



DWI Prosecution: Common Defense Challenges

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- Traffic Safety Resource Prosecutor
 - Grant funded program
 - Provide training and resources to law enforcement and prosecutors on impaired driving related issues
 - Protecting Lives, Saving Futures
 - Drugged Driving 101
 - DWI Bootcamp
 - Cops in Court
 - Bi-monthly newsletter
 - Technical assistance

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- Totality of the Circumstances:

“One piece of sand may not make a beach, but courts will not be made to look at each grain in isolation and conclude there is no seashore.”
State v. Crenshaw, 144 NC App 574 (2001)

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- Horizontal Gaze Nystagmus
 - What is it?
 - Why does it matter?
 - How will it be challenged?

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- What is HGN?
 - Involuntary jerking of the eyes as they move side to side
 - Six total clues (three in each eye)
 - Lack of smooth pursuit
 - Distinct and sustained nystagmus at maximum deviation
 - Onset of nystagmus prior to 45°
 - Displaying 4 or more clues indicates impairment

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- Administrative procedures:
 - Stimulus positioned 12-15 inches from subject's face, slightly above eye level
 - Check for equal pupil size and resting nystagmus
 - Check for equal tracking

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- Lack of smooth pursuit:
 - Stimulus is moved at a pace that will take two seconds to get from center to maximum deviation
 - Eyes should follow smoothly with no noticeable jerkiness

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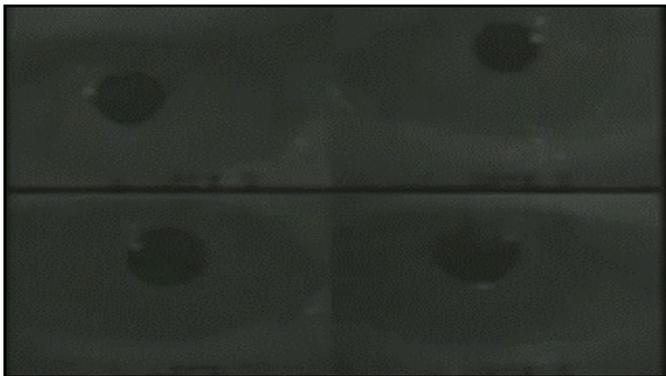


- Distinct and sustained nystagmus at maximum deviation
 - Eye is moved all the way to the left or right, no white showing in the corner
 - Held for a minimum of 4 seconds

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- Onset prior to 45°
 - Stimulus is moved to the side at a pace that would take approximately 4 seconds to reach a 45° angle
 - Once jerking is observed, stimulus is stopped to verify the angle
 - Should still be white showing in the corner of the eye

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- Why does it matter?
 - A person who is impaired by a DID drug will display nystagmus
 - If done correctly, very reliable
 - 1998 San Diego Field Validation Study found that officers made correct arrest decisions 88% of the time when relying on HGN alone
 - Cannot be practiced or hidden

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- How is it challenged?
 - Improper administration
 - Alternative explanation
 - Rotational
 - Post-rotational
 - Caloric
 - Optokinetic

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- Improper Administration
 - Stimulus moved at incorrect speed
 - Generally too fast
 - Will actually benefit defendant as officers will miss clues
 - Test conducted too fast
 - Claim that test takes a minimum of 64 seconds to conduct
 - Manuals indicate all times are approximate
 - Can have immediate or nearly immediate onset when checking for onset prior to 45°

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- Improper Administration
 - Posture of subject
 - So long as head is in line with the body (i.e. neck is straight), HGN can be administered to a subject who is sitting or laying down
 - Positional Alcohol Nystagmus will only be observed when the head is tilted to one side (i.e. ear is closer to shoulder on one side or the other)
 - "We conclude that the proper use of the HGN and VGN tests at any test posture will help an officer correctly identify individuals impaired with alcohol at BACs of 0.08% and higher."
 - Citek, K., Ball, B., & Rutledge, D. A. (n.d.). *Nystagmus testing in intoxicated individuals*, Optometry, Volume 74, No. 11, November 2003.

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- BUT...
 - Proper administration is foundational requirement.
 - *State v. Hill*, 865 S.W.2d 702
 - Only one of the SFSTs that is considered scientific
 - *State v. Browning*, 458 S.W.3d 415, fn. 3

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- Alternative Explanations for Observed Nystagmus

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- Rotational Nystagmus
 - Occurs when a person is actively spinning, causing the fluid in the inner ear to be disturbed
- Not a defense to DWI
 - Occurs ONLY during rotation
 - Will not be observed in the field

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- Post-Rotational Nystagmus
 - Occurs after rotation, while the inner ear fluid is still disturbed
- Not a defense to DWI
 - Lasts only for a short while
 - Officer would rarely be on scene, let alone administering HGN, in time to observe post-rotational nystagmus
 - Demonstration

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- Caloric Nystagmus
 - Occurs when cold or warm water is introduced into the ear canal
- Not a defense to DWI
 - Water or air of different temperature must be introduced into the actual ear canal
 - Conditions will not be present in the field
 - Occurs in forward gaze, not while eyes are tracking a stimulus

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- Optokinetic Nystagmus
 - Occurs when the eyes fixate on an object that suddenly moves out of sight or when the eyes watch sharply contrasting moving images
- Not a defense to DWI
 - Regardless of what is in the background—strobe or rotating lights, traffic, etc.—will not be observed if subject is watching the stimulus

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- Challenges to the breath test result
 - Observation period
 - Mouth alcohol
 - Denial of counsel

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- Lack of observation period
 - Prior to administering a breath test, subject MUST be observed by a Type II or Type III
 - No oral intake
 - No vomiting
 - No smoking
 - Observation period is required for the test result to be admissible

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- Mouth alcohol
 - Not a valid defense so long as there is a valid observation period
 - All of the instruments have slope detectors—instruments will abort the test if the level of alcohol detected spikes too quickly

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- Denial of counsel
 - Subjects are entitled to 20 minutes to contact an attorney after being read implied consent
 - Must be an **affirmative** request
 - Subject is entitled to a private consultation with counsel if requested
 - *Roesing v. Director of Revenue*, 573 S.W.3d 634

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- Challenges to the blood test result
 - Improper tube
 - Expired tube
 - Fermentation

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- Improper tube
 - Must use a gray top tube for forensic testing
 - Preservative: Sodium fluoride
 - Anticoagulant: Potassium oxalate
 - Spoiled or clotted blood will be apparent to the criminalist who does the testing

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- Expired tube
 - Expiration date on the tube is only for the vacuum seal
 - So long as the tube draws in blood when used, the tube is good

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- Fermentation
 - Blood samples can ferment, thereby increasing the alcohol content
 - BUT...
 - **Extremely** rare
 - Requires presence of yeast in the blood
 - Use of gray top tube will prevent this from happening
 - More likely that a sample will lose alcohol concentration over time

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- Defenses to drug impaired driving
 - Prescription/OTC drug
 - No number
 - Wrong sample

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- Prescription drug
 - Nothing in 577.010 requires drug causing impairment to be illicit
 - Prescription and OTC medications can cause significant impairment
 - Warning labels—do not drive or operate heavy machinery
 - Ambien?
 - Defense concedes impairment
 - Will likely be a frequent issue with the advent of Amendment 2

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- No number
 - Drug results not quantified in Missouri
 - Even if you have a quantified result, there are no studies which correlate drug levels to impairment
 - Drugs affect people differently
 - Studies would be illegal/unethical to conduct for illicit drugs
 - States with limit for marijuana—no scientific basis for number selected
 - Attractive defense to a jury

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- Wrong sample
 - Urine test results show only what was present in the body at some time past
 - Typically shows only drug metabolites which are often not psychoactive
 - Blood is the only matrix which will show what was active in the body at the time of arrest
 - MSHP will soon stop testing urine for drugs in DWI cases

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