

Criminal law -- Driving under influence -- Evidence -- Field sobriety exercises -- Horizontal Gaze Nystagmus -- Although manual states that deviation from HGN test protocol will compromise test validity, where there is no scientific explanation in manual or testimony of defendant's expert for how validity is compromised, test results are not inadmissible as matter of law and remain relevant to deputies' determination of probable cause for arrest -- Deviations from protocol may affect weight accorded to test results

STATE OF FLORIDA, Plaintiff, v. JEFF KOSIBA, Defendant. County Court, 16th Judicial Circuit in and for Monroe County. Case No. 2006-CT-638-M. October 12, 2007. Ruth Becker, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court after hearing on Defendant's Motion to Suppress Field Sobriety Exercises, and the Court, with regard to admissibility of the Horizontal Gaze Nystagmus (HGN) exercise, having heard testimony, argument of counsel, and reviewing case law and other authority finds as follows:

INTRODUCTION

Defendant seeks to suppress admission of the HGN exercise administered to him during the investigation leading to his arrest for Driving Under the Influence (DUI).

FACTS

On September 3, 2006, Deputy Lantiqua, Monroe County Sheriff's Office, was conducting an investigation of the Defendant for DUI. As part of this investigation, the officer administered the HGN exercise. A videotape was recorded during the investigation. The facts in dispute concern whether lighting affected the Defendant, and whether the specific procedures by which the officer was trained were followed accurately during this exercise. There was no dispute that the protocol for administration of this exercise was provided to the officer from the "NHTSA" training manual. There is also no dispute that the officer began the HGN with the Defendant's right eye, whereas the protocol indicates to begin with the left eye. It is also indicated from the testimony and video that the officer did not check for "equal tracking." The testimony and tape also appear to indicate a deviation from the exact times recommended for each "pass" in administration of the HGN exercise.

APPLICATION OF LAW AND CONCLUSION

The Court will incorporate by reference all of the case law and authority provided by counsel for the Defendant and the State in the large volume of materials submitted after the hearing in this case, all of which is part of the case file.

The Court finds that the appropriate analysis in this case is that of the classic issue of relevance. Despite any deviations from protocol in the administration of HGN, is the evidence relevant? There is no question that the NHTSA manual sets forth a specific order of administration of this exercise. The manual also contains the language that "if any one of the standardized field sobriety test elements is changed, the validity is compromised."

What is troubling to the Court is that there is no scientific explanation of how, if at all, the validity of HGN is compromised by deviation from the protocol. Further, none of the cases cited by counsel for the Defendant provide such an explanation. Neither did the testimony of Mr. Rick Swope, called as an "expert" by the Defendant in this case. In fact, when cross-examined by the State, Mr. Swope could not offer an explanation

for the difference in result between two and four seconds on “smooth pursuit.” Nor was there, or is there in the cases or authority provided, any scientific explanation of what difference it would make if the officer began with the right, rather than the left, eye of the Defendant.

This case is not one in which the HGN is being offered to indicate a level of blood alcohol. In this case, the Defendant did not provide a breath sample. The HGN in this case was used as an investigative tool, among the totality of circumstances, by the officer in determining probable cause for the arrest. Certainly, the officer's method of administration of HGN may provide ample ground for cross-examination of Deputy Lantigua. However, in this case, there is no record evidence of how in fact the officer's administration of HGN affected the officer's ability to detect nystagmus.

The Court finds that the results of the HGN exercise in this case, based on the specific deviations from protocol at issue here, are not inadmissible as a matter of law. The results remain relevant to the investigation by Deputy Lantigua. The issues that remain as a result of how the exercise was performed may affect the weight the finder of fact may choose to give to the results.

It is therefore Ordered and Adjudged that Defendant's Motion is denied.

* * *