

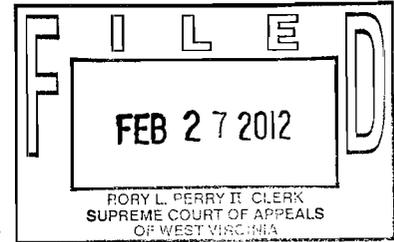
ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOE J. WHITE, JR.

Petitioner,

No.: 11-0171



JOE MILLER, COMMISSIONER;
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

I. AS A PREREQUISITE TO ADMISSIBILITY, THE STATE MUST SHOW THAT THE OFFICER WAS PROPERLY TRAINED AND THE TEST WAS ADMINISTERED PROPERLY, I.E., IN ACCORDANCE WITH NHTSA GUIDELINES.

The Respondent does not contest Dr. White's assertion and the myriad of cases upon which he relies that before the HGN test can be admitted into evidence, the State must show that the officer was adequately trained and qualified and that he administered the test properly.¹ Remarkably, the Commissioner cites multiple cases that so hold. (Respondent's ("R") Br., at 14, 19-20).

Since, in this case, the officer failed to establish that he was adequately trained or that he administered the test properly, regardless of how the court decides the other issues herein, the Respondent committed reversible error by allowing the results of the HGN test into evidence. Given the weakness of the other evidence, a reversal and a dismissal of Dr. White's revocation is warranted.

¹A prerequisite that most courts apply to the administration of the other field sobriety tests.

II. THE RESPONDENT CONCEDES THAT THE HGN TEST IS SCIENTIFIC EVIDENCE.

For the first time, the Respondent concedes that the HGN test is a scientific test. However, he wants this court to take judicial notice of its scientific reliability. (R. Br., at 23-24). However, in support of his position, the Respondent only references four out of state cases, all of which are outdated, before the more authoritative decisions in *McKown*, *Horn*, and *Lasworth*, and before the multitude of scientific evidence was developed demonstrating the unreliability of the theory, the unreliability of the methodology, the unreliability of using the test in the difficult environmental circumstances of a roadside setting, and the unreliability of the training received by law enforcement.

III. BEFORE ADMITTING THE RESULTS OF THE HGN TEST, EXPERT TESTIMONY IS REQUIRED BECAUSE THE TEST IS NEITHER “WELL PROVEN” NOR “RELIABLE.”

What is remarkable and disingenuous about the Commissioner’s argument is his selective reliance on scientific evidence and case law. In other words, he tries to convince the court of the validity of the HGN test by isolating bits and pieces of scientific testimony from a few cases, taking quotes out of context, and ignoring the multiple cases that revealed the copious deficiencies underlying the theory and methodology in the multiple studies sponsored by NHTSA and, especially, the ones in which Marcelline Burns was involved, which was most of them.

Moreover, even the evidence he relies upon illuminates the tenuous validity of his position. For instance, she cites a portion of the testimony of Dr. Joseph Citron in *McKown* where, in pertinent part, he states that there are “at least 39” causes of nystagmus and that at a certain “threshold level” a driver “. . .could display nystagmus.” (R. Br., at 4). (Emphasis

supplied.)

The Respondent also quotes the court's statement in *McKown*, at 959, that "A failed HGN test is relevant to impairment in the same manner as the smell of alcohol on the subject's breath. . ." *McKown*, at 959. *Id.* This court, in *Federoff v. Rutledge*, 175 W. Va. 389; 332 S. E. 2d 855 (S. Ct. WV 1985), has already determined that the smell of alcohol has very little relevance to intoxication. Moreover, the smell of an alcoholic beverage is more directly related to alcohol than HGN results. There are not 39 causes of an alcoholic breath. Moreover, an alcoholic breath is not given the heightened status of scientific evidence. It is not a "test" that you "fail" and for which you receive negative "scores."

The *McKown* court was so dubious of the test that, while it recognized the general acceptance under *Frye*, it limited that evidence to "proving that a defendant "may have consumed alcohol and may, as a result, be impaired." (R. Br., at 14 Quoting *McKown*). (Emphasis supplied.) The *McKown* court draws this conclusion even though it conceded that if a driver fails "4 or more clues," he "may or may not be impaired for driving." (R. Br., at 14).

The Respondent seeks to strengthen his argument by citing a multitude of West Virginia cases. (R. Br., at 5-10). However, in none of these cases was the issue of the scientific reliability of the HGN litigated or fully developed. Moreover, this court's holding in *Muscatell* has been disowned by the author of that opinion in his concurrence in *State v. Dilliner*.

In most drunk driving cases, the question as to whether the driver had any alcohol to drink is not an issue. The undersigned cannot recall even one drunk driving case in which the driver did not admit he or she had consumed some alcohol. The issue is not consuming but intoxication. That is the issue where HGN evidence is most damaging, most unreliable, and

most misleading. This is why in this case, where the evidence of intoxication is so weak the results of the HGN test should have been excluded, especially considering the subjective nature of this so called test.

The Commissioner places great reliance on the fact that in DMV hearings there are trained hearing examiners who, he asserts, can reliably determine the weight given to HGN evidence. However, given the history of the prosecutorial orientation of hearing examiners as a result of the training they have received from the Commissioner's legal counsel, it is even more important to limit the evidentiary value of HGN evidence, or to exclude it altogether, in license revocation hearings. Indeed, the DMV had become such a prosecutorial agency the legislature was compelled to deprive it from conducting hearings. Nevertheless, the hearing examiners trained under the old system are still hearing cases. Moreover, the undersigned does not understand why the unreliability of a scientific evidence should be sacrificed to a more liberal standard of proof or to more liberal evidentiary requirements.

It is a reflection of the weakness of the Commissioner's position that in support of its argument that the HGN test is a "well established" and "reliable tool" of DUI detection that it cites the various NHTSA sponsored studies and the conclusions to which they came. (R. Br., at 10-13), but never *once* tries to counter or deflect the many criticisms of these studies or the other scientific studies that raise great doubts about their reliability and validity.

Other than *McKown*, the other out of state case relied upon by the Commissioner is *State v. Baity*, a 2000 Washington Supreme Court case. It first must be emphasized that that case relied upon *State v. Superior Court*, a 1986 Arizona case which has since been discredited by more authoritative decisions. *Baity* was also decided prior to the *Horn*, *Lasworth*, and *McKown*

cases.” Moreover, the *Baity* court applied the *Frye* standard to the admissibility. Most important of all, the issue in *Baity* was not alcohol but drugs and the witness for the State was a drug recognition expert. The court specifically held that “[a] properly qualified expert. . .may render an opinion about the presence or absence of certain categories of drugs in a suspect’s system.” 997 P. 2d at 1161. Even then, it reversed and remanded for the trial court to evaluate whether it was admissible under Rules 702 and 703. *Id.*

In addition, relying on *Baity*, again, Respondent stresses that the unreliability and false positives associated with the test can be cured. . .”through cross-examination and, therefore, deficiencies in the test go to the weight of the evidence rather than admissibility. . .” (R.. Br., at 17). (Quoting *Baity*, at 140 Wn. 2d at 14.) That concession to challenging the reliability of the test is worthless. The officer is not an expert on the scientific reliability of the test. Any cross-examination questions that goes to reliability, false positives, margins of error, acceptance in the scientific community, or *Daubert* standards, can appropriately and successfully be objected to by the state. The officer is a technician, not a scientific expert. His testimony is limited to how he was trained and how he administered the test. To successfully amount a challenge to the scientific reliability of the test would require the driver to hire an expert. As the Commissioner eagerly points out, the vast majority of drivers will not be able to hire an expert. Thus, most drivers will be unable to challenge the admissibility of HGN evidence.

In addition, the Commissioner also emphasizes the fact that the American Optometric Association issued a resolution that declared the test to be scientifically valid and reliable for trained officers to be used in field testing. What the Commissioner fails to disclose is that one of the primary cases he relies upon, i.e., *McKown*, refused to consider that resolution for the

following reasons:

“The American Optometric Association is a professional organization, not a scientific body. Its goals are to set professional standards, lobby government and other organizations on behalf of the profession, and to provide leadership for research and education. . .According to Citek’s testimony, not all members of the profession are members of the Association.

We do not believe that a resolution adopted by the members of a professional organization can be considered evidence of consensus among the members of that profession. Of the 36,000 actual members, it is likely that a fraction were present at the American Optometric Association House of Delegates in 1993 when this resolution was adopted and when it was subsequently reaffirmed. The record contains no information as to the number of members voting for or against the resolution. Thus, rather than expressing general acceptance, the resolution expresses the opinion of a relatively small number of members of the profession.

Further, the purpose of the American Optometric Association resolution was to urge doctors of optometry to “become involved as professional consultants in the use of HGN field sobriety testing.” Thus, rather than expressing a considered professional opinion on the science underlying HGN testing, the resolution expressed an interest in urging members to take advantage of a professional opportunity being created by the emerging acceptance of HGN testing by law enforcement agencies.

Thus, we agree with the defendant on this point and give no weight whatsoever to the Association’s resolution.”

McKown, 236 Ill. 2d at 295-296.

Finally, the other cases relied upon by the Commissioner are equally dubious and misleading. For instance, in *State v. Koch*, another State of Washington case, the State had an expert, a toxicologist, testify to the reliability of the HGN test to establish a blood alcohol level. While the Washington Court of Appeals recognized the unreliability of this evidence, but given the breath test results of 0.141, the court could not say the error was harmful. 703 P. 3d at 1285.

Similarly, in *State v. Leibel*, the Nebraska Court of Appeals held that the evidence was sufficient to establish guilt, “as there was no authority that indicated field sobriety tests *other than the HGN test*, were subject to the scientific validity requirements of *Frye* or *Daubert*. (2002 Neb. App. LEXIS 225 at *1).

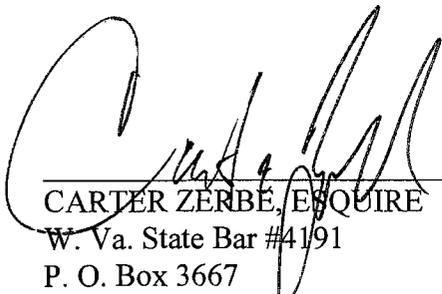
IV. CONCLUSION

For the foregoing reasons, Dr. White requests this honorable court to hold that the results of the test is admissible unless its reliability and validity under *Daubert* is established by expert testimony. If this court rejects that position, the Petitioner requests that like the PBT, the results of the test be limited to probable cause. Further, Dr. White requests this honorable court to reverse his conviction and order the Respondent to dismiss his revocation.

Respectfully submitted,

JOE J. WHITE, JR.

By Counsel



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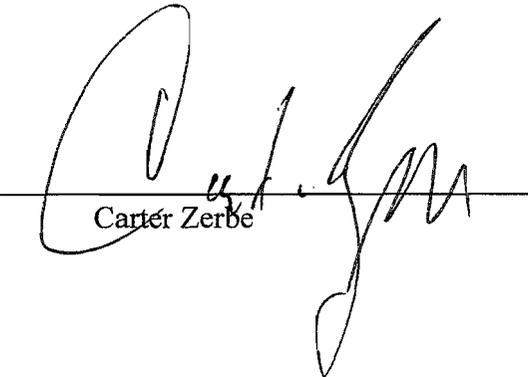
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CERTIFICATE OF SERVICE

I, Carter Zerbe, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Janet James, Asst. Attorney General
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

on this 27th day of February 2012.


Carter Zerbe