

IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,

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vs.

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CASE NO: SU-22-CR-0013-S

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JABBARY ANTOINE STEVENS,
Defendant.

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ORDER ON DEFENDANT'S MOTION TO SUPPRESS

On April 26, 2022, Defendant filed a Motion to Suppress. A hearing was held on June 22, 2022, and Trooper Sarah Kitchens of the Georgia State Patrol testified. The parties requested additional time to review the transcript of the motion hearing and file briefs. The transcript of the hearing was filed on July 14, 2022, and counsel for the State and Defendant provided briefs to the Court. Having considered the Defendant's written motion, the evidence presented, and the arguments of counsel, it is hereby ORDERED that the Defendant's Motion to Suppress is **GRANTED**.

FACTS

On February 11, 2018, Trooper Kitchens of the Georgia State Patrol responded to a motor vehicle accident in Athens-Clarke County that was reported as a possible fatality. Upon her arrival, she observed a four-year-old child on the ground with CPR being performed. The trooper noted that she believed the child was "medically deceased." The trooper did not testify as to the time she responded to the accident or what time the accident occurred.

At the scene of the accident, the trooper observed the Defendant in an ambulance. She introduced herself to him at that time and later spoke with the Defendant at Piedmont Athens

Regional Hospital. Prior to this trooper's conversation with the Defendant at the hospital, Trooper Choi spoke to the Defendant at the hospital. Trooper Choi did not testify, and no evidence was presented as to any of his conversation with Defendant. Trooper Kitchens met with the Defendant in a trauma room. She described his demeanor as alert and coherent, but also slow and confused. According to Trooper Kitchens, a nurse gave her permission to speak with the Defendant. The nurse's name was not provided and the nurse did not testify at the hearing.

When speaking with Defendant, Trooper Kitchens asked him about his day. The trooper testified that the Defendant was under investigation but not under arrest at the time she spoke to him and she did not read Defendant the Miranda warnings. Defendant advised that he had taken cocaine to wake up at 11:00 a.m. or noon, and then later around 2:00 p.m. or 3:00 p.m., he smoked some marijuana before going to see his girlfriend.

Trooper Kitchens testified that after speaking with the Defendant, she placed him under arrest. She testified that the arrest was not a custodial arrest and no handcuffs were placed on Defendant. Trooper Kitchens did not note in her incident report that she had placed the Defendant under arrest. Having confirmed the Defendant's age, the trooper then read the Defendant the implied consent notice for persons age 21 and over and requested that the Defendant provide a blood sample. She stated that the Defendant also signed some consent paperwork from the hospital. The consent paperwork was not put into evidence by the State, nor was any testimony presented by a hospital employee regarding the consent paperwork.

On cross examination, Trooper Kitchens testified that she was not equipped with a recording device that would have produced a video or audio recording of her interactions with Defendant in the hospital. When questioned regarding the

probable cause to arrest the Defendant for DUI prompting the reading of the implied consent notice, Trooper Kitchens testified that she found probable cause based upon the totality of the circumstances which included the less safe act of the Defendant, the witness statements, the statements of the Defendant, and the evidence at the scene. The trooper did not testify regarding any witness statements or evidence found at the scene. She testified that she had some suspicion of possible impairment of the Defendant. She advised the Defendant's family that she would be issuing warrants for the Defendant's arrest.

At the time of this accident and investigation, Trooper Kitchens had completed field training and been a trooper for approximately one month. She testified that she did not write any citations to Defendant on the date of the incident, and did not recall when warrants were issued for the Defendant's arrest. Upon a review of the file in the case, the Court determined that the warrants were issued for the Defendant's arrest on December 4, 2018. Trooper Kitchens had no contact with the Defendant between February 11, 2018 and the time that she requested the arrest warrants.

LAW AND ANALYSIS

In Defendant's Motion to Suppress, he asserts that the search and seizure of his blood was unlawful as it was taken without a warrant, without a valid exception to the warrant requirement, in violation of the Georgia implied consent law, and without consent. In his brief submitted after the hearing, Defendant argued that Defendant was given untimely and improper implied consent warnings, and that Defendant did not voluntarily consent to the blood draw. The State contends that Defendant's Motion to Suppress should be denied because Defendant consented to the blood draw, Trooper Kitchens had probable cause to arrest the Defendant, the implied consent warnings were properly

administered to the Defendant, and due to the serious injuries from the accident, the Defendant was not required to be placed under arrest for implied consent to be administered.

O.C.G.A. § 40-5-55 sets forth the Georgia implied consent law. Subsection (a) provides, in part, "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 or if such person is involved in any traffic accident resulting in serious injuries or fatalities." With respect to serious injuries or fatalities, subsection (c) means a motor vehicle accident "in which one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness."

The Georgia Supreme Court has determined that in order for implied consent to be read in a case with serious injuries, a defendant must either be arrested prior to reading of implied consent or there must be a serious injuries and probable cause to believe the defendant was driving under the influence of alcohol or other drugs. See Hough v. State, 279 Ga. 711 (2005). In determining whether this was a case with serious injuries, the Court must determine whether the trooper's testimony that a child was "medically deceased" meets the serious injury definition under O.C.G.A. § 40-5-55(c). While the trooper did not specifically testify that the child was unconscious, the Court can infer that "medically deceased" involves a loss of consciousness such that there was a serious injury based upon the motor vehicle accident. Even a temporary loss of

consciousness meets the statutory requirements. State v. Umbach, 284 Ga. App. 240 (2007).

Having determined that the case involved a serious injury, the trooper must either have probable cause to believe the Defendant was driving under the influence of alcohol or other drugs or have arrested the Defendant for DUI which also requires probable cause. Trooper Kitchens testified that she placed the Defendant under arrest prior to reading the implied consent warning to Defendant. An arrest does not require that the Defendant be physically placed in restraints, only that the Defendant's liberty be restrained. Hough, 279 Ga. at 716. Here, the trooper advised the Defendant that he was under arrest as well as told his family that he would be arrested. She released the Defendant to the custody of the hospital staff. Therefore, the Court, finds that the Defendant was under arrest and would have believed that his liberty was restrained at the time the implied consent notice was read.

At issue in this case is whether the trooper had probable cause to arrest the Defendant for DUI and/or whether probable cause existed to believe that the Defendant was driving under the influence of drugs. Trooper Kitchens admitted on cross-examination that she had some suspicion of possible impairment of Defendant. She did not testify as to any signs that Defendant was impaired or any indicia of impairment based upon her observations or the Defendant's demeanor. A suspicion of possible impairment does not rise to the level of probable cause. "[P]robable cause requires merely a probability - less than a certainty but more than mere suspicion or possibility." Diaz v. State, 344 Ga. App. 291, 302 (2018).

In its brief, the State contends that the facts that Defendant admitted to the use of drugs and committed a less safe act at the time he failed to maintain lane are sufficient to

establish probable cause. However, the State has not cited any case that supports this argument in the absence of other evidence. Further, Trooper Kitchens testified that she found probable cause based upon the totality of the circumstances, which included the less safe driving act of Defendant, witness statements, the statements of the Defendant, and evidence at the scene. The Court finds the facts of the current case are distinguishable from cases in which there was an accident and an officer testified to indications of impairment of the Defendant as related to the use of alcohol or drugs. See State v. Umbach, 284 Ga. App. 240 (2007) (Officer noted driver's speech was slurred, the driver seemed disoriented and had glassy eyes, and the officer smelled the odor of alcohol on the driver's breath); Davis v. State, 358 Ga. App. 832 (2021) (Evidence presented showed that driver was dazed and confused, had somewhat thick and slow speech, and had unusually constricted pupils in addition to the manner in which the crash occurred); Holland v. State, 329 Ga. App. 103 (2014) (Evidence presented that driver failed to yield, was slow in responding, had slurred speech, was withdrawn, had bloodshot and watery eyes, and admitted to taking medications that made him sleepy.)

Here, although the officer testified that probable cause was based in part on the scene and witness statements, the State presented no evidence as to the scene or any witness statements. Additionally, without any evidence presented of the time of the accident, any indications of impairment of Defendant, or any expert testimony as to how the use of drugs between approximately 11:00 a.m. and 3:00 p.m. would have affected the Defendant at the time of the accident, the Court finds that the State has not proven that the trooper had probable cause to either arrest the Defendant for DUI or read the implied consent notice to Defendant. In the absence of probable cause, the

Court finds that the reading of the implied consent was improper.


Since the Court has found that Trooper Kitchens did not have probable cause to either arrest the Defendant for DUI or read the implied consent warning to Defendant, the State must prove that the Defendant consented to the test of his blood. At the hearing, the trooper testified that the Defendant consented to a test of his blood and that he signed paperwork from the hospital indicating such consent. The officer testified that Trooper Choi located a phlebotomist and a GBI blood kit was used. The State did not present any consent paperwork from the hospital and no hospital employee testified to receiving consent from Defendant. Since the Defendant has raised the issue of consent or voluntariness to the blood test given, the "State must prove that the suspect gave actual consent - i.e., that the totality of the circumstances show that the suspect acted freely and voluntarily in given that consent." Davis v. State, 332 Ga. App. 488, 490 (2015). Here, the Court finds that based upon the lack of evidence presented by the State as to Defendant's alleged consent to the blood test, the State has not proven that the consent was freely and voluntarily given.

In the absence of probable cause to arrest the Defendant for DUI or to read implied consent, and the lack of proof of Defendant's consent to blood testing, the Court finds that the Defendant's blood test and any results therefrom are not admissible in the trial of this case. Based upon this ruling, the Court need not address whether the implied consent warnings read to Defendant were proper.

For the foregoing reasons, the Court GRANTS Defendant's Motion to Suppress.

Let a copy of this Order be served upon Tyler Normandia, Assistant District Attorney, and John Donnelly, Public Defender as required by law.

SO ORDERED this 7th day of September, 2022.


LAWTON E. STEPHENS
Judge Superior Courts
Western Judicial Circuit

9-7-22
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