BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

GEOVANIE M. ORTIZ, Petitioner,	:	
v.	:	Docket No.: OSAH-DDS-ALS-1649872-58-Howells
DEPARTMENT OF DRIVER SERVICES Respondent.	:	Agency Ref. No.: 057135756

FILED
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JUL 06 2016
Christa Orbann, Legal Assistant

FINAL DECISION

Introduction

Petitioner appeals the decision of the Georgia Department of Driver Services ("Respondent") to suspend Petitioner's driver's license or privilege to drive in the State of Georgia. The hearing was held on July 1, 2016. For the reasons indicated below, the suspension of Petitioner's driver's license, permit or privilege to drive by Respondent is **AFFIRMED.**

Findings of Fact

1.

On May 21, 2016, Forsyth County Sheriff's Deputy Michael Reutter observed Petitioner failing to maintain his lane while travelling southbound on Georgia 400. He then conducted a traffic stop, made contact with Petitioner, and explained why he stopped Petitioner. (Testimony of Deputy Reutter.)

2.

While speaking with Petitioner, Deputy Reutter smelled an overwhelming odor of alcohol coming from Petitioner's vehicle. He observed that Petitioner's eyes were bloodshot and that his speech was slurred. Petitioner stated that he was coming from a party and admitted to consuming one beer. Deputy Reutter then asked Petitioner to exit the vehicle. Upon his exiting the vehicle,

Deputy Reutter observed that Petitioner was unsteady on his feet. (Testimony of Deputy Reutter.)

3.

Deputy Reutter then conducted the following field sobriety evaluations: Horizontal Gaze Nystagmus ("HGN"), Walk and Turn, and One Leg Stand. On the HGN, he observed six out of six possible clues. On the Walk and Turn, he observed five out of eight possible clues. On the One Leg Stand, he observed two out of four possible clues. He then asked Petitioner to submit to a portable breath test, which was positive for alcohol. (Testimony of Deputy Reutter.)

4.

At that point, based on his observations and the results of the field sobriety evaluations, Deputy Reutter determined that Petitioner was less safe to drive. He placed Petitioner under arrest for DUI and read to Petitioner the implied consent notice for suspects age 21 or over, designating a blood test as the state-administered test. Initially, Petitioner indicated that he was unsure. Petitioner then requested an attorney. Deputy Reutter explained to Petitioner that he was not entitled to an attorney for the purpose of deciding whether to consent to the state-administered test. After some further discussion, Petitioner refused to consent to the state-administered test of his blood. Deputy Reutter then transported Petitioner to the jail, provided Petitioner with the DPS 1205 Form, which Petitioner signed, and turned Petitioner over to the jail staff. (Testimony of Deputy Reutter.)

Conclusions of Law

1.

The instant matter is a civil, administrative driver's license suspension. *See* O.C.G.A. § 40-5-67.1(g)(1); *see also Nolen v. State*, 218 Ga. App. 819 (1995) (recognizing that proceedings pursuant to Section 40-5-67.1 are civil, administrative proceedings). The Respondent agency bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07. The standard of proof is a preponderance of the

evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

In closing argument, counsel for Petitioner argued that pursuant to the recent United States Supreme Court decision in *Birchfield v. North Dakota*, Nos. 14-1468, 14-1470, 14-1507, 2016 U.S. LEXIS 4058, at *1 (June 23, 2016), a warrant is required any time a blood test is requested. For the reasons that follow, Petitioner's argument is without merit.

3.

The scope of this administrative hearing is limited to the following issues: (A) Whether the officer had reasonable grounds to believe that Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol and Petitioner was lawfully placed under arrest for violating O.C.G.A. § 40-6-391; or (B) Whether Petitioner was involved in a motor vehicle accident or collision resulting in serious injury or fatality; and (C) Whether at the time of the request the officer informed Petitioner of his implied consent rights and the consequences of submitting or refusing to submit to the state administered chemical test; and (D) Whether Petitioner refused the test; or (E) Whether a test or tests were was administered and the results indicated an alcohol concentration of 0.08 grams or more; and (F) Whether the test or tests were properly administered. O.C.G.A. § 40-5-67.1(g)(2); *Miles v. Ahearn*, 243 Ga. App. 741, 742-43 (2000).

The Constitutional Inquiry of Whether a Warrant is Required for a Blood Test is Outside the Limited Scope of the Administrative License Suspension Hearing

4.

"'The purpose of the driver's license suspension hearing is to provide a quick, informal procedure to remove dangerous drivers from Georgia's roadways and thereby protect public safety.'" *Swain v. State*, 251 Ga. App. 110, 113 (2001)(citation omitted) (scope of the hearing is confined to

six discrete issues). *See also Miles v. Ahearn*, 243 Ga. App. 741 (2000) (Georgia legislature has chosen to expressly limit the issues that may be considered at an administrative license suspension hearing); *Dozier v. Pierce*, 279 Ga. App. 464, 464-45 (2006).

5.

Additionally, Georgia courts have held that an administrative license suspension ("ALS") hearing is a remedial proceeding, separate from the criminal proceeding, which relates to a person's privilege to drive on Georgia highways.

> [T]he purpose of the license suspension hearing is clearly remedial. 'The State of Georgia considers dangerous and negligent drivers to be a direct and immediate threat to the welfare and safety of the general pubic, and it is in the best interest of the citizens of Georgia immediately to remove such drivers from the highways of this state.' O.C.G.A. § 40-5-57. . . . In Georgia, a driver's license is not an absolute right but rather is a privilege that may be revoked for cause. 'The right to continue the operation and to keep the license to drive is dependent upon the manner in which the licensee exercises this right. The right is not absolute, but is a privilege. . . . While it cannot be revoked without reason, it can be constitutionally revoked or suspended for any cause having to do with public safety.' [*Nelson v. State*, 87 Ga. App. 644, 648 (1953).]

Nolen v. State, 218 Ga. App. 819, 822 (1995).

6.

The Georgia Court of Appeals has described the ALS hearing as an "abbreviated procedure," where "the State has only a limited opportunity to litigate the issues." *Swain v. State*, 251 Ga. App. at 114. Consequently, the Court of Appeals found that the results of an ALS hearing would not act as collateral estoppel in a criminal proceeding because to do so would frustrate the purpose of the "summary suspension hearing" by turning "'an administrative device at the disposal of the defendant in which the defendant can halt the otherwise automatic suspension of his driving privileges,'" into "'an integral part of the criminal trial. . . . The process would seldom, if ever, be swift.'" *Id., quoting People v. Moore*, 138 Ill. 2d 162 (1990).

7.

By arguing the applicability of the *Birchfield* case to the present proceeding, Petitioner incorrectly presupposes the availability of the exclusionary rule in ALS cases. The exclusionary rule is not constitutionally mandated, but rather is "a judicially created means of deterring illegal searches and seizures." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (*quoting United States v. Calandra*, 414 U.S. 338, 348 (1974)). Therefore, it does "proscribe the introduction of illegally seized evidence in all proceedings," but applies only where its "deterrence benefits outweigh its 'substantial social costs.'" *Id.* (*quoting United States v. Leon*, 468 U.S. 897, 907 (1984)); *State v. Thackston*; 289 Ga. 412 (2011).

8.

Because the exclusionary rule precludes the introduction of reliable and probative evidence, it imposes a "'costly toll' upon truth-seeking and law enforcement objectives." *Pa. Bd. of Prob. & Parole*, 524 U.S. at 364. Given these significant costs, proponents of the rule's application to proceedings other than criminal trials face a "high obstacle," and courts have been reluctant to apply the rule beyond the context of criminal trials.[1] *Id.* at 363, 364–65; *Thackston*, 289 Ga. at 415. Although the Georgia Court of Appeals has held the exclusionary rule applicable in certain "quasi-criminal" proceedings, such as civil forfeiture actions,[2] the exclusionary rule has never been held to apply in administrative appeals of driver's license suspensions or analogous proceedings in Georgia.[3] *See Thackston*, 289 Ga. at 415.

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[1] *See Pa. Bd. of Prob. & Parole*, 524 U.S. at 369 (holding that the exclusionary rule does not apply in a parole revocation hearing); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *United States v. Janis*, 428 U.S. 433, 453–54 (1976) (holding that the exclusionary rule does not apply in a civil tax proceeding); *United States v. Calandra*, 414 U.S. 338, 349–50 (1974) (holding that the exclusionary rule does not apply to grand jury proceedings).

[2] *Pitts v. State*, 207 Ga. App. 606 (1993).

[3] Unlike the proceedings in which the Georgia Court of Appeals found the exclusionary rule applicable, ALS proceedings are not quasi-criminal inasmuch as they do not entail adjudication of a property right. *Nolen v. State*, 218 Ga. App. 819, 822–23 (1995) ("An administrative suspension of a driver's license is not comparable to the civil forfeiture of a property

9.

Applying the exclusionary rule in ALS proceedings would exact a considerable social cost by interfering with the state's means of combating drunk driving, which the U.S. Supreme Court has repeatedly recognized as an important state interest. *See, e.g., Missouri v. McNeely*,133 S. Ct. 1552, 1565 (2013); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Moreover, implementation of the exclusionary rule would jeopardize the ALS hearing's purpose in providing "a quick, informal procedure to remove dangerous drivers from Georgia's roadways and thereby protect public safety." *Swain v. State*, 251 Ga. App. 110, 113 (2001); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (exclusionary rule incompatible with civil, administrative nature of civil deportation proceedings).

10.

In contrast with the significant social costs associated with applying the exclusionary rule in ALS proceedings, the deterrence benefits of applying the exclusionary rule in such proceedings are slight. As the deterrence benefits of the exclusionary rule are fully realized by its application in concurrent criminal proceedings, its use in ALS proceedings would have a *de minimis* incremental deterrent effect. *See Pa. Bd. of Prob. & Parole*, 524 U.S. at 364 ("The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches"); *Janis*, 428 at 448, 454 (exclusionary rule's deterrence benefits minimal where its availability in criminal trial already deterred illegal searches); *United States v. Calandra*, 414 U.S. 338, 349–50 ("The need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a *criminal sanction* on the victim of the search.")

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right, which has been found to constitute punishment.").

(emphasis added); *Thackston*, 280 Ga. at 415 (recognizing minimal deterrent effect where law enforcement would "be substantially deterred from violating the suspect's Fourth Amendment rights by the application of the exclusionary rule to the criminal trial.").

11.

Because the exclusionary rule is inapplicable in ALS proceedings, the constitutional inquiry of whether a warrant is required for a blood test is not within the limited scope of these proceedings.[4]

The Birchfield Decision Does Not Apply to an Implied-Consent Statute that Imposes Only a Civil Penalty and an Evidentiary Consequence

12.

Even if such Fourth Amendment inquiries were within the limited scope of an ALS proceeding, which they are not, the *Birchfield* decision involved statutes that imposed *criminal* penalties on the refusal to submit to a blood alcohol test. 2016 U.S. LEXIS 4058, at *10. The Court noted that its prior opinions have "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at *61. It further stated that nothing in its decision should be read to cast doubt on such statutes. *Id.* Georgia's implied-consent statute imposes a civil penalty (*i.e.*, a license suspension) and an evidentiary consequence on motorists. O.C.G.A § 40-5-67.1. Thus, the *Birchfield* decision is inapplicable to Georgia's implied-consent statute.

[4] In ALS proceedings, the arresting officer is the complainant witness for the Respondent Department of Driver Services. *See* Ga. Comp. R. & Regs. 570-1-.05(k). He or she presents the evidence to the administrative law judge, in the vast majority of cases, without the benefit of counsel.

The Suspension of Petitioner's License was Proper Under O.C.G.A. § 40-5-67.1

13.

Deputy Reutter 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 and lawfully placed him under arrest for violating O.C.G.A. § 40-6-391. O.C.G.A. § 40-5-67.1(g)(2)(A)(i). While driving on Georgia 400, Petitioner failed to maintain his lane. Upon making contact with Petitioner, Deputy Reutter detected an overwhelming odor of alcohol coming from Petitioner's vehicle. He observed that Petitioner's eyes were bloodshot and his speech was slurred. Petitioner admitted to consuming one beer. Upon exiting his vehicle, Deputy Reutter observed that Petitioner was unsteady on his feet. Deputy Reutter observed six out of six possible clues on the HGN, five out of eight possible clues on the Walk and Turn, and two out of four clues on the One Leg Stand. Petitioner's breath tested positive for alcohol on the portable breath test. Based on his observations and Petitioner's performance on the field sobriety evaluations, Deputy Reutter placed Petitioner under arrest for driving under the influence of alcohol.[5]

14.

At the time of the request for the state-administered chemical test Deputy Reutter 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). Petitioner refused to take the state-administered chemical test of his blood. O.C.G.A. § 40-5-67.1(g)(2)(C)(i).

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[5] *See Fredrick v State*, 270 Ga. App. 397, 398 (2004) (holding that, even without field sobriety tests, the experienced officer's undisputed testimony that defendant smelled of alcohol, admitted that he had been drinking, and had glossy eyes sufficed to create probable cause for the arrest); *see also Cann-Hanson v. State*, 223 Ga. App. 690, 691 (1996) (finding that bloodshot, watery eyes and an odor of alcohol was sufficient to show probable cause to arrest for DUI, even in the absence of field sobriety tests).

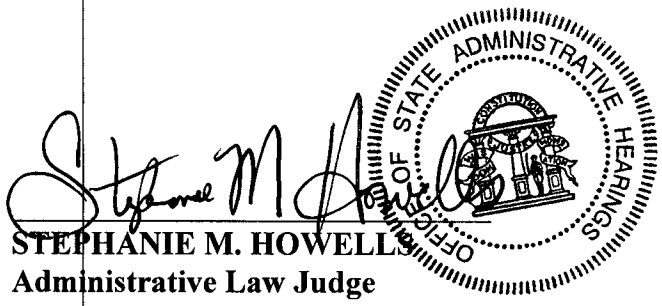
15.

For the foregoing reasons, Respondent's suspension of Petitioner's driver's license was proper. O.C.G.A. § 40-5-67.1.

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 **AFFIRMED**.

SO ORDERED this 6th day of June, 2016.



STEPHANIE M. HOWELL
Administrative Law Judge

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

GEOVANIE MARQUEZ ORTIZ, Petitioner,	:	Docket No.: OSAH-DDS-ALS-1649872-58-Howells
v.	:	Agency Reference No.: 057135756
DEPARTMENT OF DRIVER SERVICES, Respondent.	:	

NOTICE OF FINAL DECISION

This is the Final Decision of the Administrative Law Judge (Judge). This decision is not reviewable by the Referring Agency. **If a party disagrees with this decision**, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek judicial review of this decision by the superior court.

FILING A MOTION WITH THE JUDGE AT OSAH

The motion must be filed within ten (10) days of the entry, i.e., the issuance date of this decision. **The filing of this motion may or may not toll the time for filing a petition for judicial review**. *See* O.C.G.A. §§ 50-13-19; 50-13-20.1. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH Clerk at:

Clerk
Office of State Administrative Hearings
Attn.: Grant Mintz, gmintz@osah.ga.gov
225 Peachtree Street, NE, South Tower, Suite 400
Atlanta, Georgia 30303-1534

PETITION FOR JUDICIAL REVIEW

A petition for judicial review must be filed within thirty days (30) after service of this Final Decision in the Superior Court of Fulton County or in the superior court of the county of the appealing party's residence unless the party is an out-of-state resident, then the petition must be filed in the Superior Court of Fulton County, Georgia. If reconsideration or rehearing is requested and granted, then a petition for judicial review must be filed within thirty (30) days after service of that decision. O.C.G.A. §§ 50-13-19 and 50-13-20.1. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of the county where the party maintains its principal place of business in the State of Georgia. A copy of the petition must be served simultaneously upon all parties of record and filed with the OSAH Clerk. Ga. Comp. R. & Reg.s r. 616-1-2-.39.