

STATE OF NORTH CAROLINA
[REDACTED] COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[REDACTED]

STATE OF NORTH CAROLINA)
)
 vs.)
)
 [REDACTED],)
 Defendant.)

MOTION TO EXCLUDE
TESTIMONY REGARDING
FIELD SOBRIETY TESTS

NOW COMES THE DEFENDANT, by and through his attorney of record, [REDACTED], at least five days prior to trial, and respectfully moves the Court for an Order that excludes from trial certain testimony of a witness, Officer [REDACTED] of the [REDACTED] Police Department. For the reasons stated below, the testimony of Officer [REDACTED] regarding Mr. [REDACTED]'s performance on his standardized field sobriety tests, as well as Officer [REDACTED]'s testimony regarding Mr. [REDACTED]'s performance on his non-standardized field sobriety tests, would not satisfy the requirements of Rule 702 of the North Carolina Rules of Evidence and the witness should not be allowed to offer testimony on that subject in this trial.

I. Background

On 9 February 2013, Officer [REDACTED] from the [REDACTED] Police Department allegedly observed the defendant, Mr. [REDACTED] (“[REDACTED]”), make several wide turns while driving in downtown [REDACTED]. Officer [REDACTED] activated his blue lights to conduct a traffic stop and conduct further investigation. Officer [REDACTED] approached [REDACTED]'s vehicle and asked where [REDACTED] was coming from and traveling to. Officer [REDACTED] subsequently requested that [REDACTED] submit to a series of field sobriety tests, including a Portable Breath Test, a Horizontal Gaze Nystagmus test, an alphabet test, and a finger-dexterity test.

Following the Horizontal Gaze Nystagmus test, Officer [REDACTED] asked [REDACTED] to perform two non-standardized field sobriety tests. First, Officer [REDACTED] asked [REDACTED] to recite the alphabet starting with the letter “G” and stopping with the letter “N.” Afterwards,

Officer ██████ asked ██████ to perform a finger-dexterity test. Based upon his observations, Officer ██████ placed ██████ under arrest for driving while impaired.

II. Applicable Law

North Carolina Evidence Rule 702(a) governs whether a given witness may render an expert opinion at trial. Rule 702(a) reads as follows:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013). The United States Supreme Court clarified the expert qualification standard pursuant to the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *State v. McGrady*, the North Carolina Court of Appeals ruled that the Rule 702(a) qualifying standard is analogous to the expert qualification standard pursuant to the Federal Rules of Evidence outlined in *Daubert*. 753 S.E.2d 361, 367 (2014).

In *McGrady*, the Court ruled that in order for expert opinion testimony to be admissible pursuant to Rule 702(a), such expert opinion must fulfill two prongs: the testifying expert must be “proposing to testify to (1) scientific knowledge” or other specialized knowledge “that (2) ‘will assist the trier of fact to understand or determine a fact in issue.’” *Id.* at 368 (quoting *Daubert*, 509 U.S. at 592).

Pursuant to prong (1), to qualify as scientific knowledge, the expert’s knowledge must be “derived by the scientific method.” *Id.* at 367 (quoting *Daubert* 509 U.S. at 590) (emphasis

omitted). The scientific method is “[a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation.” *Id.* at n.4 (quoting *Black's Law Dictionary* 1463–64 (9th ed.2009)). Furthermore, scientific knowledge requires something “more than subjective belief[s] or unsupported speculation.” *Id.* at 367 (quoting *Daubert*, 509 U.S. at 590) (emphasis omitted).

Pursuant to prong (2), “[t]he focus...must be solely on principles and methodology, not on the conclusions they generate.” *Id.* at 368 (quoting *Daubert*, 509 U.S. at 595). In determining “whether the proffered scientific theory or technique will assist the trier of fact, the trial court may consider, among other things,” the following:

- (1) “whether [a theory or technique] can be (and has been) tested;”
- (2) “whether the theory or technique has been subjected to peer review and publication,”
- (3) “the known or potential rate of error...and the existence and maintenance of standards controlling the technique’s operation” and
- (4) whether the theory or technique is generally accepted as reliable in the relevant scientific community.

Id. at 368 (quoting *Daubert*, 509 U.S. at 593-94).

III. Argument

Pursuant to North Carolina Evidence Rule 702(a), Any Opinion Testimony Concerning A Driver’s Impairment, Which is Based Upon Standardized Field Sobriety Tests, Must be Presented By An Expert Witness.

The National Highway Traffic Safety Administration (“NHTSA”) recognizes three Standardized Field Sobriety Tests: (1) Horizontal Gaze Nystagmus; (2) Walk-and-Turn; and (3) One-Leg Stand.¹ An expert witness is required in order to present opinion testimony based upon observations made during a Standardized Field Sobriety Test because such opinion is based upon

¹ National Highway Traffic Safety Administration, *Advanced Roadside Impaired Driving Enforcement*, Nov. 2007, available at <http://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/2007%20NHTSA%20ARIDE%20Manual.pdf>

scientific knowledge that assists the trier of fact. Furthermore, any opinion testimony based upon observations made during a non-standardized field sobriety test cannot form the basis of an opinion regarding impairment.

A. Opinion testimony based upon observations made during a Standardized Field Sobriety Test require an expert witness.

The NHTSA standardized field sobriety tests—Horizontal Gaze Nystagmus, Walk-and-Turn, and One-Leg Stand—have been subjected to scientific research and development for over three decades.² Unexceptionally, this scientific research and development has involved thorough testing using the scientific method.³ As such, pursuant to *McGrady*, a qualified witness who gives an opinion based upon observations made during standardized field sobriety tests is presenting opinion testimony based upon scientific or other specialized knowledge. *See* 753 S.E.2d at 368. Furthermore, each of these standardized field sobriety tests are based upon scientific knowledge that assist the trier of fact in determining impairment. Specifically, each standardized field sobriety test has been repeatedly tested, peer reviewed in the scientific community, accepted as reliable in the scientific community, and their rates of error have been established.⁴

But given the highly technical facets of standardized field sobriety tests, a lay witness is not qualified to present opinions concerning an individual's impairment when his opinion is based upon standardized field sobriety tests. Pursuant to *McGrady*, a witness who gives an opinion regarding a subject's impairment is presenting expert testimony when the opinion is based upon observations made during standardized field sobriety tests. *See* 753 S.E.2d at 368.

2 National Highway Traffic Safety Administration, *Development of a Standardized Field Sobriety Test Training Management System*, Nov. 2001, available at <http://www.nhtsa.gov/people/injury/alcohol/sfst/introduction.htm#1>
Development and Validation

3 *See id.*

4 *Id.*

Therefore, Rule 702(a) mandates that only an expert witness may present opinion testimony regarding impairment when such opinion is based upon standardized field sobriety tests. *See id.*

B. Opinion testimony based upon observations made during a non-standardized field sobriety test cannot form the basis of an expert's opinion regarding impairment.

As stated above, an expert witness is required when a witness is presenting opinion testimony concerning impairment and when that opinion is based upon observations made during a standardized field sobriety test. As a consequence, logic dictates that an expert presenting an opinion on impairment may not derive his opinion from knowledge that is neither scientific nor specialized. Otherwise his opinion fails to assist the trier of fact. *See id.*

In the instant case, Officer ██████ subjected ██████ to two non-standardized field sobriety tests. First, Officer ██████ conducted an alphabet test in which ██████ recited the alphabet letters “G” through “N.” Also, Officer ██████ conducted a finger-dexterity test in which ██████ was required to touch his fingers together as directed by Officer ██████. The NHTSA does not recognize an alphabet test as a standardized field sobriety test, nor does the NHTSA recognize a finger-dexterity test as a standardized field sobriety test.

Unlike the standardized field sobriety tests, the alphabet test and finger-dexterity test performed by ██████ have not been subjected to continual scientific research and development for over thirty years; thus, these non-standardized field sobriety tests do not fulfill the scientific or other specialized knowledge requirement of Rule 702(a). When an individual has difficulty touching his nose with his finger, a multitude of inferences may be drawn, one of which *may* be impairment. Furthermore, unlike the standardized field sobriety tests, Officer ██████'s alphabet test and finger-dexterity test have not been tested in a scientifically, controlled environment, they have not been peer reviewed, they are not accepted as reliable, nor has any

rate of error been established for either of these two tests; thus, there is no basis to conclude that these non-standardized field sobriety tests assist the trier of fact pursuant to Rule 702(a).

In conclusion, testimony concerning ██████'s performance during the alphabet test and finger-dexterity test are not based upon scientific knowledge nor will they assist the trier of fact. Therefore, in accordance with the Rule 702(a) standard outlined in *McGrady*, any observations derived from these non-standardized field sobriety tests cannot be used in formulating Officer ██████'s opinion that ██████'s was impaired.

Given *McGrady*'s mandate that trial courts must serve an enhanced gatekeeping function, it therefore appears necessary and the Defendant respectfully requests that the Court conduct a hearing outside the presence of the jury to determine whether Officer ██████'s testimony in this case would satisfy the requirements of Rule 702 of the North Carolina Rules of Evidence.

WHEREFORE, the Defendant respectfully requests that this Court grant the Defendant's motion to conduct a pretrial hearing to determine the admissibility of Officer ██████'s testimony.

This the _____ day of May, 2014.

Respectfully Submitted,

Assistant Public Defender

_____, NC _____
Attorney for the Defendant

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that she served a copy of the foregoing Application by depositing a copy of the same via hand delivery to the Office of the District Attorney for [REDACTED] County addressed as follows:

[REDACTED]
Assistant District Attorney
[REDACTED]
[REDACTED], NC [REDACTED]

This the ____ day of May, 2014.

Respectfully submitted,

[REDACTED]
Assistant Public Defender
[REDACTED]
[REDACTED]
[REDACTED], NC [REDACTED]
Attorney for the Defendant