcohol emanating from her breath, her admission that she had consumed alcohol prior to the stop, and the results of the preliminary breath test. See, e.g., Trotter v. State, 256 Ga. App. 330, 331–32 (2002); Cann-Hanson v. State, 223 Ga. App. 690, 691 (1996). Corporal McKenzie also had reasonable grounds that Petitioner was intoxicated to the extent that it was less safe for her to drive based upon her unsteadiness on her feet, her combative behavior, and her inability to follow instructions on the HGN test. See, e.g., Frederick v. State, 270 Ga. App. 397, 398 (2004).

*The Implied Consent Notice Delay*

4.

Respondent established that, at the time for his request for the state-administered test of Petitioner's blood, Corporal McKenzie properly read to Petitioner the Georgia implied consent notice for suspects over the age of twenty-one (21) years old. O.C.G.A. § 40-5-67.1(g)(2)(B).

5.

Petitioner's argument that the results of the blood test are inadmissible due to the delay between her arrest and Corporal McKenzie's reading of the implied consent notice is without merit because Respondent established that the delay was justified. Georgia Law requires the arresting officer to advise the arrestee of her rights to a chemical test or tests at the time of the arrest. O.C.G.A. § 40-6-392(a)(4) (2014). The Supreme Court of Georgia has held that the statute requires that the implied consent notice be read either "at the time of arrest, or at a time as close in proximity to the instant of arrest as the circumstances of the individual case might warrant." Perano v. State, 250 Ga. 704, 708 (1983). Where there is a delay between the arrest and the reading of the implied consent notice, Respondent must show that the delay was justified by the circumstances. Id.

6.

In this case, Respondent demonstrated that the lapse of time between Petitioner's arrest and Corporal McKenzie's reading of the implied consent notice (approximately 45 minutes) was justified by the circumstances surrounding the arrest. After placing Petitioner under arrest, Corporal McKenzie immediately attempted to read the implied consent notice to Petitioner. However, Petitioner collapsed before Corporal McKenzie could finish reading the notice, whereupon she was administered medical attention and transported to the hospital. Corporal

McKenzie followed Petitioner to the hospital, where he felt that he was unable to read the implied consent notice due to disruptive, uncooperative, and belligerent behavior on the part of Petitioner and her parents. Corporal McKenzie properly read the implied consent notice as soon as he felt he was able to read the notice and ensure that Petitioner could understand what he was reading. Cain v. State, 274 Ga. App. 533, 534 (Ga. Ct. App. 2005) (arrestee’s “drunken and obstreperous behavior” justified the arresting officer’s delay in reading the implied consent notice because “an earlier reading of the warning would have been of no benefit to [the arrestee]”).

*Chain of Custody*

7.

The results of the blood test indicated an alcohol concentration in excess of .08 grams. O.C.G.A. § 40-5-67.1(g)(2)(C)(ii).

8.

Petitioner’s contention that the results of the blood test are inadmissible due to a potential lapse in the chain of custody is without merit. “[W]hen a blood sample is routinely handled and ‘. . . nothing in the record raises a suspicion that the blood tested was other than that taken from the defendant, the evidence of tests on such blood is admissible.’” Cunningham v. State, 255 Ga. 35, 38 (1985) (quoting Patterson v. State, 224 Ga. 197 (1968)). Further, “[t]he circumstances of the case need only establish reasonable assurance of the identity of the sample.” Id. In this case, Respondent established that Petitioner’s blood sample was handled in a routine manner. Corporal McKenzie testified that immediately after the sample was taken, it was placed in a sealed, labeled, and packaged container. He then transported that sample to Georgia State Patrol

Post 40, where it was duly stored and thereafter shipped to the Division of Forensic Sciences. Nothing in the record suggests that the blood tested was other than that taken from Petitioner.

*Adequacy of the Crime Lab Report*

9.

O.C.G.A. 40-5-67.1(g)(2)(D) prescribes that the scope of an ALS hearing shall include:

[w]hether the test or tests were properly administered by an individual possessing a valid permit issued by the Division of Forensic Sciences of the Georgia Bureau of Investigation on an instrument approved by the Division of Forensic Sciences or a test conducted by the Division of Forensic Sciences, including whether the machine at the time of the test was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order, which shall be required.

This Code Section further provides that “where the test is performed by the Division of Forensic Sciences, a copy of the crime lab report shall satisfy the requirements of this subparagraph.” In this case, the blood test was performed by the Division of Forensic Sciences and a copy of the crime lab report was submitted into the evidentiary record. Accordingly, Respondent has definitively satisfied the requirements of O.C.G.A. 40-5-67.1(g)(2)(D).

**IV. Decision**

In accordance with the foregoing Findings of Fact and Conclusions of Law, Respondent’s decision to suspend Petitioner’s driver’s license is **AFFIRMED**.

**SO ORDERED** this \_\_\_\_\_ day of March, 2014.

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**BARBARA BROWN**  
**Administrative Law Judge**