BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

JONATHAN CARTER, **Petitioner,** **v.** **DEPARTMENT OF DRIVER SERVICES,** **Respondent.**	**Docket No. 2220055** **2220055-OSAH-DDS-ALS-58-Howells[1]** **Agency Reference No.** [redacted]

Grant Mintz, Legal Assistant

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 June 3, 2022, before the undersigned administrative law judge. Greg Willis, Esq. represented Petitioner. Deputy Loucks represented Respondent. 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. On January 22, 2022, at approximately 3:30 a.m., the arresting officer initiated a stop of a vehicle driven by the Petitioner based on a traffic violation (failure to maintain lane).
2. Petitioner did not have difficulty producing his driver's license, and he did not have difficulty exiting his vehicle or walking from his car to the patrol car. However, while speaking with Petitioner, the arresting officer noted that Petitioner exhibited:
   - ☒ bloodshot eyes
   - ☐ glassy eyes
   - ☐ watery eyes
   - ☒ slurred speech
   - ☐ slow speech
   - ☐ unsteadiness on his/her feet
   - ☒ swaying
   - ☐ confusion
   - ☒ a strong odor of an alcoholic beverage coming from the Petitioner's ☒ vehicle ☐ person ☒ breath ☐ other:__________________________.
   - ☒ a strong odor of marijuana coming from inside the vehicle and from Petitioner's person.[2]
3. In response to the arresting officer's inquiry regarding Petitioner's consumption of alcoholic beverages, Petitioner:
   - ☐ denied consuming any alcoholic beverages.
   - ☒ admitted consuming alcoholic beverages (one Long Island alcoholic beverage one hour prior to the stop).
   - ☒ other: admitted to smoking marijuana around 8am the previous morning.

[1] Judge Kennedy sat in for Judge Howells' June 3, 2022, calendar.

[2] After being placed under arrest, Petitioner admitted he had marijuana in his pants and the arresting officer retrieved a package of what he suspected to be marijuana from Petitioner's pants.

4. ☒ Petitioner exhibited clues of impairment on the following field sobriety evaluations, which he performed at the arresting officer's request:
   - ☒ horizontal gaze nystagmus (6 of 6 clues observed)
   - ☒ walk and turn (5 of 8 clues observed)
   - ☒ one-leg stand (2 of 4 clues observed)
   - ☐ other:_________________________.
   - ☐ The Petitioner completed an Alco-Sensor/preliminary breath test, which was positive for alcohol.
   - ☒ Petitioner declined the arresting officer's request for: ☐ field sobriety evaluations ☒ an Alco-Sensor/preliminary breath test.
   - ☐ The arresting officer did not ask the Petitioner to perform field sobriety evaluations.

5. Petitioner did not exhibit a clue of impairment on the modified Rhomberg field sobriety evaluation that the arresting officer administered. Rather, Petitioner estimated the passage of 30 seconds within the permissible time of 32 seconds.

6. The arresting officer placed Petitioner under arrest for driving under the influence of alcohol,[3] read him the implied consent notice for drivers aged 21 and over and designated a ☐ breath ☒ blood ☐ urine test as the state-administered chemical test.

7. After being advised of his implied consent rights, 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:

1.

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 or a controlled substance, 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).

2.

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

3.

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

4.

Suspension or revocation of a motorist's driver's license under Implied Consent Laws remains the standard legal consequence of refusal to submit to a state-administered test following a lawful arrest for driving while impaired. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). Georgia's Implied Consent Laws, and the consequences for refusing to submit to a state administered test following a DUI arrest, are codified under Georgia Code Sections 40-5-67.1 and 40-6-392. Petitioner argues that Georgia Code Sections 40-5-67.1 and 40-6-392, as currently written regarding an officer's

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[3] The citation only refers to O.C.G.A. § 40-6-391(a)(1), referencing being under the influence of alcohol, and not (a)(2), which references under the influence of any drug.

authority to designate a blood test as the only option for a driver to comply with the implied consent laws following a DUI arrest, is unconstitutional under both federal and state constitutions. Petitioner asserts it "is unconstitutional to allow the officer to choose the most intrusive test as the only option when a breath test is available" in a case such as this where the officer charged Petitioner with DUI alcohol under Georgia Code Section 40-6-391(a)(1).[4] Petitioner further asserts that the value of a driver's right to exercise his or her constitutional right to refuse is essentially gutted if the driver can be punished for exercising that right. Georgia courts have held that a refusal to consent to a breath or urine test cannot be admitted against a defendant in a criminal trial but have not addressed the issue as it relates to a warrantless blood test or a civil administrative proceeding regarding an individual's driving privileges. *See* Awad v. State, 313 Ga. 99 (2022) (Art. I, Sec. I, Par XVI of the 1983 Georgia Constitution prohibits the State from admitting in a criminal trial evidence of a defendant's refusal to urinate into a collection container); Elliott v. State, 305 Ga. 179 (2019) (Art. I, Sec. I, Par. XVI of the 1983 Georgia Constitution prohibits admission in a criminal trial evidence that a suspect refused to consent to a breath test). According to Petitioner, for the constitutional right to refuse a breath, blood or urine state-administered test to have any meaning, it should be inadmissible in both criminal and civil proceedings. In this matter, Petitioner seeks a declaration that Georgia's Implied Consent Warning and Implied Consent Scheme are unconstitutional both on their face and as applied to the facts of this case regarding an arresting officer's designation of a warrantless blood test following a DUI arrest based on a charge for driving under the influence of alcohol. However, as an Administrative Law Judge, this Court cannot declare a statute unconstitutional. Ga. Comp. R. & Regs. 616-1-2-.22. Thus, this Court must apply the statutory scheme as written. Based on the scope of hearing before this Court and based on the findings of fact as set forth above, the Court concludes Respondent has met its burden by a preponderance of the evidence.

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 6th day of July, 2022.

GEORGIA OFFICE OF STATE ADMINISTRATIVE HEARINGS 1995

Ana Kennedy
Administrative Law Judge

[4] Among several cases cited by Petitioner is *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). *Birchfield supra.* involves a statute that makes it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The Supreme Court in *Birchfield supra.* noted that "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." The Supreme Court concluded [b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." Ultimately, the Supreme Court held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense" and reversed Birchfield's conviction for refusing to submit to a blood test because it was based on a demand for an unlawful search under the Fourth Amendment.

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

JONATHAN CARTER, **Petitioner,** **v.** **DEPARTMENT OF DRIVER SERVICES,** **Respondent.**	**Docket No. 2220055** **2220055-OSAH-DDS-ALS-58-Howells**[1] **Agency Reference No.** [redacted]

FILED
OSAH
SEP 09 2022
Grant Mintz, Legal Assistant

ORDER GRANTING PETITIONER'S MOTION TO REQUEST SPECIFIC AND DISTINCT RULING ON EACH ISSUE RAISED
AND
ORDER DENYING PETITIONER'S MOTION TO RECONSIDER
AND
AMENDED FINAL DECISION

On July 14, 2022, Petitioner filed a Motion to Reconsider and Motion to Request a Specific and Distinct Ruling on Each Issue Raised Before this Honorable Court. In his motion, Petitioner requested that the Court make specific findings of fact regarding the arresting officer's certification to operate an Intoxilyzer 9000 and regarding the location of the Intoxilyzer 9000 breath testing instrument being at the jail where Petitioner was transported to following his arrest. After careful consideration, the Court hereby **GRANTS** Petitioner's request for specific findings of fact regarding the Intoxilyzer 9000 but **DENIES** Petitioner's request for the Court to declare Georgia Code Sections 40-5-67.1 and 40-6-392 unconstitutional and to reverse the license suspension.

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 June 3, 2022, before the undersigned administrative law judge, and a Final Decision affirming Respondent's decision was issued on July 6, 2022. After careful consideration of Petitioner's Motion to Reconsider, the Court maintains that Respondent's action should be **AFFIRMED** for the reasons stated below.

[1] Judge Kennedy sat in for Judge Howells' June 3, 2022, calendar.

II. Findings of Fact

1. On January 22, 2022, at approximately 3:30 a.m., the arresting officer initiated a stop of a vehicle driven by Petitioner based on a traffic violation (failure to maintain lane).

2. Petitioner did not have difficulty producing his driver's license, and he did not have difficulty exiting his vehicle or walking from his car to the patrol car. However, while speaking with Petitioner, the arresting officer observed that Petitioner exhibited bloodshot eyes and slurred speech, and he was swaying. The arresting officer also detected the strong odor of an alcoholic beverage coming from Petitioner's vehicle and breath, and a strong odor of marijuana coming from inside the vehicle and Petitioner's person.[2]

3. In response to the arresting officer's inquiry regarding Petitioner's consumption of alcoholic beverages, Petitioner admitted consuming alcoholic beverages (one Long Island alcoholic beverage one hour prior to the stop) and also admitted to smoking marijuana around 8am the previous morning.

4. Petitioner exhibited clues of impairment on three field sobriety evaluations, which he performed at the arresting officer's request. Specifically, the arresting officer observed 6 of 6 clues on the Horizontal Gaze Nystagmus evaluation, 5 of 8 clues on the Walk and Turn evaluation, and 2 of 4 clues on the One-Leg Stand evaluation. Petitioner declined the arresting officer's request for an Alco-Sensor/preliminary breath test.

5. Petitioner did not exhibit a clue of impairment on the modified Rhomberg field sobriety evaluation that the arresting officer administered. Rather, Petitioner estimated the passage of 30 seconds within the permissible time of 32 seconds.

6. The arresting officer placed Petitioner under arrest for driving under the influence of alcohol,[3] read him the implied consent notice for drivers aged 21 and over and designated a ☐ breath ☒ blood ☐ urine test as the state-administered chemical test.

7. After being advised of his implied consent rights, Petitioner refused to submit to the state-administered test of his blood as designated by the arresting officer.

8. Petitioner was transported to the jail where an Intoxilyer 9000 breath testing instrument was available if the arresting officer had chosen to request a breath test instead of a blood test.

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[2] After being placed under arrest, Petitioner admitted he had marijuana in his pants and the arresting officer retrieved a package of what he suspected to be marijuana from Petitioner's pants.

[3] The citation only refers to O.C.G.A. § 40-6-391(a)(1), referencing being under the influence of alcohol, and not (a)(2), which references under the influence of any drug.

Additionally, the arresting officer was certified to operate the Intoxilyzer 9000 had the arresting officer chosen to request a breath test instead of a blood test.

III. Conclusions of Law

In this matter, Respondent bears the burden of proof to establish that the proposed administrative license suspension of Petitioner's driver's license for refusing to submit to a warrantless state-administered test of his blood following an arrest for Driving Under the Influence (DUI) of alcohol is authorized under Georgia Code Sections 40-5-67.1 and 40-6-392 (collectively referred to as Georgia's Implied Consent Laws).

Petitioner has challenged the administrative suspension of his driver's license on all grounds but primarily "challenges the unreasonable and unconstitutional demand for a blood test as the only option for Petitioner to avoid suffering the civil, administrative consequences of a license suspension equivalent to a taking of his property when he was arrested for DUI alcohol." Petitioner argues that Georgia's Implied Consent Laws allowing an arresting officer to designate a blood test as the only option for a driver to comply with the implied consent laws following a DUI arrest are unconstitutional because the laws allow "the officer to choose the most intrusive test as the only option when a breath test is available" in a case such as this where the officer charged the driver with DUI alcohol under Georgia Code Section 40-6-391(a)(1)[4] and had a breath testing machine reasonably available to administer a breath test. Petitioner asks that this Court "find the arbitrary and unnecessary demand for blood as the only option was unlawful and unreasonable and that any law or conditions requiring Petitioner to forfeit his constitutional rights to avoid a license suspension are illegal."

Petitioner challenges the constitutionality of Georgia's Implied Consent Laws based on the laws allowing Georgia to punish Petitioner by suspending his license simply for exercising his constitutional right to refuse an intrusive warrantless blood test. Petitioner argues that the value of a driver's right to exercise his or her constitutional right to refuse is essentially gutted if the driver can be punished for exercising that right.

After careful consideration, the undersigned is not persuaded by Petitioner's arguments, in

[4] Among several cases cited by Petitioner is *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). *Birchfield supra.* involves a statute that makes it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The Supreme Court in *Birchfield supra.* noted that "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." The Supreme Court concluded [b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." Ultimately, the Supreme Court held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense" and reversed Birchfield's criminal conviction for refusing to submit to a blood test because it was based on a demand for an unlawful search under the Fourth Amendment.

part, because the United States Supreme Court stated in *Birchfield v. North Dakota*, 579 U.S. 438 (2016) that Implied Consent Laws that provide for civil penalties such as license suspension for refusing to submit to a state-administered test following a DUI arrest are generally approved and that "nothing we say here should be read to cast doubt on" those laws.

Petitioner seeks reversal of the administrative license suspension based on "each of the following rights of Petitioner that he exercised and refused to waive: (1) the Right to be free from unreasonable, warrantless searches as provided by the U.S. Constitution Fourth Amendment; (2) the Right to be free from unreasonable, warrantless searches as provided by the Georgia Constitution Article I, Section I, Paragraph XIII; (3) Substantive and Procedural Due Process as provided by the U.S. Constitution Fourteenth Amendment; (4) Substantive and Procedural Due Process as provided by the Georgia Constitution; (5) Privileges or Immunities Clause of the U.S. Constitution Fourteenth Amendment; and (6) Privileges and Immunities Clause of the Georgia Constitution Article I, Section I, Paragraph VII."

Petitioner argues that under the "United States Supreme Court's holding in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016), this Court should conclude that the arresting officer's demand for a warrantless blood draw from Petitioner was a violation of Petitioner's constitutional rights, both federal and state, because the officer did not have exigent circumstances sufficient to overcome the Fourth Amendment's warrant requirement (and also protected by Georgia Constitution Article I, Section I, Paragraph XIII)." Petitioner further argues that "Petitioner was threatened with an unlawful search" when the arresting officer told Petitioner that if he invoked his constitutional right to refuse the warrantless blood draw it could result in the suspension of his driver's license. However, suspension or revocation of a motorist's driver's license under Implied Consent Laws continues to be an authorized legal consequence of refusal to submit to a state-administered test following a lawful arrest for driving while impaired because the United States Supreme Court's holding in *Birchfield* supra. applies to a State imposing criminal penalties for refusal to submit to a warrantless blood test but does not extend to civil penalties, such as license suspension, that have been generally approved. <u>Birchfield</u>, supra.

Georgia courts have similarly drawn a distinction between how refusal to submit to a requested state-administered test is treated in the criminal context versus the civil context. Georgia courts have held that a refusal to consent to a breath or urine test cannot be admitted against a defendant in a criminal trial but have not addressed whether Respondent is prohibited from imposing civil penalties for such refusals against an individual's driving privileges. *See* <u>Awad v. State</u>, 313 Ga. 99 (2022) (Art. I, Sec. I, Par XVI of the 1983 Georgia Constitution prohibits the State from admitting in a criminal trial evidence of a defendant's refusal to urinate into a collection

container); Elliott v. State, 305 Ga. 179 (2019) (Art. I, Sec. I, Par. XVI of the 1983 Georgia Constitution prohibits admission in a criminal trial evidence that a suspect refused to consent to a breath test). Thus, in Georgia, the Implied Consent Laws authorizing suspension of a motorist's driver's license for refusing to submit to a state-administered breath, blood or urine test remain valid law.

Despite the United States Supreme Court's seeming approval of civil penalties for refusal to submit to a state-administered test following a DUI arrest and the Georgia Supreme Court's decisions prohibiting admission of a refusal in criminal trials but not addressing the civil administrative hearings, Petitioner argues that for the constitutional right to refuse a breath, blood or urine state-administered test to have any meaning, it should be inadmissible in both criminal *and* civil proceedings. Petitioner seeks a declaration that Georgia's Implied Consent Warning and Implied Consent Scheme are unconstitutional both on their face and as applied to the facts of this case regarding an arresting officer's designation of a warrantless blood test following a DUI arrest based on a charge for driving under the influence of alcohol. However, as noted above, in *Birchfield*, supra., the United States Supreme Court stated that "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." The United States Supreme Court further stated that "nothing we say here should be read to cast doubt on" those laws but found that it is another matter entirely for a State to seek to impose criminal penalties for refusal to submit to a warrantless state-administered blood test. The United State Supreme Court then concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense" but did not extend their conclusion to the realm of civil penalties. The matter before this Administrative Court does not involve a criminal offense. Rather, it involves implied-consent laws that impose civil penalties against motorists who refuse to comply. Moreover, even if the Court was persuaded by Petitioner's arguments, that Georgia's Implied Consent Laws are unconstitutional, this Administrative Court does not have authority to declare those statutes unconstitutional. Ga. Comp. R. & Regs. 616-1-2-.22.

Based on the foregoing, under each of the issues raised by Petitioner, including issues related to the Fourth Amendment of the United States Constitution, Article I, Section I, Paragraph XIII of the Georgia Constitution, Substantive and Procedural Due Process as provided by the Fourteenth Amendment of the United States Constitution and Georgia's Constitution, the Privileges or Immunities Clause as provided by the Fourteenth Amendment of the United States Constitution and Article I, Section I, Paragraph VII of Georgia's Constitution, the Court concludes that civil penalties such as license suspension for refusal to submit to a warrantless state-administered blood test following an arrest for DUI alcohol is legally authorized even in a matter

where the arresting officer chose to designate a blood test for an individual charged with DUI alcohol.

Turning now to the issues enumerated in Georgia Code Section 40-5-67.1(g), the Court concludes that Respondent has met its burden as set forth below:

1.

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 or a controlled substance, 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).

2.

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

3.

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

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 9th day of September, 2022 nunc pro tunc 6th day of July, 2022.

Ana Kennedy
Administrative Law Judge