

Traffic Safety Standard

SPRING 2014
ISSUE 13

Providing relevant information to Montana's prosecutors, law enforcement, and judges

IN THIS ISSUE

HGN Admissibility	1
Prosecuting the Drugged Driver Course Held in Great Fall	4
Traffic law update	4
Training	5

HGN Admissibility

Horizontal Gaze Nystagmus (HGN) is a powerful tool in discerning whether a person is under the influence. It is useful to law enforcement in making his/her arrest decision, and it is useful to jurors in determining guilt or innocence. Despite its value, it can be challenging to use in court. In discussing the issue with prosecutors and law enforcement throughout the state, two reasons for non-use are prevalent: law enforcement administer the test incorrectly, and prosecutors are unable to obtain an expert witness capable of testifying as to the correlation between HGN and the use of an intoxicating substance. This article provides a brief overview of these two issues.¹

Proper HGN Administration

In order for HGN to be admissible in court, the officer must have been trained how to administer the test, and the test had to have been administered in accordance with his/her training.² The best way to ensure law enforcement officers are administering the HGN test correctly is for him/her to attend a Standardized Field Sobriety Test (SFST) refresher on a regular basis. Annual refreshers are recommended for a variety of reasons. Primary reasons include the fact that the National Highway Traffic Safety Administration (NHTSA) updates the curriculum regularly and annual refreshers help officers avoid diminishing skills.

Trooper Larry Adorni with the Montana Highway Patrol is currently charged with

the management and scheduling of Montana's SFST program. He can be reached at ladorni@mt.gov.

As for how to administer the HGN test, the following is a brief synopsis of the current procedures taught throughout the state. More thorough descriptions can be found in NHTSA's SFST 2013 Manual. Prior to beginning the test, officers must check for equal pupil size, resting nystagmus and equal tracking. To be consistent with the three parts of the HGN test, officers must hold the stimulus 12 to 15 inches from the suspect's face, move the stimulus first to the suspect's left at a two-second pace, then to the right, and make a total of two passes across each eye.

If the pupils are equal in size, there is no resting nystagmus and both eyes track equally, the officer may begin by looking at the first pass that is scored: lack of smooth pursuit. The officer continues to hold a stimulus 12 to 15 inches from the suspect's face and instructs the suspect to focus on it. The officer then begins by moving the stimulus to the suspect's left, the officer first checks the left eye for lack of smooth pursuit. The officer then checks the right eye. The officer moves the stimulus from nose to left eye and nose to right eye twice total, utilizing two-second passes. If the officer moves the stimulus faster or slower, he/she runs the risk of not seeing the nystagmus. If the eye jerks as it

Montana's Traffic Safety Resource Prosecutor (TSRP) position is funded by the Montana Department of Transportation (MDT) as part of a comprehensive effort to reduce the number and severity of traffic crashes, injuries, and fatalities on Montana's highways. The views presented in this newsletter are meant to inform but do not necessarily reflect MDT's views.



follows the stimulus, lack of smooth pursuit is present. One clue is possible in each eye.

Next, the officer looks for distinct and sustained nystagmus at maximum deviation in each eye. Again the officer holds the stimulus 12 to 15 inches from the suspect's face, begins by moving to the left, and makes a total of two passes. The officer moves the stimulus to the left until no white in the outside corner of the suspect's left eye is visible. If the nystagmus is distinct (obvious) and sustained (continues) at maximum deviation, a clue is scored for each eye it is present in. One clue is possible in each eye. Finally, the officer looks for onset of nystagmus prior to 45 degrees. This test is very slow: four seconds from nose to 45 degrees. If the officer moves the stimulus too quickly, onset prior to 45 degrees will not be observed. As with the previous tests, the officer holds the stimulus 12 to 15 inches from the suspect's face, begins by moving to the left, and makes a total of two passes. The officer moves the stimulus outward until either nystagmus is observed or the stimulus reaches 45 degrees from the center of the suspect's face, whichever occurs first. If nystagmus is observed prior to 45 degrees, the officer stops and verifies the nystagmus and then moves on to the other eye. The officer does not continue on to 45 degrees if nystagmus is observed prior. One clue is possible in each eye.

The most common errors made by law enforcement are holding the stimulus the incorrect distance from the face, moving the stimulus at the wrong speed, and

making too few passes. In most cases, these errors weigh in favor of the suspect. Therefore, absolute adherence to the test guidelines are not necessary for admissibility. In those cases, the errors are a factor to be weighed by the trier of fact. If an officer, however, skips steps, or cumulatively makes an abundance of errors in administering the test, admissibility is questionable. Often times in those cases, experts advise prosecutors not to pursue admitting HGN, and valuable evidence is lost. When this happens, the investigating officer and his/her supervisor should be made aware of the errors, so training can be arranged.

HGN Experts

In addition to the officer being trained how to administer the HGN test and the officer having administered the test properly, an expert must testify as to the correlation between consumption/use of the substance and the HGN.³ Officers with nothing more than law enforcement officer basic training at the Montana Law Enforcement Academy do not qualify as HGN experts.⁴ Drug Recognition Experts (DREs) have qualified as experts given their additional specialized training.⁵ Optometrists and Ophthalmologists also qualify. Other officers may qualify depending on their training and experience.⁶ Once the court determines the witness has the requisite skills and experience to qualify him/her as an expert, the officer must communicate effectively to the court the correlation between the substance consumed/used and HGN. At that point, proper foundation will have been laid, and the investigating officer can

Other Resources

For more information on over-service trainings, please visit

www.AlcoholServerTraining.mt.gov.

Also read *A Montana First: Server Charged in DUI Case* in the April, 2010 Issue of the *Traffic Safety Standard*.

Montana liquor law

16-3-301 (4) It is unlawful for any licensee, a licensee's employee, or any other person to sell, deliver, or give away or cause or permit to be sold, delivered, or given away any alcoholic beverage to:

- (a) any person under 21 years of age; or
- (b) **any person actually, apparently, or obviously intoxicated.**

testify about how the suspect performed on the HGN test. Some prosecutors prefer to qualify an officer as an HGN expert by having a pre-trial hearing (often referred to as a 702 hearing). Other prosecutors prefer to qualify the officer as an HGN expert at trial. Either method is acceptable. Irrespective of the method used, prosecutors must give notice to the defendant of the intent to call an officer as an HGN expert. This notice should be given as early in the proceedings as possible, and prosecutors should be prepared for challenges to the qualification of the officer as an HGN expert.

Whether qualifying the officer prior to or at trial, the expert will be expected to testify before the court about his/her qualifications as an expert as well as the correlation between the substance consumed/used and HGN. The expert often also testifies about the proper administration of the HGN test as outlined in the NHTSA SFST Manual and the underlying validation studies. The officer is then either deemed an HGN expert or not by the court. If this testimony occurs at a pre-trial hearing, the prosecutor and expert should ensure training and experience as well as the correlation between substance consumed/used and HGN are testified to at trial. This testimony is not merely foundational; it is very helpful to the jury in understanding the significance of HGN.

Common challenges in getting an officer admitted as an expert for the first time are an inability of an officer to testify as to the NHTSA SFST Manual, underlying validation studies and an inability of an officer to explain the correlation between the

substance consumed/used and HGN. Therefore, officers testifying as experts should review their SFST Manual and validation studies, and practice explaining HGN to others when preparing for court. Similarly, prosecutors should be familiar with the officer's materials and meet with the officer prior to court. Despite preparation, some officers do not qualify as an HGN expert the first time he/she testifies. Officers and prosecutors should learn from those experiences and take steps to improve testimony for the next case.

Conclusion

While HGN evidence is useful to the trier of fact in determining guilt or innocence in a DUI case, it is often not admissible. The Montana Supreme Court has given the State clear guidance in setting forth three pre-requisites to admissibility of a suspect's HGN test. 1. An officer must have been trained on how to properly administer the HGN test, 2. The officer must have administered the test on the suspect in accordance with his/her training, and 3. An expert must testify as to the correlation between substance consumed/used and HGN. Officers should attend SFST refresher training regularly to be sure he/she performs the tests properly. Also, prosecutors and officers should work together in preparing for expert witness testimony. If everyone does his/her part, HGN evidence will be admissible. Judges and juries will then benefit from understanding HGN, and they can consider HGN evidence in making their final judgment.

¹ The Montana Supreme Court has long held HGN is not novel scientific evidence, so *Dubert* challenges are not proper. *State of Mont. Dept of Justice, Motor Vehicle Div. v. Hulse*, 1998 MT 108.. Similarly, the court has held HGN evidence is admissible in DUI cases. *Id.* As discussed in the remainder of this article, the Montana Supreme Court has held that there are three foundational requirements for HGN admissibility. *Id.* Absent all three of those requirements, HGN is not admissible. *Id.*

² *State v. Geiser*, 2011 MT 2.

³ *Id.*

⁴ *Hulse at ¶¶71-2.*

⁵ *State v. Harris*, 2008 MT 213.

⁶ Professional development classes, trade schools, and college classes are considered in ascertaining whether an officer has adequate training to qualify him/her as an expert.

Prosecuting the Drugged Driver Course Held in Great Falls



Montana Highway Patrol Sergeants Jim Sanderson and Kurt Sager along with Missouri DRE Coordinator Tracey Durbin explain the DRE protocol to more than 30 students at *Prosecuting the Drugged Driver* in Great Falls in February. The training included several national experts in the field and was provided at no charge to prosecutors and law enforcement officers thanks to additional funding from the Montana County Attorneys Association, the National Association of Prosecutor Coordinators, and the Montana Department of Transportation.

MONTANA TRAFFIC LAW UPDATE

For additional detail, please visit www.searchcourts.mt.gov

Ditton v. Dept of Justice Motor Vehicle Div., 2014 MT 54. There is no requirement in Montana Code Annotated Section 61-8-403 that the State answer to a petition for reinstatement of driver's license, so default judgment is not appropriate. Acquittal in the underlying DUI case does not preclude license suspension.

Professional Development

Training is focused on enhancing the consistent identification, arrest, prosecution and sentencing of traffic safety violations, particularly impaired driving.

Continuing legal education (CLE) credits and public safety officer standards training (POST) credits are available.

For more information about training available through the Traffic Safety Resource Prosecutor program, or to request training, please contact Barb Watson at:

barb@inmantraining.com

or

(406) 498-6941,

or visit

www.mdt.mt.gov/tsrp.

Erin Inman, PLLC

*Montana Traffic Safety
Resource Prosecutor*

11 Friendship Ln, Ste 101
Montana City, MT 59634

(406) 449-1255 (office)

(406) 422-7355 (cell)

erin@inmantraining.com

COURSES AVAILABLE UPON REQUEST

Cops In Court This four-hour course focuses on increasing the ability of law enforcement officers to communicate effectively and confidently in the courtroom. Designed for law enforcement officers with a wide variety of trial testimony experience, the course includes instruction and discussion on all aspects of trial preparation and courtroom testimony in an impaired driving case. Experts in the fields of law enforcement and prosecution present the curriculum, which includes:

1. “What Jurors want” – courtroom preparation and testimony
2. Report writing
3. Goals and strategies of cross-examination

Legal / legislative update This two-hour training provides an update on the latest case rulings and legislation that affect Montana’s law enforcement and prosecution.

DUI search warrants Learn about how other jurisdictions have successfully implemented telephonic search warrants for blood evidence in DUI cases, as allowed by § 61-8-402 (5), MCA following the passage of Senate Bill 42 by the 2011 Legislature. Minimum course length is one hour but can be longer to allow for discussion and planning.

Please request training by contacting Barb Watson at barb@inmantraining.com or call 406-498-6941.

FREE ONLINE COURSES

Conducting Compliance Check Operations

Environmental Strategies

Party Prevention and Controlled Party Dispersal

Techniques for Managing Special Events