

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

**ROBERT KEITH BAPTISTE,**  
                    **Petitioner,**

v.

**DEPARTMENT OF NATURAL  
RESOURCES,**  
                    **Respondent.**

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**Docket No.:**  
**OSAH-BNR-BUI-1604812-69-Miller**  
  
**Agency Reference No.: 026496743**

**FINAL DECISION**

**I. OVERVIEW**

This matter is an administrative review of the Department’s decision to suspend the Petitioner’s privilege to operate a moving vessel on Georgia waters pursuant to O.C.G.A. § 52-7-12.5. The hearing took place on August 25, 2015,<sup>1</sup> before the undersigned administrative law judge of the Office of State Administrative Hearings. After considering all of the admissible evidence and for the reasons stated below, the Respondent’s action is **AFFIRMED**.

**II. FINDINGS OF FACT**

1.

On July 12, 2015, at approximately 12:05 a.m., Corporal Jason Roberson of the Department of Natural Resources (“DNR”) was patrolling Lake Lanier in Hall County, Georgia, when he observed a large cabin cruiser operated by the Petitioner traveling at a speed that created a wake in an area marked as a “no wake zone.” The Petitioner’s vessel was motorized and exceeded ten horsepower. (Testimony of Cpl. Roberson.)

2.

Corporal Roberson initiated a stop and safety check of the Petitioner’s vessel. During the safety check, Corporal Roberson observed that Petitioner exhibited slurred speech, poor

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<sup>1</sup> The record was held open until September 8, 2015, for the submission of post-hearing briefs and Exhibit P-1. To the extent the Petitioner offered additional exhibits as part of his post-hearing filing, such exhibits were not authorized and have not been admitted into evidence.

coordination, and glassy, watery, and bloodshot eyes. Corporal Roberson also smelled a strong odor of alcohol on the boat and noted that the Petitioner maintained one-hand contact with the boat while moving around. The Petitioner denied that he had consumed any alcohol. When Corporal Roberson asked the Petitioner to put on a life jacket and board the DNR boat, the Petitioner appeared confused by the request and struggled to put on his life jacket. Once the Petitioner was aboard the DNR vessel, Corporal Roberson noted a strong odor of alcohol on the Petitioner's breath. (Testimony of Cpl. Roberson; Exhibit P-1.)

3.

Corporal Roberson asked the Petitioner to submit to field sobriety testing. The Petitioner declined to perform any field sobriety exercises at that time. (Testimony of Cpl. Roberson; Exhibit P-1.)

4.

Corporal Roberson placed the Petitioner under arrest for boating under the influence, read him the implied consent notice for drivers age 21 and over, and designated a breath test as the state-administered chemical test. The Petitioner refused to submit to the state-administered breath test, but stated multiple times that he wanted to take a blood test. When Corporal Roberson began to re-read the implied consent notice, the Petitioner stated he did not need to hear it again. (Testimony of Cpl. Roberson; Exhibits DNR-1; P-1.)

5.

After he was placed under arrest, the Petitioner asked Corporal Roberson to administer the field sobriety tests. Corporal Roberson therefore advised him of his Miranda rights and asked him if he would take the field sobriety tests. When the Petitioner stated that he would, Corporal Roberson administered (1) the horizontal gaze nystagmus ("HGN") test; (2) a number

count exercise; (3) the alphabet test; (4) the finger dexterity test; and (5) the hand pat test. During the HGN test, the Petitioner exhibited six out of six clues of impairment. The Petitioner's speech was thick and slurred during the number count exercise and the alphabet test, and he started too soon and exhibited poor coordination during the hand pat test. During the finger dexterity exercise, the Petitioner miscounted, exhibited poor coordination, and touched the pads of his fingers instead of his fingertips. Corporal Roberson also administered a preliminary test of the Petitioner's breath, which was positive for the presence of alcohol. These tests indicated to Corporal Roberson that the Petitioner was not safe to drive a vessel, and he informed the Petitioner that he was still under arrest for boating under the influence. (Testimony of Cpl. Roberson; Exhibit P-1.)

6.

Corporal Roberson transported the Petitioner to the intoxilyzer facility at Aqualand Marina to complete paperwork and wait for a deputy to transport the Petitioner to jail. They waited at the facility for approximately ten minutes before Deputy Bonds of the Hall County Sheriff's Department arrived. Deputy Bonds searched the Petitioner, secured him in handcuffs, and placed him in the back of his patrol vehicle. The Petitioner was turned over to the deputy's custody approximately one hour and forty (40) minutes after the initial stop. (Testimony of Cpl. Roberson; Exhibit P-1.)

7.

A short time later, approximately ten minutes after they departed from the marina, Deputy Bonds called Corporal Roberson and told him that the Petitioner was now asking for a breath test. Corporal Roberson determined that the Petitioner's belated request was unreasonable

because more than two hours had elapsed<sup>2</sup> since his first contact with the Petitioner and he had received other calls for service during that time. Therefore, Corporal Roberson elected not to provide the Petitioner with another opportunity to take the state-administered test of his breath. (Testimony of Cpl. Roberson; Exhibit P-1.)

### III. CONCLUSIONS OF LAW

#### 1.

The Respondent bears the burden of proof in this matter. Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-21(4). The Respondent met its burden.

#### 2.

Corporal Roberson had reasonable grounds to believe the Petitioner was operating or in actual physical control of a moving vessel upon the waters of this state while under the influence of alcohol or a controlled substance in violation of O.C.G.A. § 52-7-12. O.C.G.A. § 52-7-12.5(g)(2)(A)(i); see also State v. Baker, 197 Ga. App. 1, 2-3 (1990) (requiring reasonable, articulable suspicion to justify a stop). Corporal Roberson possessed a reasonable, articulable suspicion for the stop when he observed the Petitioner's vessel creating a wake in a no wake zone. See O.C.G.A. §§ 52-7-20(a)(2), (b). Further, Corporal Roberson had reasonable grounds to believe the Petitioner was under the influence of alcohol based on a totality of the circumstances, including the Petitioner's glassy, watery, and bloodshot eyes, slurred speech, lack of coordination, and the strong odor of alcohol on his breath.

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<sup>2</sup> Corporal Robinson overestimated the amount of time that had passed, which was closer to one hour and fifty minutes. (Exhibit P-1.)

3.

At the time of the request for the state-administered chemical test, Corporal Roberson properly informed the Petitioner of his implied consent rights and the consequences of submitting or refusing to submit to the state-administered test. O.C.G.A. § 52-7-12.5(g)(2)(B). The Petitioner argues that Corporal Roberson should have re-read the implied consent notice to clear up the Petitioner's purported confusion and/or allowed the Petitioner to take a blood test instead of a breath test. Corporal Roberson, however, was not required to read the implied consent notice a second time. See O.C.G.A. § 52-7-12.5(b) (an individual to whom an officer reads the implied consent notice is "deemed to have been properly advised of his or her rights"). Moreover, the Petitioner was only entitled to take a test of his choosing after performing the state-administered breath test. See O.C.G.A. §§ 52-7-12.5(a), (b)(2).

4.

Corporal Roberson did not err in denying the Petitioner's attempt to rescind his prior refusal to submit to the state-administered chemical test. The Georgia Court of Appeals has articulated five factors for courts to consider in determining whether a driver has properly rescinded a prior refusal. See Ga. Dep't of Pub. Safety v. Seay, 206 Ga. App. 71, 73 (1992). "[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 [the] arrest.'" Id. at 73. Although the Respondent has the burden of proving the statutory

requirements for the administrative suspension of the Petitioner's privilege to operate a vessel on the waters of the state, the Petitioner bears the burden of proving that he properly rescinded his initial refusal. See O.C.G.A. § 24-14-1 ("The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential."); 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 . . ."). The Petitioner did not meet his burden to show that his attempted rescission complied with the Seay guidelines.

5.

Under the fourth element of the Seay test, the Petitioner was required to show that granting his belated request to submit to the state-administered test would not result in substantial inconvenience or expense to the police. The only evidence presented on this issue was Corporal Roberson's testimony that he had received other calls for service during the time he spent with the Petitioner, and that he believed honoring the Petitioner's request would have been unreasonable under the circumstances. The Petitioner did not rebut this testimony, nor did he offer any evidence as to whether or not Deputy Bonds would have experienced any inconvenience or expense.

6.

Further, although the Petitioner was under Corporal Roberson's observation from the time of the initial stop until he was turned over to Deputy Bonds, the record contains no evidence regarding what happened while the Petitioner was in Deputy Bonds' custody, other than his attempt to rescind his prior refusal. Thus, it is unknown whether the test results could

have been compromised or testing protocol violated due to events that occurred after the Petitioner left the marina.

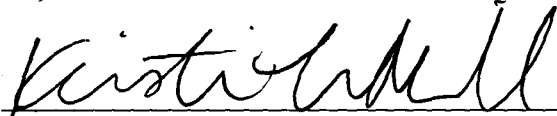
7.

The Court concludes that because the Petitioner refused the state-designated test and did not show, based on the evidence of record, that he properly rescinded his initial refusal, the Respondent's suspension of his privilege to operate a vessel on the waters of this state for one year was proper. O.C.G.A. § 52-7-12.5(e), 52-7-12.5(g)(2)(B)(i).

**IV. DECISION**

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Respondent's decision to administratively suspend the Petitioner's privilege to operate a vessel on the waters of this state is **AFFIRMED**.

**SO ORDERED**, this 15<sup>th</sup> day of September, 2015.

  
**KRISTIN MILLER**  
Administrative Law Judge