

THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[REDACTED]

Petitioner,

v.
DEPARTMENT OF DRIVER
SERVICES,

Respondent.

:
:
: Docket No. OSAH-DDS-ALS-
: 1412425-48-Schroer
:
: Agency Ref. No.: 049227727
:
:
:



DEC 23 2013

Hazel Jackson

Hazel Jackson, Legal Assistant

FINAL DECISION

I. Introduction

This matter is an administrative review of Respondent's decision to suspend Petitioner's driver's license pursuant to O.C.G.A. § 40-5-67.1. The hearing in this matter was held on December 18, 2013, before the Office of State Administrative Hearings, a court of administrative law. Petitioner was represented at the hearing by Rachel M. Kaufman, Esq. Respondent was represented by the arresting officer, Deputy Kenny Turner, of the Douglas County Sheriff's Department. After considering all the admissible evidence, Respondent's action is hereby **AFFIRMED**.

II. Findings of Fact

1. On September 4, 2013, at approximately 10:40 p.m., Investigator Matt Gray of the Douglas County Sheriff's Department observed Petitioner failing to maintain her lane of travel on a back road in Douglas County. Investigator Gray initiated a traffic stop after observing Petitioner's vehicle travel entirely over the center lane. (Testimony of Gray)

2. Upon speaking with Petitioner, Investigator Gray detected a strong odor of recently-applied perfume. Based on his training and experience, he believed that

Petitioner may have sprayed the perfume to mask an odor of some kind. Petitioner's eyes were glazed, and she was wearing only a bikini. Petitioner told the investigator that she had left a pool party and that she was trying to get to a local college by using the GPS on her mobile telephone. Petitioner denied having had any alcoholic beverage to drink prior to driving. (Testimony of Gray)

3. Because Investigator Gray was in an unmarked car without audio and video equipment, he requested that a uniformed deputy come to the scene and perform field sobriety tests. Deputy Turner arrived within ten or so minutes of Investigator Gray initiating the traffic stop. (Testimony of Gray)

4. When Deputy Turner approached Petitioner inside her vehicle, he detected an odor of alcohol coming from the vehicle. He observed that her eyes were blood-shot and glassy. Petitioner told Deputy Turner that she had had two bottles of Bud Lite beer at the Braves game prior to going to the pool party. Petitioner was still in her bikini, and Deputy Turner asked her to put on some clothes. Thereafter, Petitioner agreed to perform certain field sobriety tests, including the horizontal gaze nystagmus ("HGN") test, the walk and turn test, and the one-leg stand test. Petitioner was not able to complete the HGN test because she was drowsy and crying and could not focus on the stimulus. On the two other tests, Petitioner showed some clues of impairment, including swaying. Deputy Turner placed Petitioner under arrest for driving under the influence of alcohol. (Testimony of Turner; Testimony of Petitioner)

4. The arresting officer properly read Petitioner the implied consent notice for drivers age 21 and over. When asked whether she would consent to a state-administered chemical test of her breath or blood, Petitioner refused. However, after

Deputy Turner read the implied consent notice again, Petitioner agreed to take a breath test. (Testimony of Turner)

5. Deputy Turner transported Petitioner to the Douglas County jail. He proceeded to set up the Intoxilyzer equipment. Petitioner repeatedly stated that she needed to use the restroom. However, Deputy Turner told her that she must complete the test first and then she could go to the restroom.¹ Petitioner then said that she did not want to perform the test and she wanted her lawyer. Deputy Turner considered these statements to be a refusal. He entered “refused” into the Intoxilyzer and then allowed her to go the restroom. A female deputy retrieved Petitioner’s purse and let her into the locked restroom. (Testimony of Deputy Turner; Testimony of Petitioner; Ex. R-1)

6. After Petitioner exited the restroom, she told Deputy Turner that she wanted to take the breath test. Deputy Turner did not allow her to take the breath test because he had already entered her response as a refusal and because she had been out of his custody while using the restroom. Instead, Deputy Turner sought a search warrant to obtain a sample of Petitioner’s blood. (Testimony of Deputy Turner; Testimony of Petitioner)

III. Conclusions of Law

Based upon the above findings of fact, the Court makes the following 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

¹ According to Deputy Turner, he could not allow her to use the restroom before the test because he had to keep her under visual observation until the test was administered. He testified that if she went into the restroom, he would be unable to monitor her to ensure that she did not do anything that would compromise the test results.

of alcohol or a controlled substance, and Petitioner 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).

2. At the time he requested that Petitioner submit to the state-administered chemical test, the arresting officer properly informed 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 arresting officer's request to take the state-administered chemical test.² Although the Court finds that Petitioner later attempted to rescind her refusal, Petitioner's subsequent consent following her initial refusal was not effective under controlling Georgia case law. First, Georgia courts have "rejected the argument that once a suspect indicates to an officer that he refuses to submit to a blood-alcohol test, the matter is closed." See Ga. Dep't of Pub. Safety v. Seay, 206 Ga. App. At 72, citing State v. Highsmith, 190 Ga. App. 838, 839 (1989).

"Such a rigid rule," we said, "would not be consistent with the approach our courts have followed in applying the statute. . . ." [citation omitted] It is therefore clear that Georgia law recognizes the possibility that an individual may rescind his or her refusal to submit to an intoximeter test.

Id.

4. However, the Court of Appeals in *Seay* adopted certain factors for courts to consider in determining whether a driver has properly rescinded a prior refusal. Id. citing Standish v. Dep't of Revenue, 253 Kan. 900 (1984). See also McCafferty v. State,

² The Kansas Supreme Court, in a case cited approvingly by the Georgia Court of Appeals, held that "a conditional response such as, 'I want to talk to my attorney (or parent or relative or friend or some other third person first,' is not a consent to take the test. It is a refusal." Standish v. Dep't of Revenue, 235 Kan. 900, 903 (1984), *cited by* Ga. Dep't of Pub. Safety v. Seay, 206 Ga. App. 71, 72 (1992) and Howell v. State, 266 Ga. 480, 484-85 (2004).

248 Ga. App. 13 (2001). “[I]n order to be effective, a subsequent consent after a refusal to take a chemical test must be made: ‘(1) within a very short and reasonable time after the prior first refusal; (2) when a test administered upon the subsequent consent would still be accurate; (3) when testing equipment is still readily available; (4) when honoring the request would result in no substantial inconvenience or expense to the police; and **(5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest.**’” *Id.* (emphasis added)

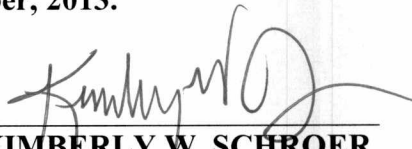
6. Although Respondent has the burden of proving the statutory requirements for the administrative suspension of a driver’s license under O.C.G.A. § 40-5-67.1(g)(2), Petitioner bears the burden of proving that she properly rescinded her initial refusal. See Complete Auto Transit, Inc. v. Baggett, 107 Ga. App. 415, 416 (1963) (“Evidence sufficient to establish a proponent’s case puts the adversary to the necessity of producing evidence to meet the prima facie case....”). She has failed to do so. Rather, the evidence shows that Petitioner did not remain under observation of Deputy Turner for the whole time since arrest. She took her purse into a restroom and was out of Deputy Turner’s visual observation for an undetermined period of time.

7. Accordingly, the Court concludes that Respondent met its burden in proving that the suspension of Petitioner’s driver’s license or driving privilege by the Department of Driver Services was proper under O.C.G.A. § 40-5-67.1 and that Petitioner failed to prove that she properly rescinded her prior refusal under the controlling case law.

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 23rd day of December, 2013.



KIMBERLY W. SCHROER
Administrative Law Judge

