

FIRST DIVISION  
March 28, 2016

No. 1-13-4055

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 11C220463;
	)	112003374
	)	
SAMUEL POP,	)	Honorable
	)	Garritt Howard,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court  
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for driving under the influence of alcohol is affirmed, although the trial court erred in admitting testimony about the results of the horizontal gaze nystagmus test without a proper foundation, where the arresting officer gave credible testimony and other evidence supported the conviction beyond a reasonable doubt.

¶ 2 Defendant, Samuel Pop, appeals his conviction after a jury trial of driving under the influence and his sentence of two years of conditional discharge. On appeal, defendant contends that (1) the trial court erred in permitting a police officer to testify about the results of his horizontal gaze nystagmus (HGN) test without laying a proper foundation; and (2) he is entitled to monetary credit for time spent in presentence custody. For the following reasons, we affirm defendant's conviction and amend the sentencing order to reflect credit for time served in presentence custody.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on November 27, 2013. Defendant filed a motion to reconsider, which the trial court denied, on that same date. Defendant filed his notice of appeal on December 24, 2013. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010) and Rule 606 (eff. Mar. 20, 2009), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 5 BACKGROUND

¶ 6 Defendant was charged with one count of aggravated battery and one count of driving under the influence of alcohol (DUI), in connection with an October 15, 2011, traffic stop on Skokie Boulevard. At trial, Officer Zerfass testified that on October 15, 2011, he was parked in his police car on the 7900 block of Skokie Boulevard and running a stationary radar. At approximately 8:50 p.m., he observed a Ford Taurus traveling northbound at a high rate of speed. The stationary radar measured its speed at 69 miles per hour, and the speed limit for that portion of the road was 40 miles per hour. Officer Zerfass made a u-turn and stopped behind the Taurus as it waited at a red light. He activated the emergency lights to indicate a traffic stop.

The vehicle, however, proceeded northbound at around 25 miles per hour. Officer Zerfass then activated the sirens and used a spotlight on the driver in an attempt to stop the vehicle. The Taurus traveled four more blocks northbound and then turned right on Main Street and traveled one block east before turning right and coming to a stop.

¶ 7 When Officer Zerfass approached the vehicle, he noticed that defendant was the only occupant. He asked for defendant's driver's license and proof of insurance, and defendant first handed him a blue credit card. Defendant asked Officer Zerfass what insurance card he needed and Officer Zerfass told him that he needed a valid insurance card. Defendant then offered his registration card, and Officer Zerfass told him that was not his insurance card. Defendant stated that he would not be able to find the insurance card but he did produce a valid driver's license. Since defendant kept driving for five and a half blocks after Officer Zerfass activated his lights, the officer asked him to take the keys from the ignition and place them on the center console. Defendant complied with the request.

¶ 8 While questioning defendant, Officer Zerfass noticed "the odor of an alcoholic beverage" on his breath, and defendant also "had bloodshot and watery eyes." Defendant seemed "confused" about what Officer Zerfass was asking of him. Officer Imeri arrived on the scene and Officer Zerfass asked defendant to place his hands on the steering wheel which he refused to do. Officer Zerfass then asked defendant to roll down the passenger side window so that Officer Imeri could confirm the odor of alcohol on defendant. Defendant refused to comply with this request. Officer Zerfass then asked defendant to step out of the vehicle, and again defendant refused to comply. When Officer Zerfass asked defendant again to step out of the vehicle, and defendant again refused to comply, he attempted to open the driver's side door to

remove defendant from the vehicle. Defendant grabbed the door from the inside and "slammed it shut."

¶ 9 Officer Zerfass opened the door again and attempted to forcefully remove defendant, who was holding onto the steering wheel with his right hand. With the help of Officer Imeri, Officer Zerfass pulled defendant by his left arm, removed him from the vehicle, and placed him on the ground before handcuffing him. Two other officers arrived to assist, and they rolled defendant on his right side to perform a pat down. Defendant pulled up his right leg and kicked Officer Zerfass on his right shin. Defendant was eventually placed in a police car and transported to the Skokie Police Department. Officer Zerfass's police car was equipped with a "dash cam" that recorded the entire incident.

¶ 10 At the police station, the officers gave defendant three standardized field sobriety tests developed by the National Highway and Traffic Safety Administration (NHTSA). Officer Zerfass testified that he received training on DUI detection and standardized field sobriety tests, and took written and practical examinations which he passed. On October 15, 2011, Officer Zerfass had been with the Skokie police department for approximately one year during which time he made five to ten DUI arrests. All of the standardized field sobriety tests defendant performed were recorded on video.

¶ 11 The HGN test measures the involuntary jerking of the eyes, called nystagmus, caused by the consumption of alcohol. In conducting the test, the officer looks for three clues: (1) "lack of smooth pursuit"; (2) "distinct and sustained nystagmus at maximum deviation"; and (3) the "onset of nystagmus prior to 45 degrees." NHTSA, *DWI Detection and Standardized Field Sobriety Student Manual*, VIII-5 (2006), *available at* <http://www.isp.state.il.us/docs/2006dwisfst.pdf> (NHTSA manual). The NHTSA manual

provides a procedure for conducting the HGN test. Prior to performing the test, the officer must inquire about any eye problems or the suspect's use of corrective lenses. The officer should also check for "equal pupil size, resting nystagmus, and equal tracking (can they follow an object together)." *Id.* at VIII-5,6. When conducting the test, the stimulus must be placed approximately 12 to 15 inches from the defendant's nose and slightly above eye level. To check for smooth pursuit, the stimulus must move "at a speed that requires approximately two seconds to bring the suspect's eye as far to the side as it can go." *Id.* at VIII-7. To check for the onset of nystagmus prior to 45 degrees, the stimulus should move at a speed that would take approximately four seconds for it to reach the edge of the defendant's shoulder. *Id.* In checking for distinct and sustained nystagmus at maximum deviation, the officer is instructed to move the stimulus to the edge of defendant's field of vision and hold that position for a minimum of four seconds. As the NHTSA manual explained, unimpaired people can exhibit a slight jerking of the eye at maximum deviation, "but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable." *Id.* at VIII-5.

¶ 12 Officer Zerfass testified that he had the minimum 24 hours of training required to perform the HGN test. Defendant did not inform Officer Zerfass of any eye injuries or conditions that would prevent him from performing the test. Officer Zerfass did not inquire about defendant's use of corrective lenses. Prior to performing the test, Officer Zerfass checked defendant for equal pupil size, resting nystagmus, and equal tracking. To perform the test, he used a pen placed approximately 12 inches from defendant and moved the pen from the middle of the nose to one side and then over to the other side. He estimated that he moved the pen seven inches from defendant's nose on both sides. Officer Zerfass performed three tests, each

time making two passes with his pen. He looked for smooth pursuit, checked for distinct and sustained nystagmus at maximum deviation (how far the eyes can go looking left or right), and checked for the onset of nystagmus prior to 45 degrees. Officer Zerfass found that neither eye tracked smoothly, and both eyes experienced involuntary jerking at maximum deviation and prior to 45 degrees. Officer Zerfass concluded that the results of the test showed that defendant had consumed alcohol. He stated that two clues indicate possible consumption and defendant exhibited six clues. Officer Zerfass testified that he had performed the HGN test in other cases and determined that the individual was not under the influence.

¶ 13 Officer Zerfass also had defendant perform the walk and turn test. For this test, defendant had to place his right foot in front of his left foot, touching heel to toe with his hands at his side. Defendant had to hold his position while he listened to the instructions, and then take nine heel-to-toe steps following a straight line while counting his steps out loud. After taking nine steps, defendant had to take small pivot steps around and take nine steps back. If at any time he fell off the line, he had to put his foot back on the line and continue where he left off. Defendant did not tell Officer Zerfass he had any injuries that would prevent him from taking the test. Officer Zerfass observed that defendant was unable to keep his position while listening to the instructions. While performing the test, defendant stepped off the line, stopped to balance himself, and did not touch heel to toe. For this test, two clues indicate possible impairment and Officer Zerfass stated that he observed four clues in defendant.

¶ 14 The third test Officer Zerfass administered to defendant was the one-leg stand test. For this test, defendant had to keep his hands down at his side while raising one foot approximately six inches off the ground, looking down at his toe and counting aloud "1,001, 1,002" until told to stop. If defendant puts his foot down at any point, he must raise his foot again and start

counting where he left off. Defendant did not inform Officer Zerfass of any injuries that would prevent him from performing the test. While performing the test, defendant swayed while balancing, raised his arms above six inches, and put his foot down. Officer Zerfass stated that two clues indicate possible impairment and defendant exhibited three clues.

¶ 15 After conducting these tests, and prior to performing a breathalyzer test on defendant, Officer Imeri read him the warning to motorists stating the consequences of submitting or not submitting to chemical testing. There was a 20 minute observation period to ensure that no alcohol is present in defendant's breath due to drinking, burping, belching, or vomiting, that would register a higher than normal blood alcohol content. During this time, defendant repeatedly asked to use the restroom but the officers did not allow him to do so because it would be difficult to observe him. Defendant became "irrational and highly belligerent" during the observation period. Officer Zerfass testified that defendant "was screaming, using slurs, swearing, kneeling down, and flailing his arms, attempting to talk to the other arrestees, [and] trying to incite him to refuse orders by other officers" for approximately 15 to 20 minutes. These events were also captured on video.

¶ 16 After the 20 minute observation period, the officers asked defendant to blow into a breathalyzer machine. When a person's information is entered into the machine, he has three minutes to blow into the machine before it times out. If the machine times out, it is considered a refusal. Officers tried to escort defendant to the machine. Defendant repeatedly stated that he was not refusing the test, but he would not go to the machine when told the machine would time out. Ultimately, defendant refused to take the breathalyzer test.

¶ 17 After defendant's refusal, two detectives tried to get him into an interview room but he refused. They placed defendant in handcuffs for safety. Officer Zerfass stated that defendant

tried to kick him again so the officers determined that they would process defendant in the morning. The next morning, defendant was read his *Miranda* rights and agreed to speak with Officer Damen Nikolopoulos. Defendant admitted to consuming alcohol the evening of October 15, 2011, and he consumed it within a 30-minute timeframe. He also remembered being pulled over by Officer Zerfass, but next remembered waking up in a holding cell at the police station. He could not remember anything that happened in between those events.

¶ 18 Officer Zerfass concluded that defendant was under the influence of alcohol on October 15, 2011, based on "the odor of an alcoholic beverage on his breath during the stop, and [his] interactions with him [at the station], the bloodshot, watery eyes, the irrational belligerent behavior, the confusion, the refusal to stop when the lights and everything was activated. The totality of all the circumstances."

¶ 19 On cross-examination, Officer Zerfass stated that for the third HGN test at 45 degrees maximum deviation, he knew to hold the pen on either side for a few seconds but did not know that he was to hold it for a minimum of four seconds. Officer Zerfass also acknowledged that defendant successfully completed the walk-and-turn test after several attempts, and was able to hold up his leg on the one-leg test for 14 seconds until another officer asked him to straighten his leg.

¶ 20 The jury found defendant guilty of driving under the influence of alcohol, and not guilty of aggravated battery. Defendant filed a motion for a new trial which was denied. The trial court sentenced defendant to 24 months of conditional discharge, an alcohol treatment program, attendance at one victim impact panel, and assessed fines, fees, and costs. Defendant filed a motion to reconsider his sentence which the trial court denied. Defendant filed this timely appeal.



¶ 21

ANALYSIS

¶ 22 Defendant contends that the trial court erred in allowing Officer Zerfass to testify as to the HGN test without a proper foundation. "The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of discretion." *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 23 In *People v. McKown*, 236 Ill. 2d 278, 303 (2010), our supreme court found "that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired." However, a proper foundation must first be laid showing that the test was administered by a properly trained officer in accordance with NHTSA protocol. *Id.* at 306. With the proper foundation, a testifying officer "may use the HGN test results as a part of the basis for his opinion that the defendant was under the influence and impaired." *Id.*

¶ 24 In *McKown*, the officer administering the HGN test did not follow NHTSA standards. Specifically, he did not check the defendant's eyes for equal tracking or for pupil size before testing, nor did he state the speed at which he moved his stylus at the point of maximum deviation or that he held the stylus at the point of maximum deviation for the requisite four seconds. He also did not state that he performed the procedure twice and he confused two of the clues when he combined two steps in the protocol. *Id.* at 307. Our supreme court concluded that admission of the officer's testimony regarding the results of the HGN test was error in the absence of a proper foundation. *Id.* at 311. It also found that the error was not harmless because no other test was used to verify the defendant's blood-alcohol content and no other sobriety field tests were given, so that the trial court "relied heavily on the improperly

admitted HGN test results." *Id.* Therefore, our supreme court reversed the defendant's conviction. *Id.*

¶ 25 Here, Officer Zerfass did not ask defendant about his possible use of corrective lenses prior to administering the HGN test. Also, for the third HGN test at 45 degrees maximum deviation, he knew to hold the pen on either side for a few seconds but did not know that he should hold it for at least four seconds. Like the officer in *McKown*, Officer Zerfass did not follow the procedure as specified in the NHTSA manual; therefore the admission of his testimony regarding the results of the HGN test was error.

¶ 26 The State argues that whether Officer Zerfass followed the procedures for the HGN test as outlined in the NHTSA manual goes to the weight of his testimony, not to its admissibility, citing *People v. Graves*, 2012 IL App (4th) 110536, as support. The defendant in *Graves* argued that the officer who administered the HGN test did not know the difference between resting nystagmus and nystagmus indicated by alcohol consumption, and performed the test even after observing resting nystagmus in the defendant. *Id.*, ¶ 23. The court found no abuse of discretion in allowing the testimony, and reasoned that the officer's lack of knowledge regarding the distinction goes only to the weight of his testimony because the manual does not require an officer who observes resting nystagmus to cease HGN testing. *Id.*, ¶¶ 26, 31. It further found that in conducting the HGN test on the defendant, the officer "was in compliance with NHTSA protocol as described in the manual." *Id.*, ¶ 27.

¶ 27 *Graves* does not support the State's contention here. The error claimed in *Graves* did not involve the failure to follow testing procedures as outlined in the manual. Additionally, the court in *Graves* specifically found that the officer "was in compliance with NHTSA protocol" when he administered the test. *Id.*, ¶ 27. As such, *Graves* simply follows our supreme court's

holding in *McKown* that an officer's testimony regarding the results of the HGN test is admissible with a proper foundation. *McKown*, 236 Ill. 2d. at 311.

¶ 28 Although admission of Officer Zerfass's testimony regarding the HGN test was error, we find that the error was harmless given the admissible evidence against defendant. An error is deemed harmless when "the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result. [Citation.]" *McKown*, 236 Ill. 2d at 311. See also *People v. Borys*, 2013 IL App (1st) 111629 (this court applied harmless error analysis where the trial court erred in admitting HGN testimony without a proper foundation).

¶ 29 Defendant is guilty of driving under the influence if the State proves that he was under the influence of a drug or alcohol to a degree that rendered him incapable of driving safely. *People v. Gordon*, 378 Ill. App. 3d 626, 631-32 (2007). The testimony of the arresting officer is sufficient to sustain a DUI conviction so long as his testimony is credible. *Id.* at 632. Officer Zerfass testified that he received training on DUI detection and standardized field sobriety tests, and took written and practical examinations which he passed. On October 15, 2011, Officer Zerfass had been with the Skokie police department for approximately one year during which time he made five to ten DUI arrests. Officer Zerfass testified that he monitored defendant's speed in a 40 mile per hour speed limit zone, and defendant was travelling 69 miles per hour. He activated his lights in order to pull defendant over, but defendant continued to drive five blocks before finally coming to a stop. When Officer Zerfass spoke to defendant, he noticed defendant had "the odor of an alcoholic beverage" on his breath, and also "had bloodshot and watery eyes." Defendant seemed "confused" when Officer Zerfass asked him for his insurance card. Defendant also did not comply with the officers' requests to exit the vehicle and

they struggled to get him out and to restrain him. At the police station, defendant became "irrational and highly belligerent" during the observation period. Officer Zerfass testified that defendant "was screaming, using slurs, swearing, kneeling down, and flailing his arms, attempting to talk to the other arrestees, [and] trying to incite him to refuse orders by other officers" for approximately 15 to 20 minutes. Unlike the situation in *McKown*, defendant here also took two other field sobriety tests, the walk-and-turn and the one-leg stand tests. Officer Zerfass found enough indicators on those tests to determine that defendant was impaired. Finally, defendant's refusal to submit to the breathalyzer test could be considered circumstantial evidence of his guilt. *People v. Garstecki*, 382 Ill. App. 3d 802, 813 (2008). All of these events were captured on video for the jury to observe. This evidence was sufficient for a jury to find defendant guilty of driving under the influence beyond a reasonable doubt.

¶ 30 Defendant disagrees, arguing that other than speeding, he did not drive improperly; that the smell of alcohol on his breath only indicated that he had consumed alcohol, not that he was impaired; the results of the other field sobriety tests conducted were "mixed" because defendant successfully completed the walk-and-turn test after several attempts, and was able to hold up his leg on the one-leg test for 14 seconds until another officer asked him to straighten his leg; and his combative and belligerent behavior could have been a response to his treatment by the officers rather than the result of alcohol consumption. However, it is the jury's responsibility to determine witness credibility, the weight to be given witness testimony, and to resolve inconsistencies or conflicts in the evidence. *People v. Collins*, 106 Ill. 2d 237, 261-62 (1985). In doing so, the jury is free to accept or reject as much or as little of a witness's testimony as it pleases, and need not disregard the inferences that flow from the evidence or search out all possible explanations consistent with defendant's innocence and raise them to a level of

reasonable doubt. *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001); *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67.

¶ 31 Defendant also argues that he is entitled to a \$15 monetary credit against his fines for the three days he served in jail prior to sentencing. The State agrees with defendant that he is entitled to this credit. We therefore order the amendment of the fines and fee order to reflect the \$15 credit.

¶ 32 **CONCLUSION**

¶ 33 For the foregoing reasons, the judgment of the circuit court is affirmed. The clerk of the circuit court is directed to correct the fines and fees portion of the sentencing order as set forth herein.

¶ 34 Affirmed.