BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

RILEY KOONTZ,	:	
Petitioner,	:	
	:	**Docket No.:**
v.	:	**OSAH-DDS-ALS-1620749-33-Woodard**
	:	
	:	**Agency Reference No.: 058446964**
DEPARTMENT OF DRIVER	:	
SERVICES,	:	
Respondent.	:	

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. The hearing on this matter was held before the undersigned Administrative Law Judge at the Marietta Municipal Court on January 11, 2016.[1] Justin Spizman, Esq., represented Petitioner at the evidentiary hearing and Officer Sam Daniels of the Cobb County Police Department testified as the arresting officer. For the reasons indicated below, Respondent's action is **AFFIRMED**.

II. Findings of Fact

1. On October 18, 2015, Officer Daniels was called to the scene of a traffic stop on I-75 to conduct a DUI investigation. Upon arriving at the scene, Officer Daniels spoke with Officer Bultman of the Cobb County Police Department, who indicated to Officer Daniels that he had initiated a traffic stop of a 2000 Dodge pickup for failing to maintain a single lane of travel. Specifically, Officer Bultman reported that he had observed the 2000 Dodge pickup straddle the lane line for several hundred yards. Officer Bultman further indicated to Officer Daniels that he had detected the odor of an alcoholic beverage emanating from the driver's breath, and that he observed the driver's eyes to be bloodshot and watery. (Testimony of Officer Daniels).[2]

2. After speaking with Officer Bultman, Officer Daniels made contact with the driver of the 2000 Dodge pickup, Petitioner Riley Koontz. Upon speaking with Petitioner, Officer Daniels noticed that Petitioner's eyes were bloodshot and watery, and that Petitioner's speech was slurred. He

[1] Following the hearing, the evidentiary record remained open to allow the parties to file briefs. Petitioner filed such brief on January 19, 2016, and Officer Daniels filed a response on January 25, 2016.

[2] During the evidentiary hearing, counsel for Petitioner objected to admission of the out-of-court statements of Officer Bultman, who did not testify at the hearing, on hearsay grounds. However, Officer Bultman's statements were admitted into the record over Petitioner's continued hearsay objection based upon the "collective knowledge" doctrine. See Burgeson v. State, 267 Ga. 102, 105 (1996); Goodman v. State, 255 Ga. 226, 229 (1985).

also detected an odor of an alcoholic beverage emanating from Petitioner's breath. Petitioner denied consuming alcoholic beverages prior to the stop. (Testimony of Officer Daniels).

3. Petitioner refused Officer Daniels' request to submit to a preliminary breath test on an Alco-sensor, but agreed to submit to standardized field sobriety tests, whereupon Officer Daniels administered the horizontal gaze nystagmus (HGN), walk-and-turn, and one-leg stand tests after ensuring that Petitioner did not have any medical conditions that could affect the outcome of the tests. Petitioner exhibited six out of six possible clues of impairment on the HGN test, four out of eight possible clues on the walk-and-turn test, and one out of four possible clues on the one-leg stand test. Based upon his prior detection of Petitioner's slurred speech, Officer Daniels also requested that Petitioner recite the alphabet from "A" to "X". Petitioner failed to satisfactorily recite the alphabet as requested. (Testimony of Officer Daniels).

4. The foregoing facts caused Officer Daniels to believe that the Petitioner had consumed an unknown quantity of alcohol in such a manner as to make him a less safe driver. He thereupon placed Petitioner under arrest for driving under the influence and read Petitioner the implied consent notice for drivers under the age of 21.[3] Petitioner refused Officer Daniels' request to submit to a state-administered chemical test of his breath, stating "No, sir." Officer Daniels advised Petitioner that he would be transported to a nearby police precinct, where Officer Daniels would apply for a search warrant to obtain his blood, breath, and/or urine. (Testimony of Officer Daniels).

5. Officer Daniels transported Petitioner to Precinct One, where, after securing Petitioner in a holding cell, he applied for a search warrant. Petitioner remained in custody and under observation at all times following his arrest. At no time did Petitioner affirmatively request to take the chemical test, or indicate to Officer Daniels that he would like to rescind his prior refusal. (Testimony of Officer Daniels).

6. Officer Daniels was granted a search warrant for Petitioner's "breath, blood, and/or urine" at 2:24 a.m., approximately two hours after the initial stop of Petitioner's vehicle. Officer Daniels presented the search warrant to Petitioner and advised him that he could provide his blood, or his breath, or be "charged with obstruction." Officer Daniels thereupon administered a breath test, during which Petitioner provided samples of his breath. (Testimony of Officer Daniels).

7. At the hearing on this matter, and in a post-hearing brief, Petitioner, through counsel, argued that he rescinded his refusal to take the State-administered chemical test of his breath by submitting to a breath test after Officer Daniels presented him with a search warrant. Petitioner cited Dep't of Public Safety v. Seay, 206 Ga. App. 71 (1992), State v. Highsmith, 190 Ga. App. 838 (1989), and Creamer v. State, 229 Ga. 511 (1972) in support of this argument.

III. Conclusions of Law

Based on the above findings of fact, the undersigned makes the following conclusions of law:

[3] Officer Daniels determined that Petitioner was under the age of 21 based on Petitioner's driver's license. (Testimony of Officer Daniels).

A. Submission to a chemical test after presentation of a search warrant does not constitute rescission of a prior refusal.

1. This appeal arises under Georgia's Motor Vehicle and Traffic laws. O.C.G.A. § 40-5-67.1. Respondent bears the burden of proof. GA. COMP. R. & REGS. 616-1-2-.07. The standard of proof is a preponderance of the evidence. GA. COMP. R. & REGS. 616-1-2-.21.

2. Georgia law recognizes the possibility that an individual may rescind his or her refusal to submit to a state-administered chemical test. Ga. Dep't of Pub. Safety v. Seay, 206 Ga. App. 71, 72 (1992); State v. Highsmith, 190 Ga. App. 838 (1989). In Department of Public Safety v. Seay, the Georgia Court of Appeals adopted specific guidelines for determining whether a refusal to submit to a state-administered chemical test had been properly rescinded. Seay, 206 Ga. App. at 73. However, as the Court of Appeals later held in Howell v. State, "the guidelines adopted in Seay assume that in order for rescission of a refusal . . . to be effective, the defendant *must affirmatively request that a test be given*." 266 Ga. App. 480, 485 (2004) (emphasis added); see also Seay, 206 Ga. App. at 72 (following initial refusal, driver asked officers three separate times if he could take the test). In the present case, the undersigned concludes that Petitioner did not rescind his initial refusal to submit to a chemical test.

3. In Howell, a driver arrested for DUI unequivocally refused to submit to a state-administered chemical test after having been properly advised of his implied consent rights. Howell, 266 Ga. App. at 481. The arresting officer then transported the driver to a detention center, where he directed another officer to administer a breath test. Id. The second officer directed the driver to blow into the testing device and told him that his failure to blow into the machine would be considered a refusal. Id. The driver then provided two breath samples. Id. The Court held that the state failed to show that the driver rescinded his earlier refusal to take the state-administered chemical test. Id. at 482. In so holding, the Court wrote:

> There is no evidence Howell was asked a second time whether he would consent to a state-administered test and no evidence that he rescinded his refusal and thereafter consented. He was thus administered a breath test simply because he did not refuse to cooperate.

Id. The Court of Appeals thus rejected the argument that the driver could be shown to have withdrawn his refusal by virtue of the fact that he submitted to the test, and in so doing drew a very clear distinction between an individual's cooperation with the state-administered test and rescission of a prior refusal.[4]

4. In the present case, Petitioner never affirmatively requested a chemical test. Further, he submitted to such a test only after Officer Daniels presented him with a search warrant and indicated that he would be charged with obstruction if he failed to cooperate. Acquiescence to

[4] The Court of Appeals reversed the trial court, which had denied the driver's motion to suppress "on grounds that although [the driver] initially refused to take the test, and although there was no evidence that he rescinded his initial refusal by actually requesting a test, there was also no evidence that he was coerced into taking the test." Howell, 266 Ga. App. at 483–84.

the command of an officer bearing a search warrant is not akin to consent. As the United States Supreme Court noted in Bumper v. North Carolina, "'The presentation of a search warrant . . . by one authorized to serve it, is tinged with coercion, and submission thereto . . . is to be considered a submission to the law.'" 391 U.S. 543, 549 n.14 (1968) (quoting Meno v. State, 164 N.E. 93, 96 (Ind. 1925)). Petitioner's submission to the breath test was not tantamount to an affirmative request for a test, or a "subsequent consent after refusal" as contemplated by Seay, but capitulation to the force of law. See, e.g., United States v. Elliott, 210 F.Supp. 357, 360.

B. The suspension of Petitioner's license was proper under O.C.G.A § 40-5-67.1.

5. Pursuant to O.C.G.A. § 40-5-55,

> any 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. Further, Code Section 40-5-67.1 provides that such chemical tests

> shall be administered as soon as possible at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391 and the officer has arrested such person for a violation of Code Section 40-6-391.

O.C.G.A. § 40-5-67.1(a). At the time a chemical test or tests are requested, the arresting officer shall select and read to the person the appropriate implied consent notice. O.C.G.A. 40-5-67.1(b). The officer must have reasonable grounds that the person was "*lawfully* placed under arrest for violating Code Section 40-6-391." O.C.G.A. § 40-5-67.1(g)(2)(A)(i) (emphasis added). In order for the arrest to be lawful, it must be supported by probable cause. See, e.g., O'Neal v. State, 273 Ga. App. 688, 690 (2005).

6. "Probable cause exists if the arresting officer has knowledge and reasonably trustworthy information about facts and circumstances sufficient for a prudent person to believe the accused has committed an offense." Devega v. State, 286 Ga. 448 (2010). "[W]hen a court considers whether an officer had probable cause to arrest a suspect, the court must focus on the facts and circumstances then known to the officer, and it must inquire whether those facts and circumstances *could* lead a prudent person—that is, a reasonable officer—to conclude that the suspect probably has committed an offense." Hughes v. State, 296 Ga. 744, 748–49 (2015) (emphasis in original).

7. In the present case, Officer Daniels had probable cause to believe that Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol or a controlled substance, and lawfully placed him under arrest for violating O.C.G.A. § 40-6-391

and O.C.G.A. § 40-5-67.1(g)(2)(A)(i). Officer Daniels had probable cause based on Petitioner's bloodshot, watery eyes and slurred speech, the odor of an alcoholic beverage emanating from Petitioner's breath, and the results of the field sobriety evaluations. See Frederick v. State, 270 Ga. App. 397 (2004); Cann-Hanson v. State, 223 Ga. App. 690, 691 (1996). Officer Daniels' determination of probable cause was further supported by Officer Bultman's report regarding the manner of Petitioner's driving. Goodman v. State, 255 Ga. 226 (1985) ("Probable cause may rest upon the collective knowledge of the police when there is some degree of communication between them, rather than solely on the information possessed by the officer who actually makes the arrest." (quoting Whitely v. Warden, 401 U.S. 560 (1971))); see also Pecina v. State, 274 Ga. 416, 419 (2001).

8. At the time of the request for the state-administered chemical test, Officer Daniels informed the Petitioner of his implied consent rights and the consequence of submitting or refusing to submit to the test. O.C.G.A. § 40-5-67.1(g)(2)(B).

9. Petitioner refused to submit to the state-administered chemical test. O.C.G.A. § 40-5-67.1(g)(2)(C)(i).

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, Respondent's action is **AFFIRMED**.

SO ORDERED this _____ day of February, 2016.

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M. PATRICK WOODARD, JR.
Administrative Law Judge