

IN THE COUNTY COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

Case No.: 2016 CT 14312 SC

ROBERT KENNETH NEVENS,

Defendant.

ORDER ON DEFENDANT'S MOTION IN LIMINE

This matter came for hearing on January 2, 2018 and March 15, 2018, on the Defendant's Motion in Limine. The Court has considered the Motion in Limine, the evidence adduced at the hearings, arguments of counsel and has been otherwise advised in the premises. The Court makes the following findings of fact and conclusions of law.

I.

In the Motion in Limine, the Defendant argues that pursuant to section 90.702 of the Florida Statutes and Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), testimony at trial regarding the Horizontal Gaze Nystagmus exercise ("HGN") is inadmissible because it is not based upon reliable methods and principles.

II.

In Daubert, the United States Supreme Court departed from its holding in Frye v. United States, 293 F.1013, 1014 (D.C. Cir. 1923) and held that trial courts are to act as gatekeepers when it comes to the relevance and reliability of scientific evidence. Id. at 594. In 2013, the Florida

Legislature amended Section 90.702 and 90.704, Florida Statutes, to require Florida courts to follow the Daubert standard. Ch. 2013-107, §§1,2, Laws of Fla. Section 90.702 now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Section 90.702, Fla. Stat. (2013). Pursuant to the reasoning set forth in State v. Cummings, 25 Fla. L. Weekly Supp. 261a (12th Cir. Fla. 2017), the Court finds Daubert to be the applicable standard.

In Daubert, the Supreme Court enumerated the following list of factors in considering the admissibility of expert scientific evidence: (1) whether it can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) and the degree it is accepted as reliable within the relevant scientific community.” Id. at 593-94. The Court addresses these factors in turn.

As to the first factor, the Court finds that HGN has been tested. The National Highway Traffic Safety Administration (“NHTSA”) has analyzed the validity and reliability of HGN through its own funded studies as well as independent studies. These studies confirm the HGN test has been subject to rigorous testing, and has been found to be highly accurate in predicting impairment. In addition, these studies prove the HGN test can be reliably performed by law enforcement officers who have completed basic FSE training that includes a Wet Lab.¹

¹ “Wet Lab” is short for a section of Field Sobriety Exercise training that involves trainees performing FSEs on volunteers who have been systematically dosed with alcoholic beverages to simulate various levels of impairment that correlate to specific breath alcohol test levels.

As to the second factor, the Court finds that HGN has been subject to peer review and publication. Both Dr. Richman and Dr. Kennedy testified as to their experience with peer-review and publication of scientific studies. Based on their testimony about the peer-review and publication process generally, it was established that the HGN test has been subject to significant peer-review and publication. The peer-reviewed and published studies have shown the HGN test to be a valid, accurate, and reliable test.

With respect to the third factor, HGN has a known error rate. The Court finds that based upon the testimony, the known error rate of the HGN test has consistently been found to be approximately 12%. To put this error rate into context, the HGN test, a diagnostic test used by optometrists for over 50 years, has a similar, or lower, error rate to such commonly used diagnostic tests as mammograms and the flu test.

Fourth, HGN has controlling standards. The International Association of Chiefs of Police (“IACP”) has adopted standards controlling the operation and administration of the HGN test during DUI investigations. These standards are thoroughly and effectively taught to law enforcement officers throughout the country via basic FSE training that includes a Wet Lab. New law enforcement recruits accurately performed the HGN test 85% of the time after successfully completing the basic FSE training course that includes a Wet Lab.²

Finally, HGN is accepted as reliable in the relevant scientific community. Resolution 1901 of the American Optometric Association³ was first adopted in 1993, and has been reviewed and affirmed periodically, most recently in 2016. Resolution 1901 acknowledges the scientific validity

²J.E. Richman & J. Jakobowski, *The Competency and Accuracy of Police Academy Recruits in the Use of the Horizontal Gaze Nystagmus Test for Detecting Alcohol Impairment*, 47 *New England Journal of Optometry*, No. 1, p. 5 (1994).

³Letter from Michael A. Stokes, General Counsel, Am. Optometric Ass’n, on AOA Resolution 1901 (June 29, 2017) (on file with author).

and reliability of the HGN test as a field sobriety test when administered by a properly trained and certified law enforcement officer. In addition, the IACP's continued use and endorsement of the HGN test in DUI investigation, and the HGN test's decades long use as a clinical diagnostic test, prove it is generally accepted as reliable in the relevant scientific communities. See State's Exhibit's 2-13.

Based upon the foregoing, the Court finds that the evidence satisfies the five factors. See, e.g., Order on Def.'s Motion in Limine, State v. Patterson, Citation A48292E (Pinellas Cty. Ct. December 9th, 2016); Order Denying Motion in Limine Regarding Horizontal Gaze Nystagmus, State v. Coulter, Case No: 2012-CT-10288 (Duval Cty. Ct. September 28th, 2015); Order Denying Second Motion in Limine With Regard To Horizontal Gaze Nystagmus, State v. Coulter, Case No: 2012-CT-10288 (Duval Cty. Ct. November 2nd, 2015); State v. Dahood, 148 N.H. 723 (N.H. 2002); State v. Carlson, 45 Conn. Supp. 461 (Conn. Sup. Ct. Wyndham 1998); State v. Aleman, 145 N.M. 79 (Ct. App. N.M. 2008); State v. Balbi, 89 Conn.App. 567 (App. Ct. Conn. 2005); State v. Commins, 83 Conn. App. 496, 503-08 (App. Ct. Conn. 2004); State v. Yuel, 840 N.W.2d 680 (S.D. 2013).

III.

The Defense argues that the data in the 2007 NHTSA Robustness of the Horizontal Gaze Nystagmus Test (the "Robustness Study") undermines the other findings of reliability of HGN which should therefore make it inadmissible under Daubert. See Defendant's Exhibit "A". The Court disagrees.

There is ample scientific authority to show HGN's reliability. The studies establishing its validity go back more than forty years. See State's Exhibits 2-13. While the Robustness Study

does show a number of false positives, the purpose of the Robustness Study (the effect of modifications to stimulus speed, the stimulus' elevation and distance from the face) and the method of performing the study (including the use of certain goggles on the participants and the use of an artificial environment) does not affect the validity or reliability of other HGN studies or the admissibility of HGN under Daubert. Dr. Richman stated that the Robustness Study “was a bad study” and “an inaccurate study because it did not follow the appropriate methodology to investigate HGN”. He discussed the reasons for the false positives and these reasons were unrelated to the reliability of HGN. Mr. Kennedy stated that Dr. Richman’s analysis was reasonable.

Upon recently understanding the flawed methodology in the Robustness Study, the relevant technical and scientific committees retracted it from use finding that it should not be relied upon in any assessment of HGN. Retraction of studies is common in medical sciences because science evolves and flaws are revealed. It is within the province of the relevant scientific community to resolve those conflicts. The evidence here establishes that that is what has occurred with respect to the Robustness Study. There is a lack of evidence for this Court to conclude that there was bad faith. Further, to the extent that the Robustness Study resulted in a modification of any scoring system which was not adequately reported, that is without effect because the Robustness Study has been retracted.

IV.

It is therefore, **ORDERED AND ADJUDGED** that the Defendant's Motion In Limine, is hereby **DENIED**.

DONE and **ORDERED** in Chambers this 17th day of April 2018 in Sarasota County, Florida.



Honorable Phyllis R. Galen
County Court Judge

cc: Thomas Hudson, Esquire
Brice Van Elswyk, Assistant State Attorney