

CASE SUMMARIES

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Criminal Law and Procedure

Illinois Supreme Court Reviews Field Sobriety Test-NGH (Naystagmus) for DUI

The horizontal gaze nystagmus (HGN) test is one of the field sobriety tests police officers use in Illinois to determine if a driver is under the influence of alcohol. “Nystagmus” is the involuntary rapid movement of an eyeball either horizontally or vertically, and alcohol impairment is one of the many different types. The Illinois Supreme Court recently decided a case that dealt with the issue of whether the HGN test is a reliable indicator of impairment due to alcohol. *People v. McKown*, No. 102372, 2010 WL 572082 (Feb. 19, 2010).

In performing the HGN test as part of the field sobriety testing, the officer first asks the driver if he or she has any medical condition that might affect the results of the test. If not, the officer performs the test to see if the pupils of the driver’s eyes are of equal size and if the eye is able to track an object as it is moved side to side at eye level. The officer is trained to look for three clues per eye during the test for a total of six points; a score of four or more is considered failing and is indicative of alcohol impairment. The three clues an officer looks for is (1) if the eyes are able to pursue the object smoothly from side to side, (2) if there is distinct nystagmus when the object is moved all the way to one side, and (3) if there is distinct nystagmus at an angle less than 45 degrees.

In *McKown*, the Illinois Supreme Court directed the trial court to conduct a *Frye* hearing to determine whether HGN testing is generally accepted in the particular scientific field to which it belongs as an indicator of alcohol impairment. Both the state and the defendant called witnesses at the *Frye* hearing and also submitted numerous journal articles along with a trial brief in support of its positions. After hearing live testimony over the course of four court dates and considering each party’s submissions, the trial court concluded that the HGN test is a reliable indicator of alcohol impairment. The court held that when the test is conducted by a properly trained police officer, it is a reliable component of field sobriety testing to help the officer form an opinion of whether the subject is under the influence of alcohol.

On appeal, the defendant argued that the HGN test is not a reliable indicator of impairment and does not meet the *Frye* standard. Furthermore, the defendant contended that officers who testify regarding HGN results should not be considered as expert witnesses unless they have received extensive training, and if the court allows HGN results at trial, the court must strictly enforce the standards of performance on the test.

The Supreme Court began its analysis by examining the evidence presented by both parties at the *Frye* hearing. Despite the defense expert’s testimony, the court held the science of HGN testing belongs to the field of medicine and optometry for the purpose of

the *Frye* hearing. However, this does not preclude a police officer from testifying regarding the performance of the test and the results observed. Both the state and the defense witnesses indicated the signs of HGN are indicative of the consumption of alcohol. Since consumption of alcohol is a necessary precondition to impairment due to alcohol, any evidence of alcohol consumption is relevant to the question of impairment.

The court held that HGN testing is generally accepted in the relevant scientific fields and the HGN test is admissible to show the defendant may have consumed alcohol and as a result may be impaired. The HGN testimony would be one thing, in addition to other indicators, such as an odor of alcohol, bloodshot or glassy eyes, or alcohol in the car, to help the officer form an opinion. The officer who performed the HGN test must be properly trained in the procedures in order to give expert testimony regarding the results of the test. These procedures must be performed in accordance with the National Highway Traffic Safety Administration (NHTSA) protocol by a properly trained police officer. After concluding the HGN test is generally accepted and passes the *Frye* test, the court determined that the admissibility of the HGN in an individual case will depend on the state's ability to lay the proper foundation and to demonstrate the qualifications of its witnesses.

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