

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

RICHARD WILLINGHAM,
Petitioner,

v.

**DEPARTMENT OF DRIVER
SERVICES,**
Respondent.

Docket No.: 1726445
1726445-OSAH-DDS-ALS-69-Miller

Agency Reference No.: 056934736



APR 12 2017

FINAL DECISION

I. OVERVIEW

This matter is an administrative review of the Respondent's decision to suspend the Petitioner's driver's license pursuant to O.C.G.A. § 40-5-67.1. The hearing took place on March 29, 2017,¹ before the undersigned administrative law judge of the Office of State Administrative Hearings. After considering all of the admissible evidence and arguments, and for the reasons stated below, the Respondent's action is **AFFIRMED**.

Alicia McDonald
Alicia McDonald, Legal Assistant

II. FINDINGS OF FACT

1.

On February 8, 2017, at approximately 12:30 a.m., Officer Cory Cummings of the Gainesville Police Department was standing near his vehicle with a group of law enforcement officers who were preparing for a warrant service behind a Kangaroo gas station on West Avenue in Gainesville, Georgia. The officers heard a loud, revving engine and squealing tires, then observed an orange Dodge Challenger "laying drags" and traveling at a high rate of speed down West Avenue. Because the officers were occupied with other duties, they did not initiate a traffic stop at that time. (Testimony of Ofc. Cummings.)

¹ The record was held open until April 5, 2017, for the parties to submit post-hearing briefs. The Court received a timely brief from the Petitioner only.

2.

A short time later, as Officer Cummings was preparing to pull out of the Kangaroo station, he observed an orange Dodge Challenger traveling toward him. Suspecting that it was the same vehicle that had been laying drags earlier, he followed the vehicle without turning on his patrol car's blue lights. The Challenger pulled into a parking space at the station, at which point Officer Cummings parked at an angle behind the vehicle, got out of his car, and approached the driver's side of the Challenger. The Petitioner, who had been driving, was still seated inside the vehicle. Passengers were also present. (Testimony of Ofc. Cummings.)

3.

Officer Cummings introduced himself to the Petitioner and asked what the group had been doing that night. The Petitioner stated that they were going to buy cigarettes. As he spoke with the Petitioner, Officer Cummings noted an odor of an alcoholic beverage coming from the vehicle. He further noted that the Petitioner's eyes were bloodshot and watery. When Officer Cummings asked the Petitioner why he had been traveling down West Avenue at a high rate of speed, he stated, "I'm sorry, just showing off for the women," referring to his passengers. In response to Officer Cummings' inquiry regarding his consumption of alcoholic beverages, the Petitioner stated, "Three or four beers, nothing serious." At some point during the conversation, Officer Cummings waved in another officer who was driving past the Kangaroo station. (Testimony of Ofc. Cummings.)

4.

Officer Cummings asked the Petitioner to step out of his car. At that point, the Petitioner was not free to leave, as Officer Cummings had decided to detain him to conduct a DUI investigation. (Testimony of Ofc. Cummings.)

5.

Officer Cummings asked the Petitioner to submit to field sobriety testing, and he agreed. On the horizontal gaze nystagmus test, the Petitioner exhibited six “clues” of impairment. On the one-leg stand test, he exhibited two out of a possible four clues. The Petitioner exhibited no clues on the walk and turn test. He also completed a backwards counting test successfully.² (Testimony of Ofc. Cummings.)

6.

Officer Cummings placed the Petitioner under arrest for DUI, read him the implied consent notice for drivers age twenty-one and over, and designated a breath test as the state-administered chemical test. (Testimony of Ofc. Cummings; Ex. R-1.)

7.

The Petitioner agreed to submit to the state-administered breath test. The test was administered by Officer Cummings, who holds a valid permit issued by the Division of Forensic Sciences of the Georgia Bureau of Investigation to analyze breath specimens using the Intoxilyzer 9000. A copy of test results from an Intoxilyzer 9000 indicated that the Petitioner’s blood alcohol concentration was 0.130 at 1:25 a.m. and 0.130 at 1:30 a.m. on February 8, 2017. (Testimony of Ofc. Cummings; Exs. R-1, R-2.)

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 The Petitioner counted from 67 to 63, rather than 67 to 53 as the officer had requested, but Officer Cummings attributed this to the Petitioner mishearing the number. (Testimony of Ofc. Cummings.)

2.

Officer Cummings had reasonable grounds to believe the Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol or a controlled substance. O.C.G.A. § 40-5-67.1(g)(2)(A)(i).

3.

An arresting officer is required to advise an arrestee of his or her implied consent rights 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); see also O.C.G.A. § 40-6-392(a)(4). Here, Officer Cummings placed the Petitioner under arrest and read him his implied consent rights immediately thereafter.

4.

At the time the Petitioner was asked to submit to the state-administered chemical test, he had been properly informed of his implied consent rights and the consequence of submitting or refusing to submit to such a test. See O.C.G.A. § 40-5-67.1(g)(2)(B). Georgia’s implied consent statute provides as follows:

[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).

5.

In the present case, the Petitioner raises two arguments. First, he contends that he was not lawfully placed under arrest, pursuant to O.C.G.A. § 40-5-67.1(g)(2)(A)(i). Specifically, he asserts that when Officer Cummings parked behind the Petitioner and walked to the driver’s side of the

Petitioner's car to see whether it was the same vehicle he had observed speeding earlier, an improper second-tier investigation was initiated because the officer did not have a reasonable and articulable suspicion that the Petitioner had violated the law. Second, the Petitioner argues that the Respondent did not meet its burden in establishing that the breath test had been properly administered under O.C.G.A. § 40-5-67.1(g)(2)(D). Both arguments lack merit, for the reasons set forth below.

Lawful Arrest

6.

Three tiers of police-citizen encounters exist under Georgia law: "(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); see also 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." Norris, 281 Ga. App. at 194.

7.

During a first-tier encounter, officers may approach a citizen, ask for identification, and freely question the citizen, as long as the officers do not detain the citizen or create the impression that the citizen may not leave. Peters v. State, 242 Ga. App. 816, 817 (2000) (citing McClain v. State, 226 Ga. App. 714, 716 (1997)). These consensual encounters may become a seizure when "'a reasonable person would have believed that he was not free to leave.'" Jones v. State, 291 Ga. 35, 37 (2012) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). This Court must consider all the circumstances surrounding the encounter to determine "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter." McClain, 226 Ga. App. at 716 (quotation omitted).

8.

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating compliance with the officer’s request might be compelled.” Cutter v. State, 274 Ga. App. 589, 592 (2005) (quotation omitted). See also Chamblee v. State, 317 Ga. App. 673, 675 (2012) (declining to find a second-tier encounter when there was no evidence of the use of sirens, emergency equipment, coercion, or physical restraint).

9.

Here, taking into account the totality of the circumstances, Officer Cummings’ act of walking over to the Challenger and questioning the Petitioner about his previous and current activities qualifies as a first-tier encounter. See McClain, 226 Ga. App. at 716 (“The actions of an officer approaching a stopped vehicle . . . and inquiring about possible criminal or suspicious activity clearly fall within the realm of the first type of police-citizen encounter . . .”).³ Although multiple officers were at the gas station and Officer Cummings waved in an officer who had driven past, nothing in the evidence suggests their presence was accompanied by shows of force, threats, acts of physical restraint, displayed weapons, or raised voices. See Chamblee, 317 Ga. App. at 675; Cutter, 274 Ga. App. at 592; compare with State v. Robinson, 239 Ga. App. 349, 349 (1999) (concluding that investigative stop occurred when five officers “rushed” defendant in three or four patrol cars).

³ In his post-hearing brief, the Petitioner relied on Jones to support his contention that Officer Cummings triggered a second-tier encounter, in part, by walking up to the Petitioner with the intent of detaining him momentarily. Such a comparison, however, is inapt. In Jones, the officer had blocked a parking lot’s exit while the defendant’s vehicle and another vehicle were in the lot. Jones, 291 Ga. at 36. After speaking with the other driver, the officer agreed to let that driver go but told her to “hold on” while he checked the defendant. Id. The Georgia Supreme Court concluded that, by this point in the encounter, the officer had intended to detain the defendant, and thus initiated an investigatory stop. Id. at 38. In the instant case, nothing in the record demonstrates that Officer Cummings intended to execute an investigatory stop when he first approached the Petitioner’s car. See id. at 37 (noting a requirement that the second-tier encounter be

Further underscoring the lack of compulsion is the fact that Officer Cummings approached the Petitioner's vehicle without turning on his blue lights. See McClain, 226 Ga. App. at 716 (noting that officer following vehicle without blue lights flashing did not indicate that driver was barred from driving on). Instead, Officer Cummings' undisputed testimony established that the Petitioner engaged in a consensual conversation with the officer.

10.

Petitioner correctly contends that an officer using his vehicle to block a citizen from driving away likely initiates a second-tier investigative stop. See Jones, 291 Ga. at 38 (officer positioned patrol car in parking lot exit to prevent defendant from leaving); Robinson, 239 Ga. App. at 349 (officers blocked front and rear of defendant's car with patrol cars). However, Officer Cummings testified that he parked his vehicle at an angle behind the Petitioner's car, as opposed to fully blocking its path. Given this sole uncontested testimony, it is not clear to this Court that the officer's parked vehicle fully blocked the Petitioner's car and prohibited him from driving away from the gas station.⁴

11.

As the totality of circumstances demonstrate that Officer Cummings' initial encounter with the Petitioner constituted a first-tier encounter, no reasonable suspicion of criminal activity was required. Once Officer Cummings noted the odor of alcohol, observed the Petitioner's bloodshot and watery eyes, and confirmed that the Petitioner had consumed alcohol, he then had grounds to detain the Petitioner. See Crosby v. State, 214 Ga. App. 753, 754-55 (1994) (concluding that officer

"willful"). Rather, Officer Cummings initially limited his first contact to inquiries about possible criminal activities like speeding, which constitutes a first-tier encounter. See McClain, 226 Ga. App. at 716.

⁴The Petitioner somewhat concedes in his post-hearing brief that he was not fully blocked, as he contends that he "could not have backed out *without having to make a 32 point turn.*" (Petitioner's post-hearing brief at p. 4) (emphasis added). At the very least, nothing in the evidence indicates the level of difficulty the Petitioner would have faced in backing out.

who pulled vehicle alongside defendant's car and asked for identification did not initiate seizure, but officer later obtained reasonable grounds to investigate once he noted defendant's alcohol odor and bloodshot eyes). The Petitioner's subsequent arrest, therefore, was lawful. See O.C.G.A. § 40-5-67.1(g)(2)(A)(i).

Breath Test

12.

It remains uncontested that the Respondent's blood alcohol concentration registered over 0.08 during the state-administered breath test. See O.C.G.A. § 40-5-67.1(g)(2)(C)(ii). However, the Respondent also must prove that the breath test was:

properly administered by an individual possessing a valid permit issued by the Division of Forensic Sciences of the Georgia Bureau of Investigation on an instrument approved by the Division of Forensic Sciences . . . , including whether the machine at the time of the test was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order, which shall be required.

O.C.G.A. § 40-5-67.1(g)(2)(D). To satisfy this statutory requirement, the Respondent may submit "[a] copy of the operator's permit showing that the operator has been trained on the particular type of instrument used and one of the original copies of the test results" Id.; see also Dep't of Public Safety v. Robinette, 254 Ga. App. 884, 885 (2002).

13.

Here, the Petitioner argues that no evidence was presented as to whether the Intoxilyzer 9000 was operating with all its components and was in good working order. Although no such testimony was proffered at the hearing, the Respondent nevertheless satisfied its burden under O.C.G.A. § 40-5-67.1(g)(2)(D) by providing this Court with both a copy of Officer Cummings' permit to conduct breath tests with the Intoxilyzer 9000, as well as a copy of the test results for the Petitioner using that same model of instrument. See Robinette, 254 Ga. App. at 884.

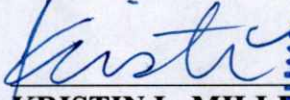
14.

In light of the above, the suspension of the Petitioner's driver's license or driving privilege by the Department of Driver Services was proper. O.C.G.A. § 40-5-67.1.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Respondent's decision to administratively suspend the 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 12th day of April, 2017.


KRISTIN L. MILLER
Administrative Law Judge

