State Supreme Court Issues Significant Rulings on HGN Evidence and Blood Draws in DWI Cases

Author : Shea Denning

Categories : Motor Vehicles, Search and Seizure

Tagged as : blood draws, exigency, G.S. 20-16.2, HGN, implied consent, McNeely, Rule 702, State v. Godwin, State v. Romano

Date : June 14, 2017

Two of last week's opinions from the North Carolina Supreme Court address significant legal issues arising in impaired driving cases. In State v. Godwin, the supreme court reversed the court of appeals, holding that the trial court was not required to explicitly recognize a law enforcement officer as an expert witness before the officer could testify to the results of a Horizontal Gaze Nystagmus (HGN) test. In State v. Romano, the supreme court upheld the court of appeals' determination that the withdrawal of blood from an unconscious impaired driving defendant violated the Fourth Amendment, notwithstanding a state statute authorizing this practice.

State v. Godwin. The defendant in *Godwin* was stopped for speeding and was subsequently charged with driving while impaired. At trial, the State elicited testimony from the law enforcement officer who arrested the defendant about the defendant's performance on an HGN test.The defendant objected to this testimony on the basis that the officer had not been qualified or tendered as an expert. The State argued that the officer did not have to be an expert because he was merely testifying to the administration of the test and his observations. In addition, the State argued that since the officer had successfully completed training in HGN, he was qualified to testify about the defendant's performance on the test. After conducting its own voir dire, the trial court concluded that the officer's training and experience rendered him qualified to testify about his administration of the HGN test and the indicators of impairment that he observed. The defendant was convicted at trial and appealed.

Court of appeals. The court of appeals held that the trial court erred by allowing the officer to testify without being formally tendered or recognized as an expert. The appellate court further determined that the error was prejudicial and awarded the defendant a new trial. The State sought review by the North Carolina Supreme Court.

Supreme court. The state supreme court determined that the trial court did not err in admitting the officer's testimony. The supreme court reasoned that the trial court had implicitly found that the law enforcement officer was qualified as an expert. As support for this conclusion, the *Godwin* court pointed to the evidence that was before the trial court regarding the officer's training and qualifications and the fact that the trial court overruled the defendant's objection to the officer's testimony.

The supreme court further determined that the trial court established the reliability of HGN testing before allowing the officer to testify about the defendant's performance. On voir dire, the officer testified that the HGN test was administered in accordance with NHTSA standards, those standards were derived from a scientific study, HGN test results are a reliable indicator of impairment, and he applied the proper principles and methods in the defendant's case.

Not *State v. Helms*. The supreme court distinguished *State v. Helms*, 348 N.C. 578 (1998)—the case relied upon by the court of appeals below—on the basis that *Helms* involved the "*reliability* of the HGN test, not the *observed impairment* of the individual being subjected to the HGN test." In *Helms*, there was no evidence regarding the reliability of the test or that the trial court implicitly found the officer to be an expert. The court characterized the facts in *Godwin* as significantly different, noting, among other differences, that the enactment of Rule 702(a1) post-*Helms* "clearly

signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State."

Reading the tea leaves. The most interesting aspect of *Godwin*—to me at least—is not its express holding but instead the court's commentary about the reliability of HGN. Prosecutors seeking to introduce evidence of HGN results through the testimony of a law enforcement officer are likely to cite as support *Godwin*'s conclusion that the officer's testimony on voir dire in that case was sufficient to established the reliability of HGN testing. I also wonder whether the supreme court's description of the legislative impetus for Rule 702(a1), without a corresponding mention of the 2011 amendments to Rule 702(a), signals the court's view that *State v. Smart*, 195 N.C. App. 752 (2009) (discussed here), did in fact survive the state's adoption of *Daubert*.

State v. Romano. The court of appeals held in Romano (discussed here) that the withdrawal of blood from an unconscious impaired driving suspect without a warrant and without an exigency violated the Fourth Amendment. The court rejected the State's argument that the withdrawal of the defendant's blood was permissible because G.S. 20-16.2(b) allows an officer to direct the taking of a blood sample from an unconscious defendant without first advising the defendant of his implied consent rights or seeking his consent. The State sought discretionary review.

Supreme court. The state supreme court affirmed, holding that G.S. 20-16.2(b) was unconstitutional as applied to the defendant because it permitted a warrantless search that violated the Fourth Amendment.

Analysis. The state supreme court first determined that G.S. 20-16.2(b) could not be upheld on the basis that the dissipation of alcohol creates a per se exigency permitting the warrantless withdrawal of blood. This type of per se exception to the warrant requirement was rejected by the United States Supreme Court in *Missouri v. McNeely*, __ U.S. __, 133 S. Ct. 1552 (2013), where the court held that the reasonableness of a warrantless blood test of a drunk-driving suspect must be determined case by case based on the totality of the circumstances. The *Romano* court further noted that the circumstances of the case did not establish exigent circumstances: multiple officers were present; the magistrate's office was only a few miles away; search warrants for blood are fill-in-the-blank forms that are not time-consuming; and magistrates were on-duty and available.

The court then turned to the State's contention that the defendant consented to the blood draw by virtue of the implied consent statutes. The State struck out there as well. The court reasoned that treating G.S. 20-16.2(b) as an irrevocable rule of implied consent would not comport with the consent exception to the warrant requirement because it would not take into account the totality of the circumstances. The court explained that while implied consent laws and "a person's decision to drive on public roads are factors to consider" in analyzing consent, those factors were not enough to establish voluntary consent.

Dissent. The majority in *Romano* held that the State waived arguments that there was no state action and that the good faith, inevitable discovery, and independent source exceptions to the exclusionary rule applied. Chief Justice Martin, joined by Justices Newby and Jackson, dissented on the basis that the good faith exception applied and the State had preserved that argument for appeal. Justice Newby also wrote a separate dissent expressing his view that the evidence in *Romano* should not have been suppressed because the blood was withdrawn by a hospital employee who was not a state actor.

As-applied? The *Romano* court held G.S. 20-16.2(b) unconstitutional "as applied" to the defendant. I cannot, however, conceive of a circumstance in which the statute could be applied constitutionally. If the State withdraws blood from an unconscious defendant pursuant to an exigency, it will be operating outside of the implied consent statutes and not pursuant to G.S. 20-16.2(b). And I don't know how the State could show voluntary consent by an unconscious person. As a result, I suspect that the State will not opt to rely on the provisions of G.S. 20-16.2(b) in future impaired driving investigations.