BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] **Petitioner,**	*	**DOCKET NO:**
	*	**OSAH-DMVS-ALS-0320144-28-AK**
v.	*	
	*	**LICENSE NUMBER: 041012163**
DEPARTMENT OF MOTOR VEHICLE SAFETY,	*	
Respondent.	*	

FINAL DECISION

I. Introduction

This matter is the administrative review of Respondent's decision to suspend Petitioner's driver's license pursuant to O.C.G.A. § 40-5-67.1. A hearing was held on December 10, 2002 in Canton, Cherokee County, Georgia. Petitioner appeared and was represented by Steven G. Eichel, Esquire. Arresting Deputy David Michael Hughes of the Cherokee County Sheriff's Department appeared on behalf of the Respondent. After considering all the admissible evidence, Respondent's action is hereby **AFFIRMED**.

II. Findings of Fact

1.

Petitioner's wife called police on the night of September 16, 2002 and advised them that Petitioner had threatened her and was on his way to her home in a white Nissan. The Cherokee County Sheriff's Department responded to the call. The Arresting Deputy responded as a back-up deputy.

2.

As the Arresting Deputy exited his vehicle in front of the home, he observed a white Nissan round the corner at a high rate of speed headed towards the Arresting Deputy. The white Nissan pulled into the driveway of the home. The Arresting Deputy observed Petitioner in the driver's seat and observed Petitioner step out of the vehicle from the driver's side.

3.

Petitioner was concerned about his family upon seeing the three sheriff's cars in front of

his wife's residence and demanded to know why the deputies were there. The Arresting Deputy was advised by another deputy that Petitioner's wife had stated she was in fear for her safety and believed that Petitioner would cause her harm if allowed to enter the home.

4.

Petitioner attempted to enter the home several times but was prevented from doing so by the Arresting Deputy. Outside of the home, the Arresting Deputy questioned Petitioner regarding the alleged threats and Petitioner's purpose for being at his wife's home at 2:35 in the morning. During the encounter, Petitioner was hostile. Due to petitioner's irrational and hostile behavior, Petitioner was detained in handcuffs for the deputies safety as well as Petitioner's.

5.

As the Arresting Deputy spoke to Petitioner, he smelled the odor of an alcoholic beverage about Petitioner. Once Petitioner had calmed down, the Arresting Deputy released Petitioner from handcuffs and asked him how much alcohol he had consumed. The Arresting Deputy did not recall Petitioner's response. At the hearing, Petitioner testified he had one 6 ounce beer that evening

6.

The Arresting Deputy requested that Petitioner complete field sobriety evaluations. Petitioner refused to submit to the field sobriety evaluations.

7.

Based on the Arresting Deputies observations of Petitioner's driving, Petitioner's irrational and hostile behavior and the odor of an alcoholic beverage emanating from Petitioner, the Arresting Deputy placed Petitioner under arrest for Driving Under the Influence (DUI), read Petitioner the implied consent notice for drivers aged 21 and over, and designated a breath test.

8.

At the scene Petitioner appeared confused and uncooperative. Instead of responding to the implied consent notice, Petitioner asked non-responsive questions such as "why were the deputies there and why couldn't he go into the house". Petitioner understood that he was under arrest for DUI and that the Arresting Deputy was requesting that Petitioner allow the State to draw blood, but Petitioner did not understand why he was under arrest

for DUI or why the State would want to draw blood.[1] In response to Petitioner's questions, the Arresting Deputy explained that Petitioner needed to provide a yes or no answer. After the Arresting Deputy asked Petitioner again if he would submit to the state administered chemical test, Petitioner did not respond. The Arresting Deputy took Petitioner's behavior and non-response as a refusal. The Arresting Deputy then transported Petitioner to the jail downtown.[2]

9.

Based on Petitioner's refusal at the arrest scene to take the state-administered breath test, the Arresting Deputy issued the appropriate DMVS 1205 form initiating the license suspension.

III. Conclusions of Law

1.

The burdens of persuasion and going forward with the evidence are upon the Respondent, however, both Petitioner and Respondent bear the burden of proof as to any fact, asserted by them, if the proof of said fact is essential to their case or defense. O.C.G.A. § 24-4-1, OSAH Rule 616-1-2-.07(1)(d). The standard of proof is preponderance of the evidence. O.C.G.A. § 50-13-15(1), O.C.G.A. § 24-4-3, OSAH Rule 616-1-2-.21(4).

2.

One of the issues to be determined within the scope of this administrative hearing is whether the law enforcement officer had reasonable grounds to believe that the Petitioner 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 O.C.G.A. § 40-6-391. OCGA § 40-5-67.1(a); *Miles v. Ahearn*, 243 Ga. App. 741; 534 S.E.2d 175 (2000) In order to determine the lawfulness of an arrest, it is necessary to establish that the underlying stop is supported by the requisite reasonable

[1] Although the Arresting Deputy's report was not introduced into evidence, testimony regarding the report indicated that the Arresting Deputy designated breath, blood and urine test when reading the Implied Consent Notice at the scene.

[2] At this point, the parties differ as to what occurred. The Arresting Deputy testified that after taking Petitioner to the detention center, he placed him in front of the intoxilyzer machine and again asked if he would submit to the state-administered breath test. The Arresting Deputy testified that Petitioner again refused. Petitioner testified that he was taken to the detention center and processed there but was not given a second opportunity to submit to the state administered test. Because I find that this fact will not affect the outcome of the case, I have made no finding as to whether Petitioner was afforded a second opportunity to submit to the state administered test.

and articulable suspicion. *Terry v. Ohio,* 392 U.S. 1(1968); *Vansant v. State* 264 Ga. 319, 443 S.E.2d 474 (1994)

3.

Reasonable and articulable suspicion to briefly detain and question Petitioner is established by the Arresting Deputy relying on the dispatcher's report and corroborating part of the report upon his arrival at Petitioner's wife's home. In *Overand v. State* 240 Ga. App. 682, 523 S.E.2d 610 (1999), the Georgia Court of Appeals held that "a dispatcher who reports a crime at a specified location gives police an articulable suspicion to investigate and detain individuals at the scene, particularly where police observations on arriving at the scene corroborate the dispatcher's report." In this case, the Arresting Deputy was responding to a call from dispatch stating that a person driving a white Nissan had made terroristic threats towards a homeowner and was on their way to the homeowner's residence. Upon arriving at the scene of the complaint, the Arresting Deputy observed a white Nissan speed towards the complainant's residence and pull into the driveway. The dispatcher's report, in addition to the Arresting Deputy's observations upon arriving at the scene, gave the Arresting Deputy articulable suspicion to detain Petitioner and investigate the alleged criminal activity. *Overand v. State* 240 Ga. App. 682, 523 S.E.2d 610 (1999)

4.

Petitioner's counsel argues that there is insufficient evidence to establish probable cause to legally arrest Petitioner for DUI. Although the Arresting Deputy did not present any evidence of the results of standardized field sobriety evaluations due to Petitioner's refusal to complete them, there was sufficient evidence to provide the requisite probable cause to arrest Petitioner for DUI. The Arresting Deputy's determination of probable cause for arrest for DUI was based on a smell of an alcoholic beverage emanating from Petitioner, Petitioner's behavior while interacting with the Arresting deputy, and Petitioner's manner of driving. Petitioner's counsel argues that Petitioner's behavior and manner of driving can easily be explained because he felt great concern for his family upon seeing three sheriff's cars in front of his home; however, the odor of an alcoholic beverage about Petitioner is sufficient for an arrest as the Georgia Court of Appeals stated in *Cann-Hanson v. State* that "even in the absence of field sobriety tests, the Deputy's observation . . . [of] bloodshot, watery eyes and . . . odor of alcohol was sufficient to show probable cause to arrest . . . for driving under the influence." Based upon the facts above, as well as the Arresting Deputy's overall assessment and opinion that Petitioner's was a less safe driver based upon the Arresting Deputy's training and experience, there was sufficient basis, under the preponderance of the evidence standard, to lawfully arrest Petitioner. See *Cann-Hanson v. State*, 223 Ga. App. 690, 478 S.E.2d 460 (1996);

Whitener v. State, 201 Ga. App. 309, 410 S.E.2d 796; State v. Smith, 196 Ga. App. 876, 397 S.E.2d 304 (1990).

5.

After arresting Petitioner, the Arresting Deputy properly informed him of his implied consent rights and the consequences of submitting or refusing to submit to a State-administered test. The arresting Deputy read Petitioner the implied consent rights for persons aged 21 and over. O.C.G.A. § 40-5-67.1(b) O.C.G.A. § 40-5-67.1 (g)(2)(C). *Cullingham v. State, 242 Ga. App. 499, 529 S.E.2d 199 (2000)*

6.

Petitioner's counsel raises three arguments regarding Petitioner's refusal at the scene to submit to the state administered chemical tests pursuant to the implied consent notice read to him. First, Petitioner's counsel argues that Petitioner did not respond to the Arresting Deputy's request that he submit to state administered chemical tests in part because he had greater concerns at the time than the implied consent notice due to his concern for his wife and children and also in part because he was confused as to whether he should or should not agree to submit to the state administered chemical test and he did not want to make a bad choice. Petitioner's counsel also argues that Petitioner requested the Arresting Deputy to explain the implied consent rights notice to him but the Arresting Deputy did not give any further clarification of the implied consent notice. Finally, Petitioner's counsel argues that the Arresting Deputy did not provide Petitioner with an opportunity to rescind his "refusal".

As to the first part of the first argument, I have found no authority that allows a person to not respond to a deputy's request for the person to submit to state administered chemical tests because the person is concerned about their family. When a person chooses to drive upon the roads of the State, they consent to submitting to state administered chemical tests. Upon reading of the implied consent notice correctly, a person has the option of submitting to the test or refusing to submit to the test. In this case, Petitioner chose to not respond which amounts to a refusal. *Furcal-Peguero v. State* 255 Ga. App. 729, 566 S.E.2d 320

As to the second part of the first argument and the second argument, the Arresting Deputy has no affirmative obligation to explain the implied consent notice to Petitioner. Petitioner's counsel argued that Petitioner was confused and did not understand his rights which is why he asked the deputy to explain it to him. However, in *State v. Kirbabas*, the Georgia Court of Appeals stated that a deputy is under no obligation or duty to give further warnings or instructions after reading the implied consent notice correctly. Furthermore, in *Furcal-Peguero v. State* the Georgia Court of Appeals reiterated the long standing rule that all drivers are entitled only to be advised of their rights under the law and the law does not require that the arresting officer ensure that the driver understands those rights. *State v. Kirbabas*, 235 Ga. App. 78, 508 S.E.2d 459 (1998), *Furcal-Peguero*

v. State 255 Ga. App. 729, 566 S.E.2d 320, *Hernandez v. State* 238 Ga. App. 796, 520 S.E.2d 698 (1999) and *State v. Tosar* 180 Ga. App. 885, 350 S.E.2d 811 (1986).

Finally, as to the third argument, I have found no supporting authority that an Arresting Deputy must affirmatively provide an arrestee an opportunity to rescind a refusal. If Petitioner told a law enforcement official at the detention center that he wanted to submit to the state administered chemical test and it was within a reasonable time, the law enforcement officers may have needed to accommodate Petitioner's request. However, there was no testimony that Petitioner, at any time, stated he would submit to a state administered chemical test of his breath, blood or urine. A deputy is not required under the law to afford a driver a second opportunity to refuse to submit to the state administered chemical test and the refusal at the scene of arrest is sufficient to warrant the issuance of the 1205 form in conjunction with the reasonable suspicion established to inquire as to Petitioner's intoxicated state, probable cause to arrest for DUI and reading of the correct implied consent rights.

Petitioner's non-response to the Arresting Deputy's request that Petitioner submit to the state administered chemical tests is a refusal. See *Fairbanks v. State* 244 Ga. App. 123, 534 S.E.2d 529 (2000), a continual demand for an attorney in response to the implied consent request for the state's test amounts to a refusal.

7.

Counsel for Petitioner further argues that there is insufficient evidence to establish a valid refusal. Counsel contends that the original printed slip of document from the Intoxilyzer machine indicating a refusal is the "best evidence" of such refusal. There is insufficient authority to support this argument, the Arresting Deputies testimony, as well as Petitioner's own testimony, indicates that Petitioner did not agree to submit to the state administered chemical breath test at the scene of arrest.

8.

The Court finds that there is competent evidence to provide the Arresting Deputy with 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 to lawfully arrest Petitioner for violation of O.C.G.A. § 40-6-391. The Arresting Deputy properly read the implied consent notice to Petitioner and Petitioner refused the request to submit to the state administered chemical test of Petitioner's breath.

IV. Decision

IT IS HEREBY ORDERED that the administrative license suspension or disqualification of the Petitioner's driver's license, permit or privilege to operate a motor vehicle or commercial motor vehicle in this state is **AFFIRMED** and that the license suspension is sustained.

This 23rd day of December, 2002.

Ana Kennedy
Administrative Law Judge