

IN THE STATE COURT OF FULTON COUNTY

FILED IN OFFICE

STATE OF GEORGIA

MAR 26 2024

Ayesha Hardy
Ayesha Hardy, Deputy Clerk
State Court in Court of GA

STATE OF GEORGIA,)
)
vs.)
)
JERRY ARROYO,)
)
Defendant.)

CASE No. **23CR005988J**
DUI-Marijuana
Failure Obey Traffic Control Device
Possession Marijuana Less Than Oz.

ORDER

This matter came before the Court on Defendant’s motion challenging articulable suspicion for the stop, probable cause for arrest and the admissibility of the HGN both generally pursuant to *Daubert*, and specifically in this, a marijuana case. The State’s only witness was the arresting officer, Conner Christiansen of the Roswell Police Department.

Officer Christiansen stated that he first observed Defendant’s vehicle as it headed east bound on Holcomb Bridge Road. The vehicle slowed down for no apparent reason, almost coming to a stop, as it approached a green light. On the dash cam (State’s Exhibit 7) the truck could then be seen stopped at a red light with the car’s two front tires over the stop line of an intersection. These two incidents were the basis for the officer stopping the vehicle.

When he approached the car, the officer testified he could smell marijuana, noticed the Defendant had red and watery eyes and that his speech was slowed. Once out of the vehicle the Defendant eventually admitted to having smoked a roach earlier in the evening and a marijuana roach was found on the front passenger seat.

The officer then requested the Defendant to complete some field sobriety tests. He

performed the Horizontal Gaze Nystagmus (HGN) test, the Walk and Turn test and the One Leg Stand test. The defense had no objection to how the HGN was conducted, and the officer testified that the test demonstrated the presence of four of six clues.¹ The officer testified that this indicated that there was one of three categories of drugs present in defendant's system.

He then conducted the Walk and Turn test and testified to finding five of eight clues present; however, upon cross examination, he admitted that he failed to medically qualify the Defendant before conducting this test. The One Leg Stand test revealed two of four clues present. He also performed a preliminary breath test which was negative for the presence of alcohol and finally he asked the Defendant to recite the alphabet starting at the letter "e" and stopping at the letter "o". The Defendant left out several letters and at one point had to start over.

1. HGN:DAUBERT CHALLENGE & ADMISSIBILITY

A. Is the HGN Test Scientifically Reliable Generally?

First the Court must determine if the HGN test is scientifically reliable pursuant to OCGA § 24-7-702, the most recent version of which became effective on July 1, 2022. In pertinent part, that statute provides

(a) ... [T]he provisions of this Code section shall apply in all proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise, if:

¹ The officer also conducted a vertical nystagmus test and found no nystagmus present.

- (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (2) The testimony is based upon sufficient facts or data;
- (3) The testimony is the product of reliable principles and methods; and
- (4) The expert has reliably applied the principles and methods to the facts of the case.

A court hearing a motion on this topic, typically called a *Daubert* motion, is empowered to

(f) ... draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

Thus, in considering a *Daubert* motion the trial court should first consider whether the factors are reasonable measures of reliability, before evaluating proffered expert testimony. *Kumho Tire*, 526 US at 152. Furthermore, expert testimony may be based either on professional studies or personal experience so long as the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.* at 152. In completing the *Daubert* analysis, a court must also keep in mind that it is not the role of the trial court to make conclusions about the persuasiveness of the proffered expert testimony; instead, vigorous cross-examination, presentation of contrary evidence, and instructions on the burden of proof are more appropriate means of attacking shaky, but admissible, evidence. *United States v. Reddy*, 534 Fed. Appx. 866 (11th Cir. 2013).

As to the experts' scientific, technical or other specialized knowledge as a tool to help the trier of fact understand the evidence or determine the facts, the state's witness, Officer Christiansen, testified that he started working with the Roswell PD in June 2021 and was Peace Officer's Standards and Training (POST) certified in September 2021. His initial training included basic DUI training and standardized field sobriety testing. Since the date of the incident the officer has also received certification in High Intensity Drug Identification (HIDTA), Advanced Roadside Impaired Driving Enforcement (ARIDE) and as a Drug Recognition Expert (DRE). He testified to the extent of all this training in addition to the fact that as of this date, exclusive of his training, he has investigated 200-250 DUI cases. He also testified to his familiarity with the National Highway Safety Training Administration (NHSTA) training manual, the ARIDE training manual, and the DRE training manual. (See State's Exhibits 1, 2, & 3 respectively).

The Defense called Joshua Ott, a former Roswell Police Officer for 10 years who was previously POST certified in Field Sobriety Testing, in ARIDE, and as a DRE. He also testified to having been approved as an expert in DUI field sobriety testing in more than 80 courts in Georgia, testifying both as an officer and now as a private consultant. He further stated that he was familiar with six studies that validated the HGN testing.

Based on the training and experience of both witnesses, each was permitted to offer testimony as an expert in DUI alcohol and drug detection, field sobriety testing and the validity of HGN testing. They each had years of training and practical

experience in the administration of the HGN test and their expertise would assist jurors as this knowledge would most likely not be within the ken of the average juror.

As to the testimony being based upon sufficient facts or data and it being the product of reliable principle and methods, both witnesses supplied ample testimony in this regard. They each offered extensive testimony regarding the methodology and application of the HGN test, testifying to their familiarity with two scientific studies² and a resolution³ that validated the methodology utilized in the testing. The State also relied on the admitted training manuals⁴ that officers use every time they conduct DUI inquiries. The manuals explain the purposes and context for administration of the HGN test, with sufficient references to studies and other empirical data, which Officer Christiansen followed.

Finally, they each offered testimony that they reliably applied these principles and methods to the facts of this case. Although the actual administration of the test was not challenged, Officer Christensen testified that he first medically qualified the Defendant by checking for resting nystagmus and equal tracking and then found a lack of smooth pursuit and distinct and sustained nystagmus at maximum deviation present in both eyes. This was a total of four out of six clues. He testified that this indicated the presence of one or more of three types of drugs that might be present in Defendant's system. Mr. Ott corroborated Officer Christensen's use of the HGN test

² 1994 DRE Validation Study of Arizona by Dr. Marcelline Burns; American Prosecutor's Research Institute validation study, 2003.

³ Resolution from the American Optometric Association, 2011.

⁴ State's Exhibits 1,2, & 3.

as it is the first test that officers are taught to administer as a prescreening test to effectively eliminate the presence of any number of drugs.

Additionally, many other judges throughout Georgia, including several judges of this Court⁵ have each thoroughly examined the question of the HGN test's general reliability in their orders, as attached to the State's motion. Along with those judges, this Court now has a thorough understanding of the scientific basis for the HGN test and its purposes and finds that it is based on sufficient scientific facts and data to permit its admissibility under OCGA § 24-7-702. The State's motion as to the reliability and admissibility generally, is GRANTED. Furthermore, it is the HOLDING of this Court henceforth that judicial notice shall be taken of the acceptance and reliability of the science of the HGN evaluation pursuant to O.C.G.A. § 24-7-702 and the only matters to be determined will be whether the officer conducting the test was qualified with adequate training and experience and whether the evaluation was properly conducted.

B. Are the Results of the HGN Test Admissible in This Case, Specifically?

The defense contends that despite the proper administration of the HGN test, it has no application in this case as Defendant is charged with DUI drugs, specifically marijuana. The Defendant admitted at the scene to smoking marijuana prior to driving. Both officers testified, however, that the presence of HGN does not indicate impairment by marijuana. The State argues that the test results are nonetheless relevant to show probable cause for the arrest

⁵ Judges Dixon and Eldein both of this Court have thoroughly examined the question of HGN's admissibility pursuant to Daubert and their orders were attached to the state's motion. Although their cases naturally involved

and impairment by “some other substance” for which the Georgia Bureau of Investigation crime lab could have tested for, but unfortunately, did not.

The HGN results are informative in establishing probable cause for arrest and the Court will consider the results in making that determination. Whether Defendant was impaired by some other substance is unfortunately irrelevant as Defendant was only charged with DUI marijuana and everyone concedes that a positive test of HGN is not indicative of the presence of marijuana. Not only is the evidence of the HGN test irrelevant, but any evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See OCGA § 24-4-403. Allowing the jury to consider this scientifically based test, the results of which are irrelevant to the charges in this case, would impress upon the investigation a scientific imprimatur it does not deserve and in all likelihood would impugn Defendant’s character by permitting an inference that he was on some other random, unknown, possibly illegal substance while driving. This Court finds that the HGN test results are therefore in no way helpful to the triers of fact and may actually be more prejudicial than probative. Defendant’s Motion to exclude the results of the HGN test in this case is GRANTED.

2. ARTICULABLE SUSPICION FOR THE STOP

Articulate suspicion to stop a driver is justified if the officer personally observes behavior that he or she deems a possible traffic violation. In Georgia, behavior “giving rise to an officer's reasonable suspicion need not be a violation of the law. Even if the driver's actions do not amount to a per se traffic violation, an officer may have a reasonable, articulable

different officers, the analysis applicable to the HGN test’s scientific reliability is precisely the same.

suspicion that a traffic offense was being committed” in order to protect the public. *State v. Calhoun*, 255 Ga. App. 753, 755 (2002) In *Calhoun* the driver made a very wide sweeping turn that crossed into oncoming traffic and caused another vehicle to abruptly stop to avoid a collision. Even though Defendant Arroyo’s slowing down in traffic may not have been an actual traffic violation, and the front tires crossing the stop line may not be correctly accused⁶, these do not negate the fact that the officer felt that Defendant’s driving was unsafe and justified further inquiry. The motion challenging articulable suspicion for the stop is DENIED.

3. PROBABLE CAUSE FOR ARREST

The standard as it relates to probable cause for arrest is much less than the burden required for a finding of guilt. “The test of probable cause requires merely a probability - less than a certainty but more than a mere suspicion or possibility. To arrest a suspect for driving under the influence, an officer need only ‘have knowledge or reasonably trustworthy information that [the] suspect was actually in physical control of a moving vehicle, while under the influence of alcohol to a degree which renders him incapable of driving safely.’” *State v. Sledge*, 264 Ga. App. 612, 615 (2003). The same standard would apply in a case of DUI-marijuana. The evidence presented by the State is more than sufficient to meet this test. Excluding the Walk and Turn as Defendant was not medically qualified, the officer observed an odor of marijuana; red, watery eyes; slow speech; and there was not only an admission of drug consumption, but the discovery of a roach in the vehicle passenger’s seat. Furthermore, the results of the HGN test which showed possible drug consumption, were an appropriate factor

⁶ Defense contends that the accusation as drawn is improper as it refers to OCGA 40-6-20, Failure to Obey Signs or Control Devices, and the driving infraction may not have involved a traffic control device. The Court will address this matter prior to trial.

for the officer to rely upon to determine possible impairment. Based on these factors, the officer had probable cause to arrest the Defendant. Defendant's motion is DENIED. In conclusion the results of the HGN test are admissible generally and were considered by this Court in establishing probable cause for arrest but are not admissible at trial as they are irrelevant and more prejudicial than probative. This case is to be set down for trial.

This the 26th day of March, 2024.

A handwritten signature in black ink, appearing to read "Bessen", written over a horizontal line.

DIANE E. BESSEN, Judge
State Court of Fulton County