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HGN, the Rules of Evidence and Suppression Hearings

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True or False: An officer does not have to be qualified as an expert to testify about horizontal gaze nystagmus in a hearing on a motion to suppress in an impaired driving case.

This statement is true.

Say what? I've written a lot about expert testimony and horizontal gaze nystagmus (HGN) lately, including a post titled "Only Experts Can Testify about HGN." That post describes the court of appeals' determination in State v. Godwin, ___ N.C. App. ___ (2016), that N.C. Evid. Rule 702(a1) requires a witness to be qualified as an expert before he may testify to the issue of impairment related to HGN results. But *Godwin* states the rule that applies to the admission of testimony ***at trial***. The rules are different at a hearing on a motion to suppress.

How does this issue arise? The HGN test is one of three standardized field sobriety tests that law enforcement officers frequently ask drivers suspected of impaired driving to perform. Thus, an officer's observation of clues on the HGN test often is relevant to determining whether there was probable cause to arrest the defendant for impaired driving. When an officer attempts to provide such testimony in a suppression hearing, defense attorneys sometimes object on the basis that the officer lacks the requisite expertise or the reported results are unreliable.

What's the law? Rule 104(a) of the North Carolina Rules of Evidence states that in determining preliminary questions of admissibility—the very issue in a suppression hearing—the court is not bound by the rules of evidence except as to privileges. This means that the evidence rules (including Rule 702) do not apply in probable cause hearings. As a result, there is no requirement that an officer be formally tendered as an expert under Rule 702 before testifying about HGN at a probable cause hearing. *See United States v. Horn*, 185 F. Supp.2d 530, 533 n.5 (D. Md. 2002) (concluding that regardless of whether SFSTs are admissible in evidence, they may establish probable cause for DWI); *State v. Grier*, 791 P.2d 627, 631 (Alaska Ct. App. 1990) (agreeing with the trial court that the HGN test is sufficiently reliable to be considered with other field sobriety tests in determining probable cause).

Of course, evidence of HGN results may also be offered at trial for an impaired driving offense as proof that the defendant was appreciably impaired when she drove. The rules of evidence, including the rule announced in *Godwin*, ***do apply*** in that context.

Confused? You aren't alone. A 2005 report from the Governor's Task Force on Driving While Impaired recommended that "the findings of [an HGN] test should be admitted in trial for purposes of proving probable cause." Given that probable cause to arrest is relevant for purposes of a motion to suppress but not to the issue of a defendant's guilt on the underlying charges, it is unclear why the task force referred to "proving probable cause" "in trial." The General Assembly responded to that recommendation by amending Rule 702, which, again, does not apply to hearings on motions to suppress.

Katie, bar the door! Before the defense bar panics, let me quickly say that the inapplicability of the rules of evidence does not mean that there are no boundaries limiting the evidence that may support a finding of probable cause. There

are. In forming probable cause, an officer may only rely on reasonably trustworthy information that would support a reasonable belief that the suspect committed an offense. *See* *Beck v. Ohio*, 379 U.S. 89, 91 (1964). To support a determination of probable cause, therefore, the results of the HGN test must possess some indicia of reliability such that a reasonable officer could rely upon them in concluding there is a fair probability that the defendant is impaired. *See State v. Ruthardt*, 680 A.2d 349 (Sup. Del. 1996).

It is the judge's call. The trial judge determines whether the information relied upon by the officer is reasonably trustworthy. In practice, this determination may not look very different from the judge's determination of whether the evidence may be admitted at trial. A trial judge might, for example, conclude that an officer must be trained in administering HGN for the results of that test to provide reasonably trustworthy information. *See State v. Superior Court In & For Cochise Cty.*, 718 P.2d 171, 178 (Ariz. 1986) (en banc) concluding that "the testimony presented at the evidentiary hearing regarding the reliability of the HGN test establishes that in the hands of a trained officer the test is reasonably trustworthy and may be used to help establish probable cause to arrest"). The judge might require the State to offer additional evidence of the connection between exaggerated nystagmus and impairment from alcohol. Or she might not. Whatever she decides, her ruling is not subject to the provisions of Rule 702.