Prosecuting Attorneys' Council of Georgia

Georgia

Traffic PROSECUTOR

Traffic Safety Program

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Resources

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Training

Protecting Lives,

Saving Futures

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Forsyth, Georgia

Web sites

Georgia Governor's Office of Highway Safety:
www.gohs.state.ga.us

National Highway Traffic Safety Administration:
www.nhtsa.dot

American Prosecutors Research Institute:

http://www.ndaa.org/apri/

CMI, Inc. www.alcoholtest.com

(Intoxilyer manufacturer)

National Association of Prosecutor Coordinators:
www.napcsite.org

National Traffic Law Center:

www.ndaa.org/apri/programs/traffic/ntlc_home.html

The Accident Reconstruction Network:
www.accidentreconstruction.com

Field Sobriety Tests Under Attack

In May, 2004, the Institute of Continuing Legal Education in Georgia sponsored the "Georgia DUI Update – DUI by the Numbers" Seminar. From the introduction of the first speaker, it became clear that the current plan of attack by defense attorneys, which has come full circle from the mid-1990s, is to once again discredit a law enforcement officer's testimony based upon his/her administration of the Standardized Field Sobriety Tests (SFSTs) to roadside subjects, and to ultimately have this evidence suppressed.

The National Highway Traffic Safety Administration (NHTSA) sponsored scientific research in the 1970s through a contract with the Southern California Research Institute (SCRI) to determine roadside field sobriety tests that were most accurate. The research indicated that three of these tests, when administered in a standardized manner, were a highly accurate and reliable battery of tests for distinguishing BACs above .10, and through current research, BACs above .08. These three Standardized Field Sobriety Tests (SFSTs) are Horizontal Gaze Nystagmus (HGN), Walk-and-Turn (WAT) and One-Leg Stand (OLS). (P. VIII-1, NHTSA SFST Student Manual, 2002)

The 2003 DUI and Vehicular Homicide Course had a workshop to show prosecutors intoxication testing methods.

Nystagmus is defined as an involuntary jerking of the eyes. Alcohol and certain other drugs cause Horizontal Gaze Nystagmus. HGN occurs as the eyes move to the side. It is the observation of the eyes for HGN that provides the first and most accurate test in the Standardized Field Sobriety Test battery. Although this type of nystagmus is most accurate for determining alcohol impairment, its presence may also indicate use of certain other drugs. (P. VIII-4, NHTSA SFST Student Manual, 2002)

Above the Horizontal Gaze Nystagmus test is being administered to an alcohol workshop volunteer.

The Walk and Turn and the One-Leg Stand are considered psychophysical tests, that is, methods of assessing a suspect's mental and physical impairment. Many of the most reliable and useful psychophysical tests employ the concept of divided attention: they require the subject to concentrate on two things at once. The Walk-and-Turn is divided into two stages: Instructional Stage and Walking Stage. The One-Leg Stand is divided into two stages: Instructional Stage and Balance and Counting Stage. (P. VII-1-4, NHTSA SFST Student Manual, 2002)

For each of the Standardized Field Sobriety Tests, NHTSA has assigned a specific number of clues, measurable indicators of impairment, that the officer may observe when a suspect performs the test. For example, one clue for HGN is that the subject's eye cannot follow a moving object smoothly; Walk-and-Turn – the subject cannot keep balance while listening to instructions; and One-Leg Stand – the subject sways while balancing.

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Field Sobriety Tests Under Attack

Written by: Patricia G. Hull, Traffic Safety Prosecutor
Prosecuting Attorneys' Council of Georgia

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There are a total of six possible clues that a subject can exhibit for HGN, eight possible clues for Walk-and-Turn and four possible clues for One-Leg Stand. (P. VII-3-6, NHTSA SFST Student Manual, 2002)

Each year it seems that the defense bar launches an attack upon a different area in DUI law. This year, it appears that the bar is deriving its ammunition for this attack from NHTSA's statement regarding the validation studies: "It is necessary to emphasize the validation of the SFSTs applies only when: The tests are administered in the prescribed standardized manner; the standardized clues are used to assess the suspect's performance and the standardized criteria are employed to interpret that performance. If any one of the SFST elements is changed, the validity is compromised." (P. VIII-19, NHTSA SFST Student Manual, 2002)

The Georgia Court of Appeals has determined that field sobriety tests such as the "walk and turn" and the "one leg stand," both of which demonstrate a suspect's dexterity and ability to follow directions, do not constitute scientific procedures. *State v. Pastorini*, 222 Ga. App. 316, 319 (1996). Testimony from an officer about a suspect's inability to complete such dexterity tests is considered behavioral observations by the officer. Id. Therefore, these two tests and any testimony concerning their administration are not subject to the standard set out in *Harper v. State*, 249 Ga. 519, 525 (1982), for determining whether a scientific procedure is admissible. The Court further opined that if the officer fails to administer the tests in accordance with his training, such variance affects only the weight to be given to the tests, and not their admissibility. The weight and credibility of evidence such as this should be left for jury determination. *Coates v. State*, 216 Ga. App. 93 (1995). On the other hand, the court found that the Horizontal Gaze Nystagmus test constitutes a scientific procedure and could be excluded if the trial court concluded that the test's administration was invalid. *Manley v. State*, 206 Ga. App. 281 (1992); *State v. Pastorini*, 222 Ga. App. 316, 319 (1996).

In the seminar, the defense listed the following as the top ten "must know" SFST cases for attorneys: *Bravo v. State*, 249 Ga. App. 433 (2001); *Hawkins v. State*, 223 Ga. App. 34 (1996); *State v. Holler*, 224 Ga. App. 66 (1996); *Howell v. State*, 2004 Ga. App. LEXIS 413 (2004); *State v. Leviner*, 213 Ga. App. 99 (1994); *State v. O'Donnell*, 225 Ga. App. 502 (1997); *State v. Pastorini*, 222 Ga. App. 316 (1996); *State v. Pierce*, 266 Ga. App. 233 (2004); *Price v. State*, 269 Ga. 222 (1998); and *Turrentine v. State*, 176 Ga. App. 145 (1985).

The challenge for prosecutors is to adequately prepare the officer for this attack. The prosecutor and officer, as a team, must discuss any problems with the administration of the SFSTs and fully assess whether this performance compromised the validity of the evaluation. If both members of the team are cognizant of the potential attacks by the defense, these weaknesses can be brought out on direct examination and turned around for possible strengths. ●

Protecting Lives, Saving Futures

This training, developed by the American Prosecutors Research Institute's, National Traffic Law Center, is designed to train law enforcement and prosecutors together in the detection, apprehension and prosecution of impaired drivers (alcohol and other drugs), and youthful offenders.

Law enforcement officers and prosecutors will learn firsthand the challenges and difficulties each other face in impaired driving cases. This allows for a greater understanding on the part of law enforcement officers as to what evidence prosecutors must have in an impaired driving case. Conversely, this will give prosecutors the opportunity to know what to reasonably expect from officers at the arrest scene and to learn to ask better questions. They will also learn from toxicologists about breath, blood and urine tests. Optometrists will teach about the effects of alcohol and other drugs on an individual's eyes, specifically horizontal gaze nystagmus (HGN). ●

**Reprinted from NHTSA's web site.*

Cooper and the Unconscious DUI 'Suspect'

Written by: Logan Butler, Third Year Law Student, Georgia State College of Law; Intern, Prosecuting Attorneys' Council of Georgia

How does *Cooper v. State*, 277 Ga. 282; 587 S.E. 2d 605 (2003), and its progeny affect the ability of the State to obtain blood samples for DUI analysis from persons who are unconscious or otherwise unable to refuse consent where they have not yet been placed under arrest because their injuries are being treated at the hospital? O.C.G.A. § 40-5-55(b) permits the State to obtain such samples from "[a]ny person who is dead, unconscious, or otherwise in a condition rendering such person incapable of [refusing the test]." In *Cooper*, the Court did not address this section of the implied consent statute. However, the logic used to support the *Cooper* decision could easily be applied to situations where samples have been obtained pursuant to O.C.G.A. § 40-5-55(b). In order to defend against a Cooper challenge to DUI evidence obtained pursuant to subsection (b) of the implied consent statute, the officer should have probable cause before having a sample extracted from a person who is "dead, unconscious, or otherwise in a condition rendering [that] person incapable of [refusing the test]."

The Georgia Supreme Court's decision in *Cooper v. State*, 277 Ga. 282 (2003), found a portion of the Georgia implied consent statute unconstitutional. Specifically, the State may no longer rely on implied consent for obtaining samples for DUI analysis where that consent is based solely on the fact that the person was involved in a traffic accident involving a fatality or serious injury. The State must have probable cause to believe that the driver was driving while impaired in order to obtain the sample. *Cooper v. State*, 277 Ga. 282, 291 (2003). Also, the driver must be placed under arrest for the implied consent statute to be applicable. O.C.G.A. § 40-5-55(a).

In *Buchanan v. State*, 264 Ga. App. 148; 589 S.E.2d 876 (2003), the results of the chemical test of the defendant's blood were excluded. The defendant was not under arrest but was told he had to submit to the testing because he was involved in an accident involving a serious injury. *Buchanan,* 264 Ga. App. 148, 149. The court held that the results of the test were inadmissible because the chemical test was conducted based on the seriousness of the injuries in an accident rather than on probable cause that the person had violated the Georgia DUI statute. *Id.* at 150.

Photo from www.car-accidents.com

Currently, under Georgia law, implied consent to chemical testing for DUI analysis cannot be invoked based solely on the seriousness of injuries received in an accident. This effectively leaves the State with three options:

(1) a sample may be extracted via implied consent where the person has been arrested and probable cause exists supporting the DUI arrest;

(2) a sample may be extracted where the person has voluntarily given consent; and

(3) a sample may be extracted pursuant to O.C.G.A. § 40-5-55(b) if the person is dead, unconscious, or otherwise unable to refuse consent. However, relying solely on § 40-5-55(b) to obtain evidence for a DUI prosecution may leave the State vulnerable to a *Cooper* challenge to the admissibility of that evidence.

Neither *Cooper v. State*, 277 Ga. 282 (2003), nor *Buchanan v. State*, 264 Ga. App. 148 (2003), address the validity of O.C.G.A. § 40-5-55(b). However, § 40-5-55(b) was addresses by the Georgia Court of Appeals in *Collier v. State*, 2004 Ga. App. LEXIS 465 (Apr. 5, 2004). In *Collier*, the police read the defendant his implied consent rights after he was arrested but the defendant refused to submit to a chemical test. The police then threatened to get a search warrant and to forcibly obtain the samples by using a catheter. The defendant then gave his consent to the chemical test. *Collier*, 2004 Ga. App. LEXIS 465 at *4. The court held that the chemical test results were inadmissible because the defendant was misled about the consequences of refusing to consent to the tests. *Id*. at *9. In reaching this decision, the court clarified a statement it made in *Buchanan v. State*, 264 Ga. App. 148 (2003). The court stated: "*Buchanan*'s statement that testing may be authorized without an accused's 'actual consent' refers to the situation where the accused is unconscious and does not give 'actual consent'…nor does he withdraw the implied consent authorized under [O.C.G.A. § 40-5-55(b)], and therefore testing is permissible under those circumstances." *Collier*, 2004 Ga. App. LEXIS 465 at *8; see also *Buchanan v. State*, 264 Ga. App. 148, 150.

The *Collier* decision appears to give full effect to O.C.G.A. § 40-5-55(b) which states: "Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this Code section, and the test or tests may be administered, subject to Code Section 40-6-392." Additionally, because the Georgia Constitution allows the State to compel citizens to take a blood or breath test, the Georgia implied consent statute grants a suspect the opportunity to refuse to take a chemical test. *Cooper*, 277 Ga. 282, 290; see also *Allen v. State*, 254 Ga. 433; 330 S.E. 2d 588 (1985).

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PAC's Traffic Safety Program

Mission Statement: Our goal is to effectively assist and be a resource to our fellow prosecutors in keeping our highways safe by helping to prevent deaths and accidents on Georgia roads.

The ***Georgia Traffic Prosecutor*** addresses a variety of matters affecting prosecution of traffic-related cases, and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic related matters. If you have suggestions or comments, please contact Fay McCormack or Patricia Hull at PAC.

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This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia. The *Georgia Traffic Prosecutor* encourages readers to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PACOG or the Council staff. Please send comments, suggestions or articles to Fay McCormack at fay.mccormack@pac.state.ga.us.

Cooper and the Unconscious DUI 'Suspect'

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This reasoning seems to support the validity of O.C.G.A. § 40-5-55(b). However, the *Cooper* decision limits the applicability of this reasoning. *Cooper* states that the use of the word 'suspect' in *Allen*'s statement that the Georgia implied consent statute grants a suspect the opportunity to refuse to take a chemical test reveals a flaw. In order to obtain a sample for chemical testing pursuant to the implied consent statute the person tested must be suspected of DUI. The portion of the implied consent statute that allows for testing without individualized suspicion or probable cause simply because the person was involved in an accident with injury is constitutionally flawed. *Cooper* further distinguishes *Allen* in that under the facts of *Allen*, the defendant was under arrest for DUI thus providing the State with probable cause to gain consent. *Cooper*, 277 Ga. 282, 292. The defendant in *Cooper* was not under arrest. Moreover, situations that would allow the State to withdraw samples for chemical testing pursuant to O.C.G.A. § 40-5-55(b) are necessarily situations were the suspects have not yet been placed under arrest because they are being treated for injuries.

Under the facts posed by the question at issue, the potential defendant is not yet under arrest and is probably best described as a suspect. Without some basis of probable cause, the State probably cannot take a sample for a chemical test based solely on the fact that the person is incapable of refusal pursuant to O.C.G.A. 40-5-55(b). Although subsection (b) of the implied consent statute provides that a person incapable of refusal will be deemed to have consented, the facts under which these situations arise are very similar to the facts of *Cooper*. Where *Cooper* does not allow the State to obtain a sample based solely on the fact that a person was involved in an accident with injury, it logically follows that a court could hold that the State may not obtain a chemical test sample based solely on the fact that a person was unable to refuse pursuant to O.C.G.A. § 40-5-55(b). However, O.C.G.A. § 40-5-55(b) has not been determined unconstitutional by the Court yet. The State may rely on O.C.G.A. § 40-5-55(b) to obtain samples for chemical testing from persons who are dead, unconscious, or otherwise unable to refuse consent. However, to protect against a *Cooper* challenge to the admissibility of such evidence, officers should also be able to articulate probable cause that the person tested was operating a vehicle under the influence. Samples should not be taken for chemical analysis based solely on the fact that the person is dead, unconscious, or otherwise unable to refuse. ●