

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[REDACTED]
Petitioner,

Docket No.
OSAH-DDS-ALS-1450018-60-Kennedy
Agency Reference No. 052730905



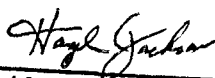
JUN 17 2014

v.

DEPARTMENT OF DRIVERS SERVICES,
Respondent.

FINAL DECISION

I. Introduction


Hazel Jackson, Legal Assistant

Petitioner requested a hearing in response to Respondent's issuance of an administrative license suspension of Petitioner'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, Respondent's action is **AFFIRMED**.

II. Findings of Fact

1.

The arresting officer initiated a stop at 4:05 a.m. on April 12, 2014, as the result of a traffic violation (speeding).

2.

Petitioner was travelling in the left lane. When the officer activated his blue lights, Petitioner activated his right turn signal and moved to the right lane. The officer followed behind Petitioner and momentarily activated his sirens. Petitioner travelled a short distance further before turning into a parking lot. He then parked in one of the parking space, opened the driver side door, and awaited the officer. Petitioner's spouse was asleep in the front passenger seat.¹

3.

The arresting officer advised Petitioner that he stopped Petitioner for travelling 52 miles per hour in a 35 mile per hour zone. Petitioner became argumentative and stated "40 miles per hour is speeding now." Petitioner continued to argue that he was not travelling more than 40 miles per hour, but shortly afterwards admitted he may have been travelling 45 miles per hour when he passed the arresting officer. He then handed the officer his driver's license, as requested.

4.

While speaking with Petitioner, the arresting officer detected a strong odor of an alcoholic beverage. He further noticed that Petitioner's eyes were red and glassy.² Petitioner admitted that he had consumed an alcoholic beverage, and that the last one was two to three hours prior to the stop.³

5.

The arresting officer requested that Petitioner perform the following field sobriety evaluations, which were not completed to the satisfaction of the arresting officer: HGN, Walk and Turn, and One Leg Stand.⁴

¹ Petitioner testified that his spouse had consumed alcohol that evening and had experienced an adverse reaction between the alcohol and her cancer medication.

² Petitioner told the arresting officer at the time of the stop that his eyes were red because it was smoky in the place where he had been prior to the stop.

³ At the hearing Petitioner stated that he last consumed an alcoholic beverage 4 to 5 hours prior to the stop. He explained that his timing was off on the night of the arrest and that he was able to more accurately account for the time afterwards when he considered the time that he left his friends party and the time of the stop.

⁴ On the HGN evaluation, the arresting officer observed six out of a possible six clues. On the Walk and Turn evaluation, the arresting officer observed five out of a possible eight clues. On the One Leg Stand evaluation, the arresting officer observed two out of a possible four clues.

6.

When the arresting officer began administering the HGN, Petitioner immediately requested a blood test. The arresting officer explained to Petitioner that they were not at the point of discussing blood alcohol testing and asked if Petitioner wanted to continue with the Field Sobriety Evaluations. Petitioner did, and the arresting officer completed the administration of the evaluations. At times, during the evaluations, Petitioner questioned why he was being required to perform the evaluations since he opined he was not inebriated.

7.

These facts caused the arresting officer to believe that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver. Petitioner opined that he was not a less safe driver due to the consumption of alcohol. Rather, he explained, his actions and appearance were a result of his frustration over events that had transpired earlier in the evening and because he was tired.

8.

Petitioner was placed under arrest for driving under the influence of alcohol. He was then placed in the back seat of the arresting officer's patrol car, and was read the implied consent notice for individuals 21 and over. The arresting officer requested a breath test.

9.

After being advised of the implied consent notice, Petitioner stated "blood test." The arresting officer explained that he was not requesting a blood test, rather he was requesting a breath test. Petitioner again stated "blood test." The arresting officer then said "that's a no," and Petitioner did not correct the arresting officer's assumption that Petitioner was refusing to submit to a breath test.

10.

At the hearing, Petitioner testified that he never refused to submit to the state administered chemical test of his breath as requested by the arresting officer. He further testified that when he and the arresting officer arrived at the police station he asked if they were there to take the breath test and that the arresting officer told him they were not based on his refusal. Petitioner alleges he then said that he would submit to the breath test, but that the arresting officer purportedly told him it was too late and that he had missed his chance. The arresting officer testified that if Petitioner had rescinded his refusal he would have taken him to the Intoxilyzer since it was right around the corner from the booking area in the police station. He would have no reason to not administer the breath test if Petitioner was willing to do so. The court finds Petitioner's testimony to be lacking in credibility. Petitioner was argumentative with the arresting officer throughout their encounter both about whether he was speeding and whether he was a less safe driver due to the consumption of alcohol. Additionally, Petitioner was frustrated that the arresting officer insisted that Petitioner's vehicle had to be towed and that his wife had to be transported by a taxi after Petitioner was placed under arrest when he had told the arresting officer they could not financially afford such expenses. It is unlikely that when they arrived at the police station Petitioner, despite his frustrations, became cooperative and willing to submit to a breath test.

III. Conclusions of Law

Based upon the above findings of fact, the Judge makes the following conclusions of law:

1.

The arresting officer had reasonable grounds to believe Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol, and he lawfully placed Petitioner under arrest for violating Code Section 40-6-391. See O.C.G.A. § 40-5-67.1(g)(2)(A)(i). Probable cause to arrest has been established based on Petitioner's driving manifestations (speeding), and his personal manifestations (argumentative behavior, red eyes, performance on field sobriety evaluations), in addition to the strong odor of an alcoholic beverage and admission to drinking.

2.

At the time of the request for the test, the arresting officer informed Petitioner of his 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).

3.

Petitioner refused the state designated test. O.C.G.A. § 40-5-67.1(g)(2)(C)(i). Although Petitioner indicated he would submit to a blood test, Georgia law provides that “the requesting law enforcement officer shall designate which test or tests shall be administered initially.” O.C.G.A. § 40-5-67.1(a). Thus, an arresting officer has the right to designate which test or tests to administer as the state-administered test and a person may request an independent test of their own choosing and at their own cost only after they have submitted to the state-administered test as designated by the arresting officer. Thomas v. State, 226 Ga. App. 1 (1997); Duckett v. State, 206 Ga. App. 651 (1992); O.C.G.A. § 40-5-67.1(b)(2). Although Petitioner testified that he rescinded his refusal and told the officer he would submit to the state designated test once they arrived at the police station, the court finds there to be insufficient evidence to meet Petitioner’s burden to prove there was an effective rescission.

4.

Accordingly, the suspension of the Petitioner’s driver’s license and driving privilege by Respondent was proper. O.C.G.A. § 40-5-67.1.

IV. Decision

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

SO ORDERED, this 17th day of June, 2014.

Ana Kennedy
Ana Kennedy, Judge

