

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

[REDACTED], Plaintiff,	:	
	:	Docket No.
v.	:	OSAH-DDS-ALS-0927508-29-Miller/Kennedy
	:	
DEPARTMENT OF DRIVER SERVICES,	:	Agency Reference No. 899531533
Defendant.	:	

**FINAL DECISION**

**I. Introduction**

Plaintiff requested a hearing in response to Defendant’s issuance of an administrative license suspension of Plaintiff’s driver’s license or privilege to drive in the State of Georgia in accordance with the provisions of O.C.G.A. § 40-5-67.1. For the reasons indicated below, Defendant’s action is **REVERSED**.

**II. Findings of Fact**

1.

The arresting officer was dispatched to the Skate-a-Round in response to a 911-call reporting a possible intoxicated driver. Upon the arresting officer’s arrival at the scene, he came into contact with Plaintiff, who was pointed out by the individual who had called 911. Upon being questioned, Plaintiff admitted to the arresting officer that she had been driving earlier.

2.

While speaking with the Plaintiff, the arresting officer detected the odor of an alcoholic beverage. He also observed that Plaintiff’s clothing was disarrayed and that she spoke repetitively. He further observed that her eyes appeared red, watery, glassy, and bloodshot. However, the arresting officer acknowledges that Plaintiff’s eyes may have appeared red, watery, glassy, and bloodshot because she was upset and possibly had been crying because her sister had just been taken to the hospital by emergency personnel.

3.

The arresting officer requested that the Plaintiff perform the following field sobriety evaluations HGN, one leg stand, and walk and turn, which were not completed to the satisfaction of the arresting officer. The arresting officer observed six of six clues on the HGN; one of four clues on the one leg stand; and six of eight clues on the walk and turn.

4.

These facts caused the arresting officer to believe that the Plaintiff had consumed an unknown quantity of alcohol in such a manner as to make the Plaintiff a less safe driver.

5.

The Plaintiff was thereupon lawfully placed under arrest for driving under the influence of alcohol and properly read the applicable implied consent notice.

6.

After being properly advised of the applicable implied consent notice, the Plaintiff agreed to submit to a breath test. Thereafter, Plaintiff attempted to submit to the state administered test of her breath but did not provide adequate samples such that the test result allegedly indicated “insufficient sample.”

**III. Conclusions of Law**

1.

The arresting officer had reasonable grounds to believe the Plaintiff 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 Code Section 40-6-391. See O.C.G.A. § 40-5-67.1(g)(2)(A)(i).

At the time of the request for the test the arresting officer informed the Plaintiff of her implied consent rights and the consequence of submitting or refusing to submit to such test. O.C.G.A. § 40-5-67.1(g)(2)(B).

The State has not presented sufficient evidence to show that the Plaintiff refused to submit to the state designated test by allegedly registering “insufficient sample.” Although faking a breath sample is a refusal, and Petitioner would bear the burden of proof to show that physical impairment was the cause of the insufficient sample, or that there was another reason that the machine failed to register her breath results, such burden does not arise until the State has shown that the breath test was administered properly. *Hunt v. State*, 247 Ga. App. 464; 542 S.E. 2d 591 (2000); *Allen v. State*, 229 Ga. App. 435, 494 S.E.2d 229 (1997); O.C.G.A. § 40-5-67.1(g)(2)(E) and (F).

In this matter, the State did not submit a copy of the operator’s permit, or one of the original copies of the test results, to establish that the test was 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, and that 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. The State also did not submit any other evidence to meet its burden as to this provision. O.C.G.A. § 40-5-67.1(g)(2)(D). Accordingly, as all provisions were not met

#### IV. Decision

**IT IS HEREBY ORDERED THAT** the decision of Defendant to administratively suspend the Plaintiff’s driver’s license, permit or privilege to operate a motor vehicle or commercial motor vehicle in this state is **REVERSED**.

**SO ORDERED, this 17<sup>th</sup> day of June 2009.**

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**Ana Kennedy, Judge**