THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-001871

City of North Charleston, ...Respondent,

v.

John Barra, ...Appellant,

REPLY BRIEF OF APPELLANT

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STATUTES

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I. THIS COURT SHOULD DISTINGUISH THIS CASE FROM THE SUPREME COURT'S RECENT OPINION IN *STATE V. GORDON* BECAUSE THE ONE-LEG STAND REQUIRES A CLEAR VIEW TO ASSESS A SUBJECT'S PERFORMANCE ON THE TEST.

In *State v. Gordon*, Opinion 5226 (S.C.Ct.App. filed June 11, 2014), *affirmed as modified*, Opinion 27554 (S.C.Sup.Ct. filed August 5, 2015), this Court ruled that the horizontal gaze nystagmus ("HGN") test required the head to be shown on the video to comply with S.C. Code Ann. § 56-5-2953. In *State v. Gordon*, Opinion 27554 (S.C.Sup.Ct. filed August 5, 2015), the Supreme Court upheld the portion of the opinion imposing such requirement. Specifically, the Supreme Court stated:

> The statute states that the video recording "must include any field sobriety test administered," which necessarily includes the HGN test. Considering the fact that the HGN test focuses on eye movement, common sense dictates that the head must be visible on the video. Accordingly, the circuit court's finding that the head must be visible does not amount to a hyper-technicality, but merely states the obvious. The Court of Appeals did not err in affirming this requirement.
>
> Here, the officer's administration of the HGN test is visible on the video recording. It is undisputed that Gordon's face is depicted in the video; it is axiomatic that the face is a part of the head. The officer's flashlight and arm are visible as he administers the test. Also, the officer's instructions were audible. Thus, the requirement that the head be visible on the video is met and the statutory requirement that the administration of the HGN field sobriety test be video recorded is satisfied. Therefore, the per se dismissal of the charge as discussed in Town of Mount Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011), and City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is not appropriate.
>
> Even if we assume that the video of a field sobriety test is of such poor quality that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge. Instead, the remedy would be to redact the field sobriety test from the video and exclude testimony about the test. If that remedy is applied here, there is still sufficient evidence to present this case to a jury for resolution. The evidence included the breath alcohol analysis report, video of other field sobriety tests, and Gordon's statement that he had consumed four beers.
>
> Neither Gordon nor the State would have been prejudiced by the exclusion of the HGN test video or testimony because of the alleged poor quality of the video. Since the focus of the HGN test is the movement of the eyes, the jury would not

> have been able to determine if Gordon passed or failed by simply looking at this video. Moreover, the viewing of a video of an HGN field sobriety test has very little probative value to a jury because the eyes of the motorist are rarely, if ever, seen.

Here, unlike *Gordon*, the one-leg stand ("OLS") does not focus on eye movement. The OLS's focus, as explained in Appellant's initial brief, is on **balance**, and the jury *would* have been able to determine whether Appellant passed or failed by reviewing a video of sufficient quality. The Supreme Court noted that: (1) the face, which is part of the head, was depicted in the video, (2) the officer's flashlight and arm were visible as he administered the test, and (3) the officer's instructions were audible. So, all of the things required to review the administration and performance of the video for this test were present. With the OLS, as described in Appellant's initial brief, there are four clues that the officer looks for in administering the test: (1) swaying while balancing, (2) using arms for balance by raising them more than 6 inches from his or her sides, (3) hopping to maintain balance, and (4) putting the foot down one or more times during the 30-second test. Of these four clues, it is impossible to determine whether Appellant swayed while balancing or whether he used his arms for balance. It is also very unclear whether he may have been hopping. The only of the four clues that are easy to review from the video in this case is when Appellant's foot was up or down. These factors create a completely different scenario from that in *Gordon*, and the deficient video during the OLS in this case is much more likely to conceal *exculpatory* evidence. While a prejudice analysis is not required for a 56-5-2953 dismissal, the prejudice here in inherent.

This Court should not construe the *Gordon* opinion to state that a video of poor quality does not entitle a criminal defendant to the statutory right to dismissal when the arresting officer fails to submit an affidavit explaining the deficiency. The *dicta* in *Gordon*, if applied at all,

should be limited to the HGN test. Additionally, the petition for rehearing in *Gordon*, filed August 20, 2015, is still pending.

II. JURISDICTIONS OTHER THAN OHIO HAVE MADE SIMILAR RULINGS TO *STATE V. HOMAN* REGARDING THE HORIZONTAL GAZE NYSTAGMUS TEST.

In its brief, Respondent states that "Appellant only cites *State v. Homan* (citation omitted) which Respondent believes is Ohio law made by Ohio lawyers best left in Ohio." However, other jurisdictions have made similar rulings with regard to the horizontal gaze nystagmus ("HGN") test. While none to date have either accepted or rejected the rule of strict compliance rule set forth in *Homan* with regard to all field sobriety tests, a majority of jurisdictions have rejected admission of the horizontal gaze nystagmus test ("HGN") when the arresting officer does not properly administer the test.

"The established rule in [Montana] is that the proper evidentiary foundation for admission of the results of an HGN test is a showing that the test was properly administered by the officer, along with expert testimony demonstrating a scientific basis for the reliability of the test results." *State v. Geiser*, 2011 MT 2, ¶ 10, 359 Mont. 95, 248 P.3d 300 (emphasis added); *see also State v. Chavez-Villa*, 2012 MT 250, ¶ 15, 366 Mont. 519, 289 P.3d 113.

In *State v. O'Key*, 321 Or. 285, 322-23, 899 P.2d 663, 689 (1995), the Supreme Court of Oregon held that "subject to a foundational showing that the officer who administered the test was properly qualified, the test was administered properly, and the test results were recorded accurately, HGN test evidence is admissible in a DUII proceeding to establish that a defendant was under the influence of intoxicating liquor[47] but, under ORS 813.010(1)(a), is not admissible to prove that a defendant had a BAC of .08 percent or more."

A majority of other jurisdictions have arrived at similar conclusions. *See*, e.g., *State v. Zivcic*, 229 Wis.2d 119, 128, 598 N.W.2d 565, 570 (1999) ("[a]s long as the HGN test results are accompanied by the testimony of a law enforcement officer who is properly trained to administer and evaluate the test," evidence is admissible); *Ballard v. State*, 955 P.2d 931, 940 (Alaska App.1998) (holding police officer may testify to results of HGN testing if government establishes officer adequately trained in administration and assessment of test); *Williams v. State*, 710 So.2d 24, 32 (Fla.App.1998) (noting "HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified [person]"); *State v. Taylor*, 694 A.2d 907 (Me.1997) (holding proper foundation for admission of HGN test is evidence that officer or administrator of test is trained in procedure and test properly administered); *People v. Berger*, 217 Mich.App. 213, 551 N.W.2d 421 (1996) (holding because HGN test satisfied Frye standard, only foundation necessary for introduction of evidence regarding HGN test is evidence that test properly performed and officer administering test qualified to perform it); *Schultz v. State*, 106 Md.App. 145, 664 A.2d 60 1995) (holding HGN results admissible in future cases without reference to Frye standard if officer properly qualified and test conducted properly); *People v. Leahy*, 8 Cal.4th 587, 882 P.2d 321, 34 Cal.Rptr.2d 663 (1994) (holding once Frye standard met in published opinion regarding HGN, prosecution not required to submit expert testimony to jury, and police officers are sufficient to testify to results of HGN tests); *State v. Hill*, 865 S.W.2d 702 (Mo.App.1993), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518 (Mo.1997) (holding when properly administered by adequately trained personnel, HGN test admissible as evidence of intoxication); *State v. Armstrong*, 561 So.2d 883 (La.App.1990) (proper foundation

for admitting HGN test is showing officer trained in procedure, certified in its administration, and procedure properly administered).

For the reasons set forth in Appellant's initial brief, and with support of the other jurisdictions that have imposed the same standard regarding the HGN test, this Court should remand this case for a new trial so that the trial judge can review the officer's administration of the field sobriety tests in a suppression hearing.

CONCLUSION

This case is distinguishable from *Gordon* because Appellant's performance on the one-leg stand requires a clear view of Appellant and his balance. Further, a majority of jurisdictions have required proper administration of the horizontal gaze nystagmus test before allowing evidence of this test to be admitted into evidence.

For the reasons set forth in Appellant's initial and reply briefs, this Court dismiss the charge of driving under the influence against Appellant because the video recording of the incident site does not properly capture the one leg stand field sobriety test in that one cannot evaluate Appellant's balance due to the defective recording of this test. Regarding the "clues" that the officer looks for, it cannot be determined whether Appellant swayed or used arms for balance during this test, and potentially exculpatory evidence was lost. Additionally, the arresting officer did not submit any affidavit stating that the camera did not work properly at the time and that reasonable efforts have been made to keep it in good working order.

If this Court does not dismiss the charge of driving under the influence, it should remand for a new trial because the municipal judge admitted the field sobriety tests into evidence without considering the degree of compliance by the arresting officer with the testing protocol. As shown throughout Appellant's briefs, the officer deviated from the proper administration

protocol on numerous occasions and marked "failing" clues against Appellant for things for which the officer omitted instructions. Upon such remand, this Court should direct the municipal judge to consider whether the officer strictly complied with the procedures, or in the alternative, substantially complied. At a minimum, the municipal judge should be required to conduct a thorough 403 prejudice analysis while considering the deficiencies in the officer's administration of the tests.

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Dated: 11/3/15

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PROOF OF SERVICE OF FINAL BRIEF OF APPELLANT, REPLY BRIEF OF APPELLANT, AND RULE 211 CERTIFICATE

I hereby certify that I have served (1) Final Brief of Appellant, (2) Reply Brief of Appellant, and (3) Rule 211 Certification on the following by United States Mail, postage prepaid, on November 4, 2015, addressed as follows:

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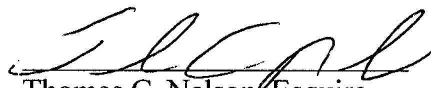
RULE 211 CERTIFICATE

The undersigned hereby certifies that Appellant's final brief and final reply brief both comply with Rule 211(b), SCACR.



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