BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	:	
	:	
Plaintiff,	:	**Docket No. OSAH-DDS-ALS-1101047-38-Schroer**
v.	:	
DEPARTMENT OF DRIVER SERVICES,	:	**Agency Ref. No.: 052070701**
	:	
Defendant.	:	

FINAL DECISION

I. Introduction

This matter is an administrative review of Defendant's decision to suspend Plaintiff's driver's license pursuant to O.C.G.A. § 40-5-67.1. The hearing in this matter was held on August 23, 2010, before the Office of State Administrative Hearings, a court of administrative law. Plaintiff was represented by Scott Cummins, Esq. and Defendant was represented by Dee Brophy, Esq. On August 26, 2010, Plaintiff filed a post-hearing brief, at which time the record closed. After considering all the admissible evidence, Defendant's action is hereby **AFFIRMED.**

II. Findings of Fact

1. On February 20, 2010, the arresting officer, Trooper O. Lundy, participated in a road block conducted by the Georgia State Patrol ("GSP") in Newnan, Georgia. The purpose of the roadblock was to perform routine traffic checks for driver's license and insurance verification, seatbelt compliance, and driver impairment, and was authorized by Sgt. L.B. Dawson, a supervisor for GSP Post 24. The location of the roadblock was in a lighted area and several patrol vehicles were parked at that location with their blue lights activated. The GSP Troopers involved in the road block wore

uniforms and bright reflective vests marked "Trooper" on the front and back. (Ex. R-1; Testimony of arresting officer)

2. Trooper Lundy, who has had special training in detection of impaired drivers and administration of field sobriety tests, participated in the road block with at least three other similarly-trained officers. If, after making contact with a driver, an officer determined that further discussion was necessary, the officer would ask the driver to pull the vehicle to the side of the road, thereby minimizing the delay to other motorists. (Testimony of arresting officer)

3. For the most part, the officers stopped each vehicle that approached the road block. However, on occasions when all the officers were occupied with other drivers, the officers allowed vehicles to proceed through the road block without stopping in order to avoid traffic delays. In fact, shortly after Plaintiff's vehicle and two others were stopped, another officer waved a motorist through the roadblock without making contact with the driver. Although the evidence in the record is insufficient to prove whether all the officers present at the roadblock were in fact occupied with other drivers at that time, the evidence does shows that there were no other vehicles immediately behind the motorist that was waved through. (Testimony of arresting officer)

4. At approximately 2:12 a.m. on February 20th, Trooper Lundy and one or two other troopers were standing on the side of the roadway, awaiting vehicles to approach the roadblock. As Plaintiff drove her vehicle up to the roadblock, Trooper Lundy walked to the center of the road. Once Plaintiff's vehicle stopped, Trooper Lundy approached and detected a strong odor of alcohol emanating from the passenger side of

the vehicle. After Plaintiff exited the vehicle, Trooper Lundy continued to detect a strong odor of alcohol coming from Plaintiff's breath. (Testimony of arresting officer)

5. Initially, Plaintiff, who is under 21 years old, denied drinking alcohol, but later admitted to drinking two Bacardi mixed drinks before driving. Plaintiff agreed to perform certain field sobriety tests, including the horizontal gaze nystagmus ("HGN") test and a portable breath test ("PBT"). The HGN test indicated six out of six possible clues of impairment and the PBT was positive for alcohol. (Testimony of arresting officer)

6. Following these field sobriety tests, Trooper Lundy asked Plaintiff some questions relating to her passengers and whether they would be able to drive her vehicle.[1] There is insufficient probative evidence in the record for the Court to determine by a preponderance of the evidence whether Trooper Lundy actually uttered the phrase, "I am going to have to arrest you" (or a similar phrase) at that time. However, Trooper Lundy testified that Plaintiff was under arrest following the completion of the field sobriety testing and before he read her the implied consent warning. (Testimony of arresting officer)

7. Trooper Lundy properly read Plaintiff the implied consent notice for drivers under the age 21 and requested a chemical test of Plaintiff's breath. Plaintiff agreed to take a breath test. (Testimony of arresting officer)

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[1] Plaintiff played a video recording of the stop at the hearing, but did not admit the recording into evidence. Trooper Lundy and Plaintiff were not visible in all portions of the video, nor was the sound recording always clear. Although the Court, the witness and the attorneys viewed and listened to the video one time at the hearing, the Court cannot make any more specific findings regarding the exact wording of Trooper Lundy's discussion with Plaintiff prior to his reading of the implied consent notice to her. It is clear from the evidence in the record, however, that Trooper Lundy did not place Plaintiff in handcuffs until after he read her the implied consent notice.

7. Trooper Lundy transported Plaintiff to the Coweta County Sheriff's Office, where he administered the state-administered chemical test. Trooper Lundy possessed a valid permit to conduct such tests and the two breath test results indicated an alcohol concentration of 0.152 grams and 0.150 grams, respectively. (Testimony of arresting officer; Exs. 2, 3)

III. Conclusions of Law

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

A. The Constitutionality of the Roadblock is outside the Limited Scope of the ALS Hearing.

"'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)(citations 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). Moreover, 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).

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).

Based on the above authority, this Court concludes that the constitutionality of the roadblock is not within the limited scope of the ALS hearing as prescribed by O.C.G.A. § 40-5-67.1. First, under Georgia law the constitutionality of a roadblock is a matter raised by filing a written motion to suppress in a criminal proceeding. See O.C.G.A. § 17-5-30. See also State v. Young, 234 Ga. 488 (1975) (In Georgia, the exclusionary rule is embedded in statutory law). Code Section 17-5-30, which does not apply to civil or administrative proceedings, codifies the exclusionary rule created by the courts in order to deter illegal searches and seizures under the Fourth Amendment. See Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 363 (1998); State v. Young, 234 Ga. at 491.

However, "[t]here is nothing sacrosanct about the exclusionary rule; it is not embedded in the constitution and it is not a personal constitutional right: 'In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" State v. Young, 234 Ga. at 491. Consequently, because the rule is not constitutionally mandated, the United Sates Supreme Court has held that it should be applied "only when its deterrence benefits outweigh its 'substantial social costs.'" Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. at 363. See also State v. Young, 234 Ga. at 492 ("[I]n all consideration of the exclusionary rule and its impact, 'It is well to remember that when incriminating evidence is found on a suspect and that evidence is then suppressed, 'the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victim.'"") (citations omitted).

The United States Supreme Court has refused to extend the exclusionary rule in many non-criminal matters.[2] "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.... [t]he 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." United

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

States v. Calandra, 414 U.S. at 348 (emphasis added).[3] Although Georgia courts have held that the exclusionary rule applies in certain "quasi-criminal" hearings, such as civil forfeiture or probation revocation hearings,[4] those proceedings are distinguishable from an ALS hearing in light of the Court of Appeals' determination that "[a]n administrative suspension of a driver's license is not comparable to the civil forfeiture of a property right, which has been found to constitute punishment." Nolen v. State, 218 Ga. App. at 822-23 (ALS hearing "is not a prosecution").

Applying these principles to this case, the Court concludes that the constitutionality of the roadblock is not swept into the limited scope of the ALS hearing under Code Section 40-5-67.1(g)(2)(A)(i), which provides the following:

> Whether the law enforcement officer had reasonable grounds to believe the person 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 Code Section 40-6-391...

Rather, the Court interprets this subsection as requiring the Defendant to prove the lawfulness of the arrest; that is, whether the officer had probable cause to arrest the driver for DUI. See generally, Swain v. State, 251 Ga. App. at 114, n.22 (citing subsection (g)(2)(A) and identifying one of the issues in the ALS hearing as "whether the arresting officer had probable cause for the arrest"). Given the remedial nature of the ALS proceeding, the compelling State interest in protecting public safety, the need for a quick and expeditious adjudication, and the minimal incremental deterrent effect of extending

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[3] The United States Supreme Court also considered the delay caused by requiring the grand jury to conduct suppression hearings. Id. "'Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.'" Id., quoting United States v. Dionisio, 410 U.S. 1, 17 (1973).

[4] See, e.g., Pitts v. State, 207 Ga. App. 606 (1993) (civil forfeiture); Amiss v. State, 135 Ga. App. 784 (1975) (probation revocation).

the exclusionary rule to the ALS setting, the Court concludes that the exclusionary rule does not apply to this case and that the validity of the roadblock is outside the scope of this hearing.[5]

B. The Suspension of Plaintiff's License was Proper under O.C.G.A. § 40-5-67.1(g)(2).

1. The arresting officer had reasonable grounds to believe Plaintiff was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol or a controlled substance, and Plaintiff 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). Specifically, the Court concludes that the evidence in the record shows that Trooper Lundy's actions and his discussions with Plaintiff following the conclusion of his investigation and testing would cause a reasonable person to believe that her detention was no longer temporary. Amin v. State, 283 Ga. App. 830, 831 (2007). See also Hough v. State, 279 Ga. 711,

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[5] The Court recognizes that its ruling is particularly meaningful in this case as Plaintiff made a strong case that Defendant failed to prove that the roadblock met the factor established in LaFontaine v. State that "all vehicles are stopped as opposed to random vehicle stops." 269 Ga. 251, 253 (1998). See State v. Manos, 237 Ga. App. 699 (1999) (Court of Appeals held that when the record was silent as to the "procedures whereby officers, either supervisory or in the field, determine[d] whether public safety requires that an existing roadblock be terminated due to a backup in traffic," such record was "inadequate to justify reposing an unfettered discretion in the field officer to stop and start the roadblock at will (randomly), based on a vague and undocumented articulation of public safety."). But see Hodges v. State, 248 Ga. App. 295 (2001) (roadblock constitutional when supervisor was present on scene and the arresting officer testified that "the road was slick, a determination had been made that it was unsafe to allow any cars to back up on the roadway, and cars were allowed to proceed through the roadblock only when all the officers on duty were busy with other cars."); Ross v. State, 257 Ga. App. 541 (2002) (roadblock was satisfactory where supervisory officer testified that he stopped and restarted the roadblocks three times to safeguard his officers and the pubic, each time letting backed-up traffic clear the roadblocks); State v. Stearns, 240 Ga. App. 806 (1999); Ledford v. State, 221 Ga. App. 238, 240 (1996). Accordingly, Plaintiff is specifically notified of her right to seek judicial review of this decision pursuant to O.C.G.A. § 40-5-67.1(h).

(2005) (The arrest necessary before the reading of implied consent, however, does not have to be a "formal arrest" in which the officer explicitly states to the suspect that he or she has been arrested. To the contrary, "'[a]n arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be.... Thus, implied consent is triggered at the point that the suspect is not free to leave and reasonable person in his position would not believe that the detention is temporary, regardless of whether a 'formal arrest' has occurred.").

2. At the time he requested that Plaintiff submit to the state-administered chemical test, the arresting officer informed Plaintiff of her 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).

3. As demonstrated by a copy of the arresting officer's operator's permit and an original copy of the test results, the tests were properly administered by an individual possessing a valid permit issued by the Division of Forensic Sciences of the Georgia Bureau of Investigation on an instrument approved by the Division of Forensic Sciences, and the machine at the time of the test was operated with all 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).

5. The test results indicated an alcohol concentration of more than 0.02 grams for a driver under the age of 21. O.C.G.A. § 40-5-67.1(g)(2)(C)(ii).

6. The suspension of Plaintiff's driver's license or driving privilege by the Department of Driver Services was proper. O.C.G.A. § 40-5-67.1.

IV. Decision

IT IS HEREBY ORDERED THAT the decision of Defendant to administratively suspend Plaintiff [redacted]'s driver's license, permit, or privilege to operate a motor vehicle or commercial motor vehicle in this state is **AFFIRMED.**

SO ORDERED this 31st day of August, 2010.

KIMBERLY W. SCHROER
Administrative Law Judge