IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

JEROME DOWELL, Petitioner,	:	Docket No.: OSAH-DDS-ALS-1326928-48-Walker
v.	:	
DEPARTMENT OF DRIVER SERVICES, Respondent.	:	Agency Reference No.: 013602666

FINAL DECISION

I. Introduction

This matter is an administrative review of Respondent's decision to suspend Petitioner's driver's license pursuant to Georgia Code Section 40-5-67.1 (2011). The hearing in this matter was held on April 17, 2013. Deputy David Martin appeared as the complainant on behalf of the Department of Driver Services, as permitted by Ga. Comp. R. & Regs. r. 375-3-3-.04(6)(b)(1) (2010). The Petitioner, Jerome Dowell, was represented by Kevin Fisher, Esq. For the reasons indicated below, the Department's decision is **AFFIRMED**.

II. Findings of Fact

1.

At approximately 9:30 p.m. on December 31, 2012, Deputy Martin of the Douglas County Sheriff's Office stopped Petitioner's vehicle at a temporary driver's license and sobriety checkpoint. Three officers were present, including Deputy Martin. Deputy Martin authorized the roadblock and acted as supervisor on site. To identify the roadblock, the officers had the blue lights on their vehicles illuminated; the officers themselves were in uniform, were wearing

reflector vests, and were bearing flashlights. All vehicles on the road were stopped, unless all three officers were busy, in which case the roadblock was suspended. The duration of the stops was minimal, generally not exceeding a minute. Department policies and procedures were followed in establishing the roadblock. (Testimony of Deputy Martin; Exhibit P-1).

2.

After stopping Petitioner's vehicle Deputy Martin noticed an open container of alcohol, which the Petitioner admitted was a daiquiri made with tequila. He stated that he had last taken a drink at home. Petitioner's breath smelled strongly of alcohol and his eyes were bloodshot and watery. The Deputy asked Petitioner if he would agree to take an alcosensor breath test, which he did, registering a positive reading. Because of the presence of an open container in Petitioner's vehicle, Deputy Martin waited approximately twenty minutes before requesting a second breath sample. His rationale was that although Petitioner claimed that he had last had a drink at home, if he had in fact had a drink more recently, the breath test could indicate a higher reading simply due to the continued presence of the alcoholic beverage in Petitioner's mouth. Petitioner's second breath sample also registered positive. (Testimony of Deputy Martin Exhibit P-1).

3.

Between taking the first and the second alco-sensor samples, Office Martin performed the horizontal gaze nystagmus test ("HGN") upon Petitioner. The test indicated six out of six possible clues of impairment. At the administrative hearing, Petitioner challenged the officer's administration of the test, claiming that the officer failed to conduct the test in accordance with the guidelines for proper administration. Specifically, the guidelines indicate that the stimulus used to perform the HGN (here, a penlight) be held at or above the subject's eye level, yet the

stimulus in this case was held slightly below eye level. Deputy Martin, who is standard field sobriety instructor[1] (i.e., he trains others in the proper administration of field sobriety tests) stated that the stimulus is to be held at or above eye level because it tends to cause the subject to open his or her eyes wider, providing a better view of the eyes. However, if the officer can see the eyes well enough where the stimulus is below eye level, the ability of test to detect impairment is not impacted. Deputy Martin testified that if he had been unable to see the Petitioner's eyes, he would have asked the Petitioner to sit on his push bumper while he performed the test, as is his practice. Deputy Martin performed the test while standing because he could see the Petitioner's eyes well enough to perform the test accurately. (Testimony of Deputy Martin; Exhibit P-1).

4.

Deputy Martin did not perform the walk-and-turn or the one-legged stand field sobriety tests because Petitioner maintained that he had trouble with his legs and knees. Deputy Martin did ask Petitioner to recite his ABCs, a non-standard field sobriety test, as part of his assessment. Petitioner recited them without mishap. At that point, Deputy Martin requested a second alcosensor test, as discussed above. (Testimony of Deputy Martin; Exhibit P-1).

5.

After obtaining a second positive alcosensor test, Deputy Martin immediately placed Petitioner under arrest for Driving Under the Influence, finding Petitioner to have been less safe to drive. He read Petitioner the Georgia implied consent warning for persons over age twenty-one word-for-word from a card, after which Petitioner agreed to submit to a state-administered chemical test. Deputy Martin collected two breath samples using the Intoxilyzer Model 5000, for which he bears a 2011 certification from the Georgia Bureau of Investigation, Division of

[1] Note that Deputy Martin did not testify in detail as to his training and experience; however, Petitioner conceded that he is an expert in field sobriety testing.

Forensic Sciences, set to expire in 2015. The first sample, taken at 10:37 p.m., came back with a reading of.083; the second sample, taken at 10:40 p.m., registered a reading of .084. (Testimony of Deputy Martin; Exhibits R-1, -2, -3.)

6.

Deputy Martin issued Petitioner a citation for driving with an open container of alcohol and a citation for Driving Under the Influence. (Testimony of Deputy Martin.)

7.

Petitioner's driver's license was suspended pursuant to Georgia Code Section 40-6-391, and he now appeals the Department's decision.

III. Conclusions of Law

A. General Law

1.

The Department bears the burden of proving by a preponderance of the evidence that its decision to suspend Petitioner's license was proper. Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4). In proceedings before this Court, "[t]he independent determination and de novo [review] mandated by [the Court's] rules require the [Court] to consider the applicable facts and law anew, without according deference or presumption of correctness to the [Department's] decision, and to render an independent decision. . . ." Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc., 298 Ga. App. 753, *10 (2009).

2.

The scope of this hearing is limited to finding that (1) the "officer had reasonable grounds

to believe the person was driving . . . while under the influence of alcohol"; (2) "[the person] was lawfully placed under arrest" for driving while impaired by an intoxicating substance; (3) "the officer informed the person of the person's implied consent rights and the consequence of submitting or refusing to submit to such test"; (4) a test was administered and that its "results indicated an alcohol concentration of 0.08 grams or more"; and (5) that "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 [same]." O.C.G.A. § 40-5-67.1(g)(2).

3.

The final requirement may be proved by "[a] copy of the operator's permit showing that the operator has been trained on the particular type of instrument used and one of the original copies of the test results." O.C.G.A. § 40-5-67.1(g)(2)(D).

4.

Petitioner challenges the suspension of his license on two grounds. First, he contends that the roadblock was improper because the supervisor was the one who conducted the field sobriety tests and thus there was no one else present to supervise him. Second, he argues that the HGN test should be excluded as it was improperly performed and, absent the HGN test, the officer lacked probable cause to arrest him.

B. Roadblock was Lawful

5.

Under Georgia case law, a roadblock is lawful where:

the record reflects that the decision to implement the checkpoint in question was

> made by supervisory officers and not officers in the field and that the supervisors had a legitimate primary purpose. The phrase "decision to implement" includes deciding to have this roadblock, and where and when to have it. The evidence must also show that (2) all vehicles were stopped as opposed to random stops; (3) the delay to motorists was minimal; (4) the roadblock operation was well identified as a police checkpoint; and (5) the screening officer's training and experience were sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.

Baker v. State, 252 Ga. App. 695, 702 (2001); see also Lafontaine v. State, 269 Ga. 251, 253 (1998). The Georgia Court of Appeals has held on multiple occasions that "officers are not precluded as a matter of law from acting simultaneously as a supervisor and a field officer." Williams v. State, 317 Ga. App. 658, 661 (2012), citing State v. Brown, 315 Ga. App. 154, 159 (2012). In other words, "a supervisor may be defined by rank and by job duties," even though he or she may supervise subordinates in the field and may even help conduct the roadblock by screening drivers. Williams, 317 Ga. App. at 660.

6.

As elicited during Petitioner's cross examination of Deputy Martin, the roadblock conformed to all the above legal requirements. First, Deputy Martin, as the supervisor, made the determination to utilize a roadblock as a sobriety and drivers' license checkpoint, both permissible purposes. Baker, 252 Ga. App. at 701, citing City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2009). Second, all vehicles were stopped. Third, motorists were delayed only briefly. Fourth, the presence of police lights and officers in uniform clearly marked the area as a police checkpoint. See Perdue v. State, 256 Ga. App. 765, 769 (2002) ("checkpoint was identified by police cars, flashing blue lights, officers in uniform wearing reflective vests, and orange cones.") Finally, as a field sobriety instructor, Deputy Martin, who screened Petitioner, had the necessary training and qualifications to assess which motorists should be administered

field sobriety tests.

C. HGN Test is Admissible

7.

Second, Petitioner claims that the Deputy's manner of conducting the HGN was so deficient that it cannot be used to establish probable cause to arrest him and, in its absence, the evidence was insufficient to justify probable cause to arrest him for D.U.I.

8.

In admitting evidence of the HGN, it is the State's burden to show that the officer conducting the screen

> 'substantially performed the scientific procedures in an acceptable manner,' that is, 'properly under law enforcement guidelines.' The burden to show error in the administration of the tests shifts to the defendant, as the party raising a foundational objection, only after the State fully satisfies its foundational burden.

State v. Tousley, 271 Ga. App. 874, 880 (2005) (internal citations omitted). In proving that the screening officer properly administered the test, the State may "elicit[] testimony that the officer was sufficiently trained and experienced in administering the test according to the standardized techniques," and that he did so on this occasion. Id. Still, even after the State has laid a proper foundation for the admission of the HGN testing results, the Petitioner is permitted to attack the reliability of the results in his case and convince the judge to give it little weight. Id. at 881. "[A] ruling that a particular HGN test was administered well enough to meet the threshold for admissibility does not preclude a defendant from arguing that the factfinder should, because of errors in the administration or interpretation of the test, assign less weight to the results." Id. at 881-82.

9.

Here, Deputy Martin, who is not only trained and experienced in the use of the HGN test to detect driver impairment but is a field sobriety test instructor, was well-qualified to administer the test. While he conceded that the test should ideally be performed with the stimulus at or above eye level, he was able to explain the reason for the general rule and why the deviation from the rule in this case does not impair the results of the test. In light of this testimony and after watching the video of its administration, the Court admits the HGN results and gives them due weight in finding that there was probable cause to arrest Petitioner. See State v. Preston, 293 Ga. App. 94, 96-97 (2008) ("[defendant's] performance on the HGN, along with his admission of drinking, odor of alcohol, alcosensor result, and bloodshot eyes gave the officer probable cause upon which to request a blood test under the implied consent statute.")

D. State-Administered Chemical Test

10.

Upon arrest, Deputy Martin read Petitioner the Georgia implied consent warning in accordance with Georgia Code section 40-5-67.1(b)(2). Petitioner then agreed to a state-administered chemical test. Two breath samples were taken. The lowest reading of .083 exceeded the minimum alcohol concentration allowed by statute. O.C.G.A. §§ 40-6-391(a)(5), 40-6-392(a)(1)(B) (2011) ("lower of the two results shall be determinative for...administrative license suspension purposes").

11.

Deputy Martin is certified to administer a blood alcohol chemical test using the

Intoxilyzer Model 5000, which is approved for such use by the Georgia Bureau of Investigation Division of Forensic Sciences. A copy of Deputy Martin's operator's permit for the Intoxilyzer Model 5000 and an original copy of the test results satisfy the requirements of O.C.G.A. § 40-5-67.1(g)(2)(D).

E. Suspension of Petitioner's Driver's License is Required

12.

Based on the evidence presented at the hearing, this Court finds that the Department met its burden of showing that Petitioner was lawfully arrested pursuant to O.C.G.A. § 40-6-391(a). Deputy Martin permissibly stopped Petitioner at a lawful license and sobriety checkpoint and had reasonable suspicion to request field sobriety tests based upon the smell of alcohol alone. Blankenship v. State, 301 Ga. App. 602, 604 (2009). Probable cause to arrest Petitioner was established by (1) the smell of alcohol on Petitioner's breath; (2) Petitioner's watery and bloodshot eyes; (3) Petitioner's admission that he had had a drink and the presence of an open container in his car; (4) six out of six clues of impairment on the HGN test; and (4) positive results on the alcosensor breathalyzer sobriety tests. When Petitioner tested positive for a blood alcohol level concentration above .08 grams on the state-administered chemical test, the Department was required pursuant to O.C.G.A. § 40-5-67.1(c) to suspend his driver's license.

V. Decision

The Department's suspension of Petitioner's driver's license and driving privileges is hereby **AFFIRMED**.

SO ORDERED, this 23 day of April, 2013.

RONIT WALKER
Administrative Law Judge