

SUPREME COURT,
STATE OF COLORADO

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Certiorari to the
District Court, Arapahoe County, 2014CV31572
County Court, Arapahoe County, 2013M1374

Petitioner
RANDY CAMPBELL

v.

Respondent
THE PEOPLE OF THE
STATE OF COLORADO

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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

It contains 1,542 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

M. Shelby Deemy

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In response to matters raised in the District Attorney’s Answer Brief and the Colorado District Attorney Council’s Amicus Brief, and in addition to the arguments and authorities presented in the Opening Brief, Randy Campbell submits the following Reply Brief.

ARGUMENT

I. The Trial Court Reversibly Erred When It Allowed Expert Testimony in the Guise of Lay Opinion on the Administration, Result, and Interpretation of the Horizontal Gaze Nystagmus Test.

A. Officer Atkins’s testimony on HGN was not admissible under CRE 701.

The District Attorney claims that the police officer’s testimony regarding the horizontal gaze nystagmus (“HGN”) test is admissible lay opinion under CRE 701. (AB, p5-6). However, this assertion is based on an improper analysis. In *Venalonzo v. People*, this Court clarified the standard that distinguishes lay testimony from expert testimony. 2017 CO 9, ¶2. To make that determination,

the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person’s experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.

Venalonzo v. People, 2017 CO 9, ¶2.

To support its claim that the testimony was properly admitted as lay opinion, the District Attorney downplays the technicalities, requirements, and training that one must have to conduct and interpret the HGN test. First, the District attorney characterizes the HGN test as “simple finger/eye maneuvers.” (AB, p7-8). However, that is not so.

The horizontal gaze nystagmus test was developed as one of three standard field sobriety tests from the National Highway Traffic Safety Administration (“NHTSA”). *State v. Baue*, 607 N.W. 2d 191, 202 (Neb. 2000); *see also* NHTSA, DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING REFRESHER: INSTRUCTOR GUIDE, p34, p40 (2018) (hereafter “2018 NHTSA Manual”).¹ The HGN test consists of ten steps and three possible signs of intoxication for each eye for a total of six clues. 2018 NHTSA Manual, p144-52; *State v. Witte*, 836 P.2d 1110, 1113 (Kan. 1992); (CCDB Amicus Brief, p11-13). To determine whether someone is intoxicated through the HGN test, an officer must be trained on how to look for the three clues which include a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and onset of nystagmus prior to 45 degrees. 2018 NHTSA Manual, p151-52; *Witte*, 836 P.2d at 1113. Officer Atkins

¹Available online at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_refresher_full_instructor_manual_2018.pdf (last visited on Jan. 15, 2019).

even testified about this specialized procedure to the jury before giving his opinion that Mr. Campbell did not perform the HGN test as a sober person would. (TR 4/30/14, p129-131); (OB, p18-21); (CCDB Amicus Brief, p7-8).

Despite the technicalities of the HGN test, the District Attorney suggests that any person “would be expected to understand the Officer’s testimony concerning his finger movements as well as the observations of Campbell’s eye movements.” (AB, p8). This argument fails. First, an ordinary person would not know how to conduct or interpret the HGN test. (OB, p13-15); (CCDB Amicus Brief, p6, p8). Further, this assertion forgets the holding of *Venalonzo* which requires Colorado courts to look at the basis for the opinion. 2017 CO 9, ¶2.

Here, the basis of the police officer’s opinion was his training, experience, and certifications. Officer Atkins testified that he had taken hours of coursework on standardized field sobriety tests and that he is certified in that area. (TR 4/30/14, p123-24, p128-29). He also testified that he had conducted around 700 DUI investigations. (*Id.*, p124). An ordinary person does not have the training and experience that Officer Atkins has. Thus, because the basis of his opinion entailed his specialized training and experience, the officer’s testimony was expert testimony. *Venalonzo*, ¶2; (OB, p13-16).

The District Attorney also asserts that “[a]ny person who has had an eye examination is familiar with technicians who check convergence by requesting that patients focus on the technician’s finger as the technician’s [sic] moves his or her finger toward the patient’s nose.” (AB, p8). This assertion does not support the District Attorney’s position. First, this presupposes that an eye examination on convergence allows for lay testimony under CRE 701. Indeed, it likely would not qualify as admissible evidence under CRE 701 because only a trained professional would conduct such an exam. While some people may be familiar with having to track their eyes to a moving finger during an examination, it is certainly not clear that an ordinary person knows what the eye examiner is testing. Second, an eye examination is very different from an HGN test conducted by a police officer during a DUI investigation. An eye examination generally tests the health of a person’s eye; whereas, the HGN test was specifically designed to determine whether someone is impaired by alcohol. 2018 NHTSA Manual, p35; *State v. Torres*, 976 P.2d 20, 30 (N.M. 1999).

The District Attorney recognizes that the HGN test is a technical phrase but claims that the technical terms do not affect its analysis. (AB, p8). Even more boldly, though, the District Attorney concludes that the “HGN maneuver was not scientific or technical.” (AB, p9). Contrary to that conclusion, the HGN test was

developed through a series of scientific studies. *Baue*, 607 N.W.2d at 201-02. Additionally, the majority of states have concluded that HGN is a scientific test. *State v. Helms*, 504 S.E.2d 293, 294 (N.C. 1998) (collecting cases); *State v. Blackwell*, 971 A.2d 296, 304 (Md. Ct. App. 2009) (“To be sure, the HGN test is a scientific test”); (see also *authorities cited in CCDB Amicus Brief*, p8-10).

These courts recognize that HGN is different from the other standard field sobriety tests, which are self-explanatory and display commonly understood signs of intoxication. *Torres*, 976 P.2d at 30. Instead, HGN “is based on principles of medicine and science not readily understandable to the jury.” *Id.*; see also *Helms*, 504 S.E.2d at 294 (“The courts which hold that HGN tests are scientific tests note that the HGN test is based on an underlying scientific assumption that a strong correlation exists between intoxication and nystagmus. Because that assumption is not within the common experience of jurors, these courts hold that before HGN evidence may be heard by a jury there must be testimony as to the techniques used by the police officer and the officer’s qualifications to administer and interpret the test.”).

State v. Baue, 607 N.W.2d 191 (Neb. 2000) and the cases it cites do not support the District Attorney’s claim. (AB, p25-30). In *Baue*, the trial court conducted a pretrial evidentiary hearing on the scientific principles underlying

HGN testing. 607 N.W.2d at 201. The prosecution presented three expert witnesses who all testified about the scientific reliability of the HGN test. *Id.* The *Baue* opinion reveals that Nebraska determines admissibility of expert testimony based on the standards set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Id.* at 194-95, 203. Under this standard, the Nebraska Supreme Court concluded that “a police officer may testify to the results of HGN testing if it is shown that the officer has been adequately trained in the administration and assessment of the HGN test and has conducted the testing and assessment in accordance with that training.” *Id.* at 205. Thus, *Baue* supports the conclusion that HGN testimony, if it is to be admissible, must come from an expert qualified in that area. This Court should join the states that conclude a witness must be qualified as an expert to testify on the issue of impairment relating to the results of an HGN test. *See, e.g., State v. Torrence*, 786 S.E.2d 40, 42 (N.C. Ct. App. 2016); *State v. Ruthardt*, 680 A.2d 349 (Del. Super. Ct. 1996); (OB, p17-19).

B. This Error Requires Reversal.

Contrary to the State’s claim, this error was not harmless. Reversal is required here because the error substantially influenced the verdict and affected the fairness of the trial proceedings. *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012); (OB, p19-22).

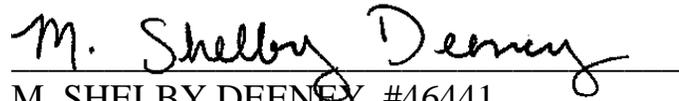
The officer's improper expert opinion likely contributed to the jury's verdict. (OB, p21-22). There was not overwhelming evidence against Mr. Campbell, and the officer's testimony regarding the results of the HGN were the most difficult to challenge. (*Id.*) The improper expert testimony was key to the prosecution's case and therefore not harmless. *People v. Veren*, 140 P.3d 131, 140 (Colo. App. 2005).

Further, other jurisdictions have reversed where HGN testimony was improperly admitted because it "could have a disproportionate impact on the jury's decisionmaking process." *Witte*, 836 P.2d at 1115. There is a real risk that the jurors overestimated the probative value of the HGN evidence and attributed an "aura of special reliability and trustworthiness" to such evidence. *Ruthardt*, 680 A.2d at 361; *see also Helms*, 504 S.E.2d at 296 ("We conclude that, in light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial."). Therefore, reversal is required. (OB, p19-22).

CONCLUSION

Based on the reasons and authorities set forth above and in the Opening Brief, Mr. Campbell respectfully requests that this Court reverse his conviction.

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CERTIFICATE OF SERVICE

I certify that, on January 15, 2019, a copy of this Reply Brief of the Petitioner was electronically served through Colorado Courts E-Filing on all parties of record.

