BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

DARIN BURGESS,
Petitioner,

v.

DEPARTMENT OF DRIVER SERVICES,
Respondent.

Docket No. 2226883
2226883-OSAH-DDS-ALS-604-Kennedy

Agency Reference No. [redacted]

FINAL DECISION

I. Introduction

This matter is an administrative review of the Respondent's decision to suspend 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 July 8, 2022, before the undersigned administrative law judge. A few hours after the hearing Petitioner submitted the officer's video of the stop. On July 12, 2022, Petitioner submitted a caselaw summary regarding the timing of the reading of the implied consent notice. Respondent has not submitted any post-hearing information. After considering all 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. For purposes of the Administrative License Suspension hearing, the parties stipulated that Respondent could meet its burden under Georgia Code Section 40-5-67.1(g)(2)(A)(i). The parties further stipulated that the arresting officer read Petitioner the correct implied consent notice and requested a breath test as the state-administered chemical test. Finally, the parties stipulated that Petitioner submitted to the state-administered chemical test of his breath and the results indicated that Petitioner's blood alcohol concentration was 0.099 grams.

2. The issue before this Court surrounds the timing of the reading of the implied consent notice. The arresting officer read the implied consent notice to Petitioner approximately 11 minutes after he placed Petitioner under arrest for Driving Under the Influence. During those 11 minutes, the arresting officer conducted a search incident to arrest that lasted approximately 1 minute; the remaining 10 minutes the arresting officer attempted to accommodate Petitioner's request to have someone come pick up his vehicle so that it would not need to be impounded. Initially Petitioner asked the arresting officer to contact Petitioner's wife. However, while speaking with her Petitioner acknowledged that she did not have a means to come and retrieve the vehicle. Petitioner then asked if he could call his friend to ask if he

could pick up the vehicle. The arresting officer accommodated Petitioner's request and called Petitioner's friend. However, the friend indicated he was not able to come pick up the vehicle and neither could anyone else at the home where the friend was because the arresting officer had stated that whoever came to pick up the vehicle would need to be "completely sober." At that point, the arresting officer advised Petitioner that his vehicle would need to be impounded. After securing Petitioner's cellphone in Petitioner's car, the arresting officer returned to Petitioner who was seated in the backseat of the arresting officer's patrol car and read him the implied consent notice.

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:

☒ The arresting officer had reasonable grounds to believe Petitioner was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol, and 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).

☐ The Petitioner was involved in a motor vehicle accident or collision resulting in a serious injury or fatality. O.C.G.A. § 40-5-67.1(g)(2)(A)(ii).

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

Petitioner argues that the 11-minute delay between the arrest and the reading of the implied consent notice was unreasonable and, consequently, Respondent has failed to meet its burden to prove by a preponderance of the evidence that at the time of the request for the state-administered breath test the arresting officer informed Petitioner of his implied consent rights. The scope of the Administrative License Suspension (ALS) hearing is limited to, as stated above, only determining whether at the time of the request for the state-administered test the arresting officer informed Petitioner of his implied consent rights. Thus, it is not clear whether the timing of the reading of the implied consent notice is even within the limited scope of the ALS hearing. However, given that the legislature and courts have recognized that in most instances the only time at which the implied consent will be meaningful is at the time of physical arrest, the Court presupposes that the issue raised by Petitioner is within the limited

scope of the ALS hearing. See Perano v. State, 250 Ga. 704 (1983).

Georgia courts have held that under ordinary circumstances a refusal or the results of a state-administered test will not be admissible against a defendant in a criminal DUI trial if the implied consent notice is not read 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 (1983).

In this matter, the arresting officer read the implied consent notice at the scene of the arrest after determining that Petitioner's vehicle would need to be impounded because neither Petitioner's wife nor Petitioner's friend were able to come to retrieve the vehicle. The Court concludes that the 11-minute delay in this matter was excusable given the arresting officer's attempt to accommodate Petitioner's request to allow his wife or friend to retrieve his vehicle and not have the vehicle impounded. Moreover, the arresting officer read the implied consent at the scene of the arrest before he transported Petitioner to the jail. See generally Dunbar v. State, 283 Ga. App. 872 (2007) (25-minute delay reasonable based on officer's need to ensure his safety and to inventory vehicle before tow truck arrived); Naik v. State, 277 Ga. App. 418 (2006) (18-minute delay reasonable when due, in part, to officer securing defendant's purse and other valuables); Martin v. State, 211 Ga. App. 561 (1993) (10-minute delay reasonable when officer did not have her new implied consent card with her at the scene and had to transport driver to the nearby police station to obtain the current implied consent notice). *Compare* Carthon v. State, 248 Ga. App. 738 (2001), overruled on other grounds (unreasonable to not read implied consent at the scene of arrest but rather delay the reading until reaching the hospital; it was incumbent on the officer to read the implied consent warning before he drove away from the scene of the collision); State v. Lamb, 217 Ga. App. 290 (1995) (unreasonable to delay reading of implied consent by 30-minutes solely because officer preferred to read implied consent in front of a witness); Clapsaddle v.State, 208 Ga. App. 840 (1993) (unreasonable for an officer to not read implied consent "at the time of arrest" but rather to delay such reading until 1 hour after the arrest and the driver was at the police station when there were no exigent circumstances to warrant the delay); Vandiver v. State, 207 Ga. App. 836 (1993) (unreasonable to delay reading of implied consent based solely on Department's standard practice to not read implied consent until driver was transported to police station).

As noted above, considering the facts and circumstances of this case, the Court

concludes that the 11-minute delay was not unreasonable and Implied Consent was read at a time as close in proximity to the instant of arrest as the circumstances warranted. Moreover, there is no evidence that reading the implied consent notice sooner would have benefited Petitioner to make the delay unreasonable on those grounds. See State v. Domenge-Delhoyo, 338 Ga. App. 439 (2016); State v. Marks, 239 Ga. App. 448 (1999).

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

☒ The state-administered 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, and 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. A copy of the operator's permit showing that the operator has been trained on the instrument used and one of the original copies of the test results were introduced into evidence and satisfied the requirements of O.C.G.A. § 40-5-67.1(g)(2)(D).

☒ The test results indicated an alcohol concentration of 0.08 grams or more. O.C.G.A. § 40-5-67.1(g)(2)(C)(ii).

Accordingly, the Respondent's suspension of 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 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 18th day of July, 2022.

Ana Kennedy

Ana Kennedy
Administrative Law Judge