BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

RISHI MUKESH PATEL,	:	
Petitioner,	:	
	:	Docket No.:
v.	:	OSAH-DPS-ALS-1511892-60-Malihi
	:	
	:	Agency Reference No.: 051077212
DEPARTMENT OF DRIVER SERVICES,	:	
Respondent.	:	

William C. Head, Esq.,
For Petitioner

Dee Brophy, Esq.
For Trooper Chris McEntyre, Complainant witness for Respondent.

FINAL DECISION

I. Introduction

Petitioner challenges Respondent's decision 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. An evidentiary hearing was held on April 21, 2015.

At the outset of the hearing on this matter, Petitioner, through counsel, moved to rescind the suspension of his license, arguing that the holding in the recent Georgia Supreme Court case of Williams v. State required the state to prove that his consent to the testing of his breath was freely and voluntarily given in order for the results of a breath test to be admissible in administrative license suspension proceedings. The evidentiary record remained open to allow Petitioner to file a brief in support of his argument. Petitioner filed this brief with OSAH on April 29, 2015 and simultaneously served a copy on Respondent. In his brief, Petitioner argued that, in light of the Supreme Court's holding in Williams, the suspension of his license must be rescinded in the absence of evidence that he gave "actual consent" to the procuring and testing of his breath. Respondent submitted a responsive brief on May 5, 2015.

The administrative law judge has carefully considered the available evidence, and the legal and factual arguments made by Petitioner both at the hearing and in the post-hearing brief. For the reasons indicated below, Petitioner's motion is **DENIED** and Respondent's action is **AFFIRMED**.

II. Findings of Fact

1. On August 31, 2014 at approximately 2:19 a.m., Trooper McEntyre was called by a fellow trooper to assist with a traffic stop. *Testimony of Trooper McEntyre*.

2. Petitioner Rishi Mukesh Patel was the driver of the vehicle involved in the traffic stop. *Testimony of Trooper McEntyre*.

3. Upon making contact with Petitioner, who was still seated in the driver's seat of the vehicle, Trooper McEntyre detected an odor of alcohol emanating from the vehicle's interior. He further observed that Petitioner had bloodshot, watery eyes. Petitioner admitted to Trooper McEntyre that he had consumed alcoholic beverages—two vodka waters and a "fireball"—prior to the stop. *Testimony of Trooper McEntyre*.

4. At Trooper McEntyre's request, Petitioner submitted to standardized field sobriety tests, including the horizontal gaze nystagmus (HGN), one-leg-stand, and walk-and-turn tests. Petitioner exhibited six out of six possible clues of intoxication on the HGN test, seven out of eight possible clues of intoxication on the walk-and-turn, and two out of four possible clues of intoxication on the one-leg-stand. *Testimony of Trooper McEntyre*.

5. Petitioner also agreed to submit to a preliminary breath test on an alco-sensor. The breath sample provided by Petitioner registered positive for the presence of alcohol. *Testimony of Trooper McEntyre*.

6. The foregoing facts caused Trooper McEntyre to believe that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver. He thereupon placed Petitioner under arrest for driving under the influence of alcohol and properly read to him the implied consent notice for suspects over the age of twenty-one. *Testimony of Trooper McEntyre*.

7. Petitioner agreed to submit to a state-administered test of his breath. *Testimony of Trooper McEntyre*.

8. Trooper McEntyre transported Petitioner to the City of Atlanta Jail, where he administered a breath test to Petitioner on the Intoxilyzer 5000 after ensuring the machine had all its electronic and operating components prescribed by its manufacturer properly attached and in good working order.[1] Petitioner provided two sequential breath samples, which registered .172 grams blood alcohol content (BAC) at 3:10 a.m., and .173 grams BAC at 3:14 a.m. *Respondent Exhibit 2; Testimony of Trooper McEntyre*.

9. Petitioner does not challenge the basis for the traffic stop of his vehicle or that Trooper McEntyre had probable cause to arrest him for DUI.

[1] Trooper McEntyre is certified by the Georgia Bureau of Investigation Division of Forensic Sciences to administer the Intoxilyzer 5000 test. *Respondent Exhibit 1*.

III. Conclusions of Law

Based on the above Findings of Fact, the undersigned makes the following Conclusions of Law:

A. The Constitutional Inquiry of Actual Consent is Outside the Limited Scope of ALS Proceedings.

1. The Supreme Court of Georgia held in Williams that a DUI suspect's agreement to submit to a state-administered test of his blood after having been read the statutory implied consent notice did not relieve the state of its burden to demonstrate the suspect's actual, voluntary consent to a search for the purpose of exception to the warrant requirement. Williams v. State, No. S14A1625, 2015 Ga. LEXIS 197, at *10–12 (Ga. March 27, 2015). In so doing, the Williams Court drew a clear distinction between (1) statutory implied consent, i.e., the consent necessary to demonstrate compliance with the implied consent statute; and (2) "actual consent," i.e., the constitutional question of whether the suspect "acted freely and voluntarily under the totality of the circumstances" so as to create an exception to the warrant requirement. Id. at 9 (citing Cooper v. State, 277 Ga. 282, 291 (2003)). The former type of consent is within the purview of Administrative License Suspension ("ALS") proceedings. The latter is not. O.C.G.A. § 40-5-67.1(g)(2) (2014); see Miles v. Ahearn, 243 Ga. App. 741 (2000) (recognizing that the Georgia legislature has chosen to expressly limit the issues that may be considered at an administrative license suspension hearing).

2. In arguing the applicability of Williams 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).

3. 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.[2] 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,[3] the exclusionary rule has never

[2] 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).

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

been held to apply in administrative appeals of driver's license suspensions or analogous proceedings in Georgia.[4] See Thackston, 289 Ga. at 415.

4. 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).

5. In contrast with the enormity of the 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.") (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.").

6. Because the exclusionary rule is inapplicable in ALS proceedings, the state need not demonstrate an exception to the warrant requirement, such as through the actual consent of the DUI suspect, in order to demonstrate the propriety of a license suspension.

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

1. This appeal arises under Georgia's Motor Vehicle and Traffic laws. O.C.G.A. § 40-5-67.1 (2014). 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. Trooper McEntyre had reasonable grounds to believe Petitioner was driving a motor vehicle while under the influence of alcohol to the extent that it was less safe for him to drive, and

[4] Contrary to proceedings in which Georgia courts have 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 right, which has been found to constitute punishment.").

lawfully placed him under arrest for violating O.C.G.A. § 40-6-391. Trooper McEntyre reasonably believed that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver based upon Petitioner's bloodshot, watery eyes; the clues of intoxication Petitioner exhibited during the HGN, one-leg-stand, and walk-and-turn tests; the positive result of the preliminary breath test; and Petitioner's admission that he had consumed alcoholic beverages prior to the stop. See, e.g., Frederick v. State, 270 Ga. App. 397, 398 (2004); see also Hughes v. State, No. S14G0622, 2015 Ga. LEXIS 185 (Ga. Mar. 16, 2015).

3. At the time of the request for the test, Trooper McEntyre informed the 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).

4. The results of the Intoxilyzer 5000 test indicated an alcohol concentration in excess of .08 grams. O.C.G.A. § 40-5-67.1(g)(2)(C)(ii).

5. The test was properly administered by an individual possessing a valid permit issued by the Division of Forensic Sciences, and the machine at the time of the test was operated with all of 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).

6. Accordingly, the suspension of Petitioner's driver's license and driving privilege by Respondent was proper. O.C.G.A. § 40-5-67.1.

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 **AFFIRMED.**

SO ORDERED this 7th day of May, 2015.

_____

MICHAEL MALIHI, Judge