

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

[REDACTED], Petitioner,	* * DOCKET NO: * OSAH-DDS-ALS-0623431-105-Kennedy * * * LICENSE NUMBER: [REDACTED] * * *
v. DEPARTMENT OF DRIVER SERVICES, Respondent.	

FINAL DECISION

I. Introduction

This matter is the administrative review of Respondent’s decision to suspend Petitioner's driver's license pursuant to O.C.G.A. § 40-5-67.1. After considering all the admissible evidence, Respondent’s action is hereby **REVERSED**.

II. Findings of Fact

1.

Georgia State Patrol set up a roadblock checkpoint on Oak Hill Drive in Murray County on the evening of March 12, 2006. Corporal Prather (Trooper) was the supervisor who approved the roadblock as a license and insurance checkpoint. Two experienced officers were conducting the roadblock, which was marked with blue lights and the officers wore reflective vests displaying “Trooper.” The roadblock caused minimal delay to motorists. At one point, the Trooper assisted the officers in an effort to ensure that the motorists only experienced minimal delay. (Testimony of Trooper).

2.

The Trooper approached Petitioner’s vehicle at the roadblock and immediately detected the odor of an alcoholic beverage. Upon being asked, Petitioner admitted to having consumed two beers that evening. At the request of the Trooper, Petitioner stepped out of her vehicle and appeared to be unsteady on her feet. Petitioner then submitted to an alco-sensor evaluation that registered positive for the presence of alcohol. The Trooper also administered two additional evaluations, the HGN and ABC evaluations.¹ On the HGN, Petitioner exhibited four out of six clues and had difficulty keeping her head still. On the ABC evaluation Petitioner did not recite the alphabet correctly. (Testimony of Trooper).

¹ The Trooper did not administer the Walk and Turn or One Leg Stand evaluations because he felt they were not in an area where it would be safe to do so.

3.

Based on the Trooper's personal observations of Petitioner, her admission of having consumed alcohol, and the positive alco-sensor reading, the Trooper placed Petitioner under arrest for driving under the influence. (Testimony of Trooper).

4.

After Petitioner was placed under arrest for DUI, the Trooper read Petitioner the implied consent notice for drivers age 21 or over, and designated a breath test as the state-administered chemical test. (Testimony of Trooper).

5.

The Trooper transported Petitioner to the Murray County Sheriff's Office where a breath test could be administered on the Intoxilyzer Model 5000. The Trooper is a certified operator for the Intoxilyzer 5000 and instructed Petitioner on how to submit to the test. Petitioner made two attempts to blow into the machine, however, the machine registered an insufficient sample. (Testimony of Trooper and Petitioner; Exhibits P-1, P-2, P-3, P-4, R-1 and R-2).

6.

During the administration of the breath test, the Trooper observed that Petitioner appeared to be blowing and that the machine began to read a sample by giving an audible tone but that Petitioner did not blow long enough for the machine to register a sample. Petitioner advised the Trooper that she suffered from asthma and he afforded her an opportunity to use her inhaler and then gave her a second opportunity to blow; however, once again Petitioner was able to blow for only a short period of time but not long enough for the machine to register a sample. The Trooper did not request a blood or urine sample; rather, he treated Petitioner's failure to provide an adequate breath sample as a refusal.² (Testimony of Trooper and Petitioner; Exhibits R-2 and R-3).

7.

Petitioner was diagnosed with asthma approximately two to three years ago and has taken medication for her condition for the past two years. Additionally, in the month that Petitioner was stopped at the checkpoint, she was also diagnosed with emphysema. (Testimony of Petitioner; Exhibits P-1 through P-4).

III. Conclusions of Law

1.

One of the issues to be determined within the scope of this administrative hearing is whether the law enforcement officer had reasonable grounds to believe that the Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol or a controlled substance and was lawfully placed under arrest for violating O.C.G.A. § 40-6-391.

² Cpl. Prather did not request a blood or urine sample because Petitioner was able to submit to an Alco-sensor evaluation, she was not actively wheezing, and because he gave her an opportunity to use her inhaler.

OCGA § 40-5-67.1(a); Miles v. Ahearn, 243 Ga. App. 741 (2000).

2.

In this matter, the Trooper lawfully initiated a traffic stop of Petitioner's vehicle at an approved roadblock. The Trooper's determination of probable cause for arrest for driving under the influence was based on an odor of an alcoholic beverage about Petitioner, her admission of having consumed alcohol, her unsteadiness, the results of the HGN and ABC evaluations, and the result of the alco-sensor. Cann-Hanson v. State, 223 Ga. App. 690 (1996).

3.

After arresting Petitioner, the Trooper properly informed her of her implied consent rights and the consequences of submitting or refusing to submit to a State-administered test. O.C.G.A. § 40-5-67.1(b) O.C.G.A. § 40-5-67.1 (g)(2)(C). Cullingham v. State, 242 Ga. App. 499 (2000).

4.

The final issue in this administrative hearing is whether Petitioner refused to submit to the state administered chemical test. Petitioner blew into the machine on four separate occasions but did not comply with the request of the Trooper to blow for a long enough period of time to allow the machine to register a sample. Petitioner has presented evidence that she suffers from a medical condition that could affect her ability to provide an adequate sample for a breath test and this information was relayed to the Trooper at the time of the administration of the test. Therefore, the Judge concludes that, based on the preponderance of the evidence, Petitioner did not refuse to submit to the state-administered chemical test. See Hunt v. State 247 Ga. App. 464 (2000) (driver has the burden of proof to show physical impairment was the cause of insufficient sample) See also Allen v. State 229 Ga. App. 435 (1997). In contrast see Komala v. State, 237 Ga. App. 236 (1999) and Dozier v. Pierce, A06A0604, April 12, 2006.

IV. Decision

IT IS HEREBY ORDERED that the administrative license suspension or disqualification of the Petitioner's driver's license, permit or privilege to operate a motor vehicle or commercial motor vehicle in this state is **Reversed** and that the license suspension is **rescinded**.

This 22nd day of June 2006.

Ana Kennedy
Administrative Law Judge