

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

ILHAN AGINLI,
Petitioner,

v.

**DEPARTMENT OF DRIVER
SERVICES,**

Respondent.

Justin Spizman, Esq.,
For Petitioner

Dee Brophy, Esq.,
For Trooper John A. Hardwick, Complainant witness for Respondent.

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Docket No.:
OSAH-DPS-ALS-1454144-60-Malihi

Agency Reference No.: 023976835



NOV 07 2014

Victoria Hightower
Victoria Hightower, Executive Assistant

FINAL DECISION

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 or privilege to drive in the State of Georgia pursuant to O.C.G.A. § 40-5-67.1. An evidentiary hearing was held on November 4, 2014 before the undersigned Administrative Law Judge at the Office of State Administrative Hearings in Atlanta, Georgia. For the reasons indicated below, Respondent's action is **AFFIRMED**.

II. Findings of Fact

1. On April 1, 2014 at approximately 10:30 a.m., Trooper John Hardwick of the Georgia State Patrol was in his patrol car in the gore area of I-20 Westbound when he observed a traffic collision involving four vehicles. One of the vehicles had overturned in the crash. Trooper Hardwick immediately responded to the accident and commenced speaking with the occupants of the vehicles in order to assess any injuries and determine the cause of the accident. Occupants of several of the vehicles indicated to the trooper that they had sustained injuries, whereupon the trooper radioed for EMTs. Emergency crews and additional law enforcement officers arrived at the scene within approximately fifteen minutes of the crash. *Testimony of Trooper Hardwick; Exhibit P-1.*

2. Petitioner, Ilhan Aginli, was the driver of one of the vehicles involved in the collision. After approaching and speaking with Petitioner, Trooper Hardwick formed the reasonable belief that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver. Trooper Hardwick thereupon lawfully placed Petitioner under arrest for driving under the influence of alcohol. *Testimony of Trooper Hardwick; Exhibit P-1.*

3. Trooper Hardwick placed Petitioner in handcuffs, put him in the back of his patrol vehicle, and resumed working the crash scene. For several minutes, the trooper interviewed witnesses and coordinated with emergency response crews and law enforcement officers at the scene. *Testimony of Trooper Hardwick; Exhibit P-1.*

4. At one point, Trooper Hardwick returned to his patrol car and sat in the front seat, whereupon Petitioner attempted to ask him questions. Emergency response personnel continued to speak with Trooper Hardwick as he sat in the front seat of the patrol car. After a brief exchange with Petitioner, Trooper Hardwick left the patrol car and spoke with other individuals who were involved in the crash to obtain their statements and ensure that they received medical attention, if necessary. Trooper Hardwick returned to his patrol car a second time and turned the vehicle around. He then exited the patrol car and conveyed the findings of his investigation to a fellow trooper. *Testimony of Trooper Hardwick; Exhibit P-1.*

5. Trooper Hardwick read the implied consent notice for drivers over the age of 21 to Petitioner approximately twenty-eight minutes after placing him under arrest. At Trooper Hardwick's request, Petitioner agreed to submit to a state-administered test of his breath. *Testimony of Trooper Hardwick; Exhibit P-1.*

6. Trooper Hardwick administered a breath test on the Intoxilyzer 5000¹ after ensuring the machine had all its electronic and operating components prescribed by its manufacturer properly attached and in good working order. Petitioner provided two breath samples, the results of which were as follows: 0.174 grams at 11:57 a.m. and 0.172 grams at 12:00 p.m. The results of this test indicated that Petitioner exceeded the minimum alcohol concentration allowable by statute. *Testimony of Trooper Hardwick; Exhibit R-2.*

7. At the hearing on this matter, the parties stipulated to all of the facts leading up to Petitioner's arrest. However, Petitioner, through argument of counsel, contended that Respondent had not met its burden to uphold the suspension of his license because Trooper Hardwick's reading of the implied consent notice was not accomplished "at the time of the arrest." Counsel for Petitioner reiterated his argument in a post-hearing brief, citing Dawson v. State, 227 Ga. App. 38, 40 (1997); Lee v. State, 177 Ga. App. 8, 11 (1985); Brown v. State, 265 Ga. App. 129 (2004); Clapsaddle v. State, 208 Ga. App. 840 (1993); Edge v. State, 226 Ga. App. 559 (1997); Hough v. State, 279 Ga. 711 (2005); Vandiver v. State, 207 Ga. App. 836 (1993); State v. Holmes, 224 Ga. App. 29, 30 (1996); and Perano v. State, 250 Ga. 704 (1983).

8. Trooper Hardwick acknowledged in his testimony that he could possibly have delivered the implied consent notice to Petitioner during one of the times when he re-entered his patrol car. Trooper Hardwick further testified that he was still in the process of investigating the incident and working the crash scene at the time he re-entered his patrol car. *Testimony of Trooper Hardwick.*

¹ Trooper Hardwick possesses a valid permit issued by the Division of Forensic Sciences of the Georgia Bureau of Investigation. *Exhibit R-1.*

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 (2014). 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. O.C.G.A. § 40-5-55(a) provides that:

[a]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 or if such person is involved in any traffic accident resulting in serious injuries or fatalities.²

O.C.G.A. § 40-5-55(a) (2014).

3. Code Section 40-6-392 requires the arresting officer to advise the arrestee of his rights to a chemical test or tests at the time of the arrest. O.C.G.A. § 40-6-392(a)(4) (2013). In Perano v. State, the Supreme Court of Georgia held that this 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); see Hough v. State, 279 Ga. 711 (2005). In deciding whether the delay in rendering the implied consent notice is excusable, the Court "considers the particular set of facts and circumstances of each case." State v. Marks, 239 Ga. App. 448, 453 (1999)

4. Petitioner contends that the twenty-eight minutes that elapsed between his arrest and Trooper Hardwick's reading of the implied consent notice constituted an unreasonable delay and rendered the implied consent defective. Petitioner's argument is without merit.

5. An officer's delay in delivering the implied consent notice "may be warranted where 'the exigencies of police work prevent giving the advice.'" Marks, 239 Ga. App. at 453 (quoting Edge v. State, 226 Ga. App. 559, 560 (1997)). At the time he placed Petitioner under arrest, Trooper Hardwick was in the midst of responding to a four-vehicle crash on a busy interstate.

² Although Trooper Hardwick testified that occupants of several of the vehicles suffered injuries, Respondent introduced insufficient evidence for the undersigned to conclude that the traffic accident resulted in "serious injuries" as defined in O.C.G.A. § 40-5-55. O.C.G.A. § 40-5-55(c) (2014) ("the term 'traffic accident resulting in serious injuries or fatalities' means any motor vehicle accident in which a person was killed or in which one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness").

The collision involved injuries that required the attention of emergency personnel. During the twenty-eight minute time period that elapsed between Petitioner's arrest and the reading of implied consent, Trooper Hardwick was engaged in responding to the exigencies of police work: coordinating with emergency personnel, ensuring the safety of crash victims, gathering evidence, and communicating with law enforcement. See Dunbar v. State, 283 Ga. App. 872 (2007) (twenty-five minute delay so that officer could evaluate passenger and inventory vehicle for towing excusable); Marks, 239 Ga. App. at 453–54 (sixteen minute delay justified by “more immediate concern of the arresting officer with completing her investigation of the accident scene and dealing with the hazard created by the [second suspect]”); Mason v. State, 177 Ga. App. 184 (1985) (twenty to thirty minute delay in reading of implied consent permissible in light of the officer's need to complete investigation of traffic accident and transfer possession of defendant's automobile to wrecker service). Trooper Hardwick read the implied consent notice to Petitioner at the scene of the arrest, as soon as all of the exigencies presented by the crash had subsided.

6. The fact that Trooper Hardwick could *possibly* have read implied consent to Petitioner during one of the times when he returned to the patrol car does not render the twenty-eight-minute delay inexcusable. Georgia law requires that the arresting officer read implied consent “as close in proximity to the instant of arrest as the circumstances of the individual case might warrant.” Perano, 250 Ga. at 708. Although reading of implied consent may have been *possible* in one of the instances where Trooper Hardwick returned to his patrol car, it was nonetheless unwarranted in light of the ongoing exigencies described *supra*.

7. Where an officer properly delays the reading of implied consent for a brief period in order to attend to the exigencies of police work, it is incumbent upon the arrestee to demonstrate how he would have benefited from an earlier reading of the implied consent notice. State v. Marks, 239 Ga. App. 448, 453–54 (1999) (citing Fore v. State, 180 Ga. App. 196 (1986)). As noted *supra*, the delay in reading implied consent was proper in light of the exigencies that were present in the wake of the four-vehicle crash. Petitioner failed to demonstrate how he would have benefited from an earlier reading of implied consent. Accordingly, the undersigned concludes that Trooper Hardwick properly and timely informed Petitioner of his implied consent rights and the consequences of submitting or refusing to submit to a state-administered chemical test. O.C.G.A. § 40-5-67.1(g)(2)(B).

8. Trooper Hardwick had reasonable grounds to believe Petitioner was driving a motor vehicle while under the influence of alcohol to the extent that it was less safe for him to drive and lawfully placed him under arrest for violating O.C.G.A. § 40-6-391.

9. The results of the Intoxilyzer 5000 test indicated an alcohol concentration in excess of .08 grams. O.C.G.A. § 40-5-67.1(g)(2)(C)(ii).

10. The test was properly administered by an individual possessing a valid permit issued by the Division of Forensic Sciences, and the machine at the time of the test was operated with all of its electronic and operating components prescribed by its manufacturer properly attached and in good working order. O.C.G.A. § 40-5-67.1(g)(2)(D).

Accordingly, the suspension of Petitioner's driver's license and driving privilege by Respondent was proper. O.C.G.A. § 40-5-67.1 (2014).

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 7th day of November, 2014.



MICHAEL MALIHI, Judge

