Nystagmus in the Courts

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Jurisprudence over whether officers may testify about defendants' horizontal gaze nystagmus (HGN) in impaired driving trials has failed to follow a smooth path. In fact, one could fairly note that more than the defendants' eyes have jumped all over the place. First, our state supreme court said that testimony from a police officer regarding the results of an HGN test performed by the defendant was inadmissible without the evidence establishing that the HGN test was scientifically reliable. State v. Helms, 348 N.C. 578 (1998). The legislature responded by amending Rule 702 in a manner that, according to the court of appeals, "obviat[ed] the need for the state to prove that the HGN testing method is sufficiently reliable" and permitted law enforcement officers trained in administering the HGN test to testify about the defendant's performance. State v. Smart, 195 N.C. App. 752 (2009). But forget admissibility for a moment. Does HGN evidence prove anything much anyway? A recent unpublished case from the court of appeals indicates that it does not.

State v. Sewell, No. COA14-269, ___ N.C. App. ___ , 768 S.E.2d 650 (2015) (unpublished).

The facts. Margaret Sewell and a passenger in her car were stopped at a North Carolina State Highway Patrol checkpoint in Durham on November 16, 2012. The trooper who asked for Sewell's license and registration smelled a strong odor of alcohol coming from the vehicle and saw that Sewell's eyes were red and glassy. Sewell's speech, however, was not slurred and she easily retrieved her license and registration. She initially denied drinking alcohol that evening, but subsequently admitted to drinking a glass of wine. The trooper asked Sewell to perform field sobriety tests. The trooper noted no clues of intoxication on the one-leg stand or walk and turn tests, but noted six of six clues on the HGN test. Sewell also submitted to a portable breath test, which was positive. Based on these results, the trooper arrested Sewell and charged her with DWI.

Legal argument. Sewell moved in superior court to suppress the evidence gathered after she was arrested on the basis that trooper did not have probable cause to arrest her. The trial court agreed and granted the motion. The State appealed.

Holding. The court of appeals held that the trooper's observation of Sewell's red, glassy eyes, six of six clues on the HGN test, and positive results on the portable breath test did ***not*** provide him with probable cause that Sewell was driving while impaired. In considering the totality of the circumstances, the court noted the lack of evidence that Sewell was the source of the alcohol odor emanating from the vehicle as well as evidence that: (1) Sewell's speech was not slurred, (2) she easily retrieved her license and registration, (3) she was steady on her feet, (4) she followed the trooper's instructions, (5) she was polite, cooperative, and respectful, and (5) she exhibited no clues on the other field sobriety tests.

Significance. We already knew that the defendant's consumption of alcohol combined with a positive result on a portable breath test wasn't sufficient to establish probable cause to support his arrest for DWI. *See* State v. Overocker, ___ N.C. App. ___, 762 S.E.2d 921 (2014) (discussed here). But one might have expected a significant number of clues on a field sobriety test to change the balance. According to *Sewell*, six of six clues on the HGN test, without more, does not.

Unpublished. I mentioned early on that *Sewell* was unpublished. So the appellate courts might ignore it in the future

as it is not controlling. But that certainly won't prevent it from making the rounds (as these things tend to do).

What do you think? Is *Sewell* a surprise? Do you think it would have come out differently if the clues were noted on one of the other two field sobriety tests to which Sewell submitted? Does this case represent the appellate courts' lingering skepticism regarding HGN? *Cf.* City of Wichita v. Molitor, 341 P.3d 1275 (Kan. 2015) (holding that the lower court erred in allowing the State to rely on "scientifically unproved HGN test results" to establish reasonable suspicion for impaired driving). Or not? *Cf.* State v. Jackson, ___ N.C. App. ___, 767 S.E.2d 149 (2014) (unpublished) ("Given Officer Noble's knowledge, experience, training, and education, he was better qualified than the jury regarding the administration and interpretation of the HGN test and his testimony on the issue of defendant's impairment was helpful to the jury.")