

FOURTH DIVISION
August 29, 2014

No. 1-12-2190

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 21542
)	
ARIN SCHUIT,)	Honorable
)	Larry G. Axelrood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Trial court did not commit reversible error by admitting, nor was trial counsel ineffective for not challenging foundation for, testimony regarding horizontal gaze nystagmus test where there was sufficient additional evidence of driving under the influence of alcohol.
- ¶ 2 Following a jury trial, defendant Arin Schuit was found guilty of aggravated driving under the influence of alcohol (ADUI) and sentenced to six months in jail and two years of probation with fines and fees. On appeal, defendant contends that the trial court erred in admitting

testimony regarding defendant's horizontal gaze nystagmus (HGN) test and that trial counsel was ineffective for not challenging the foundation for said testimony.

¶ 3 Defendant was charged with ADUI in that, on or about November 25, 2010 (Thanksgiving Day), he drove a vehicle while under the influence of alcohol and while (a) his driving privileges were suspended on a statutory summary suspension (625 ILCS 5/11-501.1 (West 2012)) and (b) he knew or should have known that the vehicle was not covered by a liability insurance policy.

¶ 4 Defendant filed a motion *in limine* seeking in relevant part to exclude evidence of the HGN test. At the hearing *in limine*, the State argued that "a *Frye* hearing has been conducted in Cook County" so that the HGN test would be admissible "upon proper foundation," while defendant argued that evidence of the HGN test would be more prejudicial than probative. The court denied the motion *in limine* on this issue.

¶ 5 At the February 2012 trial, police officer Lucas Wise testified that he was an officer for about seven years. After midnight on November 25, 2010, he and Officer Michael Walsh were on patrol when they stopped for a red signal at the intersection of Chicago Avenue and Orleans Street in Chicago. Officer Wise saw a car in the left-turn lane on Chicago waiting to turn onto southbound Orleans though its turn signal was not lit. When the traffic signal changed, the car "abruptly cut in front of a[] taxicab that was trying to turn eastbound, disregarding the right of way and driving a short distance in the northbound lanes of traffic [in] the wrong direction." The taxi had to brake abruptly. The officers signaled for the car to stop and pull over, and it did. The officers approached the car and saw that defendant was the driver. When Officer Wise told defendant to exit the car, he did so but then "abruptly" put his hands behind his back. When Officer Wise told defendant to walk to the rear of the car, he did so but with impaired balance and

coordination; he braced himself with his arms against the side of the car. Officer Wise asked defendant for his driving license and proof of insurance, but he did not provide either.

Defendant's face was "flush red," his eyes were bloodshot, his speech was slurred, and he had a strong odor of an alcoholic beverage on his breath. Officer Wise asked defendant if he had been drinking; he replied that he had "a couple of beers." Defendant was handcuffed and placed in the police vehicle because he was unable to provide his license or proof of insurance. While there, defendant said that he might have his license in his car. Officer Walsh searched the car for the license, finding defendant's identification card but not his license.

¶ 6 Officer Wise decided to "offer" defendant standard field sobriety tests. In 2005, Officer Wise received 40 hours of training in investigating suspected DUI, including "written and practical exams" that he passed. One of the field sobriety tests he learned to administer was the HGN test. He also received annual "refresher" courses in DUI investigation, including further training on the HGN test. He explained that the HGN test entails moving a pen or stylus about a foot in front of the subject's face and observing the subject follow it without moving his or her head; the officer is looking for involuntary jerking (nystagmus) rather than fluid movement of the eye left-to-right. He has administered the HGN test a "couple hundred" times during field sobriety testing.

¶ 7 Officer Wise told defendant to stand on the sidewalk, which was level and well-lit. He asked defendant if he was sick or injured; he responded that he was diabetic but mentioned no other illness. Officer Wise told and demonstrated the test instructions to defendant. Before administering the test, Officer Wise shut off the police vehicle's flashing emergency lights; he was unaware of any other lights shining into defendant's eyes that would affect the test. Officer Wise performed the HGN test according to the standards of the National Traffic and Highway Safety

Administration (NHTSA), the procedure he was trained to use. During the test, defendant's eyes "equally tracked" the pen and his pupils were "equally sized." Defendant had, in both eyes, "a lack of smooth pursuit," the "onset of nystagmus prior to 45 degrees," and "distinct nystagmus at maximum deviation." Officer Wise explained that "smooth pursuit" is fluid movement of the eyes, while defendant's eyes had an involuntary twitch as they followed the pen, and that "45 degrees" refers to holding the pen at a 45-degree angle to defendant's head with his eyes in the furthest corner of the socket. There are seven potential clues of impairment on the HGN test, with four or more clues "indicat[ing] consumption of alcohol" and Officer Wise saw six in defendant's test. When Officer Wise explained the walk-and-turn and one-legged-stand tests, defendant declined to take the tests. Officer Wise then arrested defendant on suspicion of DUI.

¶ 8 As Officer Wise drove defendant to the police station, with no others in the vehicle, defendant said "You take care of me and I'll take care of you. It's Thanksgiving" and offered Officer Wise \$150; he declined. Defendant also reiterated his earlier statement that he drank two beers before the officers stopped him. Officer Wise smelled an odor of alcohol in the vehicle that was not present before defendant's arrest. At the police station, defendant refused to take a breath test. He was "yelling and screaming, being verbally abusive" to Officers Wise and Walsh and repeatedly slamming his hand against a table. He professed to be "an FBI agent out of the Glenview field office" and demanded to be released on that basis. Officer Wise opined that defendant was under the influence of alcohol on the day in question, based on his "poor decision-making skills" while driving, including "cutting off" the taxi and driving in the oncoming lane, his admission to drinking, the smell of alcohol on his breath, his bloodshot eyes, red face, and

slurred speech, his "lack of judgment" in offering a bribe, and his behavior at the police station.

At trial, Officer Wise authenticated defendant's post-arrest photograph.

¶ 9 On cross-examination, Officer Wise testified that, as he approached defendant's car, defendant was smoking a cigarette inside the car. He smelled alcohol after defendant exited the car and dropped the cigarette to the ground. Officer Wise could not attribute the alcohol odor to any particular beverage; he inferred that defendant had drank beer from his admission to doing so. Defendant did not state, nor did Officer Wise ask, how large the two beers had been. He also did not ask defendant how much time passed between each drink or from the last drink to the traffic stop. Officer Wise denied that he was trained to ask if a subject has diabetes before administering the HGN test, but instead was taught to ask generally if he had any illness, injury, or disability that would prohibit him from performing the field sobriety tests. Officer Wise explained that "resting nystagmus" is jerking of the eye in the absence of a stimulus and that it can occur if the subject had a head injury. Officer Wise did not ask defendant if he wears eyeglasses because he was not wearing glasses when stopped; he did ask defendant if he was wearing contact lenses, and defendant replied "no." While Officer Wise's report did not reflect that question or answer, it is a standard question. While his report did not reflect that defendant's pupils were of equal size nor that his eyes were equally tracking, he would have suspected that defendant had a brain injury and provided medical attention if this had not been so. He could not recall being taught that influenza or hypertension could affect equal tracking, and he denied that nicotine consumption would cause gaze nystagmus. While Officer Wise recited that there are six types of nystagmus, he could not describe all of them. (On redirect examination, he explained that his training focused on horizontal gaze nystagmus and mentioned other types only so officers are aware that other types

exist.) However, his opinion that defendant was under the influence of alcohol was based on various factors with the results of the HGN test being only one factor. Officer Wise did not charge defendant with attempting to bribe him because he alone cannot charge felonies; he raised the allegation to the State's Attorney but it was "not pursued further."

¶ 10 Officer Michael Walsh testified to seeing defendant's car turn in front of the taxi and drive briefly in the oncoming lane on Orleans Street, denying on cross-examination that defendant drove in the oncoming lane to avoid a collision. As defendant stood outside his car, Officer Walsh noticed his bloodshot eyes and a strong alcohol odor from his breath. Officer Walsh observed Officer Wise administer field sobriety testing but could not see defendant's face during the HGN test. The rear emergency lights were still on during the HGN test "so we're not hit from behind," but the front and rear emergency lights can be operated separately. On cross-examination, Officer Walsh could not recall being trained to ask if a subject has diabetes before administering the HGN test; instead, he asks if the subject has any medical conditions. Defendant declined further testing after the HGN test and was then arrested. Officer Walsh drove defendant's car to the police station and thus was not in the police vehicle as Officer Wise transported defendant to the station. At the station, Officer Walsh saw defendant hitting a table with his hands and claiming that "you can't lock me up, I'm an FBI agent." When Officer Wise asked defendant to take a breath test, he refused. Officer Walsh opined that defendant was under the influence of alcohol while driving that day.

¶ 11 In his unsuccessful motion for a directed verdict, defendant argued in relevant part that Officer Wise's testimony on the HGN test should be discounted because of his unfamiliarity with

the various types of nystagmus. Following closing arguments, instructions (for DUI without the charged aggravating factors), and deliberation, the jury found defendant guilty of DUI.

¶ 12 Defendant filed a post-trial motion arguing in relevant part insufficiency of the evidence and that his motion *in limine* to exclude HGN evidence should have been granted as its admission denied him a fair trial. Following arguments, the court denied the motion without further findings. Following evidence and arguments in aggravation and mitigation, the court sentenced defendant on ADUI to six months in jail and two years of probation with fines and fees. This appeal timely followed.

¶ 13 On appeal, defendant contends that the court erred in admitting testimony regarding his HGN test and that counsel was ineffective for not challenging the foundation for said testimony.

¶ 14 The admissibility of evidence is within the discretion of the trial court so its decision will not be set aside absent an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12. A court abuses its discretion only where its decision was arbitrary, fanciful, or unreasonable so that no reasonable person would agree with it. *People v. Rivera*, 2013 IL 112467, ¶ 37. Moreover, an error in the admission of evidence is not reversible if harmless; that is, beyond a reasonable doubt, the error did not contribute to the conviction. *In re Brandon P.*, 2014 IL 116653, ¶ 50. When determining whether an error is harmless, we may (1) focus on the error to determine whether it may have contributed to the conviction, (2) examine the properly-admitted evidence to determine whether it overwhelmingly supports the conviction, or (3) determine whether the improper evidence is merely cumulative or duplicates properly-admitted evidence. *Id.*

¶ 15 On a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability

exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. Where counsel was allegedly ineffective for not seeking to exclude evidence, the defendant must show that the unraised challenge is meritorious and that a reasonable probability exists that the outcome of the trial would have been different had the evidence been excluded. *Id.*, ¶ 15.

¶ 16 Consumption of alcohol is a necessary precondition to impairment due to alcohol, so that any evidence of alcohol consumption is relevant to the issue of impairment. *People v. McKown*, 236 Ill. 2d 278, 302 (2010). "A failed HGN test is relevant to impairment in the same manner as the smell of alcohol on the subject's breath or the presence of empty or partially empty liquor containers in his car. Each of these facts is evidence of alcohol consumption and is properly admitted into evidence on the question of impairment." *McKown*, 236 Ill. 2d at 302-03. Our supreme court has concluded that HGN testing passes the *Frye* test -- that is, it is generally accepted in the relevant scientific fields -- so that HGN test results are admissible to prove that a defendant may have consumed alcohol and may be impaired as a result of that consumption. *McKown*, 236 Ill. 2d at 303. A properly-trained officer who performed the HGN test in accordance with the NHTSA test protocols may give expert testimony regarding the results of the test. *McKown*, 236 Ill. 2d at 306. Moreover, admission of HGN testimony in the absence of a proper foundation is harmless error where other evidence establishes the defendant's guilt beyond a reasonable doubt so that retrial without the HGN evidence would produce no different result. *McKown*, 236 Ill. 2d at 311.

¶ 17 Here, Officer Wise testified that he was trained in the HGN test pursuant to the NHTSA protocol, and counsel cross-examined him at length concerning his administration of the HGN test. While defendant contends that Officer Wise conflated two tests of the HGN testing procedure so that his testimony should have been excluded for lack of foundation -- that is, defendant contends that the *McKown* requirement that the officer properly administer the HGN test was not met -- it is apparent that counsel chose to focus at trial on the weight of Officer Wise's HGN testimony rather than reiterate his pre-trial motion to exclude it. Moreover, in addition to the HGN test results, both officers testified to defendant's bloodshot eyes and odor of alcohol, and Officer Wise testified that defendant's face was red, his speech was slurred, and his walking was unsteady, and that he admitted to drinking two beers. Defendant's post-arrest behavior corroborates his impairment: he showed impaired judgment with his attempt to bribe Officer Wise and his insistence that he should be released because he professed to be an FBI agent, and he showed hostility (that is, impaired ability to control his emotions) when he yelled at and insulted the officers and he forcefully drummed on a table at the police station. Under these circumstances, with the ample corroborating evidence described above, we conclude that a foundational challenge to the HGN evidence was unlikely to have affected the outcome of the trial, and thus find no reversible error by the court nor ineffective assistance by trial counsel.

¶ 18 Accordingly, the judgment of the circuit court is affirmed.

¶ 19 Affirmed.