

Expert Testimony Regarding Impairment

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[Rule 702\(a1\)](#) was enacted in [2006 \(effective for hearings held August 21, 2006 or later\)](#) to render admissible two types of expert testimony on the issue of impairment: (1) testimony regarding the results of a Horizontal Gaze Nystagmus (HGN) test; and (2) testimony from a certified Drug Recognition Expert (DRE) regarding whether a person is under the influence of an impairing substance. For both types of expert testimony, the rule specifies that testimony is admissible solely on the issue of impairment and not on the issue of a specific alcohol concentration level. Expertise in HGN and drug recognition and classification are premised upon standardized curricula developed by the National Highway Transportation Safety Administration.

HGN is one of three components of the Standardized Field Sobriety Test battery. The others are the Walk-and-Turn and the One-Leg Stand tests. The latter tests measure behavior that a lay person without specialized training would commonly associate with intoxication such as lack of balance and coordination. The HGN test, in contrast, evaluates the eye's ability to smoothly follow a moving stimulus and the jerking of the eye (termed "nystagmus") as it moves to the far side of a person's vision. Specialized, or scientific, knowledge is required to correlate this type of eye movement with intoxication. Thus, before enactment of Rule 702(a1)(1), the state supreme court held in *State v. Helms*, 348 N.C. 578 (1998), that testimony from a police officer regarding the results of an HGN test performed by the defendant was inadmissible without the introduction of foundational evidence establishing that the HGN test was scientifically reliable. The scientific reliability of HGN testing has been hotly debated among law enforcement and legal advocates, and research supports both the views of HGN proponents and its detractors. Compare Steven J. Rubenzer and Scott B. Stevenson, [Horizontal Gaze Nystagmus: A Review of Vision Science and Application Issues](#), *Journal of Forensic Sciences* (March 2010) (reviewing prosecution and defense claims about HGN and concluding that "[w]hile the sobriety testing literature provides circumstantial evidence of HGN's validity when BAC is used as a criterion, the eye movement literature raises serious questions about its use as a roadside sobriety test") with Marcelline Burns, [The Robustness of the Horizontal Gaze Nystagmus Test](#), National Highway Transportation Safety Administration (September 2007) (concluding that "HGN as used by law enforcement is a robust procedure" and finding "no basis for concluding that the validity of HGN is compromised by minor procedural variations").

Indeed, Rule 702(a1)(1) was proposed by the Governor's Task Force on Driving While Impaired, which opined that HGN testimony was "among the most effective sobriety tests" and would "enhance accurate assessment of DWI offenders," but that "[b]ecause of *State v. Helms* (1998), most judges will not admit this testimony."

The adoption of Rule 702(a1)(1) up-ended the *Helms* analysis by "obviating the need for the state to prove that the HGN testing method is sufficiently reliable." See [State v. Smart](#), ___ N.C. App. ___, 674 S.E.2d 684 (2009). Under the current rule, an officer trained in administering the test may testify about the defendant's performance without being qualified as an expert on the scientific principles underlying the HGN test or whether there is a causal connection between alcohol use and distinct and sustained nystagmus. Doubtless, experts will continue to debate the reliability of HGN, but their arguments in criminal cases now will be aimed at the finder of fact rather than the gatekeeper jurist.

A similar provision likewise proposed by the Governor's Task Force on Driving While Impaired—Rule 702(a1)(2)—permits a certified Drug Recognition Expert (DRE) to testify regarding whether a person was under the influence of an impairing substance and the category of the substance. DREs are trained to administer a 12-step

protocol designed to determine whether a person is impaired by drugs, and, if so, what category of drug (central nervous system depressant, central nervous system stimulant, hallucinogen, dissociative anesthetic, narcotic analgesic, inhalant, or cannabis) caused the impairment. The DRE certification and evaluation process is described in detail [here](#).

There are no published appellate cases in North Carolina applying Rule 702(a1)(2) or defining the permissible scope of DRE testimony, though two unpublished cases reveal the sort of testimony the State may attempt to proffer through a DRE. In [State v. Wright](#), No. COA09-1062 (N.C. App. May 18, 2010) (unpublished op.), a DRE officer testified that the defendant was impaired by Ambien, a central nervous system depressant available only by prescription. The defendant did not object to this testimony at trial, but argued on appeal that the DRE's opinion was improperly admitted because it was inconsistent with the results of the analysis of her blood, which revealed the presence of a central nervous system stimulant rather than a depressant, and because the officer was not qualified to testify about the effect of prescription drugs on the human body. The court held that the officer was properly tendered as an expert and the testimony was proper, but that even if the testimony was improper, it did not amount to plain error.

In [State v. Blinderman](#), COA08-824 (N.C. App. June 2, 2009) (unpublished op.), the defendant likewise failed to object at trial but argued on appeal that the trial court should have excluded testimony from a DRE regarding the effects of prescription drugs on the body as well as other confusing and erroneous testimony. Notwithstanding the erroneous nature of the testimony and the fact that the DRE never personally examined the defendant as required by DRE protocol, the court found no plain error. Interestingly, the Supreme Court of Kentucky recently reversed a defendant's convictions for second-degree manslaughter and second-degree assault based on improper testimony from a DRE who did not observe the defendant but instead based his opinion solely on his review of ambulance report. See *Burton v. Kentucky*, 300 S.W.3d 126 (Ky. 2009). The *Burton* court held that the DRE's testimony "improperly invited the jury to speculate that Burton could have been under the influence of LSD, ecstasy, and methamphetamine—all illicit substances of which there was no evidence."

Because DRE testimony can be a critical to the state's case in prosecutions where a chemical analysis fails to detect an impairing substance or is inconclusive regarding the time of its ingestion, it seems likely that our appellate courts will be called upon in future cases to more clearly define what sorts of opinion testimony may accompany DRE testimony regarding a person's impairment.

As always, we'd love to hear from you regarding how these issues are playing out in the trial court trenches.