BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

SANDHYA ANANTHARAMAN, Petitioner,	*	
	*	Docket No.:
v.	*	OSAH-DPS-ALS-1439471-60-Malihi
	*	
	*	Agency Reference No.: 051306516
DEPARTMENT OF DRIVER SERVICES, Respondent.	*	

JUL 21 2014

Victoria Hightower, Executive Assistant

Robert W. Chesney,
For Petitioner

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

FINAL DECISION.

I.
Findings of Fact

1. On February 6, 2014 at approximately 3:13 a.m., Trooper Christopher McEntyre of the Georgia State Patrol was on routine patrol in the Buckhead area when he observed a white Kia Rio operating without activated headlights headed northbound on Roswell Road. Trooper McEntyre turned onto Roswell Road, activated his emergency equipment, and initiated a traffic stop of the vehicle. The driver of the Kia Rio made a right turn into an adjacent parking lot, driving the vehicle over the sidewalk rather than using the parking lot's entrance. *Testimony of Trooper McEntyre; Exhibit P-1.*

2. Trooper McEntyre approached the vehicle and made contact with the driver. At the trooper's request, the driver produced her driver's license, and Trooper McEntyre identified her as Petitioner, Sandhya Anantharaman. *Testimony of Trooper McEntyre.*

3. Petitioner explained to Trooper McEntyre that the Kia Rio was a rental, and that she thought the vehicle's lights operated automatically. Upon speaking with Petitioner, Trooper McEntyre detected a strong odor of alcohol emanating from the vehicle's interior, whereupon he requested that Petitioner exit the vehicle. After Petitioner complied, Trooper McEntyre was able to determine that the strong odor of alcohol was emanating from Petitioner's breath. *Testimony of Trooper McEntyre.*

4. Trooper McEntyre further observed that Petitioner's eyes were red, watery, and bloodshot. In interviewing Petitioner, Trooper McEntyre noted that Petitioner's responses were slow and slurred and that Petitioner seemed confused. Petitioner admitted to consuming "two whiskey cokes" and one beer "a few hours" prior to the stop. *Testimony of Trooper McEntyre; Exhibit P-1.*

5. Trooper McEntyre asked Petitioner if she would submit to standardized field sobriety tests. Rather than provide a definitive response, Petitioner indicated that she did not understand the trooper's request and repeatedly asked him to explain the consequences of refusal to take the tests. Eventually, Trooper McEntyre explained to Petitioner that the field sobriety evaluations aided in his determination as to whether she was safe to drive and stated to Petitioner: "Everything that I've seen thus far is indication of an intoxicated driver." After Petitioner remained evasive after several minutes, Trooper McEntyre interpreted Petitioner's failure to provide a definitive response as refusal to submit to field sobriety tests. *Testimony of Trooper McEntyre*; *Exhibit P-1*.

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. Trooper McEntyre thereupon lawfully placed Petitioner under arrest for driving under the influence of alcohol and properly read to her the implied consent notice for drivers over the age of 21. At Trooper McEntyre's request, Petitioner agreed to submit to a state-administered test of her breath. *Testimony of Trooper McEntyre*.

7. Trooper McEntyre administered a breath test 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. Petitioner provided two breath samples, the results of which were as follows: 0.187 grams at 4:09 a.m. and 0.181 grams at 4:12 a.m. *Testimony of Trooper McEntyre; Exhibit R-2*.

8. The parties stipulated to the following facts at the hearing on this matter:

- Trooper McEntyre is certified by the Georgia Bureau of Investigation Division of Forensic Sciences to operate the Intoxilyzer 5000.
- The Intoxilyzer 5000 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.
- The substance of the appropriate implied consent notice was properly read by Trooper McEntyre, though dispute remained as to timing of the reading.
- The test results indicated an alcohol concentration of 0.08 grams or more.

9. Petitioner contended that Respondent had not met its burden to uphold the suspension of her license inasmuch as the arresting officer lacked reasonable grounds to arrest Petitioner for DUI. Additionally, Petitioner, through argument of counsel, submitted that Trooper McEntyre effectively placed Petitioner under custodial arrest by making the above-mentioned statement to the effect that everything that he had observed indicated an intoxicated driver. Consequently, Petitioner argued, Trooper McEntyre's reading of the implied consent notice (approximately seven minutes after the statement) was untimely. In support of this argument, counsel for Petitioner cited Brown v. State, 265 Ga. App. 129 (2004); Clapsaddle v. State, 208 Ga. App. 840 (1993); Edge v. State, 226 Ga. App. 559 (1997); Dawson v. State, 227 Ga. App. 38 (1997); Hough v. State, 279 Ga. 711 (2005); and Perano v. State, 250 Ga. 704 (1983).

II. Conclusions of Law

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

A. Trooper McEntyre's Reading of the Implied Consent Notice was Timely

1. O.C.G.A. § 40-5-55(a) provides that:

> [a]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 . . . .

O.C.G.A. § 40-5-55(a) (2013).

2. Code Section 40-6-392 requires the arresting officer to advise the arrestee of her rights to a chemical test or tests at the time of the arrest. O.C.G.A. § 40-6-392(a)(4) (2013). In Perano v. State, the Supreme Court of Georgia held that this statute requires that the implied consent notice be read either "at the time of arrest, or at a time as close in proximity to the instant of arrest as the circumstances of the individual case might warrant." Perano v. State, 250 Ga. 704, 708 (1983). This requirement is referred to as the "proximity rule." See Hough v. State, 279 Ga. 711 (2005).

3. "Georgia law recognizes three tiers of police-citizen encounters: (1) consensual encounters; (2) brief detentions that must be supported by reasonable suspicion; and (3) arrests, which must be supported by probable cause." State v. Norris, 281 Ga. App. 193, 194 (2006); O'Neal v. State, 273 Ga. App. 688, 690 (2005). "A law enforcement officer's stop and detention of a motorist to investigate a possible DUI violation is a second-tier encounter." State v. Norris, 281 Ga. App. 193, 194 (2006). The requirement that the arresting officer read the implied consent notice to the individual is triggered when the second-tier investigative detention escalates into a third-tier custodial arrest. State v. Norris, 281 Ga. App. 193, 195 (2006); see also Plemmons v. State, 326 Ga. App. 765, 768 (2014).

4. The test for determining whether a person has been placed under custodial arrest

> is whether the individual was [1] *formally arrested* or [2] *restrained to a degree associated with a formal arrest*, not whether the police had probable cause to arrest. The test ... is whether a reasonable person in the suspect's position would have thought the detention would not be temporary . . . . [I]t is the reasonable belief of an ordinary person

under such circumstances, and not the subjective belief or intent of the officer, that determines whether an arrest has been effected.

State v. Norris, 281 Ga. App. 193, 195-196 (2006) (emphasis added).

5. In the present case, Petitioner contends that at the time Trooper McEntyre stated that he had observed indicia of intoxication, the encounter escalated into a custodial arrest, whereupon he was obligated to immediately read the implied consent notice pursuant to the proximity rule. Therefore, according to Petitioner's argument, Trooper McEntyre's reading of the implied consent notice approximately seven minutes after the aforementioned statement constituted an unreasonable delay and rendered the implied consent defective. Petitioner's argument is without merit.

6. Trooper McEntyre's statement that he observed indicia of intoxication did not elevate the police-citizen encounter to a third-tier custodial arrest. Rather, Trooper McEntyre's statement amounted to an explanation of his request for field sobriety tests. The statements certainly did not constitute a formal arrest. Moreover, they would not place an ordinary person in like circumstances under a reasonable belief that their detention would not be temporary. A mere explanatory statement by a law enforcement officer falls far short of the generally-recognized hallmarks of custodial arrest. See United States v. Hastamorir, 881 F.2d 1551, 1556 (11th Cir. 1989) (factors that may indicate an arrest include, but are not limited to, blocking an individual's path, displaying weapons, number of officers present, length of the detention, and the extent to which officers physically restrain an individual); see also Courson v. McMillan, 939 F.2. 1429 (11th Cir. 1991) ("[An] officer's not taking detained individual to a station or office, not conducting a full search of [her] person, and not touching the individual indicate an investigatory stop, rather than an arrest."). Accordingly, Trooper McEntyre properly read the applicable implied consent notice to Petitioner at the time of the arrest.

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

1. This appeal arises under Georgia's Motor Vehicle and Traffic laws. O.C.G.A. § 40-5-67.1 (2013). 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. In this case, the arresting officer 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 her to drive and lawfully placed her under arrest for violating O.C.G.A. § 40-6-391. Trooper McEntyre had reasonable grounds based upon Petitioner's confused demeanor; her slurred, slow, and confused speech; her bloodshot, watery, eyes, the strong odor of alcohol on her breath, and her admission that she had consumed alcohol prior to the stop. See Frederick v. State, 270 Ga. App.

397, 398 (2004); Cann-Hanson v. State, 223 Ga. App. 690, 691 (1996). Trooper McEntyre also had reasonable grounds to believe that Petitioner was intoxicated based upon her erratic driving. See Mayberry v. State, 312 Ga. App. 510, 511–12 (2011); Pecina v. State, 274 Ga. 416, 419 (2001) ("When there is evidence that the defendant has been drinking, the manner of his driving may be considered on the question of whether he has been affected by alcohol to the extent that he is less safe to drive.").

3. As discussed *supra*, Trooper McEntyre properly informed Petitioner of her implied consent rights and the consequences of submitting or refusing to submit to a state-administered chemical 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).

Accordingly, the suspension of Petitioner's driver's license and driving privilege by Respondent was proper. O.C.G.A. § 40-5-67.1 (2013).

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 21st day of July, 2014.

MICHAEL MALIHI, Judge

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