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Re: State vs. Craig J. Guy
39:4-50

Dear Mr. Weeks:

I have reviewed the pertinent police reports and car DVDs provided regarding the above listed matter, as per your request. Having reviewed the case material further, I have noted certain facts and arrived at certain conclusions which have led me to the opinions expressed herein. A synopsis of facts, and conclusions upon which I base my opinions are as follows: On October 31, 2019 Mr. Guy was arrested for a violation of the N.J. drinking driving law and processed at the NJSP Newark station. A review of the Alcohol Influence Report Form indicates that the Alcotest 7110 MK III C operator received two breath samples which produced EC/IR results of 0.146%/0.148% and 0.143%/0.145%. The REPORTED BREATH TEST RESULT was reported with truncation as being 0.14% BAC.

From a procedural point of view, Breath test operators in the State of New Jersey are trained to conform to a continuous, direct and uninterrupted twenty-minute observation period prior to administering breath tests. This testing protocol must be carefully, meticulously and strictly followed in order to ensure the proper administration of breath tests and reliability of those breath test results obtained. In the final STATE VS. CHUN decision by the NEW JERSEY SUPREME COURT, we are advised that "Operators must wait twenty minutes before collecting a sample to avoid overestimated readings due to residual effects of mouth alcohol". "The software is programmed to prohibit operation of the device before the passage of twenty minutes from the time entered as the time of the arrest".

"Moreover, the operator must observe the suspect for the required twenty-minute period of time to ensure that no alcohol has entered the person's mouth while he or she is awaiting the start of the testing sequence". "In addition, if the arrestee swallows anything or regurgitates, or if the operator notices chewing gum or tobacco in the person's mouth, the operator is required to begin counting the twenty-minute period anew". The final STATE VS. CHUN decision also advises that "His role now consists of observing the subject to ensure that twenty minutes has passed and to be certain that the subject has neither swallowed nor regurgitated any substances during that time that would influence the test results".

A review of Alcohol Influence Report Form identifies the ARRESTING TROOPER/ALCOTEST 7110 MK III C OPERATOR as Tpr. Mark A. Colon #7840. Although the DRINKING DRIVING REPORT indicates that "I observed Mr. Guy for over twenty minutes before the administration of the Alcotest unit", I have the following comments. This information does not indicate whether or not the observation was direct, continuous, and uninterrupted up and until the time that the first breath sample was actually provided. The police reports are silent as to when the twenty-minute observation had actually commenced and when same had ended.

I am further advised that Mr. Guy mints/Halls throat lozenge in his mouth within 20 minutes of the breath tests. The state has not clearly and convincingly established compliance with a STRICT AND METICULOUS direct, continuous, and uninterrupted twenty-minute observation and deprivation procedure prior to when the first breath sample was actually provided at the NJSP Newark station. Therefore, the breath tests are suspect at best and procedurally improper.

A further review of the police reports and car DVDs reveals that certain field sobriety tests were administered to Mr. Guy. These tests administered in front of Mr. Guy's vehicle and out of view of the video camera. I will have to listen to the testimony of the Trooper in order to determine the proper administration and reliability of these tests any further than those comments already contained in this report. Officers are advised that Simplicity is the key to divided attention field sobriety testing. It is not enough to select a test that just divides the subject's attention. The test also must be one that is reasonably simple for the average sober person to complete as instructed when sober. Tests that are difficult for a sober subject to perform have little or no evidentiary value.

Beginning in late 1975, extensive scientific research studies (1977, 1981, and 1983) were sponsored by NHTSA through a contract with the Southern California Research Institute (SCRI) to determine which roadside field sobriety tests were most accurate. The 1983 large scale field validation study was the first significant assessment of the workability of the standardized tests under actual enforcement conditions. It was the first time completely objective clues and scoring criteria had been defined for these tests. The results of this study validated the SFST's. NHTSA analyzed the original SCRI research laboratory test data and found that HGN, by itself, was 77% accurate. WAT, by itself was 68% accurate and OLS, by itself was 65% accurate. This is a part of the history component of the training of the officer.

Three additional studies were undertaken between 1995 and 1998. The 1998 SAN DIEGO SFST VALIDATION STUDY was undertaken because of the nationwide trend towards lowering the BAC limits to 0.08%. The study examined the validity of SFSTs for both .08% and .04%. This is the most current research used to describe the accuracy of the SFSTs. HGN was 88% accurate. WAT was 79% accurate. OLS was 83% accurate. The results of this study provide clear evidence of the validity of the three-tests to support arrest decisions at above or below .08%. It strongly suggests the SFSTs also identify BACs at 0.04 and above.

It should be noted that these percentages were obtained from experienced SFST personnel. With experience, properly administering and interpreting the SFSTs in a systematic and standardized manner, officers can obtain results similar to the studies mentioned above. Officers are reminded from the current February 2018 DWI/SFST PARTICIPANT manual and training that "It is necessary to emphasize this validation applies only when: The tests are administered in the prescribed, standardized manner: The standardized clues are used to assess the suspect's performance: The standardized criteria are employed to interpret that performance. If any of the SFST elements is changed, the validity may be compromised".

In the current curriculum, greater emphasis has been placed on the maintenance of the SFST Field Arrest Log. The International Association of Chiefs of Police (IACP) strongly recommends the use of this log for the following reasons. The log records training proficiency, records field proficiency, and documents the officer's experience. The log is important in documenting the officer's experience and proficiency in performing and interpreting the SFSTs.

The log has the following components: The actual date of the SFSTs administered, Subject's full name, Results of each SFST test. Participants in the current SFST course are directed to transfer their documentation from the note-taking guide to the log which includes the Classification of BAC as above or below 0.08 BAC, Arrest/Not Arrest, Subject's measured BAC (if available) and any REMARKS.

The NJSP Alcohol/Drug Test unit offers instruction in the SFST tests which include not only the HGN test but the two SFST known as Divided Attention tests. In the current manual, the term "Battery" was removed to describe the three SFST tests. We are advised "The research showed that these three tests were the most accurate and the remaining tests were merely reassessing the same skills". "While many field sobriety tests are valid tests, the Standardized Field Sobriety Tests have been validated through numerous research studies". They are referred to as Divided Attention tests since they divide the subject's attention between performing mental and physical tasks.

The mental tasks include processing of information, recall of memory and comprehension of verbal instructions. The physical tasks include balance and coordination. All the instructions given must be complete and accompanied by demonstration and an acknowledgment of understanding by the person being tested in order to retain their reliability and validity. In the Administrative Procedures Instruction Stage for the Walk and Turn test, Instructors are told to "Emphasize that officer must receive some affirmative response before continuing".

We are advised that LAW ENFORCEMENT SHOULD BE ENCOURAGED TO ADMINISTER THE SFSTs IN THE STANDARDIZED FORMAT FOLLOWING THE EXACT INSTRUCTIONS OF THE TRAINING MANUAL. This ensures the STANDARDIZED nature of the tests, reduces confusion, protects against liability, eliminates harmful defense cross-examination, and ensures the successful prosecution of impaired drivers.

The two Divided Attention tests in the SFST were administered to Mr. Guy. These tests are known as the Walk and Turn and One Leg Stand tests. There is no indication in the police reports or car DVDs that Mr. Guy was ever provided the prescribed and standardized instruction to "watch your feet at all times" during the Walk and Turn test or to "keep watching the raised foot" while performing the One Leg Stand test. In my experience, these omissions would specifically impact the reliability of certain validated scoring factors in the event that Mr. Guy was not watching his feet/foot at all times in order to facilitate the tasks at hand. For both tests, each clue may be observed several times, but constitutes only one clue. It is also emphasized during training that it is important to inform the subject not to stop walking once the Walk and Turn test begins. The Trooper did not do so.

Mr. Guy was never instructed to begin the Walk and Turn test from the standardized instruction stage position by counting his first steps from same as "ONE". Troopers are reminded that there may be times when the suspect takes a wrong number of steps or begins the heel-to-toe walk with the wrong foot resulting in a turn on the right foot instead of the left. If this occurs the suspect would normally be assessed a clue for an incorrect number of steps and not assessed a clue for an improper turn if the turn was made using a series of small steps as instructed and the suspect did not lose his/her balance while attempting the turn. This scoring is consistent with the original research and training conducted by the Southern California Research Institute and with the administration and scoring of the Walk and Turn test in the San Diego Field Study.

When asked, Mr. Guy advised that he has a "bad hip". The car DVD revealed that you could hear him express pain as he stated "Ouch". He also advised the Trooper that his leg is weak. The Trooper advised him that he was asking Mr. Guy to perform something that is design for the "Normal" person. The DRINKING DRIVER/OPERATOR QUESTIONNAIRE indicates that when asked, Mr. Guy advised that he was in fact injured in his right hip/back which was affecting him with trouble walking and standing. It is my understanding that Mr. Guy has back, hip and an inner ear problem in which tubes were placed recently due to dizziness and discomfort. I have been provided medical reports which document and detail his medical history. It also should be noted that at the time of field sobriety testing I was very windy.

Troopers administering SFSTs at roadside are expected: 1.) to be **reasonable and prudent** in their decision to test and 2.) not to deviate from the SFST administrative instructions. The current curriculum now recommends asking the driver about medical conditions during the PERSONAL CONTACT PHASE of the investigation. This includes an inquiry such as if they have any physical disabilities, are they sick or injured, are they under the care of a doctor or dentist, are they diabetic or epileptic, and if diabetic do they take insulin, and if they are on any medications.

The Alcohol Influence Report Form indicates that Mr. Guy is 5'6" and weighs 260 LBS. The original SCRI studies suggested that individuals over 65 years of age or people with back, leg or inner ear problems had difficulty performing the Walk and Turn test. In the Walk and Turn test, it is stressed to participants to consider age along with environmental factors, location, injury or physical ailments while administering this test. The importance of the totality of the circumstances must not be overlooked. Prior to administering psychophysical tests, an officer must ask if they have any physical problems or disabilities. Examples of conditions that may interfere with subject's performance of the Walk and Turn test includes Wind/Weather conditions, Subject's age, and Subject's footwear.

The original SCRI studies suggested that individuals over 65 years of age; people with back, leg or inner ear problems; or people who are overweight by 50 or more pounds may have difficulty performing the One Leg Stand test. Instructors in the DWI/SFST course are to "Stress to participants to consider age and excessive weight along with environmental factors, location, injury, or physical ailments while administering this test". Once again, "The totality of all factors should not be overlooked". Examples of conditions that may interfere with subject's performance of the One Leg Stand test includes Wind/Weather conditions, Subject's Age, Weight, and Subject's footwear.

The other SFST test that was administered was the Horizontal Gaze Nystagmus test. The **ADMINISTRATION OF THE HGN TEST IS NOT TO BE USED TO ESTIMATE SPECIFIC BAC LEVEL.** There are 10 steps in the systematic administration of the Horizontal Gaze Nystagmus test. The ADMINISTRATIVE PROCEDURES include a Check for Eyeglasses, Verbal Instructions, Position stimulus 12 to 15 inches in front of the nose and slightly above eye level, Check for equal pupil size and resting nystagmus Check for equal tracking, Lack Of Smooth Pursuit, Distinct and Sustained Nystagmus at Maximum Deviation, Onset of Nystagmus Prior to 45 Degrees, Total the Clues, and Check for Vertical Gaze Nystagmus.

Based upon prevailing case law under State vs. **DORIGUZZI**, the admissibility and/or use of the HGN test is an issue in this case. The Qualifications for HGN Certification by the NJSP consists of the HGN practitioner having to fill in all required information on the HGN Log. Certification requires a minimum of twenty (20) evaluations and eighty percent (80%) of evaluations must be correct. Refusals can be entered, but not count as a number towards certification. A maximum of ten (10) evaluations can be achieved from training. All non-training evaluations require a summons number. As a result of this it is necessary to review the documentation of the practice tests in order to determine if the practitioner was properly recommended for certification.

We are advised that the original NHTSA study which "unmistakably validated the SFSTs", that the "Standardized" elements included: Standardized Administrative Procedures, Standardized Clues, and Standardized Criteria". We are further advised to "Remember that the SFSTs are a tool to assist you in seeing visible signs of impairment and are not a pass/fail test". **With experience, properly administering and interpreting the SFSTs in a systematic and standardized manner, officers can obtain results similar to the studies mentioned above".**

The National Highway Traffic Safety Administration (NHTSA) published a Final Report dated August 1998 entitled "Validation of the Standardized Field Sobriety Test Battery at BACs Below .10%." with the following comments. They conclude that **"Thus, SFST results, help officers to make accurate DWI arrest decisions even though SFSTs do not directly measure driving impairment."** The SFST tests are fully acceptable in establishing probable cause to arrest, if administered properly in the prescribed standardized manner, but do not have "face validity" to measure driving impairment.

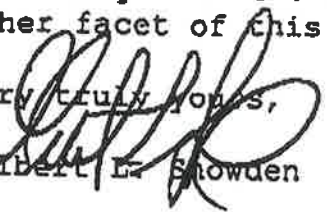
This study revealed that the "only appropriate criterion measure to assess the accuracy of the SFSTs is BAC." "Measures of impairment are irrelevant because performance of the SFSTs must be correlated with BAC level, rather than driving performance." Based upon the 1998 study we are further advised that "HORIZONTAL GAZE NYSTAGMUS LACKS FACE VALIDITY BECAUSE IT DOES NOT APPEAR TO BE LINKED TO THE REQUIREMENTS OF DRIVING A MOTOR VEHICLE". "HGN'S APPARENT LACK OF FACE VALIDITY TO DRIVING TASKS IS IRRELEVANT BECAUSE THE OBJECTIVE OF THIS TEST IS TO DISCRIMINATE BETWEEN DRIVERS ABOVE AND BELOW THE BAC LIMIT, NOT TO MEASURE DRIVING IMPAIRMENT".

In view of the facts and conclusions presented above, it is my opinion that the breath tests are not conclusive enough to sustain a per se violation under 39:4-50. Without the per-se value of the breath test results, the state may not be able to prove the elements of the observation prong of the 39:4-50 statute. All of the opinions in this report are made within a reasonable degree of certainty in the field of breath testing and field sobriety testing.

At time of trial, I will be prepared to testify to the following:

1. The proper administration, interpretations, and validity of on-site field sobriety tests to include the Standardized Sobriety Tests sanctioned by the U.S. Department of Transportation.
2. The procedures of proper operation and reliability of breath tests conducted on subjects when utilizing breath testing instruments which include the Alcotest 7110 MK III C instrument and Breathalyzer Model 900/900A.

If you have any questions with regard to this report or any other facet of this case, please do not hesitate to contact me.

Very truly yours,

Gilbert E. Snowden