

MEMORANDUM IN SUPPORT OF THE JUDICIAL REVIEW OF LICENSE SUSPENSION
(Refusal)

FACTS

[Insert relevant facts]

ARGUMENT

“Results of a properly administered HGN test are admissible to show impairment which may be caused by alcohol and, when accompanied by other evidence, will be sufficient to establish probable cause to believe a person may be intoxicated.” Cooper v. State, 761 N.E.2d 900, 903 (Ind.Ct.App. 2002). Here, neither the nystagmus tests were properly administered nor was there any other evidence to establish probable cause to believe the Defendant was under the influence of drugs.

Although any statements or evidence gathered after the officer requested the blood test is irrelevant to the probable cause determination supporting the request, this Memorandum includes a discussion of the officer’s administration of the nystagmus tests. Because the officer’s administration of the tests were substantially flawed, even if the Court finds the results of the officer’s administration of the nystagmus tests occurred at a time prior to the determination of probable cause, the test results still cannot support probable cause due to their inherent unreliability.

I. Both Deputies’ opinions concerning the nystagmus within the Defendant’s eyes are unreliable and cannot be considered to establish probable cause.

According to the National Highway Safety and Traffic Association (“NHTSA”), which is the very organization that trained the officers in the administration of field sobriety tests:

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN: THE TESTS ARE ADMINISTERED IN THE PRESCRIBED STANDARDIZED MANNER THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT’S PERFORMANCE HE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

DWI Detection and Standardized Field Sobriety Testing, Participant Manual, NHTSA, VIII-19 (2002) herein incorporated and referenced as Exhibit A; *DWI Detection and Standardized Field Sobriety*

Testing, Student Manual, VIII-3 (2000), NHTSA, herein incorporated and referenced as Exhibit B.

Further, NHTSA teaches Judges that “[l]aw enforcement officers will not confuse HGN with any other type of nystagmus if the HGN is conducted correctly.” *Horizontal Gaze Nystagmus: The Science and the Law, A Resource Guide for Judges, Prosecutors and Law Enforcement*, NHTSA, p. 8.

Consistent with the teachings of NHTSA, Indiana courts have stated that results of a *properly* administered HGN test are admissible to show impairment. Cooper v. State, 761 N.E.2d at 903. Here, both officers failed to administer any part of the nystagmus test properly and, thus, compromised the reliability of the results. Because nystagmus can have other innocent causes and occurs naturally, it is even more essential that the nystagmus tests are administered in strict compliance with the NHTSA training. The first officer testified he was trained by NHTSA on the procedure for administering the horizontal and vertical nystagmus tests in 2002, and the second officer was trained in 2000. However, both deputies were unaware of even the basics of the administration of the nystagmus test, such as the positioning of the stimulus throughout the tests. According to the 2002 and the 2000 NHTSA participant manual, when administering the nystagmus test, the stimulus should be positioned “approximately 12-15 inches from the suspect’s nose.” Ex. A. at p. VIII-6; Ex. B at VIII-7 (2000). However, the first officer testified he positioned the stimulus at least 16 inches from the Defendant. The second officer testified that he positioned the stimulus at “arm’s length.”

A. Smooth Pursuit

According to the 2002 and the 2000 NHTSA participant manual, the officer should check for smooth pursuit in each eye by moving “the stimulus smoothly, at a speed that requires approximately two seconds to bring the suspect’s eye as far as to the side as it can go.” Ex. A. at VIII-7; Ex. B at VIII-7. However, the first officer testified that he simply estimated the speed at which to move the stimulus and did not use the two second rule. Moreover, the second officer claimed that he simply moved the stimulus at a speed “within reason.” In fact, neither deputy recalled even being taught a method of estimating the proper speed at which to move the stimulus.

B. Distinct Nystagmus at Maximum Deviation

According to the 2000 and 2002 NHTSA participant manual, the next step is for the officer to detect distinct nystagmus at maximum deviation in each eye by moving the stimulus “until the eye has gone as far to the side as possible.” Ex. A at VIII-7; Ex. B at VIII-7. “Hold the eye at that position for a minimum of four seconds, and observe the eye for distinct and sustained nystagmus.” Ex. A at VIII-7. Although the 2000 manual does not emphasize the importance of observing sustained nystagmus by underlining “sustained” as does the 2002 manual, the 2000 manual still requires the officer to “hold the eye at [maximum deviation] for a minimum of four seconds.” Ex. B at VIII-7. However, the first officer only held the stimulus at maximum deviation for long enough to see nystagmus. Again, he was unaware of a time period for which he was required to hold the eye at maximum deviation. Moreover, the second officer believed that the time period to hold the eye at maximum deviation was only one second.

The four second requirement is not only a required element of administration of a nystagmus test, but an emphasized requirement.

C. Onset of Nystagmus Prior to 45 Degrees

According to the 2000 and 2002 NHTSA participant manual, the next step is for the officer to check the onset of nystagmus prior to 45 degrees by moving the stimulus “at a speed that would take approximately four seconds for the stimulus to reach the suspect’s shoulder.” Ex. A at VIII-7; Ex. B at VIII-8. When you see jerking, “stop and verify that the jerking continues.” Ex. A at VIII-7; Ex. B at VIII-8. Further, “it is important to use the full four seconds when checking for onset of nystagmus.” Ex. A at VIII-7; Ex. B at VIII-8. However, here, both officers again did not use the four second rule, or were even aware there is a proper speed for moving the stimulus. Moreover, neither officer stopped and verified that the jerking continued within the Defendant’s eyes. In fact, the second officer mistakenly thought that he was to continue taking the eye to maximum deviation after he saw the onset of jerking.

D. Vertical Nystagmus

According to the 2000 and 2002 NHTSA participant manual, in order to perform the vertical gaze nystagmus test, the officer should again position the stimulus 12-15 inches in from of the suspect’s nose,

raise the object until the suspect's eyes are elevated as far as possible and "hold for approximately four seconds." Ex. A at VIII-8; Ex. B at VIII-9. However, again, the first officer held the stimulus at least sixteen inches from the Defendant, and the second officer held the stimulus at arm's length from the Defendant. Again, the first officer did not hold the eyes at the elevated position for any specific period of time, or was even aware of any time period.

E. Interpretation of the tests

The first officer testified that only two clues were needed to fail the horizontal nystagmus test. However, NHTSA requires "four or more clues" to fail. Ex. A. at VIII-8.

II. Even if the Court finds that the nystagmus test results can be used to support probable cause, in the instant case, the nystagmus test results, alone, still do not support probable cause.¹

A. The nystagmus test results do not support probable cause that the Defendant was Operating While Intoxicated.

Even if the trial court finds that the nystagmus tests are admissible to determine probable cause, the results of the nystagmus tests administered to the Defendant, either by the first officer and/or the second officer, are insufficient to support probable cause. "Results of a properly administered . . . when accompanied by other evidence, will be sufficient to establish probable cause to believe a person may be intoxicated." Cooper, 761 N.E.2d at 903. The Cooper holding is consistent with the teaching of NHTSA. In NHTSA's Horizontal Gaze Nystagmus: *The Science and the Law, A Resource Guide for Judges, Prosecutors and Law Enforcement*, NHTSA recognizes that nystagmus can occur naturally. However, NHTSA teaches that the naturally occurring nystagmus should not pose a problem to impairment detection because:

in making the ultimate decision of whether the subject is impaired, the law enforcement officer is continually taking into account other facts, such as the subject's performance on the other SFSTs, that suggest the subject is impaired by alcohol or other drugs. The law

¹ Even if the officers' opinions can be considered in support of probable cause, their opinions as to nystagmus must be given a lesser weight than a nystagmus test that was administered in strict compliance with the NHTSA standards.

enforcement officer will never base an arrest decision solely on the results of the HGN test. Id. at *8.

Moreover, cases and literature indicate that there are at least thirty-eight (38) possible causes, other than alcohol and drugs, of nystagmus, including, “(14) hypertension; . . . (25) acute head trauma; . . . (34) exposure to solvents.” Schultz v. State, 664 A.2d 60, 77 (Md.Ct.App. 1995) (listing the thirty-eight potential causes and citing Mark A. Rouleau, Unreliability of the Horizontal Gaze Nystagmus Test, 4 Am. Jur. Proof of Facts 3d 439 (1989) and Louise J. Gordy & Roscoe N. Gray, 3A Attorney’s Textbook of Medicine § 84.63 and 84.64 (1990)).

The deputies determined that the Defendant drove his truck off the road not because of an innocent reason, such as swerving to miss a deer or a pot hole, but because he was under the influence of a drug. To support this conclusion, the first officer determined that the Defendant had nystagmus both vertically and horizontally in his eyes, while his eyes were tracking evenly. Further, although the officer did not have medical training, the officer determined that the laceration below the base of the Defendant’s skull was not serious. Thus, he determined that the nystagmus was caused by drug impairment and not a medical injury. However, the Defendant had been laying floors with the use of solvents during that day and had failed to take his medicine for high blood pressure. In addition to head trauma, both solvents and hypertension can cause nystagmus. The officer performed no other field sobriety test and observed no impairment. Overall, the officer made his decision as to probable cause based solely on the nystagmus. According to Indiana case law and the NHTSA who trained the officers, this is not probable cause.

B. The nystagmus test results do not support probable cause that the Defendant was operating a vehicle with a controlled substance in his blood because the Deputy lacked the training to determine whether the Defendant was under the influence of a drug and, if so, whether it was an illegal drug.

“A law enforcement officer who has probable cause to believe that a person has committed an offense under this chapter, I.C. 9-30-5, or I.C. 9-30-9, or a violation under I.C. 9-30-15 shall offer the person the opportunity to submit to a chemical test.” I.C. 9-30-6-2. The first officer testified that he did not suspect that the Defendant was under the influence of alcohol. Further, the first officer testified that the Defendant’s behavior did not provide suspicion that the Defendant was impaired.

Therefore, the only offense for which the officer could even suspect the Defendant of committing was Operating “with a controlled substance listed in Schedule I or II of I.C. 35-48-2 or a metabolite in the person’s body.” I.C. 9-30-5-1(c). However, the first officer is not a drug recognition expert. In fact, he does not know the physical and psychological effects of different classes of drugs. He could only testify that he suspected the Defendant was on “drugs” in general. Thus, there is no probable cause that he was operating a vehicle with a drug listed in the Schedule I or II or I.C. 35-48-2.

Dalton v. State, 773 N.E.2d 332 (Ind.Ct.App. 2002), is the only Indiana case of which counsel is aware that discusses probable cause as to an individual being under the influence of drugs. In Dalton v. State, the Court upheld a probable cause determination to offer Dalton a chemical test for drugs. However, the officer in Dalton, who was a trained drug recognition expert, properly administered three field sobriety tests: a PBT, a chemical breath test, and observed behavior indicative of impairment. Moreover, Dalton’s car was on fire following a crash, he had fled the scene of the accident and was so abusive to the officer that the officer could not perform the twelve steps of the drug recognition examination.

Unlike Dalton, the Defendant did not smell of alcohol, and did not stumble. The Defendant did not flee the scene, but rather walked to his home which was 100 yards from his truck. Moreover, the Defendant did not crash his car. The officers testified that the truck was not damaged or wrecked, but simply off the road. Despite the deputies being at the Defendant’s home for one hour after the Defendant’s fourteen hour work day, the Defendant was not abusive towards the officer. The Defendant admitted he drove the truck, and freely discussed the situation with the officers. The fact that the Defendant did not want to go to the hospital with the officer does not make him abusive.

Unlike the officer in Dalton, here, despite his one hour stay at the Defendant’s home, the first officer did not perform any field sobriety tests other than the nystagmus tests, and did not even perform those properly. The officer did not administer a PBT or request a chemical breath test. More importantly, he did not observe behavior indicative of impairment. The officer testified that the Defendant recognized field sobriety tests, and seemed to remember a good deal about what happened. In fact, the Defendant’s

lack of impairment was one of the reasons the officer believed that the nystagmus he allegedly saw was due to drugs rather than a head injury. Most importantly, the officer is not a drug recognition expert.

Overall, the officer determined that there was probable cause that the Defendant's going off the road with his car was due to "drugs" rather than an innocent reason, such as fatigue or avoiding a collision with a deer. During his encounter with the Defendant, the officer admittedly did not observe any behavior indicative of impairment, did not administer the one leg stand or the walk and turn tests, and did not offer the Defendant a PBT. Rather, the officer based his probable cause determination solely on improperly administered nystagmus tests. This is not probable cause.

(Signature)

CASE LAW

Hinds v. State, 906 N.E.2d 877 (Ind.Ct.App. 2009) (officer's failure to check for all three clues in both eyes, twice, starting with the left eye as taught by NHTSA did not render the HGN test and its results inadmissible).

O'Banion v. State, 789 N.E.2d 516 (Ind.Ct.App. 2003) (the Court disagreed with Defendant's premise that covering one eye is a mandatory procedure for a valid HGN test; the thrust of Cooper is to provide that the proper HGN procedure is for the tester to move an object in a certain fashion in front of the driver and watch the driver's eyeball to detect involuntary jerking; this was done here).