

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

KENNETH WILLIAMS,  
Petitioner,

Docket No.: OSAH-DPS-ALS-1635913-33 Woodard

v.

Agency Reference No.: [REDACTED]

FILED  
OSAH

DEPARTMENT OF DRIVERS SERVICES,  
Respondent.

MAR 24 2016

FINAL DECISION

I. Introduction

*Kasey Salter*  
Kasey Salter, 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. An evidentiary hearing was conducted in Marietta Municipal Court, Cobb County, Georgia, on March 21, 2016. Petitioner was represented by Cory Yager, Attorney at Law, Atlanta. Respondent was represented per DDS rule by Officer Mary Fernandez, Cobb County Police Department, Marietta.

The undersigned has considered the entire oral and documentary record. For the reasons indicated below, Respondent's action is **REVERSED**, as Petitioner provided a sufficient breath sample, and cannot be found to have refused the state-administered chemical test of his breath when he refused to provide a second sample.

II. Findings of Fact

1. On February 9, 2016, Officer Mary Fernandez was dispatched to the Orient Express restaurant in Cobb County to investigate a car stuck on a railroad track behind the restaurant. When she arrived, Officer Fernandez encountered Petitioner Kenneth Williams, who stated that his car stopped on the tracks after he unsuccessfully attempted a u-turn.
2. As Petitioner conversed with Officer Fernandez, she noticed a strong odor of an alcoholic beverage on Petitioner's breath. Petitioner admitted that he had consumed "one glass of wine," then later c "two glasses of wine." Officer Fernandez noticed that Petitioner's eyes were bloodshot and watery, that his speech was slurred, and his speech patterns were hesitant or halting. Petitioner used profanity while speaking with Officer Fernandez, but he did not direct his comments specifically toward the officer.
3. Based on her initial observations, Officer Fernandez was concerned that Petitioner was not safe to drive due to consumption of alcohol. At Officer Fernandez' request, Petitioner submitted a breath sample for a portable roadside breath test, which registered positive for alcohol. Petitioner refused to perform any other field sobriety test requested by Officer Fernandez or other officers on the scene.
4. Petitioner's physical manifestations and a positive reading on the portable breath test led Officer Fernandez to conclude that Petitioner was under the influence of alcohol and therefore unsafe to drive a motor vehicle. Officer Fernandez placed Petitioner under arrest for DUI pursuant to O.C.G.A. § 40-6-391.
5. Immediately after she placed Petitioner under arrest, Officer Fernandez read the Georgia Implied Consent Warnings for suspects over age 21 from the orange card issued by Respondent. Petitioner appeared to have great difficulty understanding the Implied Consent Warnings. Officer Fernandez read the warnings aloud twice outside her patrol car, and a third time while Petitioner was seated in her patrol car. Petitioner still seemed to not understand what he was being read, so Officer Fernandez allowed Petitioner to read the Implied Consent Warnings for himself. Petitioner initially refused to agree to submit to the chemical test of his breath requested by Officer Fernandez, stating that he knew the test would show he consumed alcohol.
6. Eventually, Petitioner agreed to submit to the test, and was escorted to the room at the police station where the Intoxilyzer 9000 was kept. Sgt. John Faber was on duty that night, and conducted the test. Sgt. Faber is certified to operate the Intoxilyzer 9000 by the Georgia Bureau of Investigation's Division of Forensic Sciences. Sgt. Faber asked Petitioner to provide a breath sample, and Petitioner was able to produce an adequate sample of 1.32 liters of air at 22:53.42 hours. This was sufficient to register a valid sample of .166 grams / liter.
7. Petitioner then asked Sgt. Faber what his blood alcohol concentration was. Sgt. Faber replied that he did not know, but that Petitioner needed to provide a second sample. When the Intox 9000 finished its usual diagnostic tests and was ready for Petitioner to provide the second sample, Sgt. Faber gave Petitioner the mouthpiece and directed him to blow. Petitioner puffed out his cheeks, made noises and other indications that he was trying hard to blow, but barely provided any breath sample into the mouthpiece. When the machine eventually timed out due to the insufficient volume of air provided by Petitioner, a report was printed showing Petitioner's second breath sample was only 0.05 liters. The machine timed out at 23:01:08 hours, less than eight minutes after Petitioner provided a sufficient breath sample.

8. Officer Fernandez consulted with Sgt. Faber (and perhaps other officers on duty that night), and determined that Petitioner had refused the state-administered chemical test by intentionally failing to provide a second breath sample. Officer Fernandez prepared a Form DDS 1205 form to initiate the administrative suspension of Petitioner's driver's license, and gave Petitioner a copy. This form indicates that Petitioner refused the state test.

### III. Conclusions of Law

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

1. Officer Fernandez investigated Petitioner for stopping his vehicle on a railroad track. During her investigation, Officer Fernandez noticed a strong odor of an alcoholic beverage on Petitioner's breath; that his speech was slurred and halting; that his eyes were bloodshot and watery; and that he used profane language. These factors are similar to those observed by the arresting officer during the DUI investigation and arrest described in *Cruessel v State*, 303 Ga. App 879, 694 SE 2d 707 (2010), and support the conclusion that Officer Fernandez had reasonable grounds to believe 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 and O.C.G.A. § 40-5-67.1(g)(2)(A)(i).
2. At the time of the request for the test or tests, Officer Fernandez properly informed the Petitioner of his implied consent rights and the consequence of submitting or refusing to submit to such test, as required by O.C.G.A. § 40-5-67.1(g)(2)(B). The credible evidence shows that Officer Fernandez read aloud the contents of the implied consent warnings card at least three times, and that Petitioner himself read the card at least one time.
3. Petitioner provided one sufficient breath sample which showed a blood alcohol concentration of .166 grams / liter, more than twice the legal limit for a driver over 21 years of age. The credible evidence shows that Petitioner tried to avoid providing a second sequential breath sample by puffing out his cheeks and making noises. Officer Fernandez believed this constituted a refusal to submit to the state test, and accordingly completed the sworn report (DDS 1205) to initiate the license suspension as a refusal.
4. The administrative court must conclude, however, that Petitioner did not legally refuse the state-administered chemical O.C.G.A. § 40-6-392 addresses the chemical tests conducted by law enforcement officers or the State crime lab, and is not always directly applicable to administrative license suspension cases under O.C.G.A. § 40-5-67.1. However, the clear and unambiguous language of O.C.G.A. § 40-6-392(B) applies to the facts presented here:

(B) In all cases where the arrest is made on or after January 1, 1995, and the state selects breath testing, two sequential breath samples shall be requested for the testing of alcohol concentration. For either or both of these sequential samples to be admissible in the state's or plaintiff's case-in-chief, the readings shall not differ from each other by an alcohol concentration of greater than 0.020 grams and the lower of the two results shall be determinative for accusation and indictment purposes and administrative license suspension purposes. No more than two sequential series of a total of two adequate breath samples each shall be requested by the state; **provided, however, that after an initial test in which the instrument indicates an adequate breath sample was given for analysis, any subsequent refusal to give additional breath samples shall not be construed as a refusal for purposes of suspension of a driver's license under Code Sections 40-5-55 and 40-5-67.1.** Notwithstanding the above, a refusal to give an adequate sample or samples on any subsequent breath, blood, urine, or other bodily substance test shall not affect the admissibility of the results of any prior samples. An adequate breath sample shall mean a breath sample sufficient to cause the breath-testing instrument to produce a printed alcohol concentration analysis

(Emphasis added by the administrative court). The Petitioner provided "an adequate breath sample...for analysis," which registered a valid BAC reading. It is legally inconsequential that Petitioner refused to provide a second sequential sample. This is properly a "Test" case and not a "Refusal" case under O.C.G.A. § 40-5-67.1, and since the arresting officer determined Petitioner refused the test, the administrative license suspension must be rescinded. This Decision is only applicable to the administrative hearing, and does not adjudicate the issues to be raised in any DUI criminal proceeding brought against Petitioner under O.C.G.A. § 40-6-391.

### IV. Decision

**IT IS HEREBY ORDERED THAT** the decision of Respondent to administratively suspend the 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 24<sup>th</sup> day of March, 2016



MAR 24 2016

M. PATRICK WOODARD JR.  
ADMINISTRATIVE LAW JUDGE



Kasey Salter, Legal Assistant