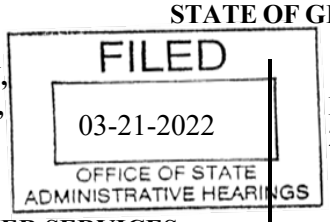
BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

DANNY MONTGOMERY,
Petitioner,

v.

DEPARTMENT OF DRIVER SERVICES,
Respondent.



Docket No.: 2215177
2215177-OSAH-DDS-ALS-59-Fry

Agency Reference No.: [redacted]

FINAL DECISION

I. Introduction

This matter is an administrative review of the Respondent's decision to suspend the Petitioner's driver's license, permit, or privilege to operate a motor vehicle or commercial motor vehicle in the State of Georgia pursuant to O.C.G.A. § 40-5-67.1. The hearing took place on March 9, 2022, before the undersigned administrative law judge. After considering all of the admissible evidence and the arguments of the parties, the Respondent's action is **AFFIRMED** for the reasons stated below.

II. Findings of Fact

1. On November 17, 2021, the arresting officer:
   ☒ initiated a stop of a vehicle driven by the Petitioner based on a traffic violation
   (The officer observed Petitioner driving. Petitioner failed to maintain lane and failed to make proper lane change by failing to use a turn signal.)

2. While speaking with the Petitioner, the arresting officer noted that the Petitioner exhibited: Petitioner stipulated that the officer had probable cause to make the arrest and contested only the reading of the Implied Consent Notice.

3. In response to the arresting officer's inquiry regarding the Petitioner's consumption of alcoholic beverages, the Petitioner: Petitioner stipulated that the officer had probable cause to make the arrest and contested only the reading of the Implied Consent Notice.

4. ☒ The Petitioner exhibited clues of impairment on the following field sobriety evaluations, which he/she performed at the arresting officer's request: Petitioner stipulated that the officer had probable cause to make the arrest and contested only the reading of the Implied Consent Notice.

5. The arresting officer placed the Petitioner under arrest for driving under the influence of alcohol or a controlled substance, read him/her the implied consent notice for ☒ drivers age 21 and over ☐ drivers under age 21 ☐ commercial drivers, and designated a ☐ breath ☒ blood ☐ urine test as the state-administered chemical test. The officer substituted the word "requested" with the word "required" as follows:

   > "The State of Georgia has conditioned your privilege to drive upon the highways of this state upon your submission to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to blood or urine testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the ~~requested~~ required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your blood?"

   The officer's reading of implied consent from O.C.G.A. § 40-5-67.1(b)(2) was read into the record by playing the video of the reading of the implied consent notice.

6. After being advised of his/her implied consent rights, the Petitioner:
   ☒ refused to submit to the state-administered test designated by the arresting officer.

III. Conclusions of Law

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 and proved the following:

☒ Based upon the Petitioner's stipulations, the arresting officer 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, and the Petitioner was lawfully placed under arrest for violating O.C.G.A. § 40-6-391. O.C.G.A. § 40-5-67.1(g)(2)(A)(i).

☒ At the time of the request for the state-administered test or tests, the arresting officer informed the Petitioner of his/her implied consent rights and the consequence of submitting or refusing to submit to such test(s). O.C.G.A. § 40-5-67.1(g)(2)(B).

Petitioner challenged the arresting officer's reading of the implied consent notice, pointing out that the officer substituted the word "required" in place of the word "requested" in the following passage from the implied consent notice: "After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing." O.C.G.A. § 40-5-67.1(b)(2). Following review of the video taken of the arrest, which included the reading of the implied consent notice to Petitioner, the arresting officer did replace the word "requested" with the word "required." Code Section 40-5-67.1(b) also states in pertinent part that "Such notice shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged." *Id*. *Compare State v. Nolen*, 234 Ga. App. 291, 292 (1998) (concluding that the arresting officer's omission of the word "and" in the next to last sentence of the statutory implied consent warning did not change the substance of the required statutory notice) *with State v. Stroud*, 344 Ga. App. 885, 886-87 (2018) (concluding that the "officer's error in giving the implied consent notice misled the defendant as to a serious consequence of refusing to submit to testing as the officer's statement to the defendant that the defendant's license "may be suspended," instead of "will be suspended," altered the substance of the implied consent notice by changing the mandatory suspension into a mere permissive possibility").

Petitioner argued that the 2019 amendment to the implied consent statute and the Supreme Court's decision in *Elliott v. State*, 305 Ga. 179 (2019), are such that the officer's substitution of the word "required" for "requested" in the section of the notice concerning the individual's right to a test of their own choosing, rendered his reading of the implied consent notice misleading. In *Elliot*, the Court focused on the former implied consent notice's statement that "Georgia law requires you to submit to state administered chemical tests of you blood, breath, urine, or other bodily substances . . . " O.C.G.A. § 40-5-67.1(b)2) (pre 2019 amendment), *Elliott*, 305 Ga. at 224 (Concurring opinion by Boggs, J.). The Supreme Court explained the scope of its holding as follows:

> To the extent the State argues that our holding here is inconsistent with and nullifies *Olevik*, the State fails to appreciate the differences between the claims decided in *Olevik* and those raised here. In *Olevik*, we resolved the defendant's claim that he was coerced into submitting to a breath test because the language of the implied consent notice did not sufficiently inform him [*223] that he was entitled to refuse. Given that argument, the consequence of refusing was not among the particular aspects of that language the defendant challenged. We rejected his argument and held that the implied consent notice sufficiently informed a defendant of the right to refuse such that the notice was not per se coercive. *Olevik [v. State]*, 302 Ga. [228] at 249-250 (3) (a) [(2017)]. Here, we do not address whether Elliott was coerced into submitting to a breath test under Paragraph XVI, but what consequences flow from her assertion of the right to refuse to submit to the test.
>
> . . .
>
> Consequently, we conclude that O.C.G.A. §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial.

Elliott, 305 Ga. at 222-23.

It is significant that the Supreme Court in *Olevik v. State*, 302 Ga. 228 (2017) rejected Olevik's argument that the implied consent statute, as applied in his case, violated his due process rights. *Id.* at 41. As that Court noted, a due process claim only arises when improperly-compelled test results are introduced into evidence by the State. *Id.*

Regardless of whether the reading of a notice compels a defendant to incriminate himself, it is not the reading of the notice that would constitute a due process violation or a violation of the right against compelled self-

incrimination. Instead, it is the admission of a compelled breath test that would amount to a constitutional violation. *See Chavez v. Martinez*, 538 U. S. 760, 767 (2003) ("Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the *Self-Incrimination Clause* occurs.")

Id. (citations omitted). In the instant case, Petitioner cannot argue that he was compelled to incriminate himself in violation of his constitutional rights because he did, in fact, exercise that right and refuse to provide the blood sample. There was no evidence that he was coerced by the officer to submit to the test after he refused or that a test was ever administered. Rather, the evidence in the record was that Petitioner refused the test, which then triggered certain consequences under the implied consent statute, namely, the loss of his driving privileges. *Elliott* simply expanded on that point and held that the refusal to submit to a *breath* test could not be used as evidence in criminal trial. Justice Boggs made it clear in his concurrent that the ruling does not apply to tests of the driver's blood or to suspension of the driver's license in an administrative proceeding. There is nothing in the Supreme Court's decision that suggests the decision has further scope than the conclusion that "O.C.G.A. §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial." *Elliott*, 305 Ga. at 223.

Georgia courts long have held that an administrative license suspension hearing is a remedial proceeding, which relates to a person's privilege to drive on Georgia highways and is separate from the criminal proceeding.

> [T]he purpose of the license suspension hearing is clearly remedial. "The State of Georgia considers dangerous and negligent drivers to be a direct and immediate threat to the welfare and safety of the general public, and it is in the best interest of the citizens of Georgia immediately to remove such drivers from the highways of this state." O.C.G.A. § 40-5-57 . . . .In Georgia, a driver's license is not an absolute right but rather is a privilege that may be revoked for cause. "The right to continue the operation and to keep the license to drive is dependent upon the manner in which the licensee exercises this right. The right is not absolute, but is a privilege . . . . While it cannot be revoked without reason, it can be constitutionally revoked or suspended for any cause having to do with public safety." *Nelson v. State*, 87 Ga. App. 644, 648 (1953).

Nolen v. State, 218 Ga. App. 819, 822 (1995), *cited in Flading v. State*, 327 Ga. App. 346, 349 (2014).

Following the Supreme Court's decision in *Elliott*, the General Assembly amended the implied consent notice in an attempt to address several concerns raised by the Court's holding and perhaps some of the ones voiced in Justice Boggs' concurrence.

The following redlined paragraph reflects the changes from the pre-2019 amendment version to the post 2019 amendment version of the implied consent notice for suspects aged 21 or older:

> ~~"Georgia law requires you to submit~~"The State of Georgia has conditioned your privilege to drive upon the highways of this state upon your submission to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to ~~the required~~blood or urine testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the ~~required~~requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which ~~tests) under the implied consent law?"~~test)?"

O.C.G.A. § 40-5-67.1(b)(2).

Although the officer used the word "required" rather than "requested," in the section concerning the right to additional tests, the reading of the implied consent notice was substantially correct. The ALJ concludes that the substitution of the word "required" for the word "requested" in this sentence in the notice did not change the substance of the required statutory notice. This part of the implied consent notice concerns the additional test(s) a driver may choose to take after submitting to the state administered test. Here, the term, "requested" serves only to refer back to and identify the state administered test that must be taken (i.e., are required to be taken) before the driver can exercise the option for their own test(s). To be sure, the General Assembly changed the word "required" to "requested" in this sentence when it amended the statute. Presumably that was done for a reason. The point is to cross reference the test or tests requested by the officer. The word substitution, however, does not alter the substance of the notice that the state administered test that was

designated (requested) by the officer is required to be taken before the driver can exercise the option of their own test. Stated differently, the test designated by the officer becomes a required test for the purposes of the additional tests of the suspect's choosing. There is nothing confusing or misleading about that. It is a stretch to conclude that the Petitioner was misled concerning the consequences of a refusal based on the use of "required" in this context. The portion of the notice regarding the consequences of a refusal were read correctly. There is no reason linguistically to conclude that this substitution misled Petitioner as to his right to refuse, i.e., it did not render the notice coercive, or to conclude that it misled him as to the consequences of refusing the requested blood test. The word "required" appears nowhere else in the current version of the notice so it is not referring back to "required" tests identified in another part of the notice, which was the case prior to the 2019 amendment. It is an even greater stretch to conclude that the Petitioner was in some way misled into refusing to submit to the blood test rather than taking the blood test based on the use of the word "required" in this context.

Finally, Petitioner did not testify and there is no testimony from the officer that Petitioner expressed confusion about the implied consent notice or that he made any statements that he was refusing to take the test because it was misleading or confusing in any way. Thus, there is no evidence in the record that Petitioner was, in fact, mislead. Rather, there is only counsel's argument that the officer's statement was misleading.

☒ The Petitioner refused the state-administered test(s). O.C.G.A. § 40-5-67.1(g)(2)(C)(i). Based on the foregoing, this Court concludes that evidence of Petitioner's response to the officer's request for a blood test was admissible in this proceeding and proved that Petitioner refused the test under Georgia Code Section 40-5-67.1(g)(C)(i).

Accordingly, the Respondent's suspension of the Petitioner's driver's license, permit, or privilege was proper. O.C.G.A. § 40-5-67.1.

IV. Decision

The Respondent's decision to suspend the Petitioner's driver's license, permit, or privilege to operate a motor vehicle or commercial motor vehicle in the State of Georgia is hereby sustained and **AFFIRMED**.

SO ORDERED, this 21st day of March, 2022.

John Fry
Administrative Law Judge