IN THE KING COUNTY DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff, vs. TERRANCE WILLIAMS, et al., Defendant.	NO. C0518820 ORDER ON PRETRIAL MOTION REGARDING THE ADMISSIBILITY OF HGN EVIDENCE TO ESTABLISH IMPAIRMENT

I. Issue

The State seeks a pretrial ruling allowing the introduction of Horizontal Gaze Nystagmus (HGN) evidence to prove impairment by alcohol in a Driving Under the Influence (DUI) of alcohol prosecution. Specifically, the State requests authorization to admit the testimony of a state toxicologist regarding the results of an HGN test performed by a police officer.

II. Facts

The defendant, Terrance Williams, was arrested for DUI on June 15, 2004. As a part of the investigatory process, the State asserts that a Washington State Patrol

trooper administered an HGN test. In its pretrial motion, the State indicated that, in addition to the trooper's testimony, it wished to call a state toxicologist who would testify as an expert on the results of the HGN. Rather than accepting the limitation commonly placed upon the State (that a witness may merely testify that an HGN test indicates that the defendant had consumed alcohol), the State requested permission to ask the toxicologist at trial if the HGN test results indicated impairment from alcohol. The defense objected, arguing that Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (1923), required an evidentiary hearing prior to a determination of the admissibility of evidence of this nature.[1] The King County District Court, finding that this was an issue of county-wide significance under LCrRLJ 8.2(2), assigned the motion to this three judge panel.[2]

III. Analysis

The HGN is a test involving a stimulus, usually a pen, used to detect nystagmus in the subject's eyes. "Nystagmus is the involuntary oscillation of the eyeballs, which results from the body's attempt to maintain orientation and balance. HGN is the inability of the eyes to maintain visual fixation as they turn from side to side or move from center focus to the point of maximum deviation at the side." State v. Baity, 140 Wash.2d 1, 7, 991 P.2d 1151 (2000), n3; citing State v. Cissne, 72 Wn. App. 677, 680, 865 P.2d 564 (citing Stedman's Medical Dictionary, 971 (5th ed. 1982)), review denied, 124 Wn.2d 1006, 877 P.2d 1288 (1994). The HGN test is based on six "clues" (three for each eye) that refer to (1) lack of smooth tracking (smooth pursuit of the eyes), (2) distinct

[1] Frye held that "evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community." State v. Cauthron, 120 Wn.2d 879, 886 (1993).

[2] Several other similarly situated defendants have joined in this motion.

nystagmus at maximum deviation (endpoint nystagmus), and (3) the onset of nystagmus prior to forty-five degrees away from center (angle of onset). [3]

In 2000, when the Supreme Court decided State v. Baity, supra, it was asked to decide "if a drug recognition protocol, used by trained drug recognition officers to determine if a suspect's driving is impaired by a drug other than alcohol, meets the requirements of Frye.... for novel scientific evidence." Id., at 3. Since Baity, the requirements for the admission of HGN evidence for drugs other than alcohol by an officer trained as a Drug Recognition Expert (DRE) have been fairly clear. The defendant's case and the other cases before this panel, however, concern the admissibility of HGN tests for the determination of impairment by alcohol alone. While this is an issue of much lower complexity than that faced in Baity, it has, because of the structure of the Baity decision, generated much greater debate.

The Baity decision itself is replete with references to the HGN; references which the defense claims are either dicta or which limit a witnesses HGN testimony to evidence of alcohol consumption only. A thorough reading of Baity, however, reveals that the Supreme Court held that the use of the HGN test for the determination of impairment by alcohol is admissible without the need for a Frye hearing. Although the overarching issue in Baity was the admissibility of evidence from the DRE program as a whole, the Baity court was also asked to determine whether the HGN test - as specifically used for the detection of alcohol - required a Frye hearing. The Baity court indicated that it would consider this issue with the following statement:

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[3] Use of Horizontal Gaze Nystagmus as a Part of Roadside Sobriety Testing, 63 Am. J. of Optometry & Physiological Optics 467, 469 (1986); National Highway Traffic Safety Adm., U.S. Dep't of Transp., DWI Detection and Standardized Field Sobriety Testing Student Manual VIII, 5-8 (2000).

> "Additionally, the State moved to admit testimony regarding the use of the horizontal gaze nystagmus (HGN) test, both for *the detection of alcohol* and for the detection of drugs. Baity moved to suppress all DRE evidence, *including the HGN test*, on the basis that the DRE program and protocol constitute novel scientific evidence subject to the Frye test for admissibility."

Id., at 7; (emphasis supplied). The Baity opinion later notes that the trial court "ruled HGN meets Frye as to alcohol," and the Baity court itself ultimately reached the same conclusion. Id., at 9.

The Baity court was also necessarily required to determine whether the HGN, as part of the DRE protocol, met the requirements of Frye. The Baity opinion stated that the HGN "test is performed in the same manner, regardless of whether the officer is testing for alcohol impairment or drug impairment." Id., at 13.

Consider as well the process the Baity court used to reach its conclusion regarding the DRE program. The Court divided its Frye review of the DRE protocol into two parts: (1) a review of HGN, including its use both for alcohol and for the 7 categories of drugs for which DRE's are trained, and (2) a review of the DRE 12-step protocol.[4] The first part of this two step DRE equation was deemed most scientifically novel. "(T)he principal step of the protocol that qualifies as novel scientific evidence is the assertion that persons who have ingested certain drugs evidence nystagmus." Id., at 11. In its Frye analysis, the Baity court did not restrict itself to the record below, but also considered "available literature, and the cases of other jurisdictions." Id.

[4] In it's Frye analysis of the DRE program, the Baity court considered a review of the 12-step DRE protocol undertaken by the Minnesota Supreme Court and a Florida appellate court and noted that these jurisdictions also divided the 12 step protocol into two portions, (1) a review of the HGN and, (2) a review of the "general portion" of the 12-step protocol. Id., at 15-16.

Thus, prior to reaching its decision on the admissibility of the HGN, the Baity court considered decisions from the states of North Dakota, Arkansas, Ohio, California and Arizona. In each of these cases the issue was the admissibility of an HGN test performed by a law enforcement officer - without any indication that the officer was trained as a DRE. Furthermore, each case involved an HGN test used solely to determine impairment by alcohol - without any evidence of other drug use. The Baity court's decision with regard to HGN tests used to determine impairment by alcohol is clearly articulated.

> "After careful review of" the cases from the above states, "we agree the underlying scientific basis for HGN testing--an intoxicated person will exhibit nystagmus--is 'undisputed, even by those cases and authorities holding the test inadmissible without scientific proof in each case.'" See State v. Superior Court, 149 Ariz. 269, 718 P.2d 171, 177, 60 A.L.R.4th 1103 (1986) (holding that a person will show a higher degree of nystagmus at higher levels of intoxication). Even the district court agreed with this proposition, stating: the evidence presented in this hearing establish [sic] that the following propositions have gained general acceptance in the relevant scientific community: (1) the HGN occurs in conjunction with alcohol consumption, (2) that the onset of HGN and its distinction are strongly correlated to breath alcohol levels, . . . (4) law enforcement officers can be trained to observe these phenomena and administer the test[.]"

Baity, 140 Wash.2d at 12 - 13.

The defendant argues, however, that even if Baity allows admission of the HGN test, its admission is limited to the determination of whether or not an individual has consumed alcohol. However, when the Baity court referenced the use of the HGN test for the detection of driving under the influence of alcohol, it indicated that the test was used to determine "intoxication." Id., at 12-14.[5]

[5] In fact, the Baity court links the HGN test and the ability to determine "intoxication" four distinct times in the opinion:

A properly administered HGN test, therefore, is admissible to show that an individual was impaired by alcohol. A witness testifying concerning the results of an HGN test, however, may not go beyond testimony of impairment to the recitation of a specific level of intoxication. Id., at 17; State v. Koch, 126 Wn. App. 589, 597 (2005). Nor may the witness "testify in a fashion that casts an aura of scientific certainty to the testimony." Baity, Id.

The State need not prove a level of impairment to establish that a defendant drove under the influence of alcohol. In Washington, a defendant may be convicted of Driving Under the Influence of alcohol by one or both of the following ways:

1. Proof that the person had, "within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood;" or
2. Proof that the person drove a vehicle while "under the influence of or affected by intoxicating liquor or any drug."[6]

RCW 46.61.502(1). Thus, the State need only prove a level of impairment under the first prong. Under the second prong, if the other elements of a DUI prosecution are satisfied, even a minimal level of impairment is sufficient to allow a jury to find a defendant guilty:

> "The phrase 'under the influence of intoxicating liquor'..., has been defined as any influence which lessens in any appreciable degree the ability of the accused to handle his automobile."[7]

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(1) "(A)n intoxicated person will exhibit nystagmus...." Id., at 12; (2) "In fact, the NHTSA recommends the HGN test as one of several field sobriety tests to help officers determine whether a driver is intoxicated." Id., at 13; (3) "As the Supreme Court in North Dakota succinctly noted: [the DRE], 'based upon his training in these principles, observes the objective physical manifestations of intoxication....'" Id.; (4) "However, none of those factors undercut the basis of the test--that intoxicated people exhibit nystagmus." Id., at 14.

[6] The state may also attempt to prove that the person was "under the combined influence of or affected by intoxicating liquor and any drug." RCW 46.61.502(1)(c).

[7] This language appears in the Washington Pattern Instructions as WPIC 92.10:

> "A person is under the influence of or affected by the use of [intoxicating liquor] [or] [drugs] if the person's ability to drive a motor vehicle is lessened in any appreciable degree."

State v. Hurd, 5 Wn.2d 308, 315 (Wash. 1940); citing Smith v. Baker, 14 Cal. App. (2d) 10; Luellen v. State, 64 Okla. Crim. 382. In the context of a DUI prosecution, the words "under the influence of" and "affected by" have the same legal meaning.[8] State v. Hurd, supra, at 316.

The defendants assert, however, that State v. Koch, supra, limits the use of HGN testimony regarding alcohol to a statement that an individual had consumed alcohol. Indeed, Koch includes two sentences which appear to indicate that the Baity court limited the use of the HGN to an indication that alcohol was present.[9] The scope of the HGN issue addressed in Koch, however, was limited to whether the HGN test could be

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[8] At oral argument the parties spent considerable time discussing the meaning of the term "impaired." Ballentine's Law Dictionary, 3rd Edition, defines "impair" as follows, "to make worse; to diminish in quality, value, excellence, or strength; to deteriorate;" while Black's Law Dictionary (5th ed., 1979), defines the word in a similar manner: "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." The Hurd court quoted three definitions of the word "affect:"

> "Bouvier's Law Dictionary defines 'affect' in the following language:
> 'To lay hold of, to act upon, impress or *influence.* It is often used in the sense of acting injuriously upon persons and things.' (Italics ours.)
> Ballentine's Law Dictionary says:
> 'The word . . . sometimes means to act upon; to *influence,* but it is more frequently used in the sense of weakening, debilitating; acting injuriously upon persons and things.' (Italic ours.)
> Black's Law Dictionary (3d ed., 1933), gives the following definition:
> 'To act upon; *influence;* change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things.' (Italic ours.)"

Hurd, supra, at 315. Thus the word "impaired" and the terms "under the influence of" and "affected by" also have the same meaning. Evidence that a person was "under the influence of or affected by intoxicating liquor" is not proof of a "level" of impairment as argued by the defendant. The Baity court stated that "an officer may not predict a specific level of drugs present in a suspect." State v. Baity, 140 Wash.2d at 17. Under the "affected by" prong of RCW 46.61.502, the State need not prove a defendant had an alcohol concentration of 0.08 or higher; instead the State need only prove the defendant was "under the influence of or affected by" alcohol. The decision in Hurd stands for the proposition that even a small effect or impairment caused by alcohol will be enough to satisfy the second prong of RCW 46.61.502.

[9] The two references to the Baity decision in State v. Koch, supra, are as follows:

> "The court ruled that under State v. Baity, testimony on the HGN test was admissible to show the presence of alcohol but not a specific level of intoxication." State v. Koch, 126 Wn. App. at 593; and,
> "The district court correctly ruled that under State v. Baity, a witness may testify that an HGN test can show the presence of alcohol but not the specific levels of intoxicants." Id., at 597 (Citations omitted).

used to determine "specific levels of intoxication." Id., at 593. The statements in Koch, therefore, limiting the use of the HGN test to an indication of alcohol consumption only, are dicta. Moreover, as has already been stated, while the Baity Court did not allow testimony regarding specific levels of impairment, it expressly approved the HGN test to show impairment by alcohol.

The Baity decision ends with a discussion of ER 702[10] and its relationship to the admissibility of DRE testimony. The Court's discussion concerning DRE testimony applies equally to the admissibility of HGN testimony.

> "Finally, the DRE evidence must also satisfy the predicate two-part inquiry under ER 702--whether the witness qualifies as an expert, and whether the testimony would be helpful to the trier of fact--before the evidence is admissible. A proper foundation for DRE testimony would include a description of the DRE's training, education, and experience in administering the test, together with a showing that the test was properly administered. Practical experience may be sufficient to qualify a witness as an expert."

State v. Baity, supra at 18 (Citations omitted). Prior to the admission of HGN testimony, therefore, the State must establish a witness's expertise (knowledge, skill, experience, training, or education).[11] The State must also introduce evidence sufficient to convince the trial court that the HGN test was properly administered. The State may attempt to meet these two requirements either exclusively through an officer or through the

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[10] "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702.

[11] Testimony regarding alcohol impairment is not limited only to a witness trained as a DRE. The Baity court only applied this limitation to the admission of evidence of impairment from drugs. "The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs." Id.

combination of the testimony of an officer and a state toxicologist[12].

IV. Conclusion

The defense objection to the admissibility of HGN evidence on the grounds that the HGN test used to determine impairment from alcohol does not meet the Frye standard, is denied. The Supreme Court has previously found that HGN tests used to determine impairment by alcohol are generally accepted in the scientific community and, therefore, we hold that the State may move to introduce HGN tests without the need for a Frye evidentiary hearing. The testimony of a state toxicologist regarding the results of an HGN test is admissible if the witness and the witness's testimony meet the requirements of ER 702 and ER 703.

Dated this 7th day of April, 2006.

Judge David A. Steiner

Judge Douglas J. Smith

I do not agree with the result reached by the majority and accordingly, dissent.

Judge Mark Eide

[12] If the State seeks the admission of testimony from the state toxicologist to establish that the test was properly administered and that the defendant was impaired, it will have to elicit testimony sufficient to establish the way in which the state toxicologist obtained this information. (Pursuant to ER 703, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.") An "expert becomes acquainted with this information either (a) by listening to the testimony of the witness, or (b) by listening to counsel's summary of the testimony in the form of a hypothetical question." 5D Karl B. Tegland, Courtroom Handbook on Washington Evidence ch.5, at 349 (2005); citing Carter v. Massey-Ferguson, Inc., 716 F.2d 344 (5th Cir.1983).

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