BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

MARIAN HOLVERSTOTT,
Petitioner,

v.

DEPARTMENT OF DRIVER SERVICES,
Respondent.

Docket No.: 2309780
2309780-OSAH-DDS-ALS-28-Boggs

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 December 16, 2022, in Canton, Georgia, before the undersigned administrative law judge.[1] Nicole McArthur, Esq., represented the Petitioner. Representing the Respondent was Officer Justin Hinkle with the Woodstock Police Department.

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 June 25, 2022, Officer Justin Hinkle with the Woodstock Police Department was in his patrol vehicle traveling on Towne Lake Parkway, a four-lane road, in the city of Woodstock,

[1] The record in this matter remained open following the hearing so the Court could receive a copy of a video, portions of which were published during the hearing. The video was received from the Petitioner on December 19, 2022, at which time the record closed. See Ga. Comp. R. & Regs. 616-1-2-.26. The video is denoted herein as **Exhibit ALJ-1**.

Georgia. Sometime just after midnight, Officer Hinkle was directly behind a vehicle driven by the Petitioner and noted the vehicle's left tag light was not working. The right tag light was operational. (Testimony of Ofc. Justin Hinkle; Ex. ALJ-1.)

2.

The Petitioner's vehicle continued traveling on Towne Lake Parkway and crossed the Noonday bridge. As seen on video footage taken from the patrol vehicle, Officer Hinkle observed the vehicle, which was in the right lane, drift toward the passenger side of the lane so that the passenger-side tires were close to touching the white line on the far side of the road. Officer Hinkle testified the vehicle was less than half a tire's width from the white line, and it continued up a hill in that lane position for 500 feet. (Testimony of Ofc. Justin Hinkle; Ex. ALJ-1.)

3.

The Petitioner then moved to the left lane after initiating her vehicle's turn signal. Officer Hinkle continued traveling in the right lane. According to Officer Hinkle, the vehicle was "left of center" in the lane, with the outside edges of the driver-side tires touching the inside edge of the yellow line. In the video footage, the driver-side tires of the Petitioner's vehicle do appear to be immediately next to the yellow line; however, it is not clear from the angle of the footage, which was taken from the right lane versus the left lane, whether the tires in fact touched or went over the line. (Testimony of Ofc. Justin Hinkle; Ex. ALJ-1.)

4.

The Petitioner's vehicle continued traveling until it approached an intersection and stopped at the red light. According to Officer Hinkle, he determined the Petitioner failed to maintain her lane because the driver-side tires had traveled on the solid-white line between the left lane and the left-turn lane. On the patrol vehicle's video, the Petitioner's vehicle appears to be traveling very

close to the white line; however, there is no indication from the video that the vehicle touched or crossed the line. Furthermore, the officer moved his patrol vehicle to the left lane behind the Petitioner's vehicle while the latter was stopped at the red light, the patrol vehicle's video shows the Petitioner's driver-side tires were not on the solid-white line. (Testimony of Ofc. Justin Hinkle; Ex. ALJ-1.)

5.

Once behind the Petitioner's vehicle at the red light, Officer Hinkle turned off his patrol vehicle's headlights, which had been illuminating the Petitioner's tag, to confirm that the Petitioner's left tag light was not operational. The video shows that, with the patrol vehicle's lights off, the left side of the Petitioner's tag was not illuminated. (Testimony of Ofc. Justin Hinkle; Ex. ALJ-1.)

6.

When the red light changed to green, the Petitioner's vehicle resumed travel; at that point, Officer Hinkle initiated a traffic stop at 2:50 a.m. The location of this stop was just outside of Woodstock city limits; however, Officer Hinkle testified at the hearing he began observing the Petitioner's violations while within his jurisdiction. (Testimony of Ofc. Justin Hinkle; Ex. ALJ-1.)

7.

During the initial investigation, Officer Hinkle spoke with the Petitioner as the latter sat in her vehicle.[2] During this conversation, the officer observed the Petitioner had watery eyes, and that she threw cigarette ash out the window. The Petitioner told the officer she was coming from a nearby bar after having a few drinks with friends. (Testimony of Ofc. Justin Hinkle.)

[2] From the patrol vehicle's video footage, two other officers were present at the scene of the stop. (See Ex. ALJ-1.) These officers' presence was not relevant to the issues decided by this Court.

8.

Officer Hinkle eventually had the Petitioner exit her vehicle. At that point, once the cigarette smoke had cleared, Officer Hinkle detected an odor of alcohol coming from the Petitioner's person and breath. The officer also noted the Petitioner was slurring her words. (Testimony of Ofc. Justin Hinkle.)

9.

The Petitioner agreed to perform field sobriety testing. Officer Hinkle performed a medical clearance for the Petitioner to proceed with the tests. During the tests, the Petitioner exhibited two out of six clues of impairment on the evaluation for horizontal gaze nystagmus ("HGN"). The two clues were for lack of smooth pursuit in each eye. The Petitioner also exhibited eight out of eight clues of impairment on the walk-and-turn test; and three out of four clues of impairment on the one-leg-stand test. (Testimony of Ofc. Justin Hinkle.)

10.

The Petitioner agreed to provide a breath sample for a portable breath test ("PBT"). The Petitioner ultimately provided two samples, both of which returned positive for alcohol. (Testimony of Ofc. Justin Hinkle.)

11.

Officer Hinkle proceeded to place the Petitioner under arrest for driving under the influence of alcohol. After confirming she was 21 or older, the officer read her the proper implied consent notice for drivers age 21 and over, requesting a chemical test of the Petitioner's breath. The Petitioner had questions about how the breath sample was collected, and Officer Hinkle testified

he tried his best to explain the test and told her it would be performed on an Intoxilyzer 9000. The Petitioner eventually consented to a breath test.[3] (Testimony of Ofc. Justin Hinkle.)

12.

Officer Hinkle next directed the Petitioner to enter the back seat of the patrol vehicle. As heard on the patrol vehicle's video, the Petitioner told Officer Hinkle, "I do have a difficult time breathing." She further stated she needed to breathe in and out of her nose for extra air, and that she was "extremely uncomfortable" in small spaces. Officer Hinkle asked her to still take a seat, and that he would keep the patrol vehicle's door open. The Petitioner stated she had never been through this before, and that being restrained might make her "hyperventilate or freak out." In the patrol vehicle's video, both the Petitioner and Officer Hinkle are out of frame during this exchange; however, Officer Hinkle testified that he observed the Petitioner breathing more rapidly, having shorter breaths, and breathing without a deep expansion of her chest. (Testimony of Ofc. Hinkle; Ex. ALJ-1.)

13.

Based on what he was observing with the Petitioner's breathing, Officer Hinkle became concerned that a sufficient breath sample could not be collected. For this reason, he re-read to the Petitioner the proper implied consent notice for drivers age 21 and over, this time requesting a chemical test of the Petitioner's blood. The implied consent notice read to the Petitioner included the statutory language that the Petitioner had the right to independent chemical testing of her blood, breath, urine, or other bodily substances at her own expense and from qualified personnel of her own choosing. (Testimony of Ofc. Hinkle; Ex. ALJ-1.)

[3] The patrol vehicle's video, admitted as Exhibit ALJ-1, does not include any audio from this reading of this implied consent notice or the subsequent exchange between the Petitioner and Officer Hinkle. (See Ex. ALJ-1.)

14.

The following is the exchange between the Petitioner and Officer Hinkle after the second reading of the implied consent notice, as heard on the patrol vehicle's video:[4]

Ofc. Hinkle: I see you nodding your head up and down. Is that a yes?

Petitioner: I understand the chemical test. Yes, I just — yes, I understand what you're saying.

Ofc. Hinkle: So just to clarify —

Petitioner: So when I get back to the station they have to do a blood test.

Ofc. Hinkle: Uh, yes, we would go to the fire station —

Petitioner: And I have to say yes to that.

Ofc. Hinkle: Yes, ma'am.

Petitioner: Otherwise they suspend your license.

Ofc. Hinkle: Um, just to clarify, were you nodding your head to say that you wanted to submit to it? Or were you —

Petitioner: I understand.

Ofc. Hinkle: Or that you understand what I read?

Petitioner: Yes, I understand.

Ofc. Hinkle: So that you understand that.

Petitioner: Yes.

Ofc. Hinkle: OK, I just wanted to clarify that. So with that being said, are you going to submit to the state-administered —

Petitioner: Yes, sir.

Ofc. Hinkle: OK. Thank you, ma'am.

[4] The Petitioner and Officer Hinkle remained out of frame in the video itself during this exchange. (See Ex. ALJ-1.)

(Ex. ALJ-1.)

15.

Officer Hinkle proceeded to take the Petitioner to the Wausau Fire Department, Station 14, where blood samples were drawn by qualified personnel. At the hearing, Officer Hinkle presented the report from the Division of Forensic Sciences of the Georgia Bureau of Investigation, showing that a test of the Petitioner's blood revealed a blood alcohol concentration of 0.086 grams. (Testimony of Ofc. Justin Hinkle; Ex. R-1.)[5]

III. CONCLUSIONS OF LAW

1.

This appeal arises under Georgia's Motor Vehicle and Traffic laws, specifically O.C.G.A. § 40-5-67.1. 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).

2.

The scope of a hearing regarding an administrative license suspension pursuant to O.C.G.A. § 40-5-67.1 is limited to four distinct issues. O.C.G.A. §§ 40-5-67.1(g)(2)(A)-(D). Each issue is discussed below:

First Issue

3.

The Respondent first must prove that "the law enforcement officer had reasonable grounds to believe the person was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol . . . and was lawfully placed under arrest for violating Code Section

[5] The Petitioner did not testify at the hearing and presented no evidence.

40-6-391," which makes it illegal to drive under the influence of alcohol to the extent that it is less safe to drive. O.C.G.A. §§ 40-5-67.1(g)(2)(A)(i), 40-6-391(a)(1). At the hearing, the Petitioner argued the Respondent failed to meet its burden here. Namely, she asserts Officer Hinkle was not justified in making the initial traffic stop, as the patrol vehicle's video never showed the Petitioner failing to maintain her lane.

4.

"For a traffic stop to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity." Jones v. State, 291 Ga. 3, 38 (2012) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968) and Thomason v. State, 268 Ga. 298, 301(1997)). A failure to maintain lane is a violation of O.C.G.A. § 40-6-48(1), which states that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Here, the patrol vehicle's video shows the Petitioner's vehicle drifting within the lane of travel, first toward the passenger side of the road while in the right lane. Yet as Officer Hinkle himself testified, the vehicle did not touch or cross the white line at this time. Although it got very close to the line, described as within a half a tire's width, it remained within the lane. The patrol vehicle's video further shows that, once the Petitioner changed lanes—after activating her turn signal, pursuant to O.C.G.A. § 40-6-123(a)—her vehicle again drifted to the lane's edge, this time with the driver tires running extremely close to the yellow line and running extremely close to the white line. But again, it does not appear from the video that the vehicle crossed or touched the yellow and white lines; in fact, the video shows the Petitioner was well within the lane's lines when it was stopped at the red light.

5.

Regardless, even assuming Officer Hinkle lacked reasonable suspicion to initiate a stop based on a suspected violation of O.C.G.A. § 40-6-48(1), the evidentiary record here sufficiently shows the officer *did* have reasonable, articulable suspicion to stop the Petitioner for her nonoperational tag light. Pursuant to O.C.G.A. § 40-8-23(d), "Either a taillight or a separate light shall be so constructed and placed as to ***illuminate with a white light*** the rear registration plate and ***render it clearly legible*** from a distance of 50 feet to the rear." (Emphasis added.) The patrol vehicle's video shows that the left side of the Petitioner's tag was not illuminated, thus rendering the left side of the tag dark and illegible. See Hampton v. State, 287 Ga. App. 896, 898 (2007) (noting that probable cause existed for an initial traffic stop, based on an officer's observance of a nonfunctioning tag light). Hence, Office Hinkle's stop of the Petitioner was not unlawful.

6.

The evidence also shows Officer Hinkle 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 and was lawfully arrested for violating O.C.G.A § 40-6-391. When determining whether probable cause for arrest exists, "[t]he facts and circumstances known to the officer must be examined altogether, for it is the totality of those facts and circumstances that matters, not any one fact or circumstance standing alone." Hughes v. State, 296 Ga. 744, 748 (2015) (citations omitted). Here, prior to her arrest, the Petitioner was observed as having watery eyes, slurred speech, and an odor of alcoholic beverages on her breath and person. The Petitioner also stated she had come from a bar where she had consumed a few drinks, and the PBT registered positive for alcohol. On the field sobriety tests, she registered all eight clues on the walk-and-turn evaluation, in addition to three out of four clues for the one-leg-stand test and two out of six clues for the HGN test.

Accordingly, upon a review of the evidence, the Respondent has met its burden on the first issue of the instant analysis. See, e.g., Temples v. State, 228 Ga. App. 228, 231 (1997).

Second Issue

7.

Second, the Respondent must prove that, at the time of the request for the state-administered test or tests, Officer Hinkle informed the Petitioner of her implied consent rights and the consequence of submitting or refusing to submit to such test or tests. O.C.G.A. § 40-5-67.1(g)(2)(B). "[T]he purpose of the implied consent law is to notify drivers of their rights so that they can make informed decisions." Kitchens v. State, 258 Ga. App. 411, 413 (2002).

8.

As an initial matter, there is no dispute that Officer Hinkle read the Petitioner the correct implied consent notice for drivers age 21 or over, both when the officer designated a breath test and when he designated a blood test. That notice is 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 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 test)?

O.C.G.A. § 40-5-67.1(b)(2). The undisputed evidence also shows the Petitioner consented to the breath test and blood test. Instead, the Petitioner argued at the hearing that (i) Officer Hinkle's decision to switch from a breath test to a blood test was improper; and (ii) Officer's Hinkle's

comments to the Petitioner after reading the implied consent notice for a blood test were misleading and thus negated the Petitioner's consent.

9.

The Petitioner's first argument here is without merit. The evidence shows that Officer Hinkle's reasoning for opting for a blood test over a breath test was reasonable, as the Petitioner by her own admission stated she had "a difficult time breathing." More to the point, "as long as a defendant's right to an independent chemical test is clear, an officer may obtain consent for more than one chemical test and then elect which consented-to 'test or tests' will be administered." State v. Brantley, 263 Ga. App. 209, 211 (2003). Hence, as the Petitioner had been notified of her right to obtain independent testing, it was well within Officer Hinkle's discretion to proceed with the blood test over the breath test.

10.

The Petitioner's second argument presents a closer question. As captured by the video, following the reading of the implied consent notice for the blood test, the Petitioner stated, "I have to say yes to that," presumably referring to the blood test. Officer Hinkle then stated, "Yes, ma'am." The Petitioner argued that the "Yes, ma'am" misled her and induced her to consent to the blood test. See State v. Terry, 236 Ga. App. 248, 250 (1999) (holding that a person's right to make an informed choice under the implied consent statute may be denied even when the misleading statements were made after the arresting officer read the implied consent notice accurately and completely).

11.

Looking at those two statements in isolation, it could be construed that Officer Hinkle was telling the Petitioner she could not refuse the testing, which is legally inaccurate. See O.C.G.A.

§ 40-5-67.1(b)(2). However, in reviewing the full context of the exchange caught on video, it becomes clear the Petitioner did *not* misunderstand her implied consent rights. After Officer Hinkle said, "Yes, ma'am," the Petitioner proceeded to say, "Otherwise they suspend your license." Based on the use of "otherwise"—an adverb meaning "if not"[6]—the Petitioner's two statements taken together accurately restate the consequence of refusing the test: "I have to say yes to that. [***If not***], they suspend your license." See id. §§ 40-5-67.1(b)(2), (d). In this context, "I have to" does not indicate the Petitioner believed the test itself to be mandatory; rather, "I have to" denotes an action she found necessary (consenting to the test) to avoid the consequence of refusal (suspension of her license). Furthermore, following this exchange, Officer Hinkle repeated the question as to whether the Petitioner would submit to the blood test, thus reaffirming the Petitioner retained a choice in the matter.[7]

12.

Hence, there is no indication that Officer Hinkle's brief interjection of "Yes, ma'am" led the Petitioner to mistakenly believe she had no choice regarding the blood test, nor is there evidence she misunderstood the consequences of saying either yes or no to the test. See State v. Chun, 265 Ga. App. 530, 531 (2004) ("The determinative issue with the implied consent notice is whether the notice given was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing."). Similarly, absent any evidence to the contrary, nothing in the record demonstrates that the "Yes, ma'am" statement confused or otherwise influenced the Petitioner in any way. See Wallace v. State, 325 Ga. App. 142, 144 (2013) (noting

[6] See MERRIAM-WEBSTER DICTIONARY, "otherwise," available at https://www.merriam-webster.com/dictionary/otherwise (last accessed Dec. 22, 2022).

[7] As evidenced on the video, the Petitioner cut off Officer Hinkle, by giving her consent before the officer could finish his full question. Nonetheless, given the context of the full exchange, including the officer's prior questions as to whether the Petitioner's nodding was to agree to the test or to indicate her understanding, the Petitioner's consent to the blood test is clear.

that the Court of Appeals has suppressed the results of chemical tests "'where the driver was misinformed of his rights and where that misinformation may have affected his decision to consent'") (quoting Kitchens, 258 Ga. App. at 413). See also Miles v. Wells, 225 Ga. App. 698, 699 (1997) ("There is no evidence in the record that Wells understood the officer's subsequent statement to be a denial of his previously explained [implied consent] right . . . . Indeed, although Wells himself testified at the hearing, he did not in any way suggest that he understood [the officer's] statement to foreclose that right.")[8] Accordingly, upon review of the evidence, the Respondent met its burden on the second issue of this analysis.

Third Issue

13.

Third, the Respondent must prove that the state-administered test or tests were 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 or a test conducted 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. O.C.G.A. § 40-5-67.1(g)(2)(D). Here, the Petitioner presented a copy of the crime lab report from the Division of Forensic Sciences, which by statute meets the requirements of O.C.G.A. § 40-5-67.1(g)(2)(D). Accordingly, the Respondent met its burden on this third issue of this analysis.

[8] Contrast Terry, 236 Ga. App. at 248-49 (upholding the inadmissibility of a test refusal because, following a lengthy set of questions from the driver, officers gave misleading information about obtaining a bond as a precondition to taking the independent test); State v. Leviner, 213 Ga. App. 99, 102-03 (1994) (upholding the inadmissibility of a test refusal on the grounds that the implied consent notice contained substantial misleading, inaccurate, and extraneous information, and that the officer's own testimony revealed the driver was confused).

Fourth Issue

14.

Fourth, the Respondent must prove that the test results indicated an alcohol concentration of 0.08 grams or more, for a driver age 21 or older. O.C.G.A. § 40-5-67.1(g)(2)(C)(ii). The report from the Division of Forensic Sciences shows the Petitioner's blood alcohol concentration was 0.086; accordingly, the Respondent met its burden on the fourth and final issue of this analysis.

* * * * *

15.

Based on the above analysis, the Respondent has proved, by a preponderance, that the suspension of the Petitioner's license was proper under O.C.G.A. § 40-5-67.1

IV. CONCLUSION

For the foregoing reasons, the Respondent's decision to suspend the Petitioner's license, permit, or privilege to operate a motor vehicle or commercial vehicle in the state of Georgia is **AFFIRMED**.

SO ORDERED, this 22nd day of December, 2022.

Lisa Boggs

Lisa Boggs
Administrative Law Judge