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

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| **JOAN LYMAN,** | : | |
| **Petitioner,** | : | |
| | : | **Docket No.:** |
| **v.** | : | **OSAH-DPS-ALS-1635960-60-Malihi** |
| | : | |
| | : | **Agency Reference No.: 039844584** |
| **DEPARTMENT OF DRIVER SERVICES,** | : | |
| **Respondent.** | : | |

Robert Chestney, Esq.,
For Petitioner

Dee Brophy, Esq.
For Trooper Scott Tarpley

FILED
OSAH
MAY 25 2016

Victoria Hightower, Executive Assistant

## FINAL DECISION

### I. Introduction

Petitioner challenges 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. The hearing on this matter was held on May 17, 2016. For the reasons indicated below, Respondent's action is **AFFIRMED**.

### II. Findings of Fact

1. On February 12, 2016 at approximately 10:00 p.m., Trooper Scott Tarpley of the Georgia State Patrol was traveling south on Piedmont Road in Buckhead, when he observed a vehicle traveling in the opposite direction towards his patrol vehicle. Trooper Tarpley observed the vehicle make a U-turn between Burke Road and Pharr Road, and proceed south on Piedmont. *Trooper Tarpley Test.*

2. The section of Piedmont Road at which the vehicle made the U-turn is divided by a concrete divider, which Trooper Tarpley described as a "traffic control barrier." The median is approximately two to three inches in height, and marked with a solid yellow line on either side. However, the area of Piedmont Road divided by the raised median is not marked by signs prohibiting U-turns or crossing over the raised median. Further, the median is "tapered" at the edges, and vehicles may easily cross over it. *Trooper Tarpley Test; Exhs. P-1, P-2.*

3. Because Trooper Tarpley determined that the vehicle had crossed a "marked traffic control device" in executing the U-turn, he concluded that the U-turn was illegal, and decided to follow the vehicle. At the hearing on this matter, Trooper Tarpley did not specify which code section he

determined the driver of the vehicle to have violated; only that he concluded that the crossing of the concrete divider in executing the U-turn was illegal. *Trooper Tarpley Test.*

4. Trooper Tarpley briefly activated his patrol car's blue lights in order to clear an intersection that was between his patrol car and the vehicle, which was approximately "200-300 yards" away. However, he deactivated the blue lights upon clearing the intersection, and proceeded to follow the vehicle. Trooper Tarpley's blue lights remained activated for approximately two seconds. At the time he activated his lights to clear the intersection, no traffic was between Trooper Tarpley's patrol car and the vehicle. After following the vehicle for an unspecified amount of time, Trooper Tarpley observed that the driver exceeded the posted speed limit and failed to maintain her clearly-marked lane of travel, whereupon he activated his blue lights and initiated a traffic stop. *Trooper Tarpley Test.*

5. Trooper Tarpley approached the vehicle and made contact with the driver. At the trooper's request, the driver produced her driver's license, whereupon the trooper identified her as Petitioner Joan Lyman and determined that she was over the age of 21. Upon speaking with Petitioner, Trooper Tarpley noticed that her speech was "slow and withdrawn" and he detected a "strong and distinct odor" of an alcoholic beverage emanating from her breath. He further observed that Petitioner's eyes were bloodshot and watery, that her eyelids appeared "heavy," and that her clothing was "disheveled." Petitioner indicated that she had not consumed any alcoholic beverages since the day before. *Trooper Tarpley Test.*

6. At Trooper Tarpley's request, Petitioner agreed to submit to a standardized field sobriety evaluations. After ensuring that Petitioner did not have any medical conditions that could affect the outcome of the tests, Trooper Tarpley administered the horizontal gaze nystagmus (HGN), one-leg-stand, and walk-and-turn standardized field sobriety evaluations. Petitioner exhibited six out of six possible clues on the HGN test, six out of eight possible clues on the walk-and-turn test, and three out of four clues on the one-leg-stand test. Petitioner refused to submit to a preliminary test of her breath on a portable breath testing device. *Trooper Tarpley Test.*

7. The foregoing facts caused Trooper Tarpley to believe that the Petitioner had consumed an unknown quantity of alcohol in such a manner as to make her a less safe driver. He thereupon placed Petitioner under arrest for driving under the influence of alcohol and properly read the applicable implied consent notice to her. Petitioner refused Trooper Tarpley's request to submit to a state-administered chemical test of her breath. *Trooper Tarpley Test.*

8. At the hearing on this matter, Petitioner, through counsel, argued that her arrest was not "lawful" inasmuch as Trooper Tarpley had initiated the stop of her vehicle without reasonable, articulable suspicion. Specifically, Petitioner contended that she had not executed an illegal U-turn according to O.C.G.A. § 40-6-121, or crossed a "gore" or "median" of a "divided highway" as is prohibited by O.C.G.A. § 40-6-50.[1] Therefore, Petitioner argued that Trooper Tarpley had not observed a traffic violation that would justify the stop of her vehicle, citing the Georgia Court of Appeals cases of State v. Goodman[2] and State v. Holler,[3] as well as two decisions of the

[1] Trooper Tarpley acknowledged in his testimony that Piedmont Road is not a "divided highway." *Trooper Tarpley Test.*

[2] State v. Goodman, 220 Ga. App. 169 (1996).

Fulton County Superior Court involving the same raised concrete divider on Piedmont Road.[4] Petitioner further argued that Trooper Tarpley's observations after he activated his blue lights to clear the intersection—specifically, Petitioner's driving over the speed limit and failure to maintain lane—were not relevant to the determination of whether Trooper Tarpley had reasonable, articulable suspicion for the traffic stop, citing the Georgia Court of Appeals case of State v. Whitfield.[5]

## 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. 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. Pursuant to O.C.G.A. § 40-5-55,

> any 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 . . . .

O.C.G.A. § 40-5-55. Further, Code Section 40-5-67.1 provides that such chemical tests

> shall be administered as soon as possible at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391 and the officer has arrested such person for a violation of Code Section 40-6-391.

O.C.G.A. § 40-5-67.1(a). At the time a chemical test or tests are requested, the arresting officer shall select and read to the person the appropriate implied consent notice. O.C.G.A. 40-5-67.1(b). The officer must have reasonable grounds that the person was "*lawfully* placed under arrest for violating Code Section 40-6-391." O.C.G.A. § 40-5-67.1(g)(2)(A)(i) (emphasis added). In order for the arrest to be lawful, the investigative stop of the vehicle that led to the driver's arrest must have been predicated on the officer's reasonable and articulable suspicion of criminal activity. See Semich v. State, 234 Ga. App. 89, 90 (1998); State v. Armstrong, 223 Ga. App. 350 (Ga. Ct. App. 1996); see also Whitehurst v. DDS, File No. 2009CV177144, (Fulton Co. Sup. Ct. Mar. 8, 2010).

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[3] State v. Holler, 224 Ga. App. 66 (1996).

[4] Whitehurst v. DDS, No. 2009CV177144 (Fulton Co. Sup. Ct. Mar. 8, 2010); Whitehurst v. Georgia, No. 2010CV185950, (Fulton Co. Sup. Ct. Feb. 3, 2012).

[5] State v. Whitfield, 219 Ga. App. 5, 6–7 (1995).

3. A brief investigative stop of a vehicle is considered a seizure under the Fourth Amendment and, as such, must be justified by "reasonable suspicion"—i.e., "a particularized and objective basis for suspecting the particular person stopped' of breaking the law." Heien v. North Carolina, 135 S. Ct. 530, 536 (2014) (quoting Navarette v. California, 134 S. Ct. 1683, 1688 (2014)). Although an officer's reasonable suspicion can be demonstrated through evidence that the stop was initiated based on the driver's commission of a crime, Thammasack v. State, 323 Ga. App. 715, 717 (2013), "[t]he driver's actions need not amount to a traffic violation, so long as the officer has a 'reasonable articulable suspicion that a traffic offense was being committed.'" State v. Rheinlander, 286 Ga. App. 625 (2007) (quoting State v. Calhoun, 255 Ga. App. 753, 755 (2002)). Because legality of the stop hinges upon "reasonableness," a traffic stop predicated upon the officer's honest, but mistaken belief that the driver committed a traffic offense is not per se unlawful. Collier v. State, 282 Ga. App. 605 (2006). The lawfulness of the stop is dependent upon "whether the officer's motives and actions at the time and under all the circumstances, including the nature of the officer's mistake . . . were reasonable and not arbitrary or harassing." State v. Armstrong, 223 Ga. App. 350 (1996) (citing State v. Webb, 193 Ga. App. 2, 3–4 (1989)); see also State v. Cartwright, 329 Ga. App. 154, 157 (2014); Heien, 135 S. Ct. at 536 ("Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground.").

4. Respondent did not establish at the hearing that Petitioner's U-turn was illegal or that Petitioner otherwise committed a traffic offense in crossing the concrete divider.[6] See State v. Goodman, 220 Ga. App. 169 (1996); State v. Holler, 224 Ga. App. 66 (1996); Whitehurst v. DDS, No. 2009CV177144 (Fulton Co. Sup. Ct. Mar. 8, 2010); Whitehurst v. Georgia, No. 2010CV185950, (Fulton Co. Sup. Ct. Feb. 3, 2012). The fact that Trooper Tarpley did not immediately initiate a traffic stop upon observation of Petitioner's crossing of the divider undermines the argument that he believed the conduct constituted a traffic violation.

5. Reasonable, articulable suspicion must exist *prior to* initiation of a traffic stop. Thammasack, 323 Ga. App. at 717 ("'It is well settled law that before stopping a car, an officer must have specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct.") (quoting Christy v. State, 315 Ga. App. 647, 650 (2012)). This requires the Court to determine at which point the stop of Petitioner's vehicle commenced. As discussed above, a traffic stop is a seizure under the Fourth Amendment, and occurs "only when, by means of physical force or a show of authority, [a person's] freedom of movement is restrained." United States v. Perez, 443 F.3d 772, 778 (11th Cir. 2006) (citing Craig v. Singletary, 127 F.3d 1030, 1041 (11th Cir.

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[6] Trooper Tarpley did not indicate in his testimony which law he determined Petitioner violated in executing the U-turn. Pursuant to O.C.G.A. § 40-6-121, governing U-turns, "No vehicle shall be turned so as to proceed in the opposite direction:

(1) Upon any curve;
(2) Upon the approach to or near the crest of a grade where such vehicle cannot be seen by the driver of another vehicle approaching from either direction;
(3) Where such turn cannot be made in safety and without interfering with other traffic; or
(4) Where a prohibition is posted.

This Code Section does not appear to prohibit the U-turn at issue.

1997)). The inquiry into whether an individual has been seized is an objective one; an individual has been seized when a reasonable person in his or her position would not feel free to terminate the encounter with the police. United States v. Santos, No. 1:11-CR-259-WBH-CCH, 2012 U.S. Dist. LEXIS 79252, *44 (N.D. Ga. Apr. 24, 2012). As applied, only the violations observed by Trooper Tarpley *prior to* the seizure at issue—i.e., the point at which a reasonable person would conclude the traffic stop had commenced, and he or she was not free to terminate the encounter—are relevant to the reasonable suspicion inquiry. See Thammasack, 323 Ga. App. at 717.

6. It is true that an officer's activation of emergency lights may constitute a "show of authority" effectuating a seizure. See, e.g., State v. Whitfield, 219 Ga. App. 5, 6–7 (1995); State v. Schlueter, 2008 Tenn. Crim. App. LEXIS 417, *8-9 (Tenn. Crim. App. May 23, 2008). However, activation of blue lights is not irrefutable evidence of a traffic stop;[7] whether an individual has been seized must be determined by analyzing "all of the circumstances surrounding the incident." United States v. Mendenhall, 446 U.S. 544, 554 (1980). The evidence on record does not indicate that Trooper Tarpley initiated a traffic stop of Petitioner's vehicle by briefly activating his lights in order to clear the intersection. Trooper Tarpley activated his emergency lights for approximately two seconds, while Petitioner's vehicle was approximately 200-300 yards away. Upon clearing the intersection, he deactivated his lights and proceeded to follow Petitioner. These facts are insufficient for a reasonable person to conclude that a traffic stop had commenced. Accordingly, Trooper Tarpley's observations after he cleared the intersection and commenced following Petitioner—Petitioner's driving over the speed limit and failing to maintain lane—remain relevant, and are sufficient to demonstrate reasonable, articulable suspicion justifying the subsequent traffic stop.

7. In order for the arrest of Petitioner to be lawful, it must be supported by probable cause. See, e.g., O'Neal v. State, 273 Ga. App. 688, 690 (2005). "Probable cause exists if the arresting officer has knowledge and reasonably trustworthy information about facts and circumstances sufficient for a prudent person to believe the accused has committed an offense." Devega v. State, 286 Ga. 448 (2010). "[W]hen a court considers whether an officer had probable cause to arrest a suspect, the court must focus on the facts and circumstances then known to the officer, and it must inquire whether those facts and circumstances *could* lead a prudent person—that is, a reasonable officer—to conclude that the suspect probably has committed an offense." Hughes v. State, 296 Ga. 744, 748–49 (2015) (emphasis in original).

8. In the present case, Trooper Tarpley had probable cause to believe that Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol or a controlled substance, and lawfully placed her under arrest for violating O.C.G.A. § 40-6-391 and O.C.G.A. § 40-5-67.1(g)(2)(A)(i). Trooper Tarpley had probable cause based on Petitioner's bloodshot, watery eyes, the strong odor of alcohol emanating from Petitioner's breath, and the clues of intoxication Petitioner exhibited on the field sobriety evaluations. See, e.g. Frederick v. State, 270 Ga. App. 397 (2004); Cann-Hanson v. State, 223 Ga. App. 690, 691 (1996).

[7] In contrast to the instant case, the officer's activation of his blue lights in State v. Whitfield was, unequivocally, a traffic stop. 219 Ga. App. at 5, 6–7.

9. At the time of the request for the state-administered chemical test, Trooper Tarpley informed the Petitioner of her implied consent rights and the consequence of submitting or refusing to submit to the test. O.C.G.A. § 40-5-67.1(g)(2)(B).

10. Petitioner refused to submit to the state-administered chemical test. O.C.G.A. § 40-5-67.1(g)(2)(C)(i).

## IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, Respondent's action is **AFFIRMED**.

**SO ORDERED** this 25th day of May, 2016.

**Michael Malihi, Judge**