

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

TISHA AVILES MORALES,  
Petitioner,

v.

DEPARTMENT OF DRIVERS SERVICES,  
Respondent.

Docket No.  
OSAH-DPS-ALS-1339402-93-Kennedy

Agency Reference No. 054134904



FILED  
OSAH

JUL 31 2013

**FINAL DECISION**

**I. Introduction**

*Valerie Ruff*

Valerie Ruff, Legal Assistant

Petitioner requested a hearing in response to Respondent's issuance of an administrative license suspension of Petitioner's driver's license or privilege to drive in the State of Georgia in accordance with the provisions of O.C.G.A. § 40-5-67.1. For the reasons indicated below, Respondent's action is **AFFIRMED**.

**II. Findings of Fact**

1.

The arresting officer, who was familiar with Petitioner from prior stops he has conducted, observed Petitioner's vehicle travel past him. He further observed that Petitioner was a passenger in the vehicle. The arresting officer decided to follow Petitioner's vehicle.

2.

Shortly after the arresting officer got behind Petitioner's vehicle, he noticed that the vehicle pulled into a private driveway of a home that appeared to be unoccupied. The arresting officer decided to turn around and position himself across from the driveway to observe. The arresting officer saw the vehicle drive down the driveway toward the road and noticed that the driver and passenger had switched seats such that Petitioner, who he had previously seen in the passenger seat, was now driving the vehicle. When the occupants of the vehicle observed the arresting officer nearby, Petitioner drove back up the private driveway. At that time, the arresting officer called for back-up to assist him in approaching the stopped vehicle to inquire about the suspicious activity of appearing to be evading the arresting officer and parking in the private driveway of an unoccupied residence.

2.

Petitioner was in actual physical control of a moving motor vehicle in this State at the time that the arresting officer approached her stopped vehicle. Both occupants had the front doors of the vehicle opened. Petitioner was seated in the driver's seat and appeared to be speaking on her cellular telephone.

3.

After approaching Petitioner and the other occupant, the arresting officer asked them what they were doing and they responded that they were lost. The arresting officer then asked both occupants to step out of the vehicle and began questioning them as to why they had switched drivers after pulling into the driveway. Both occupants refused to answer the arresting officer's questions regarding who had been driving, or why they had switched drivers. However, the arresting officer discovered that the individual he believed to be the original driver was unlicensed. He also discovered that neither occupant knew anyone who lived at the residence.

4.

The arresting officer asked Petitioner for consent to search her vehicle, and Petitioner agreed. While searching the vehicle, the arresting officer discovered a six-pack of Budweiser Ice in the rear seat, and noticed that three of the alcoholic beverages were missing. Both occupants admitted that they had consumed alcohol that evening, and Petitioner also admitted that the Budweiser Ice belonged to her. The arresting officer then requested that Petitioner perform the following field sobriety evaluations, which were not completed to the satisfaction of the arresting officer: HGN, Walk and Turn and Rhomberg. The arresting officer also administered the One Leg Stand evaluation, but he observed no clues on this evaluation. The arresting officer also administered an alco-sensor that registered positive for the presence of alcohol.

5.

These facts caused the arresting officer to believe that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver.

6.

Petitioner was thereupon placed under arrest for driving under the influence of alcohol and properly read the applicable implied consent notice.

7.

After being properly advised of the applicable implied consent notice, Petitioner asked several questions. The arresting officer advised Petitioner that he could not provide any explanation or advice regarding the implied consent notice. The arresting officer also advised Petitioner that if she failed to provide an answer he would consider her continuous questioning to be a refusal. Petitioner never advised the arresting officer that she would consent to submit to the state designated test.

### III. Conclusions of Law

1.

The arresting officer had reasonable grounds to believe Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol, and he lawfully placed Petitioner under arrest for violating O.C.G.A. § 40-6-391 and O.C.G.A. § 40-5-67.1(g)(2)(A)(i).

Petitioner argued that the arresting officer did not lawfully place her under arrest because he did not have a valid basis for stopping her. However, in this instance the arresting officer did not effectuate a “stop” as that term is defined for purposes of the Fourth Amendment. Georgia courts generally recognize that “there are three tiers of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief ‘seizures’ that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause.” McClain v. State, 226 Ga. App. 714.

In this matter, the arresting officer’s encounter with Petitioner falls under the first tier of police-citizen encounters because the arresting officer approached Petitioner’s stopped vehicle to inquire what she was doing at the unoccupied residence. “The actions of an officer approaching a stopped vehicle, requesting to see a driver’s license, and inquiring about possible criminal or suspicious activity clearly fall within the realm of the first type of police-citizen encounter and do not amount to a stop.” McClain supra. See also Baker v. State, 300 Ga. App. 307 (2009); Voyles v. State, 237 Ga. App. 886 (1999); Crosby v. State, 214 Ga. App. 753 (1994). Additionally, “[r]egardless of whether [Petitioner’s conduct] violated any traffic laws, it was sufficiently suspicious and furtive to provide an articulable suspicion of criminal activity” that would authorize the arresting officer to approach Petitioner and question her about the activity of switching drivers and pulling into a private driveway of an unoccupied residence. See Collier v. State, 282 Ga. App. 605 (2006).

2.

At the time of the request for the test the arresting officer informed the Petitioner 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.

Petitioner refused the state designated test. O.C.G.A. § 40-5-67.1(g)(2)(C)(i). After being properly read the correct implied consent notice, Petitioner never affirmatively stated that she would submit to the designated test of her breath. Instead, Petitioner repeatedly asked questions. Petitioner’s actions in not affirmatively responding that she would submit to the test is tantamount to a non-verbal refusal. See generally Fairbanks v. State, 244 Ga. App. 123 (2000) (court held continual demand for an attorney in response to the implied consent request for the state’s test amounts to a refusal).

### IV. 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 30<sup>th</sup> day of July, 2013.**

  
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**ANA B. KENNEDY, Judge**

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

MARK WESLEY PARRISH,  
Petitioner,

v.

DEPARTMENT OF DRIVERS SERVICES,  
Respondent.

Docket No.: OSAH-DPS-ALS-1344563-42-Kennedy

Agency Reference No.: 03224376



JUL 31 2013

**FINAL DECISION**

**I. Introduction**

*Valerie Ruff*

Valerie Ruff, Legal Assistant

Petitioner requested a hearing in response to Respondent's issuance of an administrative license suspension of Petitioner's driver's license or privilege to drive in the State of Georgia in accordance with the provisions of O.C.G.A. § 40-5-67.1. For the reasons indicated below, Respondent's action is **REVERSED**.

**II. Findings of Fact**

1. The arresting officer initiated a stop as the result of a road block.
2. Petitioner was in actual physical control of a moving motor vehicle in this State at the time of the initial stop.
3. After approaching Petitioner, the arresting officer detected a strong odor of an alcoholic beverage, and noticed a plastic bag on the passenger seat. Petitioner told the arresting officer that the plastic bag contained a six-pack of beer. The arresting officer asked Petitioner how many beers he had consumed, and Petitioner told the arresting officer that four of the six beers had been consumed. The arresting officer also asked Petitioner to show him the contents of the plastic bag. The arresting officer observed that there were five Budweiser bottles in the plastic bag. At that time the arresting officer asked Petitioner to pull to the side of the road.
4. After Petitioner pulled to the side of the road, Petitioner admitted that there was one open alcoholic container in his vehicle. The arresting officer then asked if Petitioner suffered from any head, knee or back injuries that he should "be concerned about." Petitioner advised the arresting officer that he did suffer from back problems. Despite Petitioner's response, the arresting officer asked Petitioner if he would perform field sobriety evaluations. Petitioner refused to submit to any evaluations. The arresting officer also asked Petitioner if he would submit to an alco-sensor evaluation, but again Petitioner refused. When the arresting officer asked Petitioner why he was unwilling to agree to perform field sobriety evaluations or to blow into an alco-sensor, Petitioner advised the arresting officer that he would fail the evaluations and he knew he was going to be taken to jail.
5. These facts caused the arresting officer to believe that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver.
6. Petitioner was thereupon placed under arrest for driving under the influence of alcohol and read the applicable implied consent notice.
7. After being advised of the applicable implied consent notice, Petitioner refused to submit to the state designated test as requested by the arresting officer.

**III. Conclusions of Law**

1.

The arresting officer had reasonable grounds to believe Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol. However, there is insufficient evidence in the record to establish that the arresting officer lawfully placed Petitioner under arrest for violating Code Section 40-6-391. See O.C.G.A. § 40-5-67.1(g)(2)(A)(i). See also State v. Ellison, 271 Ga. App. 898 (2005) (insufficient evidence of how the alcohol in Defendant's body would affect Defendant's driving ability, or how the alcohol impaired Defendant, for the officer to conclude that Defendant was a less safe driver.)

"Impaired driving ability depends solely upon an individual's response to alcohol. Because individual responses to alcohol vary, the presence of alcohol, in a defendant's body, by itself, does *not* support an inference that the defendant

was an impaired driver.” See Ellison supra. (emphasis in original) In this matter, there is no evidence that the arresting officer observed bloodshot, red, watery or glassy eyes, that Petitioner’s speech was slurred or otherwise impaired, that Petitioner was unsteady on his feet or had any difficulty exiting his vehicle, or any other personal manifestations or driving manifestations that would indicate that Petitioner’s consumption of alcohol impaired his ability to drive, or that his blood alcohol level was likely to exceed the state limit. Based on the evidence presented, the court concludes Respondent has not met its burden to establish that the arresting officer had probable cause to place Petitioner under arrest for violation Code Section 40-6-391.

2.

Accordingly, the suspension of the Petitioner’s driver’s license and driving privilege by Respondent is not authorized based on the present record. 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 **REVERSED**.

**SO ORDERED, this 30<sup>th</sup> day of July, 2013.**



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**ANA B. KENNEDY, Judge**