18 The four clues are swaying while balancing, using arms for balance, hopping, and putting a foot down. *Id.* at VIII–24.

19 The Florida Validation Study is undated. During the Rule 104(a) hearing, there was testimony from Spurgeon Cole, Ph.D., one of Horn's witnesses, that a third validation test had been done in San Diego, but it was not offered as an exhibit. Dr. Cole did testify, however, as to its conclusions and the defects in its design.

20 This criticism is especially significant in light of the third evaluative factor in Rule 702. This factor requires that the expert's opinion testimony be based on the use of principles/methods themselves reliable but that also reliably have been applied to the facts of the particular case. Thus, even if the SFSTs are determined to be reliable measures of driver intoxication, an officer's testimony about their use in a particular case could not be allowed absent a showing that the officer properly had administered the tests.

21 During his testimony, Dr. Cole stated that the Colorado, Florida and San Diego "validation" studies performed by Dr. Burns with various sheriff's departments do not cure the defects contained in the original reports. The three studies involved officers that made stops of drivers that were driving unsafely, and the officers evaluated them using the SFSTs, but also had the benefit of preliminary breath analysis tests, in many instances, and the studies do not permit a critical reviewer to determine whether the officer's arrest decision was based on the SFSTs alone, or on the totality of the information available to the officer, including the results of the breath test. Thus, the studies were not controlled, and there were multiple variables that affected the ultimate decision. He concluded, therefore, that these "validation" studies were scientifically unacceptable.

22 The information reported in the chart is found in Def's. Reply Memo, Ex.6 at 1–13.

1977 Report	1981 Report (Lab & Field Phases)	1983 Report	1995 Colo. Study	Fla. Study
1. In the lab the HGN test was administered using a chin rest which facilitated making HGN observations. This was not done in the field.	1. Serious flaws include 20% false positive evaluations of intox.; very high error rates in reliability if using SFSTs to predict BAC.	1. Report seriously flawed, does not meet professional standards of testing community.	1. Report describes results of impaired driving arrests from seven Colorado law enforcement organizations. Report too incomplete to draw any conclusions about the validity of the test.	1. Report too incomplete to permit meaningful evaluation.
2. A single set of data was used to determine criterion score and to evaluate accuracy of test, which artificially inflates estimate of accuracy.	2. HGN test affected by time of day, no adjustment in scoring.	2. Failure to monitor data collection by officers. Cannot tell if decisions based on SFSTs or prelim. breath test (PBT).	2. Methodology results and data sections of report are missing.	2. Methodology not described, and data regarding methodology not provided in report.
3. Tests are not age & gender neutral, and age/gender differences can affect ability to perform SFSTs.	3. Test/retest reliability rates very low.	3. Arrest decisions made on PBT results as well as SFSTs. Not possible to tell reliability of SFSTs.	3. Data generated by "volunteer" officers—suggesting possible bias.	3. Data incompletely described.
4. In lab tests officers were monitored to insure correct performance of tests, not done in field.	4. Report states testing officers did not necessarily base decisions on results of SFSTs, making validity suspect.	4. Authors fail to report the data from N.C. Test site-over 25% of data for whole test.	4. No monitoring of data collection to verify reporting methodology. Officers merely reported results.	
5. Test results differ in	5. Authors admit field	5. No statistical tests	5. Results unclear,	

statistically significant respects depending on time of day that HGN test was performed, yet test scoring did not account for difference in time of day test was administered.	test data not appropriate for statistical significance testing, and could be biased.	conducted on data.	particularly because two different arrest standards used (one for intoxication, another for impaired)
6. The study was not peer reviewed, and would not have been accepted if offered.	6. High error rates. 28.6% of subjects with "legal" BAC arrested, and 50% of subjects w/ BAC > 0.10 not arrested.	6. SFSTs not administered in standard fashion.	
	7. Officers selected for study not representative of police officers across the board.	7. Authors acknowledge "extreme caution" needed in analyzing data collected in study. Accuracy of data suspect.	
	8. Authors reported that in field some officers forgot or ignored standardized procedure to administer SFSTs.		

23 The concern about the reliability of SFSTs performed by officers in the field under actual stop and detain conditions is not fanciful, given the fact that the NHTSA officer training manual itself cautions that the reliability of the SFSTs depends on strict compliance with the standardized procedures. Gov't. Opposition Memo, Exh. 2 at VIII–12. Further, there is clear evidence that given the conditions under which SFSTs actually are performed in real life situations, officers often do not follow the prescribed methodology. *See* Def's. Reply Memo, Exh.8 at 116 ("End-position nystagmus as an indicator of ethanol intoxication," *Science and Justice Journal* 2001)(author studied videotapes of actual traffic stops where HGN test was administered. Over 98% of the roadside HGN tests were improperly conducted); 1981 Final Report at 18–19 (stating that officers did not necessarily follow the standardized decision criteria used with the SFSTs). The fact that officers may not perform the SFSTs properly in the field has special significance when evaluated under Rule 702, as the third factor in that rule requires the court to find that the opinion testimony is based on reliable methods or principles that reliably were applied to the facts of the particular case. Thus, if reliable methods exist, but are not used in a particular instance, the results of the misapplication of the methodology are not admissible.

24 The NTLC was "created in cooperation with ... (NHTSA) and works closely with NHTSA and the National Association of Prosecutor Coordinators to develop training programs." The NTLC is a program of the American Prosecutors Research Institute, the principal function of which "is to enhance prosecution in America." Gov't. Opposition Memo, Exh. 1 at 2. The foreward to this publication was written by Dr. Marcelline Burns.

25 The Government also had intended to introduce the affidavit of Sergeant Thomas Woodward of the Maryland State Police but ultimately was unable to do so.

26 *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

27 The court cautioned that it was not ruling that HGN test results were admissible to prove that a driver had a BAC in excess of 0.10 "in the absence of a laboratory chemical analysis." *Id.*, 718 P.2d at 181. In *State v. City Court of the City of Mesa*, 165 Ariz. 514, 799 P.2d 855 (1990), the Arizona Supreme Court clarified that in cases where no independently admissible chemical test of a driver's BAC had been performed, HGN evidence was admissible only as circumstantial evidence that the driver had consumed alcohol and not to prove a specific BAC. *Id.*, 799 P.2d at 860.

28 The Appendix is intended to aid future courts called upon to research the issues presented in this case. The Court gratefully acknowledges the assistance of Ms. Jennifer Warfield, Mr. Kevin Cross, Ms. Jennifer Thomas, and Mr. Rodney Butler, interns who worked tirelessly on the Appendix. If the future of the legal profession may be predicted by these law students' work, it is a bright one. It also should be noted that, in addition to appointed counsel, Horn was also represented by Mr. Ryan Potter, a law student in the University of Maryland's much respected clinical law program. Admitted to practice under Local Rule 702, and under the skillful supervision of Professor Jerry Deise, these clinical law students offer significant assistance to their clients while concomitantly gaining invaluable trial experience. Ms. Claudia Diamond, my law clerk, also was instrumental in helping to revise and edit this opinion for which I am also very thankful.

29 The Maryland rules of evidence were adopted in 1994 after the *Daubert* decision had been rendered by the United States Supreme Court. In the commentary to Rule 5–702, which is the state equivalent to Fed.R.Evid. 702, the drafters, however, noted that it was not their intent to adopt the *Daubert* test, then widely viewed as applicable only to issues regarding the admissibility of scientific evidence. Instead, the Maryland rule was intended to maintain the *Frye* test, which had been adopted by the state in the case of *Reed v. State,* 283 Md. 374, 391 A.2d 364 (1978). To this day, Maryland has declined to adopt the *Daubert* test. *Burral v. State,* 352 Md. 707, 724 A.2d 65, 80 (1999)("We have not abandoned *Frye* or *Reed.*"); *Clark v. State,* 140 Md.App. 540, 781 A.2d 913, 935 & n. 13 (2001); *State v. Gross,* 134 Md.App. 528, 760 A.2d 725, 757 (2000); *Schultz,* 664 A.2d at 64 n. 3. Thus, in federal court, under the most recent version of Rule 702 and the *Daubert/Kumho Tire* decisions, the proponent of any expert testimony, whether scientific, technical or the product of some specialized knowledge, must undertake an analysis of reliability of the methods/principles underlying the opinion, as well as the reliability of the application of the methodology used by the expert to the particular facts of the case. Under Maryland evidence law, the *Frye/Reed* test applies only to introduction of scientific evidence, and Rule 5–702 alone covers all other types of expert opinion testimony.

30 Maryland cases routinely refer to the *Frye* test as the "*Frye/Reed*" test. This opinion will as well.

31 As noted at pp. 534 – 535, in December 2000 the Federal Rules of Evidence were amended. Among the rules that were changed was Rule 702, the expert opinion rule. The amendment added three additional foundational requirements before expert testimony in any subject, whether scientific, technical or other specialized knowledge, is admissible: the opinion must be based on *sufficient facts or data;* it must be the product of *methods* and *principles* shown to be *reliable,* and the proponent must show that the methods/principles *reliably had been applied* to the facts of the case at hand. These factors are required by the rule itself and are independent from the factors identified by the Supreme Court in the *Daubert/Kumho Tire* decisions. The Maryland Rules of Evidence did not adopt the 2000 changes to the federal rules, and the Maryland expert opinion rule, Rule 5–702, does not contain the three additional foundational requirements as does Rule 702.

32 Edward B. Tenney, *The Horizontal Gaze Nystagmus Test and the Admissibility of Scientific Evidence,* 27 *New Hampshire Bar Journal* 179 (1986) (hereinafter "Tenney article").

33 Tenney article at 187.

34 Indeed, in this regard, the Maryland and Federal Rules of Evidence are substantially identical. Rule 5–201 and Fed.R.Evid. 201 permit the taking of judicial notice of adjudicative facts if: (a) the facts are generally known within the territorial jurisdiction of the court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Obviously, the scientific basis underlying HGN tests is not a matter generally known within the state; so, if judicial notice is to be taken, it must be by reference to sources whose accuracy cannot reasonably be questioned. While the sources relied on in the *Schultz* case may not have been subject to reasonable question at the time that court considered them, given the lack of any evidentiary facts in the record regarding the reliability of the HGN test, and the fact that judicial notice was taken on appeal-not at the trial level where the parties might have had an opportunity to develop a factual basis to challenge the propriety of judicial notice—the same cannot be said given the record in this case. Further, Rule 201(e) and 5–201(e) permit a party to be heard on the propriety of taking judicial notice, which did not occur in the *Schultz* case because judicial notice was taken on appeal. As one commentator has noted "where judicial notice of an adjudicative fact is taken by an appellate court on its own motion, an issue arises as to whether the provisions of Rule 201(e) concerning an opportunity to be heard are to be applied. At the moment, the question is unresolved." Graham, *Handbook of Federal Evidence* § 201.07 (5th ed.2001). In any event, Rule 201(g) provides that in criminal cases, the court must instruct the jury that "it may, but is not required to, accept as conclusive any fact judicially noted." Implicitly, the rule would permit a defendant in a criminal case to offer evidence to rebut any adjudicative fact noticed by the Court. Thus, if a Court took judicial notice of the reliability and general acceptance of the HGN test, the defendant initially could object to it doing so under Rule 201(e). Then, if unsuccessful in preventing the court from taking judicial notice, the defendant could introduce evidence contesting the fact judicially noted.

35 In FY 2000/2001, 35,962 DWI/DUI cases were filed in Maryland. *Administrative Office of the Maryland Courts Judicial Information System,* Maryland District Court Traffic System Citation Statistics, Report No. A70TM214, Run Date July 15, 2001.

36 In addition, if local prosecutors may lack sufficient resources to prove the reliability and general acceptance of the SFSTs, which it is their burden to do in the first instance, it can be expected, *a fortiori,* that individual defendants charged with DWI and DUI will have even fewer resources to challenge the science and technology underlying these tests. If, once accepted by the application of the judicial notice rule, SFSTs are ever after immune from reconsideration, even in the face of new evidence challenging their reliability, then the burden will have been shifted from the state or government to establish the admissibility of the SFSTs to the defendant to disprove their admissibility. This is a high price to pay in the interest of conserving limited prosecutorial resources.

37 "She blinded me with science! And hit me with technology."
Thomas Dolby, "She Blinded Me With Science," *http:// www.prebble.com/sheblinded.htm. See also State v. Ferrer,* 95 Hawai'i 409, 23 P.3d 744, 765 n. 6 (App.2001)(*quoting State v. O'Key,* 321 Or. 285, 899 P.2d 663, 672 n. 6) (jurors may be "overly impressed with the aura of reliability surrounding scientific evidence").

38 The *Hulse* court held that neither the *Frye* nor *Daubert* tests were applicable to admissibility of HGN evidence because those tests were restricted to admissibility of "novel" scientific evidence and HGN test was not "novel" science. 961 P.2d at 91. Instead, the court applied Montana Evidence Rule 702, which was identical to the then current version of Fed.R.Evid. 702. The court did not rule on the admissibility of HGN evidence in a DWI/DUI criminal trial, as the appeal arose from a trial court decision denying Hulse's petition to reinstate driving privileges after they were suspended because Hulse refused to take a breathalyzer, and the only legal issues presented were the existence of probable cause to arrest for DWI/DUI, and the driver's refusal to take a breath test. *Id.* at 91–92.

39 In *Torres,* the court made several significant rulings. First, it held that police officers are not qualified to testify about the scientific bases underlying the HGN test and are not competent to establish that the test is reliable. 976 P.2d at 32. It further held that it "is improper to look for scientific acceptance only from reported case law," and it declined to take judicial notice of the reliability of the HGN test because "[w]e are not persuaded that HGN testing is 'a subject of common and general knowledge,' or a matter 'well established and authoritatively settled.' " *Id.* at 33. Finally, the court held that, although a qualified expert was needed to testify about the reliability of the HGN test and its results, a properly trained police officer could testify about the administration of the test "after an appropriate foundation regarding such [scientific] knowledge has been laid by another, scientific expert." *Id.* at 34. The care taken by the *Torres* court illustrates the difference in application of the *Daubert* test from the *Frye* test. *Daubert* requires analysis of the methodology used, its reliability and validity. *Frye,* on the other hand, may tempt a court faced with determining the admissibility simply to see what other courts have done in the past, as well as review publications supplied by the parties, or found by the court's own efforts, without engaging in the sometimes difficult analysis of the reliability of the science or technology underlying those sources.

40 *Ito* used Hawaii Evidence Rule 702, which, in addition to the requirements of the then current version of Fed.R.Evid. 702, added the provision that the court "may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert." 978 P.2d at 200. The court held that judicial notice of the reliability of HGN evidence was not proper under Hawaii Evidence Rule 201 but that judicial notice of its reliability was proper under Hawaii common law which permits a trial court to take judicial notice of facts judicially noticed in case law from other jurisdictions. *Id.* at 208–09. In doing so, the court relied heavily on the Maryland *Schultz* opinion.

41 Justice Stephen Breyer, all too aware of this problem, wrote in the introduction to the *Reference Manual on Scientific Evidence* 4 (2d ed.2000):

> [M]ost judges lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims. Judges are typically generalists, dealing with cases that can vary widely in subject matter. Our primary objective is usually process-related: seeing that a decision is reached in a timely way. And the decision of a law court typically ... focuses on a particular event and specific individualized evidence.

See also Mueller & Kirkpatrick, *Evidence* § 7.8 (4th ed. 1995) ("The main difficulty [with the Daubert case] is that courts are ill equipped to make independent judgments on the validity of science. Most judges are not scientists, and they do not have the time to spend at trial or beforehand to make fully considered decisions on validity.").

42 *See, e.g., Schultz v. State,* 106 Md.App. 145, 664 A.2d 60 (1995) (discussing whether HGN and other SFSTs are "scientific evidence"); *Hulse v. State,* 289 Mont. 1, 961 P.2d 75 (1998).

43 If offered only as circumstantial evidence of intoxication/impairment, the HGN test still clearly invokes scientific and technical underpinnings. The WAT and OLS SFSTs, however, involve only observations of the suspect's performance, and therefore, it may be argued that they are not couched in science and technology if used for that purpose.

44 The existence of a causal connection between alcohol ingestion and observable horizontal gaze nystagmus is the type of discrete adjudicative fact that properly may be judicially noticed under Rule 201 because it is a fact that can be accurately and readily determined by resort to sources whose accuracy cannot reasonably be questioned. This use of judicial notice is far more narrow than attempting to take judicial notice, as did the Court of Special Appeals in *Schultz,* that the SFSTs have attained general acceptance within the relevant scientific or technical community. Alternatively, the government may prove the causal relationship between alcohol consumption and exaggerated nystagmus by expert testimony, but in this regard I agree with the New Mexico Supreme Court's decision in *State v. Torres,* which held that a police officer is unlikely to have the qualifications needed to testify under Rule 702 as to the scientific principles underlying the HGN test or as to whether there is a causal link between alcohol use and exaggerated nystagmus. 976 P.2d at 32, 34. Accordingly, asking the court to take judicial notice of this causal connection likely will be the most frequent method used by the government to prove this essential fact. An alternative would be to use learned treatises, under Rule 803(18), if a proper foundation first is established. The police officer will, of course, be qualified to testify as to the training received in how to administer the HGN test, and to demonstrate his or her qualifications properly to administer it. Because Officer Jarrell did not testify at the Rule 104(a) hearing, there is no factual basis before me at this time to permit me to make findings regarding the final factor under Rule 702, i.e., whether Jarrell properly administered and interpreted the SFSTs given to Horn.

45 The court recognized the following causes or possible causes of nystagmus: problems with the inner ear labyrinth; irrigating the ears with warm or cold water; influenza; streptococcus infection; vertigo; measles; syphilis; arteriosclerosis; Korchaff's syndrome; brain hemorrhage; epilepsy; hypertension; motion sickness; sunstroke; eye strain; eye muscle fatigue; glaucoma; changes in atmospheric pressure; consumption of excessive amounts of caffeine; excessive exposure to nicotine; aspirin; circadian rhythms; acute head trauma; chronic head trauma; some prescription drugs; tranquilizers, pain medication, and anti-convulsant medicine; barbiturates; disorders of the vestibular apparatus and brain stem; cerebellum dysfunction; heredity; diet; toxins; exposure to solvents; extreme chilling; eye muscle imbalance; lesions; continuous movement of the visual field past the eyes; and antihistamine use. 664 A.2d at 77. The fact that there are many other causes of nystagmus in the human eye also is the type of adjudicative fact that may be judicially noticed under Rule 201. Thus, the defendant in a DWI/DUI case may ask the court to judicially notice this fact, once the government has proved the causal connection between alcohol ingestion and exaggerated nystagmus. Alternatively, the defendant may seek to prove the non-alcohol related causes of nystagmus by other means, such as the testimony of an expert witness, cross examination of any such witness called by the government or through a properly admitted learned treatise. (Fed. Rule of Evid. Rule 803(18)).

46 *See supra* at pp. 539 – 540. Cole reported that 46% of the officers that observed videotaped subjects with BAC levels of .0% performing the WAT and OLS tests reported that the subjects had had too much to drink to be driving.

47 The court cites to decisions from Alabama, Arizona, California, Georgia, Illinois, Maryland, Massachusetts, New York, Pennsylvania, Florida and Oregon that have reached the same conclusion about the nature of psychomotor FSTs like the WAT and OLS tests. *Id.,* 23 P.3d at 760–62.

48 It would be preferable to refer to the standardized field sobriety tests as "procedures," rather than tests, as the use of the word test implies that there is an accepted method of determining whether the person performing it passed or failed, and this has not been shown in this case. I recognize, however, that the HGN, WAT and OLS procedures have been referred to as field sobriety "tests" for so many years, that it is likely that it will be impossible to stop using this terminology altogether. Occasional reference to the HGN, WAT and OLS procedures as "tests" should not alone be grounds for a mistrial in a jury case. However, repeated use of the word "test" to describe these procedures, particularly when testifying as to how the defendant actually performed them, would be improper.

49 Maryland's equivalent evidence rule, 5–701, does not contain the third requirement imposed by the federal rule.

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EXHIBIT C

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89 Ohio St.3d 421
Supreme Court of Ohio.

The STATE of Ohio, Appellant,
v.
HOMAN, Appellee.

No. 99–1107. | Submitted April 26, 2000. | Decided Aug. 16, 2000.

Defendant was convicted in the Court of Common Pleas, Erie County, of driving under the influence (DUI), driving left of center and child endangering. Defendant appealed. The Court of Appeals reversed and remanded. State was allowed discretionary appeal. The Supreme Court, Francis E. Sweeney, Sr., J., held that: (1) field sobriety tests that were not administered in strict compliance with standardized procedures could not serve as evidence of probable cause to arrest defendant for DUI; (2) state trooper had probable cause to arrest defendant for DUI based on totality of facts and circumstances; and (3) defendant's filing of motion to suppress with respect to DUI charge did not toll statutory speedy trial period for subsequently-filed charge of child endangering.

Affirmed.

Kenneth A. Rocco, J., concurred separately with opinion.

Lundberg Stratton, J., concurred in part and dissented in part with opinion in which Cook, J., concurred.

Douglas, J., dissented.

West Headnotes (9)

[1] **Automobiles**
⇦Intoxication
Automobiles
⇦Conduct and Proof of Test; Foundation or Predicate

For the results of a field sobriety test to serve as evidence of probable cause to arrest driver for driving under the influence (DUI), the police must have administered the test in strict compliance with standardized testing procedures. R.C. § 4511.19(A)(1); U.S.C.A. Const.Amend. 4.

176 Cases that cite this headnote

[2] **Automobiles**
⇦Conduct and Proof of Test; Foundation or Predicate

When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable.

10 Cases that cite this headnote

[3] **Automobiles**
⇦Intoxication

In determining whether the police had probable cause to arrest an individual for driving under the influence (DUI), court considers whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. R.C. § 4511.19(A)(1); U.S.C.A. Const.Amend. 4.

108 Cases that cite this headnote

[4] **Automobiles**
⇦Intoxication

In making determination as to whether police had probable cause to arrest individual for driving under the influence (DUI), court examines the "totality" of facts and circumstances surrounding the arrest. R.C. §

4511.19(A)(1); U.S.C.A. Const.Amend. 4.

58 Cases that cite this headnote

[5] **Automobiles**
⚖Intoxication

State trooper had probable cause to arrest driver for driving under the influence (DUI), though he did not administer field sobriety tests in strict compliance with standardized procedures, where trooper observed erratic driving on part of the driver prior to stopping vehicle, trooper observed that driver's eyes were "red and glassy" and that her breath smelled of alcohol, and driver admitted to trooper that she had been consuming alcoholic beverages. R.C. § 4511.19(A)(1); U.S.C.A. Const.Amend. 4.

189 Cases that cite this headnote

[6] **Automobiles**
⚖Intoxication

Probable cause to arrest suspect for driving under the influence (DUI) does not necessarily have to be based, in whole or in part, upon the suspect's poor performance on one or more of field sobriety tests; the totality of facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where the test results must be excluded for lack of strict compliance. R.C. § 4511.19(A)(1); U.S.C.A. Const.Amend. 4.

274 Cases that cite this headnote

[7] **Criminal Law**
⚖Successive, amended, or reinstated charges; successive trials

Defendant's filing of pretrial motion to suppress evidence relating to driving under the influence (DUI) charge did not toll statutory speedy trial period in which defendant had to be brought to trial on child endangering charge, which was filed subsequent to filing of the motion to suppress. R.C. §§ 2945.71(B)(2), 2945.72(E).

11 Cases that cite this headnote

[8] **Criminal Law**
⚖Delay caused by accused

Statutory provision extending the statutory speedy trial period for any delay resulting from motion filed by defendant is strictly construed in favor of defendant. R.C. § 2945.72(E).

3 Cases that cite this headnote

[9] **Criminal Law**
⚖Successive, amended, or reinstated charges; successive trials

When a criminal defendant files a pretrial motion and the state later files against defendant additional, related criminal charges, the defendant's filing of the pretrial motion does not extend the time within which he or she must be brought to trial on those additional charges. R.C. § 2945.72(E).

5 Cases that cite this headnote

Syllabus by the Court

***421** 1. In order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures.

2. When a criminal defendant files a pretrial motion and

the state later files against the defendant additional, related criminal charges, R.C. 2945.72(E) does not extend the time within which the defendant must be brought to trial on those additional charges.

**953 On October 25, 1996, Trooper Andrew R. Worcester of the Ohio State Highway Patrol stopped a vehicle driven by appellee, Marie Homan, who was traveling with her six-year-old daughter. As a result of this vehicle stop, appellee was ultimately charged with driving under the influence ("DUI") in violation of R.C. 4511.19(A)(1), driving left of center in violation of R.C. 4511.25(C), and child endangering in violation of R.C. 2919.22(C)(1).

At appellee's trial, Trooper Worcester testified that he stopped appellee's vehicle after twice witnessing appellee drive left of center. When Trooper Worcester approached appellee's vehicle, he smelled a strong odor of alcohol on appellee's breath and observed appellee's eyes to be red and glassy. Trooper Worcester administered the horizontal gaze nystagmus ("HGN"),[1] walk-and-turn, *422 022[2]422 and one-leg-stand[3] tests. **954 Trooper Worcester testified that, based upon the results of these field sobriety tests, appellee's demeanor, and appellee's own admission that she had consumed three beers, he placed appellee under arrest.

During cross-examination, Trooper Worcester testified that, in administering to appellee the HGN and walk-and-turn tests, he at times deviated from established testing procedures. With respect to the HGN test, for example, Trooper Worcester testified that, in observing appellee's eyes for nystagmus at maximum deviation, he did not hold appellee's eyes at maximum deviation for a full four seconds as standardized procedures require. In addition, in determining at what angle appellee's eyes began to exhibit nystagmus, Trooper Worcester did not, as recommended, move the stimulus at a pace that would take a full four seconds to move appellee's eyes from a forward gaze to the right. It took Trooper Worcester only one to two seconds to make the pass.

Trooper Worcester also admitted to deviating from established police practice by conducting the walk-and-turn test between his patrol car and appellee's car. In addition, Trooper Worcester gave appellee the option of turning either to the right or the left after completing the required number of steps. Police procedure requires that the suspect turn to the left. Trooper Worcester also erred in the manner in which he instructed appellee on how to perform this test. Trooper Worcester testified that he did not, as required by police training manuals, instruct appellee on how to conduct the test while the appellee stood, on the testing line, with her right foot placed in front of her left. The record also indicates that the walk-and-turn test was conducted on a gravel-covered, uneven surface of road when a flat surface is required to perform the test.

*423 On November 4, 1996, appellee filed a speedy trial waiver. At this point, appellee faced charges of DUI and driving left of center. On November 21, appellee filed a motion to suppress the evidence gathered by the state as a result of the vehicle stop, arrest, and subsequent detention. In this motion, appellee argued, *inter alia,* that, because Trooper Worcester did not administer the field sobriety tests in strict compliance with standardized methods and procedures, the results of these tests were unreliable and could not serve as the basis for probable cause to arrest. In an order dated May 2, 1997, the Erie County Court held that, taken as a whole, the field sobriety tests indicated sufficient impairment to support a finding of probable cause, notwithstanding Trooper Worcester's failure to strictly comply with established police procedures. In the intervening months between appellee's filing of the motion to suppress and the trial court's order, appellee was charged with child endangering. Appellee's trial commenced on July 17, 1997.

On the morning of trial, appellee filed a motion to dismiss the child endangering charge on speedy trial grounds. The trial court denied the motion; it concluded that, under R.C. 2945.72, appellee's filing of the motion to suppress tolled the time in which she had to be brought to trial on the child endangering charge even though her motion preceded the filing of this charge. Thereafter, appellee entered a plea of no contest to child endangering. Appellee proceeded to trial on the charges of DUI and driving left of center. At the conclusion of this trial, a jury returned a verdict of guilty on the DUI charge. The trial court found appellee guilty of driving left of center.

Appellee appealed to the Sixth District Court of Appeals, arguing that the trial **955 court improperly admitted the results of the field sobriety tests and erred in concluding that the filing of the motion to suppress tolled the time in

which she had to be brought to trial on the charge of child endangering. The court of appeals agreed that the trial court improperly admitted the results of the field sobriety tests as evidence of probable cause. The court of appeals held that because Trooper Worcester did not strictly comply with standardized testing procedures in administering the HGN and walk-and-turn tests, these tests could not form the basis for probable cause to arrest. However, the court of appeals concluded that, even with the suppression of the HGN and walk-and-turn tests, there remained sufficient evidence upon which Trooper Worcester could have relied in arresting appellee. The court of appeals also concluded that the trial court should have dismissed the child endangering charge. Construing R.C. 2945.72, the court of appeals held that, because the child endangering charge was filed after the motion to suppress, the motion to suppress did not toll the time in which appellee had to be brought to trial on this charge.

*424 The cause is now before this court pursuant to the allowance of a discretionary appeal.

Attorneys and Law Firms

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Opinion

FRANCIS E. SWEENEY, SR., J.

FRANCIS E. SWEENEY, SR., J. This case presents two issues for our consideration. First, we are asked to consider whether, in administering field sobriety tests, the police must strictly comply with established, standardized procedures. The second issue concerns R.C. 2945.72(E), which provides that pretrial motions instituted by criminal defendants extend the time within which they must be brought to trial. Appellant contends that this extension can apply to additional, related charges brought against the defendant after the motion is filed.

[1] For the reasons that follow, we conclude that in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures. We also determine that when a criminal defendant files a pretrial motion and the state later files against the defendant additional, related criminal charges, R.C. 2945.72(E) does not extend the time within which the defendant must be brought to trial on those additional charges.

I

[2] When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable. In an extensive study, the National Highway Traffic Safety Administration[4] ("NHTSA") evaluated field sobriety tests in terms of their utility in determining whether a subject's blood-alcohol concentration is below or above the legal limit. The NHTSA concluded that field sobriety tests are an effective means of detecting legal intoxication "only when: the tests are administered in the prescribed, standardized manner[,] * * * the standardized clues are used to *425 assess the suspect's performance[, and] * * * the **956 standardized criteria are employed to interpret that performance." National Highway Traffic Safety Adm., U.S. Dept. of Transp., HS 178 R2/00, DWI Detection and Standardized Field Sobriety Testing, Student Manual (2000), at VIII–3. According to the NHTSA, "[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised." *Id.* Experts in the areas of drunk driving apprehension, prosecution, and defense all appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures. See, *e.g.*, 1 Erwin, Defense of Drunk Driving Cases (3 Ed.1997), Section 10.06 [4]; Cohen & Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.01.

We too have recognized that while field sobriety tests are a potentially effective means of identifying intoxicated drivers, these tests' reliability depends largely upon the care with which they are administered. In *State v. Bresson* (1990), 51 Ohio St.3d 123, 554 N.E.2d 1330, we considered whether a police officer may testify at trial

regarding a driver's performance on the HGN test as it pertains to the issue of probable cause. In holding that such testimony is admissible, we stressed the importance of the testing process. We noted that the arresting officer's knowledge of the test, his training, and his ability to interpret his observations are key considerations in determining admissibility. *Id.*, 51 Ohio St.3d at 129, 554 N.E.2d at 1336. Although the only test at issue in *Bresson* was the HGN, we suggested that these strict prerequisites to admissibility would also apply to the other field sobriety tests, including the walk-and-turn and one-leg-stand tests. *Id.*

The small margins of error that characterize field sobriety tests make strict compliance critical. Here, for example, Trooper Worcester's failure to use the full four seconds when checking for the onset of nystagmus, while seemingly trivial, rendered the results of this test unreliable. When a police officer moves the stimulus too quickly, he or she runs the risk of going past the point of onset or missing it altogether. NHTSA Student Manual, at VIII–8.

The HGN test is not the only field sobriety test that requires special care in its administration. With respect to the walk-and-turn test, for example, it is important that the investigating officer have the suspect balance heel-to-toe while listening to his or her instructions on how to perform the test, a step that was omitted by Trooper Worcester. The ability or inability of the suspect to keep his or her balance while simultaneously listening to instructions is an important test clue. NHTSA Student Manual, at VIII–11. Even the seemingly straightforward one-leg-stand test requires precise administration. For instance, a police officer must make sure that the suspect keeps his or her foot elevated for the full thirty-second ***426** duration. Some intoxicated persons can competently perform the test for up to twenty or twenty-five seconds. Erwin, at Section 10.04[1].

Although in a number of our DUI cases we adopt a rule of substantial compliance, we find these cases to be inapposite. Two representative cases, *State v. Plummer* (1986), 22 Ohio St.3d 292, 22 OBR 461, 490 N.E.2d 902, and *State v. Steele* (1977), 52 Ohio St.2d 187, 6 O.O.3d 418, 370 N.E.2d 740, illustrate the important differences between our substantial-compliance cases and the case now before us.

In *Plummer*, we held that the police need only substantially comply with an administrative regulation that required urine specimens to be refrigerated when not in transit or under examination. Accordingly, a three- to four-hour interval of non-refrigeration did not render the results of a subsequent urinalysis test inadmissible at a DUI trial. In reaching our holding, we noted that the refrigeration requirement contemplated situations involving ****957** longer periods of non-refrigeration than that at issue in *Plummer*. *Plummer*, 22 Ohio St.3d at 295, 22 OBR at 464, 490 N.E.2d at 905. We further noted that strict compliance with this regulation would not always be realistic or humanly possible. *Id.*, 22 Ohio St.3d at 294, 22 OBR at 463, 490 N.E.2d at 905.

Similarly, in *Steele*, we held that strict compliance with Department of Health regulations in regard to breathalyzer testing was not necessary in order for the test results to be admissible at trial. At issue in *Steele* was a Department of Health regulation that required arresting officers to visually observe the suspect for twenty-minutes prior to testing so as to prevent the suspect from orally ingesting any substance. We found that this requirement had been fulfilled even though the arresting officer had averted his gaze from the suspect for a few seconds while he exited and walked around his patrol car. We noted that because there was no evidence to suggest that the suspect had in any way corrupted the test results during the few seconds that the officer had departed, the purpose of the rule had not been undermined. *Steele*, 52 Ohio St.2d at 190, 6 O.O.3d at 419–420, 370 N.E.2d at 742.

Cases such as *Plummer* and *Steele* are distinguishable from the case at bar. In the substantial-compliance cases, the minor procedural deviations that were at issue in no way affected the ultimate results. In contrast, it is well established that in field sobriety testing even minor deviations from the standardized procedures can severely bias the results. Moreover, our holdings in the substantial-compliance cases were grounded, at least in part, on the practical impossibility of strictly complying with the applicable administrative regulations. In contrast, we find that strict compliance with standardized field sobriety testing procedures is neither unrealistic nor humanly impossible in the great majority of vehicle stops in which the police choose to administer the tests.

[3] [4] ***427** In determining whether the police had probable cause to arrest an individual for DUI, we consider whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. *Beck v. Ohio* (1964), 379 U.S. 89, 91,

85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145; *State v. Timson* (1974), 38 Ohio St.2d 122, 127, 67 O.O.2d 140, 143, 311 N.E.2d 16, 20. In making this determination, we will examine the "totality" of facts and circumstances surrounding the arrest. See *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703, 710; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 111, 534 N.E.2d 906, 908.

[5] In the case *sub judice,* Trooper Worcester, the arresting officer, admitted to having not strictly complied with established police procedure when administering to appellee the HGN and walk-and-turn tests. We nevertheless agree with the court of appeals that the totality of facts and circumstances surrounding appellee's arrest supports a finding of probable cause.

[6] While field sobriety tests must be administered in strict compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where, as here, the test results must be excluded for lack of strict compliance.

Prior to stopping appellee's vehicle, Trooper Worcester observed erratic driving on the part of appellee. Upon stopping appellee's vehicle, he observed that appellee's eyes were "red and glassy" and that her breath smelled of alcohol. Appellee admitted to the arresting officer that **958 she had been consuming alcoholic beverages. The totality of these facts and circumstances amply supports Trooper Worcester's decision to place appellee under arrest. See *Mason v. Murphy* (1997), 123 Ohio App.3d 592, 598, 704 N.E.2d 1260, 1263; *State v. Beall* (Mar. 8, 1999), Belmont App. No. 94–B–43, unreported, 1999 WL 148371.

II

[7] Appellant contends that appellee's motion to suppress tolled the time in which appellee had to be brought to trial on the child endangering charge, which was filed subsequent to the filing of the motion to suppress. We disagree.

[8] Under R.C. 2919.22, driving a motor vehicle while intoxicated with one or more children in the car constitutes child endangering. A violation of this law is a first-degree misdemeanor. R.C. 2919.22(E)(5)(a). A defendant charged with a misdemeanor of the first degree must be brought to trial within ninety days after arrest. R.C. 2945.71(B)(2). This period of time may be extended by "[a]ny period of delay necessitated by reason of * * * motion * * * instituted by the *428 accused." R.C. 2945.72(E). This extension is strictly construed in favor of the defendant. *State v. Singer* (1977), 50 Ohio St.2d 103, 109, 4 O.O.3d 237, 240, 362 N.E.2d 1216, 1220.

[9] The question presented is whether R.C. 2945.72(E) applies where the filing of the motion precedes the filing of the criminal charge. Because an answer to this question does not appear on the face of the statute, we invoke rules of statutory construction in order to arrive at the legislature's intent. *Symmes Twp. Bd. of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, 553, 721 N.E.2d 1057, 1061. R.C. 1.49 sets forth specific rules of statutory construction, which serve as guideposts for courts to follow in interpreting ambiguous statutes. Included among them are the object sought to be attained by the legislature and the consequences of a particular construction. Applying these guideposts, we conclude that tolling was not intended to occur for charges filed subsequent to the defendant's motion filing.

The facts of the instant case are analogous to those in *State v. Adams* (1989), 43 Ohio St.3d 67, 538 N.E.2d 1025. In *Adams,* we held that when a defendant waives his right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of facts that are brought subsequent to the waiver. We attributed our holding in *Adams* to the objective underlying Ohio's speedy trial statutes—that the ability of a defendant to maintain his or her defense not be impaired. *Id.,* 43 Ohio St.3d at 70, 538 N.E.2d at 1028. We noted in *Adams* that knowing and intelligent tactical decisions cannot be made until all of the facts are known by the accused, and this, of course, includes knowing the exact nature of the crimes charged. *Id.*

Here, as in *Adams,* the state's interpretation of Ohio's speedy trial law conflicts with the objective sought to be achieved by the General Assembly. Appellant's proposed construction of R.C. 2945.72(E) provides the state with an incentive to file charges piecemeal, as opposed to bringing all related charges at the same time. The potential prejudice to defendants is manifest. When a defendant is unaware of the precise nature of the crimes charged, he or she cannot make informed and intelligent

tactical decisions about motion filings and other matters.

For the foregoing reasons, we conclude that R.C. 2945.72(E) does not apply to charges filed by the state after the defendant's motion is filed. Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., ROCCO and PFEIFER, JJ., concur.

ROCCO, J., concurs separately.

****959** COOK and LUNDBERG STRATTON, JJ., concur in judgment and dissent in part.

***429** DOUGLAS, J., dissents.

KENNETH A. ROCCO, J., of the Eighth Appellate District, sitting for RESNICK, J.

KENNETH A. ROCCO, J., concurring.

ROCCO, J., concurring. I agree with the majority that field sobriety test results can provide probable cause to arrest only if the administering officer strictly complies with the standardized testing procedures. I write separately to emphasize an additional point.

I would extend the court's holding here to explicitly state that field sobriety test results are admissible at trial only if the officer strictly complied with standardized testing procedures. The majority has demonstrated that the care with which a field sobriety test is administered has a decisive effect on the test's reliability, and hence its evidentiary value. It seems self-evident to me that if strict compliance with testing procedures is necessary to demonstrate probable cause to arrest, it becomes even more necessary if the tests are to be used to prove guilt.

LUNDBERG STRATTON, J., concurring in part and dissenting in part.

LUNDBERG STRATTON, J., concurring in part and dissenting in part. I concur with the majority in that the filing of a motion before an additional charge is brought does not toll the speedy-trial provisions for that charge under R.C. 2945.72(E). Prosecutors should refile applicable motions or require defendant's counsel to refile their motions if the motions also apply to the new charge in order to extend speedy-trial provisions to those later charges.

However, I disagree with the majority's conclusion that field sobriety tests require strict compliance. Field sobriety tests are used by arresting officers to assist in determining whether probable cause exists to arrest the driver for driving under the influence of drugs or alcohol. Field sobriety tests are not constitutionally required, nor are they mandated by statute. They are not even required by the Department of Health or any traffic regulation. They are merely *procedures* established by the National Highway Traffic Safety Administration ("NHTSA"). As such, they are only evidentiary tools.

In 1986, this court examined the level of compliance required in administering regulations concerning storage temperature of urine samples taken from suspected impaired drivers. This court held that "absent a showing of prejudice to a defendant, the results of a urine-alcohol test administered in substantial compliance with Ohio Adm.Code 3701–53–05 are admissible in a prosecution under R.C. 4511.19." *State v. Plummer* (1986), 22 Ohio St.3d 292, 22 OBR 461, 490 N.E.2d 902, syllabus. Because the court required only substantial compliance, rather ***430** than strict compliance, for those regulations, the evidentiary value of the item decreased as substantial compliance decreased. But even at a substantial-compliance level, rather than a strict-compliance level, the test retained strong evidentiary value.

Similarly here, substantial compliance affects the *evidentiary value* of the field sobriety tests. But substantial compliance should not result in the tests' *exclusion.* If *Plummer* only requires substantial compliance with the Ohio Administrative Code for the admissibility of chemical test readings for a strict-liability statute, I would find that only substantial compliance should be required for administering the field sobriety tests in question.

The majority notes that according to the NHTSA, "[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised." National Highway Traffic Safety Adm., U.S. Dept. of Transp., HS 178 R2/00, DWI Detection and Standardized Field Sobriety Testing, Student Manual (2000), at VIII–3. Again, this potential compromise in validity can be challenged by the defense on the basis of reliability. A trial court can conduct a ****960** pretrial hearing on whether the tests are

sufficiently reliable to be admissible, just as a trial judge conducts similar hearings on other evidentiary issues. Even if the trial judge finds that there was substantial compliance with the field sobriety tests so as to make these tests admissible, defense counsel can still attack the tests' reliability as evidence at trial, depending on the degree of compliance. The NHTSA testing only confirms that the better the compliance, the better the reliability.

The majority highlights *Plummer* 's observation that strict compliance is "not always realistically or humanly possible" regarding urine test regulations. *Id.*, 22 Ohio St.3d at 294, 22 OBR at 463, 490 N.E.2d at 905. However, field sobriety tests are often administered in the dark, on icy roads, on gravel, during wind and rain. Law enforcement officers do not have the ability to select the ideal environment. Thus, so too with field sobriety tests, I believe that strict compliance is not always realistically or humanly possible.

I fear that this ruling will substantially hamper the effectiveness of law enforcement officers in their ability to ascertain probable cause for OMVI arrests. Defense counsel can now attack any minor deviation from the field sobriety tests and seek exclusion of the tests. At a time when more tools are needed in the effort to combat drunk driving, we have greatly reduced the effectiveness of one of those tools, field sobriety tests.

I believe that strict compliance is neither constitutionally nor statutorily mandated, and certainly not mandated by any evidentiary rules. Therefore, I respectfully concur in the judgment, but dissent in part and would find that ***431** substantial compliance, not strict compliance, is the appropriate standard for the admissibility of field sobriety tests.

COOK, J., concurs in the foregoing opinion.

Parallel Citations

732 N.E.2d 952, 2000 -Ohio- 212

Footnotes

1 The HGN test is one of several field sobriety tests used by police officers in detecting whether a driver is intoxicated. "Nystagmus" is an involuntary jerking of the eyeball. "Horizontal gaze nystagmus" refers to a jerking of the eyes as they gaze to one side. The position of the eye as it gazes to one side is called "maximum deviation." In administering the test, an officer takes some object, a pen for example, and places it approximately twelve to fifteen inches in front of the suspect's nose. The officer then observes the suspect's eyes as they follow the object to determine at what angle nystagmus occurs. The more intoxicated a person becomes, the less the eyes have to move toward to the side before nystagmus begins. Cohen & Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.04 [2][a]. Other signs of intoxication include distinct nystagmus at maximum deviation and the inability of the suspect's eyes to smoothly follow the object. See 1 Erwin, Defense of Drunk Driving Cases (3 Ed.1997), Sections 10.04[5] and 10.06[1].

2 The walk-and-turn test requires the suspect to walk a given number of steps, heel-to-toe, in a straight line. The suspect is then told to turn around and walk back in the same manner. During the test, the suspect is told to keep his or her hands at his or her sides. The officer assesses a suspect's performance according to the degree to which the suspect exhibits a lack of balance or coordination. Erwin, at Section 10.03[2].

3 The one-leg-stand test requires the suspect to stand with his or her feet together and his or her arms at his or her sides. The suspect is then told to hold one leg straight and forward about eight to twelve inches off the ground for approximately thirty seconds. While in this position, the suspect counts off the number of seconds. At all times, the suspect is to keep his or her arms at his or her sides and to watch his or her raised foot. The officer demonstrates the test before administering it. Erwin, at Section 10.04[1].

4 The NHTSA has been a leader in the study and development of field sobriety testing policy and procedure. The NHTSA's standardized test manuals form the basis for manuals used by state law enforcement agencies across the country. Taylor, Drunk Driving Defense (5 Ed.2000), Section 4.3.2.

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