volume 7, issue 1

# GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

## ···> our mission

*The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.*

## ···> contents

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

*The horizontal gaze nystagmus (HGN) test is one of three field sobriety tests that make up the standardized field sobriety test battery. The other two are the walk-and-turn and the one-leg-stand. Scientific evidence establishes that HGN is a reliable roadside measure of a person's impairment due to alcohol or certain other drugs. Georgia is among the majority of states where the courts have held that HGN is a scientific test, resting upon the scientific principle that there is a strong correlation between alcohol consumption and HGN.*

### contents



# Horizontal Gaze Nystagmus in Georgia

**By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council**

The horizontal gaze nystagmus (HGN) test is based on the well-known and medically accepted principle that nystagmus can be caused by the ingestion of alcohol: Jerk nystagmus… is characterized by a slow drift, usually away from the direction of gaze, followed by a quick jerk or recovery in the direction of gaze. A motor disorder, it may be congenital or due to a variety of conditions affecting the brain, including ingestion of drugs such as alcohol and barbiturates.[1] For over 20 years, the relationship between nystagmus and alcohol has been recognized by highway safety agencies as a tool to detect those illegally driving under the influence of alcohol.[2] The National Highway Traffic Safety Administration (NHTSA) has endorsed the HGN test as the most sensitive in determining alcohol impairment.[3]

## HGN IS AN ACCEPTED, COMMON PROCEDURE THAT HAS REACHED A STATE OF VERIFIABLE CERTAINTY IN THE SCIENTIFIC COMMUNITY

The above description of horizontal gaze nystagmus was set out in ***Hawkins v. State***, 233 Ga. App 34 (1996), when the Court of Appeals held that, in Georgia, the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol. The Court followed the standard set by the Georgia Supreme Court in ***Harper v. State,*** 249 Ga. 519 (1982) for determining whether a scientific procedure is admissible.

## HGN TEST REQUIRES HIGHER STANDARDS THAN OTHER FST'S

In ***State v Pastorini***, 222 Ga. App. 316 (1996), the trial court suppressed evidence of the walk and turn, the one leg stand and the horizontal gaze nystagmus on the ground that they had not been administered in accordance with NHTSA standards. The Court of Appeals pointed out that by doing so, the trial court in essence treated each test as a scientific procedure. The Court reiterated that sobriety tests such as the "walk and turn" and the "one leg stand," both of which demonstrate a suspect's dexterity and ability to follow directions, do not constitute scientific procedures and testimony from an officer about a suspect's inability to complete such dexterity tests does not amount to testimony regarding scientific procedures, but instead amounts to testimony as to behavioral observations on the officer's part. Therefore, these two tests and any testimony concerning their administration are not subject to the standard set out in ***Harper*** for determining whether a scientific procedure is admissible. The Court goes on to explain that while it is true that the police officer in this case had been trained to administer the above-mentioned dexterity tests by the NHTSA, and defendant introduced expert testimony indicating that the officer had failed to administer the tests in accordance with his training, such expert testimony affects only the weight to be given to the tests, and not their admissibility. The Court stated that weight and credibility of evidence such as this should be left for jury determination and concluded that the trial court's decision to suppress evidence concerning the one leg stand and walk and turn tests based on the officer's administration of these tests was clearly erroneous.

However, the Court of Appeals pointed out, the trial court's decision to suppress evidence of the horizontal gaze nystagmus test was not clearly erroneous. That test constitutes a scientific procedure, and there was ample evidence from which the trial court could have determined that the test's administration was invalid. Consequently, the Court affirmed the trial court's decision to exclude evidence regarding that test.

## OFFICER CAN TESTIFY TO THE NUMERICAL SCORE

***Lorio v. State***, 216 Ga. App. 255 (1995). Defendant appealed from a Gwinnett State Court judgment convicting him of driving under the influence of alcohol, failure to maintain lane, and driving without a license. Defendant challenged the admission of the testimony of a police officer regarding his

*continued >*

*This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia. The "Georgia Traffic Prosecutor" encourages readers to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PACOG or the Council staff. Please send comments, suggestions or articles to Fay McCormack at fmccormack@pacga.org.*

numerical score on a particular test administered after his vehicle was stopped. Defendant argued on review that it had been error to permit testimony about defendant's score on a test administered by police to determine the presence of alcohol. He argued that the test was merely a field sobriety test and that the admission of his numerical score had been prejudicial. The Court found that: (1) the test was admissible to indicate, though not determine, the presence of alcohol; (2) the police officer had not testified to anything more than what the results of an admissible test were; (3) the other testimony, including testimony that defendant's car crossed the centerline on the highway at least five times prior to apprehension, and the other test results were sufficient to eliminate any significant potential prejudice; and (4) it had not been error to admit the test's numerical score.

## JURY MUST BE INFORMED OF TEST RESULTS INCLUDING "SCORES"

***Sieveking v. State,*** 220 Ga. App. 218 (1996). The horizontal gaze nystagmus test involves asking a suspect to follow an object with his eyes when it is moved horizontally near his face, watching for a jerking movement of the eyes. The Court's precedents refer to "the presence of alcohol" in discussing the admissibility of HGN test results on grounds of scientific reliability, but that is not the limit of the testimony allowed on the subject. Field sobriety tests are not designed to detect the mere presence of alcohol in a person's system, but to produce information on the question of whether alcohol is present at an impairing level such that the driver is less safe within the meaning of O.C.G.A § 40-6-391(a)(1). Mere presence of alcohol is not the issue; the quantity is needed because the issue is effect. Field sobriety tests such as the HGN are often "scored" with a number of "clues" indicating conditions that suggest impairment, and it is not error to inform the jury about the test results, including the "scores."

## A SCORE OF FOUR OUT OF SIX CLUES CONSTITUTES EVIDENCE OF IMPAIRMENT

In ***Tousley v. State***, 271 Ga. App. 874 (2005), the Court found that even though the HGN test results were excluded by the trial court based on the officer's administration of the maximum deviation component of the HGN test, this only accounted for two out of the six possible clues of intoxication and there was no error in the remaining two components of the HGN test, which accounted for four out of the six clues. A score of four out of six clues constituted evidence of impairment. The State laid the foundation for admitting the HGN test results by showing that the officer was sufficiently trained and experienced in administering the test and that he properly administered and interpreted the test with regard to four of the clues that he found. Thus, the officer did not fail to substantially comply with applicable law enforcement guidelines. The Court found that exclusion of the HGN test results was wrong and that the trial court erroneously failed to consider the HGN test results when deciding whether the officer had probable cause to arrest defendant.

## NUMERICAL BLOOD ALCOHOL LEVEL IS ADMISSIBLE

***Webb v. State,*** 277 Ga. App. 355 ( 2006): After defendant's vehicle was stopped, defendant completed a horizontal gaze nystagmus test, on which she exhibited six out of six possible clues. At trial, the arresting officer testified that six out of six clues on the HGN test indicated a blood/alcohol concentration and that four out of six clues indicated a 74 percent chance of a blood alcohol concentration of above 0.10. The trial court overruled defendant's relevance objection. The Court of Appeals held that the trial court did not err in refusing to exclude this testimony on grounds of relevance. Field sobriety test results are relevant to show the effect of alcohol on a defendant charged with driving under the influence of alcohol to the extent that it was less safe to drive in violation of O.C.G.A. § 40-6-391(a)(1). The probative value of the officer's testimony was not substantially outweighed by the danger of unfair prejudice or misleading the jury. There was nothing inherently inflammatory about the blood alcohol evidence, and there was no reason why the jury was not capable of evaluating the evidence in the context of the § 40-6-391(a)(1) charge.

## HGN NOT PERFORMED ACCORDING TO TRAINING

In ***State v. Pierce,*** 266 Ga. App. 233 (2004), the officer admitted that the HGN test had not been properly administered. He admitted that he failed to ask Pierce certain qualifying questions before administering the field sobriety tests although it is his practice now, after further training, to ask such questions. The officer also conceded that during the HGN test, he failed to make the requisite number of passes in observing Pierce and failed to hold his observation for the recommended time period. He also agreed with defense counsel that it should take over one minute to administer the test, but his test on Pierce took only 35 to 36 seconds. He agreed that he had not performed the test properly. The officer further acknowledged that the training manual provides that if any element of the standardized field sobriety test is changed, the validity of the test is compromised. He admitted that he currently trains those in his charge to perform the tests exactly as proscribed because otherwise, the results can be compromised. The appellate court finally placed HGN in the same category as that of the other field sobriety evaluations by holding that the evidence did not mandate the exclusion of the HGN test results. The fact that the HGN test was not performed exactly according to the training manual goes to the weight and not the admissibility of the test and the trial court erred in excluding the results of the HGN evaluation.

## OFFICER'S TRAINING

***Tuttle v. State***, 232 Ga. App. 530 (1998). Tuttle argued that the trial court erred in denying his motion to exclude the HGN test results because the officer who administered the test: (1) had no formal training in administering field sobriety tests; (2) administered the HGN test while Tuttle was sitting instead of standing, in contravention of law enforcement guidelines; (3) could only estimate the angle of onset of nystagmus; and (4) admitted that the test was only 77 percent accurate.

The Court of Appeals pointed out that contrary to Tuttle's contention; the record showed that the officer, who had been a police officer for seven years and a member of the department's DUI task force for four years, received sufficient training in administering field sobriety tests. He attended an eight-hour course on sobriety testing and received personal training and updates from a senior DUI officer who was a certified drug recognition instructor. The arresting officer had administered the battery of field tests used in this case to approximately 400 people. The officer also received training in the administration of the HGN test from three other officers. The officer testified in great detail how each test was administered, what clues he looked for, and how Tuttle responded. Formal education is not required even for a witness to qualify as an expert in DUI detection. See also ***Wrigley v. State,*** 248 Ga. App 387 (2001) (it was within the trial court's discretion to determine whether the officer possessed the requisite learning and experience to testify as an expert, given his vast experience in DUI detection, field sobriety evaluations, and conducting breath tests).

## HGN ADMINISTERED TO SEATED SUBJECT

***Lancaster v. State,*** 240 Ga. App. **359 (1999)**. Lancaster contended that the trial court erred when it allowed the State to present evidence of his performance on the HGN test because the officer administered it to him while he was sitting, instead of standing. The Court responded that although the officer admitted he violated law enforcement guidelines when he administered the test to Lancaster while he was sitting, Lancaster submitted no evidence showing how this would affect the validity of the test. The Court further stated that it was difficult to understand, without such testimony, why the results of the HGN test administered to Lancaster could be questionable simply because he was sitting instead of standing.

## HGN ADMINISTERED TO DISABLED SUBJECT

***Harris v. State,*** 689 S.E.2d 91, A10A0119 (12/21/09). A police officer observed defendant driving erratically. His speed fluctuated between 30 and 60 miles per hour, and his car weaved within his lane several times. The officer stopped defendant and noticed a strong odor of alcohol from his vehicle. Defendant removed a credit or debit card twice before finally producing his license, and he admitted drinking at a friend's house. Defendant suffered from cerebral palsy, a muscular disorder. He informed the officer and a back-up officer of his condition. The second officer performed an HGN test and an alco-sensor

*continued >*

test. Based on his driving, the odor of alcohol, his admission of drinking, his performance on the HGN test, and the results of his alcosensor test, the officers arrested defendant. Defendant argued that the officer incorrectly performed the HGN test on him given his medical condition and that the results were therefore unreliable. The court held that defendant presented no scientific evidence or testimony to establish the unreliability of HGN test results on an individual with cerebral palsy. Additionally, the officers still had probable cause to arrest defendant even without the HGN test results.

### DEFENSE EXPERT ON HGN

***Muir v. State***, 256 Ga. App. 381 (2002)

The arresting officer testified in detail regarding the fact that ingesting alcohol causes an involuntary nystagmus, or jerking, in the eyes, and regarding his administration of the test to Muir. He further testified that Muir had "a lack of smooth pursuit. She had nystagmus at maximum deviation, and she also had nystagmus prior to 45 degrees," and proceeded to explain what those terms meant. The officer concluded that Muir's responses to the test were "significant indicators of impairment."

Muir then cross-examined the officer regarding the test administration and the conclusions that could be drawn from the results. The officer agreed that some people have a natural nystagmus, and factors other than alcohol, such as lack of sleep or excessive caffeine, can cause it. He also testified that he decided to arrest Muir after he completed the field evaluations, including the HGN.

The defense called Dr. James Woodford to testify. After direct examination by Muir, the defense tendered Dr. Woodford as an expert "in the area of chemistry and the effects of alcohol on the human body; also, the Georgia breath testing machine as it's currently embodied in this state. And I'm going to ask questions concerning the interpretation of test results, comparative studies between blood and breath of men and women in that area." After a lengthy voir dire by the State, during which Dr. Woodford stated, "I'm a chemist, and I know about medicinal chemistry, which is the chemistry of bodily functions. But I'm not a physiologist," the trial court certified Dr. Woodford as an expert in chemistry. Muir then tendered Dr. Woodford as an expert on the Intoxilyzer 5000 and gender bias in breath alcohol testing. After further direct examination and voir dire by the State, the trial court recognized the witness as an expert in the areas of chemistry and studies on the use and accuracy of the Intoxilyzer machine (but not the workings of the machine itself).

During his testimony, Muir's counsel asked Dr. Woodford a question about a study from Clemson University on "field sobriety evaluations," including the HGN, and the error rate for experienced officers giving these tests. This question fell outside of the areas of expertise that he had been qualified in, and therefore he was not authorized to comment on the report, which would have been hearsay.

Muir then offered that Dr. Woodford was qualified to testify about the HGN test. Dr. Woodford testified that he had been certified in field sobriety evaluations, but did not explain whether the certification included the HGN test. This certification, Muir's attorney explained, was the "same course that the officer was certified in." Muir also made an informal proffer that the witness would testify about the "predictability or the reliability of an HGN and being able to predict the presence of alcohol. . . . And moreover, I might be inclined to ask him is there any correlation between the HGN and the predictability of impairment." The attorney went on to say that there was "no predictability between the presence of the six clues on the HGN and a person's actual impairment . . . ," and that there were no studies to show the contrary.

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

Simply put, the Court stated, the record contained no indication that the witness had any expertise in the area of the accuracy, reliability, or "predictability" of HGN tests to show whether someone is impaired. Being certified to perform the test falls far short of being an expert in these areas. One requires learning a technique and memorizing how to read the results. The other requires education, training, or experience sufficient to develop a peculiar knowledge concerning some matter of science or skill to which his testimony relates. Second, the witness admitted that he was not an expert in human physiology. The Court found that the record contained no evidence that the witness had expertise regarding the extent to which the presence of the six clues on the HGN test revealed a person's actual impairment. Third, there was only evidence that the witness was familiar with one report on the subject of HGN. The Court declared that anyone can read one report on a topic but that does not make them an expert. Finally, there was no evidence that the witness had performed his own studies or that he had personal experience judging the reliability of HGN results.

The Court ruled that the decision to qualify a witness as an expert rests in the trial court's discretion and that where the party offering the witness has failed to show that the witness has expertise in a particular subject, the Court does not abuse its discretion by limiting testimony on that topic.

### ENDNOTES

[1] The Merck Manual of Diagnosis and Therapy, p. 1980 (14th ed. 1982)

[2] Burns & Moskowitz, Psychophysical Tests for DWI Arrest, U.S. Department of Transportation, Rep. No. DOT-HS-802-424 (1977)

[3] Schweitz & Snyder, Field Evaluation of a Behavioral Test Battery for DWI, U.S. Department of Transportation, Rep. No. DOT-HS-806-475 (1983)

# Notice Requirements for Charging Suspended License Violations

**By Jennifer Ammons, General Counsel, Department of Driver Services**

**The State bears the burden of proving** that a defendant has notice of the suspension of his driver's license. Some license suspensions require actual notice, while notice is inferred for other suspensions based upon the mechanism that caused the suspension. An example of a situation in which the evidence would show that a defendant had actual notice of a suspension would be if he/she admits that he/she knows that the license is suspended. Documentary evidence would also work as proof of actual notice, such as the 1205 issued for an administrative suspension or the certified mail receipt from correspondence sent by the DDS.

Proof of actual notice of a license suspension is now only required for the following suspensions:

- ALS or implied consent
- Failure to appear (pre-January 1, 2010)
- Child support
- School suspensions
- Safety responsibility
- Insurance cancellation (no new insurance cancellation suspensions were imposed after October 2002)

All other suspensions are imposed by operation of law, so the suspect has notice of his or her license suspension by virtue of his or her conviction for the underlying offense.

Effective January 1, 2010, notice of suspensions for failure to appear is based upon the verbiage found on the Violator's copy of the UTC that warns him/her of the potential for a license suspension if he/she fails to appear on the ticket. The FTA suspension must have been imposed on or after January 1, 2010, OR you must have proof of actual notice of the suspension. The Court of Appeals upheld the search of a vehicle incident to the driver's arrest for DWSL despite the fact that the State ended up not proceeding with the DWSL charge due to insufficient evidence of notice of the suspension. *Johnson v. State*, 297 Ga. App. 254 (2009). In addition to clarifying a search and seizure issue, the Court gave a detailed analysis of the notice requirements for DWSL. The opinion specifically noted that notice for an FTA suspension would be satisfied by the language on the UTC as of January 1, 2010.

# Random Tag Check

**By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council**

Law enforcement officers have the statutory authority to enforce the laws relating to registration and licensing of motor vehicles in Georgia. ***It is the duty of every arresting officer, county, municipal, and state, to enforce this chapter. O.C.G.A. § 40-2-133***

Decisions from the Georgia Court of Appeals confirm that officers have the authority to randomly check license plates:

***Thompson v. State,*** 289 Ga. App. 661 (2007)
An officer randomly checked the tag on defendant's vehicle and learned that it was registered to a different vehicle. The officer testified that she randomly checked license plates as part of her patrol duties.

The officer stopped defendant and learned that he had no identification. She then placed him under arrest for driving without a license. While searching defendant incident to his arrest, the officer found pills and a marijuana joint as well as an identification card, which prompted defendant to admit that his license was suspended.

The court rejected defendant's argument that the stop was illegal. When an officer sees a traffic offense occur, a resulting traffic stop does not violate the Fourth Amendment or the Georgia Constitution, even if the officer had ulterior motives in initiating the stop. Here, it was a violation of O.C.G.A. § 40-2-6 for a vehicle to bear license plates issued for another vehicle. Thus, as officers were authorized to stop vehicles for traffic violations, the stop was valid.

***Andrews v. State,*** 289 Ga. App. 679 (2008)
Officer Jimmy Jones was patrolling a stretch of I-85 in Troup County. Jones ran a routine registration check of a vehicle traveling the highway and learned that the car was registered as silver in color. According to Jones, the car appeared greenish-gold. Thus, Jones was suspicious that someone had taken the tag from another vehicle, and he pulled the car over to determine if the tag matched the vehicle identification number.

Michael Stanton and Jack Andrews were subsequently convicted for trafficking in cocaine. Both defendants alleged that the officer who stopped them lacked a sufficient basis for instigating the initial traffic stop and that his belief that the car was a different color than that listed on the registration was a mere "hunch" that did not give rise to reasonable, articulable suspicion of criminal conduct. But, the appeals court first noted that it is unlawful to transfer a license plate assigned to one vehicle to another vehicle and/or to knowingly operate a vehicle with such improperly transferred tag. Thus, when the officer presented pictures of the subject vehicle at the suppression hearing which showed that the car did in fact have a greenish hue, these pictures supported his reason to believe that the tag had been improperly transferred. The fact that he was ultimately mistaken did not change the result. Second, once the officer became suspicious after being told two different accounts of where defendants had been, and one defendant declined to give the officer consent to search, such served as a basis for him to have his drug dog perform a free air search around the vehicle. Under these circumstances, the officer did not unlawfully expand the traffic stop. The judgment was affirmed.

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

***State v. Dixson,*** 280 Ga. App. 260 (2006)
(Case lost on insurance issue)
An officer was on routine patrol and decided to run a check with the National Crime Information Center on the car in front of him, which was being driven by defendant. The check revealed an "unknown" insurance status, and the officer stopped defendant's car. Eventually, cocaine was found in defendant's car. The officer never did check the status of defendant's insurance, and testified that it was necessary to verify with the insurance company whether the insurance was valid or not.

The appellate court found that the record did not show that the state database provided the officer with any specific articulable facts that created a reasonable suspicion that defendant was engaged in criminal conduct. No other facts in the record supported the validity of the stop. The "unknown" response from the database did not create a valid basis for the stop.

Held: The officer was unauthorized to stop defendant's car. The subsequent search was therefore tainted, and the trial court properly suppressed its results.

# Motorcycle DWI Detection Guide

**Courtesy: NHTSA**

NHTSA has found that the following cues predicted impaired motorcycle operation:

**Excellent Cues (50% or greater probability)**

- Drifting during turn or curve
- Trouble with dismount
- Trouble with balance at a stop
- Turning problems (e.g., unsteady, sudden corrections, late braking, improper lean angle)
- Inattentive to surroundings
- Inappropriate or unusual behavior (e.g., carrying or dropping object, urinating at roadside, disorderly conduct, etc.)
- Weaving

**Good Cues (30 to 50% probability)**

- Erratic movements while going straight
- Operating without lights at night
- Recklessness
- Following too closely
- Running stop light or sign
- Evasion
- Wrong way

## ····> upcoming training

Upcoming joint prosecutor law enforcement training courses:

**April 26, 2010**
Public Safety Building
1st Floor - Community Room
510 Tenth Street
Columbus, Georgia 31902
8:30 AM - 12:30 PM

**May 26, 2010**
Union County Courthouse
Jury Assembly Room
65 Courthouse Street
Blairsville, Georgia 30512
8:30 AM - 12:30 PM

**Tuesday, June 8, 2010**
Firing Range
Thomasville Police Department
921 Smith Avenue
Thomasville, Georgia 31792
8:30 AM - 12:30 PM

Other, tentative courses are scheduled for May 7 in Burke County and June 7 in Jesup, Georgia. For more information on these training courses, please visit our website at: www.pacga.org/training/pac.shtml

# GEORGIA traffic PROSECUTOR

**Prosecuting Attorneys' Council of Georgia**
**Traffic Safety Program**
**104 Marietta Street, NW**
**Suite 400**
**Atlanta, Georgia 30303**

## ····> traffic safety program staff

**Fay McCormack**
**Traffic Safety Coordinator**
**404-969-4001 (Atlanta)**
**fmccormack@pacga.org**

### ····> fact:

Drunk driving is the nation's most frequently committed violent crime, killing someone every 30 minutes. Because drunk driving is so prevalent, about three in every ten Americans will be involved in an alcohol-related crash at some time in their lives. In 2006, an estimated 17,602 people died in alcohol-related traffic crashes in the USA. These deaths constituted 41 percent of the nation's 42,642 total traffic fatalities.

***-Statistics courtesy NHTSA (www.nhtsa.gov)***

*The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editor Fay McCormack at PAC.*