BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

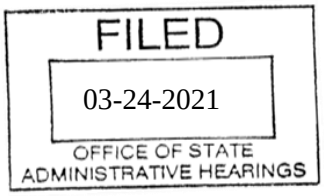
URIEL SALAZAR,
Petitioner,

v.

DEPARTMENT OF DRIVER SERVICES,
Respondent.

Docket No.: 2114653
2114653-OSAH-DPS-ALS-92-Brown

Agency Reference No.: 060552046



FINAL DECISION

I. Introduction

This matter concerns the decision of Respondent, the Department of Driver Services, to suspend Petitioner's driver's license or privilege to drive in the State of Georgia pursuant to O.C.G.A. § 40-5-67.1. An evidentiary hearing was held before the undersigned Administrative Law Judge at the Lowndes County Judicial and Administration Complex, Valdosta, Georgia, on March 19, 2021. John Holt, Esq. represented Petitioner, and Dee Brophy, Esq. represented Trooper Chandler Poore, complainant witness for Respondent. For the reasons indicated herein, Respondent's action is **REVERSED.**

II. Findings of Fact

1. Trooper Chandler Poore (the Trooper) has been a Georgia State Patrol trooper for just over two years, and has had DUI detection training, as well as training on speed detection, radar and the Intox 9000.

2. On November 26, 2020, the Trooper was working on GA Highway 38/Highway 84, Mile Marker 3 on I-75, observing traffic flow, when he observed a white vehicle traveling at a high rate of speed. The posted speed limit at Mile Marker 3 was 65 mph, but the Trooper indicated that the vehicle was traveling at 83 mph. As a result, the Trooper initiated a traffic stop.

3. The driver was the Petitioner herein, and he was alone in the vehicle. As it was dark and the stop occurred on I-75, the Trooper approached the vehicle from the passenger side, and when the Petitioner rolled down the window, the Trooper smelled immediately the strong odor of an alcoholic beverage.

4. Petitioner's eyes were extremely bloodshot and watery. Although his speech was normal, he seemed a little nervous. When the Trooper asked him if he had consumed alcoholic beverages that evening, the Petitioner indicated that he had two beers earlier.

5. When questioned as to where he was headed, Petitioner said that he was trying to go see family, as it was Thanksgiving time. The Trooper asked Petitioner to exit the vehicle, whereupon he observed that the Petitioner was unsteady on his feet, and continued to be that way throughout the investigation.

6. Although the Trooper believed that the Petitioner understood him, Petitioner was not responding to the Trooper appropriately, so the Trooper testified that there may have been "language issues." The Trooper testified that at times, the Petitioner did not seem to understand what he was saying.

7. When the Trooper inquired as to whether or not Petitioner would perform certain field sobriety evaluations, the Petitioner agreed. The first evaluation was the HGN, but after several instructions to keep his head still and looking forward, the Petitioner kept turning his head to follow the stimulus; therefore, the test was terminated.

8. The second evaluation was the walk and turn. The Trooper demonstrated and gave appropriate instructions as to how to perform the evaluation. Although the Petitioner indicated that he could walk "okay," he did mention to the Trooper that he had boots on that may affect the

test. However, even given the opportunity to remove the boots, Petitioner indicated "no;" that he preferred to keep his boots on to perform the tests.

9. The Trooper observed 5 of 8 clues for the walk and turn, to wit: Petitioner was unable to balance; he stopped walking on the walk out and on the walk back; he missed heel to toe when he stepped; he stepped out of line, and he made an improper turn.

10. The Trooper asked Petitioner about the one-leg stand, but the Petitioner stated that he did not have good balance with his boots on.

11. The Trooper asked Petitioner if he would blow into the PBT, preliminary breath testing device, and in this case, an alco-sensor approved by the Georgia Department of Public Safety. The Petitioner agreed, but only after the Trooper made certain hand motions indicating that he had to blow as if he was blowing up a balloon. The results were positive for alcohol.

12. Based on his driving, the observations made concerning Petitioner's physical manifestations, and, lastly, Petitioner's performance on the field sobriety evaluations, the Trooper made the decision that the Petitioner was "too impaired to drive," and arrested Petitioner for DUI. Afterwards, the Trooper read to Petitioner the implied consent notice for suspects over the age of 21 years, requesting a blood test.

13. According to the Trooper's testimony, the Petitioner did not seem to understand the request to submit to a blood test; therefore, the Trooper attempted to explain to the Petitioner that he was asking for a blood test, that the test was voluntary, and that the Petitioner would go to jail regardless of whether he agreed to take the test. Specifically, the Trooper testified:

> With everybody I place under arrest for DUI, I explain to them that whether they give consent, whether they refuse, it doesn't change that they're still going to go to jail. They're already placed in handcuffs. They're already being arrested. Implied consent is just something we're supposed to read. A lot of people, they think that if they agree or refuse—either if they refuse it's going to make things worse, some people believe that. So I always tell them that it's not going to make things worse,

> it's not going to change anything, it's not going to change how I see them, it's not going to change any of that, I explain that to them.

14. After the Trooper provided this explanation and pantomimed a blood draw in an effort to help Petitioner understand that he was asking for a blood test, the Petitioner shook his head, "no." At no point in time did Petitioner indicate that he had changed his mind and wished to take the state's chemical test of his blood.

III. Conclusions of Law

1. This appeal arises under Georgia's Motor Vehicle and Traffic laws.[1] Respondent bears the burden of proof.[2] The standard of proof is a preponderance of evidence.[3]

2. Pursuant to Code Section 40-5-55,

> any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 . . . .[4]

Further, Code Section 40-5-67.1 provides that such chemical tests

> shall be administered as soon as possible at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391 and the officer has arrested such person for a violation of Code Section 40-6-391.[5]

3. At the time a chemical test or tests are requested, the arresting officer shall select and read to the person the appropriate implied consent notice.[6] The notice must be read in its entirety, but need not be read exactly so long as its substance remains unchanged.[7] However, misleading

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1 O.C.G.A. § 40-5-67.1.
2 GA. COMP. R. & REGS. 616-1-2-.07.
3 GA. COMP. R. & REGS. 616-1-2-.21.
4 O.C.G.A. § 40-5-55.
5 O.C.G.A. § 40-5-67.1(a).
6 O.C.G.A. § 40-5-67.1(b).
7 *Id.*

information may effectively nullify the implied consent notice if such misinformation influenced the person's decision regarding whether to submit to the test.[8]

4. In the present case, Trooper Poore read the implied consent notice to Petitioner in its entirety and with substantial accuracy. However, after reading the notice, he stated to Petitioner that his decision whether to submit to the chemical test "made no difference" and that his refusal to take such test "would not make things worse" or "change anything."[9] Such statements were misleading; refusal to take the test would result in a suspension of Petitioner's driver's license or privilege to drive.[10] Further, the statements may have influenced Petitioner's decision to refuse to take the test. An objective listener could have reasonably concluded from such statements that there were no consequences for refusal. At the time the statements were made, Petitioner had yet to decide whether to take the test. Petitioner refused to take the test after hearing the statements.[11] Therefore, the Court concludes that Petitioner was not properly informed of his implied consent rights and the consequences of submitting or refusing to submit to the test.[12]

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[8] *See, e.g.*, *Kitchens v. State*, 258 Ga. App. 411, 414–15 (2002); *State v. Coleman*, 216 Ga. App. 598, 599 (1995).

[9] A person may be denied their right to make an informed choice under the implied consent statute even where the misleading statements were made after the arresting officer read the implied consent notice accurately and completely. *State v. Terry*, 236 Ga. App. 248, 250 (1999).

[10] Based on Trooper Poore's testimony, it is clear he meant to convey to Petitioner that he would go to jail regardless of whether he consented to the chemical test, and that he did not intend to misinform Petitioner. However, in determining whether Petitioner was informed of his implied consent rights and the consequences for refusal, the Court must focus on the statements and their effect on Petitioner, and not the trooper's subjective intentions.

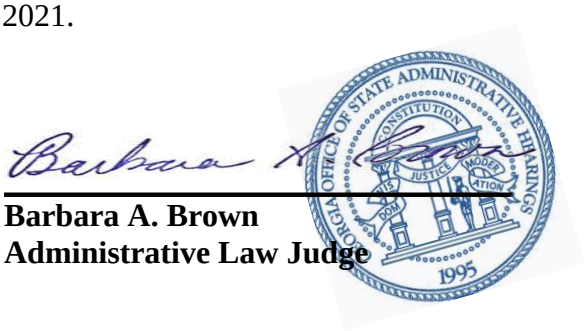
[11] *But see Rojas v. State*, 235 Ga. App. 524, 527 (1998) (misstatement harmless were made *after* driver refused to take the chemical test).

[12] O.C.G.A. § 40-5-67.1(g)(2)(B).

IV. Decision

Based on the foregoing findings of fact and conclusions of law, Respondent's decision to suspend Petitioner's license and/or privilege to drive in the State of Georgia is **REVERSED**.

SO ORDERED, this 25th day of March, 2021.



Barbara A. Brown
Administrative Law Judge

NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41. A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(4). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Hazel Jackson - 404-656-7055; Email: hjackson@osah.ga.gov; Fax: 404-656-7055; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.