

Police training in drunk driving eye test challenged

by Nora Tooher Published: March 9th, 2010



A recent Illinois Supreme Court ruling may provide fodder for defense lawyers in other states seeking to challenge police testimony about an eye test widely used in DUI arrests.

The court held in *State v. McKown* that the horizontal gaze nystagmus (HGN) test is admissible for the purpose of proving that a defendant may have consumed alcohol.

But [the court also held that admitting an officer's testimony regarding HGN testing was reversible error](#) because the test was not performed in compliance with the National Highway Traffic Safety Administration's protocol. "Admission of [the officer's] testimony regarding the HGN test he performed in the absence of a proper foundation was error," the court said.

Don Ramsell, a veteran DUI defense lawyer in Wheaton, Ill., who argued the case, called the ruling "very significant."

"It institutes a very rigid and specific protocol for the test, namely the NHTSA protocol only, and that's a big foundational movement that many states don't have in place presently," he said. HGN testing is used by police in about 40 states as part of field-sobriety testing. It basically involves holding up a stationary object such as a finger or pen and seeing if the driver can follow it smoothly with his or her eyes. Failing the test indicates alcohol impairment.

Inadequate training

According to Ronald Henson, a retired police officer and instructor on field-sobriety testing in Illinois, many officers don't receive sufficient training to conduct the test properly. For example, while NHTSA recommends a 24-hour course in field-sobriety testing, Illinois devotes only one hour to HGN. Based on his review of videotapes of actual Illinois arrests in the *McKown* case, Henson testified that only one in 100 field HGN tests properly administered. **Ramsell agreed: "[The police] take shortcuts, they don't move their fingers the right way, and they misinterpret things. If you try to bring out the NHTSA book to cross-examine them, they will say, 'I was trained a different way in my academy.'"**

The Illinois ruling means that police departments in that state "will have to change the training because right now a great majority of the police officers in Illinois are no longer qualified to administer the test," Ramsell said.

"The reality is that ... the value of the test was literally completely gutted by the opinion," he added. The decision could inspire similar challenges in other states, Ramsell predicted.

Challenge in Kansas

Criminal defense lawyer Jay Norton, a partner at Norton Hare in Overland Park, Kan., is handling a case in which prosecutors are trying to change the rules on the admissibility of HGN testing. Kansas is one of the few states where HGN test results are currently inadmissible. A *Frye* hearing is scheduled for April 26 on the admissibility of an HGN test in the DUI arrest of a 19-year-old client.

Norton said he intends to argue against both the test itself and the way it is administered by police.

"The fact of the matter is it's not really good science, and certainly not for law enforcement purposes," he asserted. "It's one thing for ophthalmologists or optometrists to be conducting this test in their offices, but it's a whole other thing for officers to be doing this test on the side of the road in the middle of the night.

"Basically, with zero training and zero demonstration of proficiency, people hit the road and give this scientific test and testify with this air of authority, when there's 49 possible causes for horizontal gaze nystagmus," Norton charged.

Jon Katz, a criminal defense lawyer in Silver Spring, Md., said that he uses a variety of tactics to challenge arresting officers' HGN testimony. Last year, the Maryland Court of Appeals held that a state trooper's testimony about a defendant's performance on a HGN test constituted expert testimony subject to the rules governing the admissibility of expert testimony (*Maryland v. Blackwell*, 971 A.2d 296). Katz said that sometimes, he can "keep that [HGN] testimony out of evidence merely by the prosecutor not notifying me in advance that they're going to have an expert witness." He has also successfully argued that to be qualified as an expert "at a minimum there has to be a training course patterned after the type of course approved by the NHTSA."