BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

JASON STEPHENS, **Petitioner,** **v.** **DEPARTMENT OF DRIVER SERVICES,** **Respondent.**	**Docket No.: 2407837** **2407837-OSAH-DDS-ALS-44-Fry** **Agency Reference No.:** [redacted]

FINAL DECISION

I. Introduction

Petitioner requested a hearing to contest 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 November 17, 2023, before the undersigned administrative law judge. 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 August 2, 2023, the arresting officer:
   ☒ responded to the scene of a single motor vehicle accident involving a vehicle driven by the Petitioner.
   The collision: ☒ did not result in a serious injury or fatality. When the officer arrived, the driver was standing outside the vehicle, leaning on the driver's side door. The vehicle had struck a utility pole, which was lying on the street. All of the vehicle's air bags were deployed. The officer testified that she did not discuss the driver's medical history but did ask him if he was okay. He responded, "I am." The officer observed bits of shattered glass on Petitioner's clothes and on his forehead. The driver refused medical treatment from EMS.

2. While speaking with the Petitioner, the arresting officer who is POST certified, trained in DUI detection and standard field sobriety testing, noted that the Petitioner exhibited:
   ☒ bloodshot/red eyes
   ☒ glassy eyes
   ☒ significantly slurred and inarticulate speech
   ☒ behavior that was evasive, standoffish
   ☒ unwillingness to answer questions
   ☒ unsteadiness on his feet, used car for balance
   ☒ an odor of an alcoholic beverage coming from the Petitioner's ☒ person.

3. In response to the arresting officer's inquiry regarding the Petitioner's consumption of alcoholic beverages, the Petitioner:
   ☒ denied consuming any alcoholic beverages.

4. ☐ The Petitioner exhibited clues of impairment on the following field sobriety evaluations, which he/she performed at the arresting officer's request:
   ☒ The Petitioner refused the arresting officer's request for: ☒ field sobriety evaluations.

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 Court finds that the officer's testimony concerning her observations of Petitioner's behavior and the manifestations of impairment he displayed, as set forth in her testimony and summarized above, showed by a preponderance of the evidence that the officer had reasonable grounds to believe that Petitioner was under the influence of alcohol to a degree which rendered him incapable of driving safely. The Court further finds that the officer's testimony showed by a preponderance of the evidence that the officer had reasonable grounds to

believe that Petitioner had been driving and in control of a moving vehicle when he struck a utility pole while under the influence of alcohol.

During the hearing, Petitioner' counsel challenged the sequence of the arrest relative to the reading of implied consent. The Court and counsel remembered the sequence of the two differently. The Court has listened to the recording, which is the official record of the hearing, multiple times and the officer testified that Mr. Stephens was placed under arrest for DUI and immediately read the implied consent notice. He was then placed in handcuffs and placed in a vehicle for transport. The following is an unofficial transcription prepared by the Court using the iRecord application to obtain a rough transcription, which the Court then edited manually based on the recording. The time stamps listed are from the recording.

> 0:04:29
> Officer: Um, so based on the involvement of Mr. Stephens being in a vehicle accident, the physical manifestations observed of the bloodshot and glassy eyes, the slurred speech, the unsteady gate, um, I asked if he'd be willing to perform field sobriety evaluations. And .. To determine if he was a safe driver and Mr. Stephens refused at that time.
>
> 0:04:54
> Um, Mr. Stephens was determined to be a less safe driver, and he was placed under arrest at that time for DUI, um, Mr. Stephens was immediately read the Georgia implied consent for subjects over the age of 21. And, It was read as follows.
>
> 0:05:17
> 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 the 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 the trial, you .. if you submit to testing and the results indicate an alcohol concentration of .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.
>
> 0:06:04
> After first submitting to the requested State test, 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 test of your blood? Is what was asked, uh, to Mr. Stephens. At which he refused.
>
> 0:06:30
> Judge: Okay.
> Officer: Um
> Judge: Anything .. Anything else?
> Officer Um-hum .. yes
> Judge: Okay.
>
> 0:06:38
> Officer: Okay. Um. So, at that point he was handcuffed, uh, according to department policy and procedure. He was placed in vehicle 1075.

Although Petitioner was not placed in handcuffs until after the officer read implied consent, the Court finds that a reasonable person having been told that they were placed under arrest would understand that they were not free to leave even though they had not yet been placed in handcuffs. Accordingly, the Court finds that the officer placed Petitioner under arrest prior to reading the implied consent notice as required. Additionally, the Court finds that the arresting officer did not subjectively consider Petitioner's refusal to submit to standardized field sobriety testing as part of the totality of circumstances providing probable cause to make an arrest for DUI. The officer's testimony was limited to her using Petitioner's actions and manifestations of impairment while she spoke with him through asking him whether he would consent to SFSTs. It is only logical and reasonable that her DUI investigation would include her observations which are of record and the results of any SFSTs to the extent they were performed. The only way for the officer to know whether the driver will submit to SFSTs and ultimately whether the results would be part of the totality of the circumstances is for the officer to ask whether the suspect will submit to SFSTs. Of course, if the suspect refuses, then the officer has to make the

decision without those results, and that decision, necessarily, would come after the officer asked the question of whether the driver would submit to SFSTs.

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:

☒ 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).

The scope of the administrative license suspension hearing as follows:

> (2) The scope of the hearing *shall be limited* to the following issues:
>
> (A) (i) Whether 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 or a controlled substance and was lawfully placed under arrest for violating Code Section 40-6-391; or (ii) Whether the person was involved in a motor vehicle accident or collision resulting in serious injury or fatality; and
>
> (B) Whether at the time of the request for the test or tests the officer informed the person of the person's implied consent rights and the consequence of submitting or refusing to submit to such test; and
>
> (C) (i) Whether the person refused the test; or (ii) Whether a test or tests were administered and the results indicated an alcohol concentration of 0.08 grams or more or, for a person under the age of 21, an alcohol concentration of 0.02 grams or more or, for a person operating or having actual physical control of a commercial motor vehicle, an alcohol concentration of 0.04 grams or more; and
>
> (D) Whether the 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, 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. 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 or, where the test is performed by the Division of Forensic Sciences, a copy of the crime lab report shall satisfy the requirements of this subparagraph.

O.C.G.A. 40-5-67.1(g)(2) (emphasis added).

> Accordingly, the plain language of O.C.G.A. 40-5-67.1(g)(2)(A) limits the scope of the ALS hearing to certain factors, the first of which is whether the officer had reasonable grounds to believe two things about the person whose license was suspended as a result of a DUI arrest: that the person (1) was driving or in physical control of a moving vehicle while impaired and (2) was lawfully placed under arrest for DUI. Although the legislature could have expanded the scope of the ALS hearing to include direct proof of the lawfulness of the arrest, not just the officer's reasonable belief regarding the arrest's lawfulness, it did not do so. The fact that the statute requires only reasonable grounds for belief that the arrest was lawfully made rather than simply that the arrest was lawfully made or actual knowledge that the arrest was lawfully made is a significant distinction. The clause "reasonable grounds for *belief*" clearly contemplates that the officer's conclusion can be based on information that is outside of the scope of his direct knowledge provided the officer has specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct.

Based on the arresting officer's interaction with Petitioner, he was arrested for DUI on the grounds that he was an impaired driver. To lawfully make an arrest for DUI, the officer must "have knowledge or reasonably trustworthy information that a suspect was actually in physical control of a moving vehicle, while under the influence of

alcohol [or a controlled substance] to a degree which renders him incapable of driving safely." *Bostic v. State*, 332 Ga. App. 604, 606-07 (2015) (quoting *State v. Sanders*, 274 Ga. App. 393, 396 (2005)). The mere presence of alcohol in the body, "by itself, does not support an inference that the defendant was an impaired driver." *State v. Ellison*, 271 Ga. App. 898, 902(3)(b) (2005) (quoting *Ricks v. State*, 255 Ga. App. 188, 190 (2002)).

It is a longstanding principle that "The presence of alcohol is not the issue. In a less safe case, the state must prove that the defendant had impaired driving ability as a result of drinking alcohol." *State v. Sanders*, 274 Ga. App. 393, 396 (2005) *citing Overton v. State*, 270 Ga. App. 285, 291 (2004) (concluding that the state is not required to prove that a defendant committed an unsafe act; rather, the state need only prove … that a defendant was under the influence of alcohol to the degree that rendered him a less safe driver).

The court must look to the totality of the circumstances to determine if there is a sufficient factual basis to support an inference that Petitioner was an impaired driver. *Hughes v. State*, 296 Ga.744, 748-49 (2015) (regarding probable cause, "[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").

> Because the standard for probable cause depends on what a reasonable officer could have concluded from those facts and circumstances, *the standard of probable cause is an objective one, and the subjective thinking of the actual officers in a particular case is not important*. *See Rodriguez v. State*, 295 Ga. 362, 371 (2014) ("As the United States Supreme Court has explained, subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis, and the constitutional reasonableness of [searches and seizures] do not depend on the actual motivations of the individual officers involved." (Citation and punctuation omitted)). *See also Whren v. United States*, 517 U. S. 806, 813 (1996). And where the totality of the facts and circumstances known to an officer would permit reasonable officers to draw differing conclusions about whether the suspect probably has committed a crime, probable cause exists, and it is for the officer — not judges, trial or appellate — to decide which of the several reasonable conclusions to draw. *See Cox v. Hainey*, 391 F3d 25, 32-33 (1st Cir. 2004) ("[T]he availability of alternative inferences does not prevent a finding of probable cause so long as the inference upon which the officer relies is reasonable. Consequently, when conflicting inferences are available to resolve the issue of probable cause and both of them are plausible, it does not matter which inference is correct. (Citations and punctuation omitted)).

Hughes, 296 Ga. at 749 (emphasis added). Regarding the indicia of impairment considered by the trial court, the Supreme Court concluded:

> that the officers in this case had probable cause to believe that Hughes had been driving under the influence of drugs. The officers had reason to believe that Hughes had driven through a red light and caused a fatal accident. They had reason to think — based on their observations of Hughes at the scene of the accident — that Hughes was under the influence of some intoxicant. And they knew that Hughes had a number of unknown pills on his person. Standing alone, any one of these circumstances would not be enough for a reasonable officer to conclude that Hughes probably had been driving under the influence. Indeed, each of these circumstances is susceptible of reasonable explanations other than driving under the influence, and although each circumstance is consistent with driving under the influence, an innocent explanation for each circumstance might be more probable. For instance, the running of the red light and the accident that followed could reasonably have been attributed to Hughes having been sleep deprived, especially considering the early-morning hour of the accident and that he appeared sleepy afterwards. His unsteadiness and red eyes could have been chalked up to the deployment of an air bag in the collision. And his possession of pills does not necessarily mean that Hughes had taken any. *But again, we do not consider any fact or circumstance standing alone. Taken together, a reasonable officer could conclude, we think, that driving under the influence was an equally or more probable explanation for the facts and circumstances known to the officers than an improbable coincidence of multiple innocent explanations.* See, e.g., *Walker v. City of Huntsville*, 310 Fed. Appx. 335, 338 (III) (11th Cir. 2009); *State v. Underwood*, 283 Ga. 498, 500 (661 SE2d 529) (2008); *Firsanov v. State*, 270 Ga. 873, 874 (3) (513 SE2d 184) (1999).

Id. at 750 (emphasis added). In explaining where the trial court went astray, the *Hughes* court noted:

> The trial court appears as well to have made the mistake of employing a "divide-and-conquer" approach, considering each of the several facts and circumstances known to the officers in isolation, rather than altogether.
> …
> Finally, the trial court and the dissenting judges at the Court of Appeals all seem to have put too much weight on the notion that some of the facts and circumstances known to the officers — especially the

> unsteadiness, sleepiness, and glassy and red eyes that the officers observed at the scene — could have been susceptible of innocent explanations. As the majority of the Court of Appeals correctly explained, "[t]he fact that there may be other explanations for Hughes's unusual behavior and manifestations does not establish" that it would have been unreasonable for an officer to draw the conclusion that Hughes probably had been driving under the influence. *Hughes*, 325 Ga. App. at 433. See also *Illinois v. Gates*, 462 U. S. 213, 243 (IV), n.13 (103 SCt 2317, 76 LE2d 527) (1983) (noting that "innocent behavior frequently will provide the basis for a showing of probable cause"); *United States v. Delossantos*, 536 F3d 155, 161 (II) (B) (2nd Cir. 2008) ("The fact that an innocent explanation may be consistent with the facts alleged does not negate probable cause." (Citation and punctuation omitted)).
>
> The problem is, the trial court was not charged with determining whether Hughes was, in fact, driving under the influence. The job of the trial court was to determine whether reasonable officers could have concluded that he probably was. That is, the trial court was supposed to determine whether the officers had probable cause. The existence of probable cause is a legal question as to which the appellate courts owe no deference to trial judges. And in any event, *if reasonable officers could have reached different conclusions — some concluding reasonably that Hughes probably had been driving under the influence, and others reasonably concluding otherwise — then probable cause by definition was established*. *See Cox*, 391 F3d at 32-33 (II) (C) (emphasis added).

Id. at 751-52. The Court of Appeals in *State v. Gray*, 267 Ga. App. 753, 755 (2004)*, overruled on other grounds*, *Hughes v. State*, 296 Ga. 744, 752 and n. 10 (2015) summarized several cases cited by the state in support of a finding of probable cause, which,

> contained additional factors [beyond the mere presence of alcohol] showing impairment. See *Boyd v. State*[1] (erratic driving, bloodshot eyes, slurred speech); *Singleterry v. State*[2] (erratic driving, glassy, watery eyes, and slowness in exiting car); *State v. Smith*[3] (unsteady on feet); *Herkert v. State*[4] (bloodshot eyes and erratic driving). *See also Cann-Hanson v. State*, 223 Ga. App. 690, 691 (1996) (concluding that even without the SFSTs, bloodshot and watery eyes and the odor of alcohol is sufficient to support a finding of probable cause to arrest).

Hence, the question is whether the totality of the circumstances would permit a reasonable officer to conclude that probable cause exists. Assuming that to be the case, the fact that the arresting officer might have reached a different conclusion, or that the ALJ on the same facts might have reached a different conclusion, is of no moment, provided the inference upon which the officer relied is objectively reasonable. During his cross examination, Petitioner's counsel attempted to parse through precisely when in the sequence of events that the arresting officer decided to make the arrest. This effort to parse each observation or manifestation of impairment is another form of the divide each observation or manifestation from the other rather than looking at them as a whole under the totality of circumstances. As *Hughes* makes abundantly clear, the divide and conquer approach has been flatly rejected. The *Hughes* court also rejected the notion that a reasonable officer cannot continue to rely on an indicator of impairment as part of the totality of the circumstances simply because an officer agrees that an indicator might possibly be the result of other causes. Thus, even after acknowledging possible alternative causes, as part of the totality of the circumstances, a reasonable officer may nevertheless rely on such indicia of impairment. *Id*. Additionally, precisely when and at what stage, the arresting officer here, subjectively determined based on her observations and the manifestations of Petitioner's impairment is of no consequence under the objective standard articulated in *Hughes*.

At the hearing, the arresting officer testified that Petitioner (1) had bloodshot and glassy; (2) had significantly slurred speech; (3) was evasive, standoffish and did not want to answer questions about the incident when questioned by the officer; (4) had a strong odor of alcohol coming from his person even when separated from his vehicle; (5) was unsteady on his feet when moving from where his vehicle was resting to the rear of the officer's car and used the car for balance; (6) had been involved in a single vehicle accident where the driver's vehicle hit a utility pole with enough force to knock the pole down and cause all of the vehicle's air bags to deploy. Here, the arresting officer had substantially more indicia of possible impairment as compared to those that were present in *Bostic*. In *Bostic*, the Georgia Court of Appeals reversed the trial court's order denying a motion to suppress on the grounds that the police had probable cause to arrest Bostic, finding instead, as a matter of law, that the evidence presented was not sufficient to support a finding of probable cause. *Bostic*, 332 Ga. App. at 607-08 (evidence that suspect

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[1] *Boyd v. State*, 259 Ga. App. 864, 865-866 (2003).
[2] *Singleterry v. State*, 227 Ga. App. 155 (1) (489 S.E.2d 42) (1997).
[3] *State v. Smith*, 196 Ga. App. 876, 877 (397 S.E.2d 304) (1990).
[4] *Herkert v. State*, 177 Ga. App. 610 (1) (340 S.E.2d 251) (1986).

admitted to consuming alcohol, exhibited bloodshot and watery eyes, and tested positive on the Alco-Sensor is only sufficient to give rise to a suspicion or possibility that Bostic was an impaired driver). Significantly, however, the Court of Appeals distinguished between watery eyes and glassy or unfocused eyes, implying, in *dicta*, that glassy or unfocused eyes, as opposed to watery eyes, would have been a sufficient additional factor that could have supported a finding of probable cause. *Id.* at 608. In this case, the observations and manifestations cited by the arresting officer in her testimony and the actions she took, are sufficient under the totality of the circumstances to provide the officer with reasonable grounds to believe that Petitioner was driving under the influence of alcohol to a degree that rendered Petitioner incapable of driving safely and that the Petitioner was lawfully placed under arrest.

☒ 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).

As noted in the Findings of Fact, Petitioner was placed under arrest before the officer read the implied consent notice. In the case where there is no serious injury, as is the case here, the suspect must be placed under arrest first for the implied consent notice to be valid. *Hough v. State*, 279 Ga. 711, 716 (2005). Since the Petitioner was not placed into handcuffs immediately following being placed under arrest, counsel for Petitioner and the Court had a colloquy concerning whether a suspect had to be handcuffed to be placed under arrest. Counsel did not appear to take that position but to be clear, the fact that Petitioner was not handcuffed and placed in the vehicle until after the officer read implied consent does not refute or undermine the officer's testimony that she placed Petitioner under arrest first, before she immediately read him the implied consent notice. The Supreme Court has held that,

> The arrest necessary before the reading of implied consent, however, does not have to be a "formal arrest" in which the officer explicitly states to the suspect that he or she has been arrested. To the contrary, "[a]n arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force." *Clements v. State*, 226 Ga. 66, 67 (2) (172 SE2d 600) (1970). Thus, implied consent is triggered at the point that the suspect is not free to leave and a reasonable person in his position would not believe that the detention is temporary, regardless of whether a "formal arrest" has occurred.

Id. When the officer in this case placed Petitioner under arrest, implied consent was triggered at that point because Petitioner was not free to leave and a reasonable person in the Petitioner's position would not believe the detention was temporary even though he had not been handcuffed and placed in the officer's vehicle.

☒ The Petitioner refused the state-administered test(s). O.C.G.A. § 40-5-67.1(g)(2)(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 __1st_____ day of_____December_____, 20_23_____.

John Fry
Administrative Law Judge