

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

DAVID LEONI, :
Petitioner, :
 :
 : **Docket No.**
v. : **OSAH-DPS-ALS-1614221-60-Malihi**
 :
 :
 : **Agency Reference No.: 057805456**
DEPARTMENT OF DRIVER :
SERVICES, :
Respondent. :

Gregory A. Willis, Esquire,
For Petitioner

Ofc. Justin J. Brodnik,
Complainant witness for Respondent

MICHAEL MALIHI, Judge



DEC 31 2015

Victoria Hightower
Victoria Hightower, Executive Assistant

FINAL DECISION

I. Introduction

Petitioner challenges the decision of Respondent to suspend his 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 December 17, 2015,¹ in Atlanta, Georgia.

For the reasons indicated below, Respondent's action is **REVERSED**.

II. Findings of Fact

1. On September 4, 2015, at approximately 1:58 a.m., Officer Justin J. Brodnik of the Atlanta Police Department was operating a speed detection device at 2520 Peachtree Street. While monitoring southbound traffic, he observed an approaching vehicle and visually estimated that it was traveling at 55 mph in a 35 mph zone. Officer Brodnik then registered the vehicle's speed as 55 mph with his speed detection device. He pulled his cruiser behind the vehicle and activated his emergency equipment to initiate a traffic stop. *Testimony of Ofc. Brodnik; Petitioner's Exhibit 1.*

2. A few seconds after Officer Brodnik activated his emergency equipment, he observed the vehicle failing to maintain its lane, with its left tires striking and going slightly over the dashed marker before correcting back into its lane of travel. The vehicle then immediately pulled over to the right

¹ The record was held open until December 29, 2015, for Petitioner to submit a video of the traffic stop relevant to this case. See Petitioner's Exhibit 1.

side of the street and came to a stop. As it was pulling over, the vehicle's right tires bumped and grazed the curb. *Testimony of Ofc. Brodnik; Petitioner's Exhibit 1.*

3. Officer Brodnik approached the vehicle and made contact with Petitioner, who was in the driver's seat. When asked if he knew why he was being stopped, Petitioner replied that he was "going a little quick." Petitioner explained to Officer Brodnik that he was coming from the Buckhead area where he had picked up his friends, who were in the vehicle with him. *Testimony of Ofc. Brodnik; Petitioner's Exhibit 1.*

4. Upon making contact with Petitioner, Officer Brodnik detected "a moderate odor of alcoholic beverage" on Petitioner's breath, and he further observed that Petitioner's eyes were watery, though not bloodshot. Officer Brodnik also observed that Petitioner's speech was normal, and that he gave "appropriate" responses to all questions. Officer Brodnik further noted that Petitioner exited the vehicle in a normal manner and proceeded to walk without any balance problems. The officer also did not notice any manual-dexterity problems as Petitioner produced his identification card and proof of insurance. *Testimony of Ofc. Brodnik.*

5. Throughout the course of the traffic stop, Petitioner maintained that he had not consumed any alcoholic beverages. *Testimony of Ofc. Brodnik; Petitioner's Exhibit 1.*

6. Petitioner refused twice to submit to standardized field sobriety tests, telling Officer Brodnik that he had been asleep when his friends had called him for a ride, that he was tired, and that the field sobriety tests were "subjective." Petitioner also refused to take a portable breath test. *Testimony of Ofc. Brodnik; Petitioner's Exhibit 1.*

7. Petitioner's driving manifestations, the moderate odor of alcohol on his breath, and his watery eyes caused Officer Brodnik to believe that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver. The officer thereupon placed Petitioner under arrest for driving under the influence of alcohol and properly read to him the applicable implied consent notice. *Testimony of Ofc. Brodnik.*

8. Petitioner refused to submit to the state-administered test of his breath. *Testimony of Ofc. Brodnik; Petitioner's Exhibit 1.*

III. Conclusions of Law

1. This appeal arises under Georgia's Motor Vehicle and Traffic laws. O.C.G.A. § 40-5-67.1. 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(4).

2. An individual shall not drive or be in actual physical control of a moving vehicle while under the influence of alcohol, to the extent that it is less safe for the person to drive. O.C.G.A. § 40-6-391(a)(1).

3. The probable cause needed to conduct an arrest for driving under the influence requires that the arresting officer have knowledge or reasonably trustworthy information that a suspect was actually in

physical control of a moving vehicle while under the influence of alcohol, to a degree which rendered him incapable of driving. Handley v. State, 294 Ga. App. 236, 237 (2008) (citation omitted). Regarding probable cause, “[t]he facts and circumstances known to the officer must be examined altogether, for it is the totality of those facts and circumstances that matters, not any one fact or circumstance standing alone.” Hughes v. State, 296 Ga. 744, 748-49 (2015).

4. Evidence which shows only that a defendant had alcohol in his body while driving provides insufficient probable cause to arrest for driving under the influence. State v. Ellison, 271 Ga. App. 898, 901 (2005). Impaired driving ability depends solely upon an individual’s response to alcohol. Id. at 902. Because individual responses to alcohol vary, the presence of alcohol in an individual’s body, by itself, does not support an inference that the individual was an impaired driver. Id.

5. In this matter, there is insufficient evidence in the record to establish that the arresting officer lawfully placed Petitioner under arrest for violating O.C.G.A. § 40-6-391. See O.C.G.A. § 40-5-67.1(g)(2)(A)(i). The officer decided to arrest Petitioner after observing only a “moderate” odor of alcohol on Petitioner’s breath and watery, though not bloodshot, eyes. See State v. Damato, 302 Ga. App. 181, 182 (2010) (concluding that the odor of alcohol on a driver’s breath shows only the presence of alcohol and does not support an inference that the driver is intoxicated and it is less safe for him to drive); Ellison, 271 Ga. App. at 904 (holding that, while bloodshot and watery eyes may support a finding of impairment, they do not require such a finding). Furthermore, the evidence shows that, rather than slurring his speech or being unsteady on his feet, Petitioner spoke in a normal manner and answered all questions appropriately, walked without any balancing problems, and demonstrated no manual-dexterity problems.² As for the driving manifestations cited by the officer, speeding could constitute evidence that Petitioner’s driving was impaired. See Jaffray v. State, 306 Ga. App. 469, 471 (2010) (holding that driver’s speeding constituted evidence of impairment). However, Petitioner went slightly over the lane line a single time, and only after the arresting officer activated his emergency lights. Also, his vehicle grazed the curb only slightly as it came to a stop. Neither of these driving manifestations demonstrates erratic driving. Compare with Harris v. State, 301 Ga. App. 775, 775, 778 (2009) (finding that the officer had probable cause to arrest a driver who smelled of alcohol, had red and watery eyes, and had been driving erratically by traveling at speeds fluctuating between 30 and 60 mph and weaving from the fog lane to the center line several times).

6. Hence, based on the totality of the facts and circumstances, the arresting officer did not have probable cause to place Petitioner under arrest for violating O.C.G.A. § 40-6-391(a)(1). See Bostic v. State, 332 Ga. App. 604, 607 (2015) (concluding that an officer did not have probable cause to believe the driver was impaired based solely on an admission of alcohol consumption and a positive alco-sensor test, given that the driver answered all questions promptly and with clear speech, had a steady and otherwise normal gait, and did not have glassy or unfocused eyes, even if bloodshot and watery); Handley, 294 Ga. App. at 237-38 (holding that the smell of alcohol on driver’s breath, an alco-sensor test revealing presence of alcohol, and the driver’s admission of drinking was insufficient

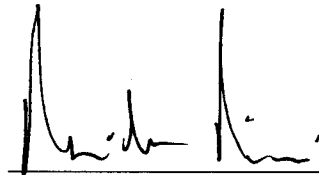
² In Cann-Hanson v. State, 223 Ga. App. 690 (1996), the Georgia Court of Appeals concluded that the officer’s observation that the driver “had bloodshot, watery eyes and exuded an odor of alcohol” constituted probable cause for the officer to arrest him for driving under the influence. Cann-Hanson, 223 Ga. App. at 691. However, this case can be distinguished because Petitioner only exhibited watery, and not bloodshot, eyes. Also, Petitioner exhibited several indicators that he was not impaired to the extent where it was less safe for him to drive, such as his clear speech and his normal gait.

to show the driver was impaired, when the driver otherwise did not slur speech, did not have an unsteady gait, and did not have bloodshot, watery, or glassy eyes).

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 **REVERSED**.

SO ORDERED this 31st day of December, 2015.



MICHAEL MALIHI, Judge

