

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

VINCENT JONATHAN JOHNSON,
Petitioner,

v.

**DEPARTMENT OF DRIVER
SERVICES,**
Respondent.

Rebecca Kozycki, Esq.,
For Petitioner

For Officer Rodney Smither, Complainant witness for Respondent.

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Docket No.:
OSAH-DDS-ALS-1446835-60-Malihi
Agency Reference No. 053863607



NOV 12 2014

Valerie Ruff
Valerie Ruff, Legal Assistant

FINAL DECISION

I. Introduction

This matter is an administrative review of the decision of Respondent, the Department of Driver Services, to suspend Petitioner's driver's license or privilege to drive in the State of Georgia pursuant to O.C.G.A. § 40-5-67.1. An evidentiary hearing was held on November 6, 2014 before the undersigned Administrative Law Judge at the Office of State Administrative Hearings in Atlanta, Georgia. For the reasons indicated below, Respondent's action is **AFFIRMED**.

II. Findings of Fact

1. The following facts were not disputed at the evidentiary hearing:
 - a. On March 2, 2014, Officer Rodney Smither responded to the scene of a traffic accident.¹
 - b. Petitioner, Vincent Jonathan Johnson, was the driver of one of the vehicles involved in the accident.
 - c. After approaching and speaking with Petitioner, Officer Smither observed sufficient indicia of intoxication to form the reasonable belief that Petitioner had consumed an unknown quantity of alcohol in such a manner as to make Petitioner a less safe driver.
 - d. After Petitioner was secured to a gurney by handcuffs, Officer Smither read the implied consent notice for drivers over the age of 21 to him.
 - e. Petitioner refused to submit to the state-administered chemical tests requested by the officer.
 - f. Petitioner was transported by ambulance to Grady Hospital.

¹ It is unclear from the evidentiary record whether the traffic accident resulted in serious injuries or fatalities.

2. Dispute remained, however, over whether Petitioner was under arrest at the time Officer Smither read the implied consent notice to him. Officer Smither testified that he read the implied consent notice “after placing [Petitioner] under arrest,” while Petitioner was handcuffed to the gurney. *Testimony of Officer Smither.*

3. Petitioner testified that Officer Smither did not inform him that he was under arrest when he was placed on the gurney, but merely told him that he was going to the hospital to get “checked out.” According to Petitioner, Officer Smither did not inform him that he was under arrest until later at the hospital. *Testimony of Petitioner.*

4. Petitioner, through argument of counsel, contended that Officer Smither had improperly read implied consent prior to placing Petitioner under arrest, citing the requirement expressed by the Georgia Supreme Court in Hough v. State. Specifically, Petitioner’s counsel argued that, at the time Officer Smither read the implied consent notice to Petitioner, Petitioner was not under formal or custodial arrest. Counsel for Petitioner further argued that the fact that Petitioner was in handcuffs at the time of the reading of implied consent did not demand the conclusion that he was under arrest, citing the Georgia Supreme Court case of Smith v. State, 271 Ga. 609 (2005), and the Georgia Court of Appeals cases of Christy v. State, 315 Ga. App. 647 (2012), and Bond v. State, 271 Ga. App. 849 (2005).

III. Conclusions of Law

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

1. This appeal arises under Georgia’s Motor Vehicle and Traffic laws. O.C.G.A. § 40-5-67.1 (2014). 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. 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 or if such person is involved in any traffic accident resulting in serious injuries or fatalities.

O.C.G.A. § 40-5-55(a) (2014).

3. 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). The Georgia Supreme Court held in Hough v. State that, based upon the clear language of the implied consent statutes, “a suspect who is not involved in a traffic accident resulting in serious injuries or fatalities must be placed under arrest *before* implied consent rights are read to him.” Hough v. State, 279 Ga. 711, 716 (2005) (emphasis added).

4. “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). In the present case, Petitioner argues that, at the time Officer Smither read the implied consent notice, the encounter had not escalated into a third-tier custodial arrest. Petitioner’s argument is without merit.

5. 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).

6. Preempting whether Petitioner had been placed under formal arrest prior to the reading of implied consent, he was nonetheless under custodial arrest inasmuch as a reasonable person in Petitioner’s circumstances would believe that they were restrained to a degree associated with formal arrest. A reasonable person, when placed in handcuffs for transport to a hospital by ambulance, would conclude that their detention would not be temporary absent indicia to the contrary, such as a representation from a police officer that they were not under arrest or that the use of handcuffs was a routine precaution. See Smith v. State, 271 Ga. 609 (2005) (suspect handcuffed during transport was not under custodial arrest because officers told him that he was not under arrest, he went willingly with police officers, and the use of handcuffs was a routine precautionary measure); Bolden v. State, 278 Ga. 459, 463 (2004) (handcuffed suspect not under arrest where she was repeatedly told by officers that she was not under arrest, that the handcuffs were a safety precaution, that she was free to leave at any time, and the handcuffs were promptly removed after transport). Petitioner’s testimony to the effect that he was given assurances by

Officer Smither that he was merely being taken to the hospital to get “checked out” is not credible.

7. An officer’s use of handcuffs during an investigatory stop does not render the encounter a third-tier arrest when such action is reasonable to protect the safety of officers or the public or to maintain the status quo. Smith, 271 Ga. at 187; Christy v. State, 315 Ga. App. 647 (2012) (no custodial arrest where suspect temporarily placed in handcuffs for the officer’s safety and the officer told the suspect that he was not under arrest); Bond v. State, 271 Ga. App. 849 (2005) (no custodial arrest where suspect temporarily placed in handcuffs as a safety precaution). However, nothing in the evidentiary record indicates that Petitioner was placed in handcuffs as a temporary measure to ensure the safety of officers or the public or to maintain the status quo. Rather, Officer Smither placed Petitioner in handcuffs to effectuate an arrest. Therefore, the undersigned concludes that Officer Smither properly and timely informed Petitioner of his 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).

8. Officer Smither 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 him to drive and lawfully placed him under arrest for violating O.C.G.A. § 40-6-391.

9. Petitioner refused the state designated tests. O.C.G.A. § 40-5-67.1(g)(2)(C)(i) (2014).

Accordingly, the suspension of Petitioner’s driver’s license and driving privilege by Respondent was proper. O.C.G.A. § 40-5-67.1 (2014).

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 10th day of November, 2014.


MICHAEL MALIHI, Judge