

Challenging DWI Detection and Field Sobriety Test Results.

NHTSA definition of DWI Detection:

The entire process of identifying and gathering evidence to determine whether or not a suspect should be arrested for a DWI violation.

Three Phases of DWI Detection;

1. Vehicle in Motion
2. Personal Contact
3. Pre-Arrest screening

Need to try to establish innocence and good facts before you even get to the field sobriety tests. Driving and the field sobriety tests are both divided attention tasks. Look for the good and point it all out.

Vehicle In Motion

This is the officers first opportunity to observe the vehicle and to note any Cues of a possible DWI violation.

24 Common Cues while the vehicle is in motion

- Weaving 60%
- Weaving across lane lines
- Straddling a Lane Line 65%
- Swerving 55%
- Turning with Wide Radius 65%
- Drifting 50%
- Almost Striking Object or Vehicle 60%
- Stopping problems (too far, short or jerky)
- Accelerating or Decelerating Rapidly 30%
- Varying Speed
- Slow Speed (10mph or more under limit) 50%
- Driving in opposing lane or Wrong Way on one way Street 45%

- Slow Response to Traffic Signals 40%
- Slow or Failure to Respond to Officer's Signals
- Stopping in Lane for No Apparent Reason 50%
- Driving without Headlights At Night 30%
- Failure to Signal or Signal Inconsistent with Action 40%
- Following Too Closely 50%
- Improper or Unsafe Lane Change
- Illegal or Improper Turn 35%
- Driving on Other Than Designated Roadway 55%
- Stopping Inappropriately in Response to Officer 35%
- Inappropriate or Unusual Behavior (throwing objects, arguing, etc)
- Appearing to be Impaired 60%

For two or more cues add 10 to the highest one and it changes the percentage.

Percentages are based off an old 1992 study, but are still used.

During the Vehicle in Motion Stage, the officer must determine whether to pull the car over, continue to observe, or move on to something else.

Phase II

Personal Contact:

The major decision of phase two is to determine **whether there is sufficient reason to instruct the driver to step out of the vehicle.**

Describable clues that an officer might see during Phase Two include: Bloodshot eyes, soiled clothing; fumbling fingers, alcohol containers, drugs or PDP, bruises, bumps, scratches, and other unusual actions.

Describable clues that an officer may hear during this phase include: slurred speech, admission of drinking, inconsistent responses, abusive language, and unusual statements.

Describable clues the officer may smell include: Alcoholic beverages, marijuana, "cover- up" odors like breath sprays or perfumes, and other unusual odors.

The initial face to face contact usually provides the first definite indication that the driver may be impaired. Things to keep in mind: from the moment the driver steps out of the vehicle the physical testing has already begun. If the officer instructs the driver to follow him to the patrol car, then the officer is trusting someone he believes to be impaired to safely walk behind him. If the officer testifies that the driver was nervous....lots of people get nervous when pulled over and start stumbling on their words.

If the officer's only point is that there was an odor of alcohol. Ask the officer on the stand, does odor alone mean that someone is intoxicated? The answer is No.

Remember when the officer talked to your client at the scene, he probably used complex questions, distracting and interrupting questions, and unusual questions. Part of your defense could be to use some of these questions during trial to demonstrate using the officer himself, which these types of questions are not easy to answer.

Put yourself at the scene and ask the questions: Did Mr. Smith provide his license and registration ok? Did he have difficulty getting out of his car? Did he stumble? Lean on car? Trip? Fall into the patrol car? Follow these questions all the way to the magistrate.

Phase III

PRE-ARREST SCREENING

The major decision in this phase is; **Is there probable cause to arrest the suspect for DWI?** The first task of this phase is to administer **THREE SCIENTIFICALLY VALIDATED** psychophysical sobriety tests. The second task is the preliminary breath test (PBT).

The psychophysicals are all divided attention tests. The one leg stand and the walk and turn should not be administered to people over the age of 65 or to people who are more than 50 lbs overweight.

The big Three: One Leg Stand
 Walk and Turn
 Horizontal Gaze Nystagmus

ONE LEG STAND:

This test has two phases; the first is the instruction stage and the second is the balancing and counting stage. During the instruction state the subject must stand with his feet together, arms down at his side and listen to and remember all instructions.

Instruction sheet provided.

Research has shown that many impaired subjects can stand on one leg for up to 25 seconds, but few can do it for 30 seconds. The officer is actually supposed to time this test with his watch.

There are four specific clues for this test:

- Sways while balancing
- Uses arms to balance
- Hops
- Puts foot down.

Inability to complete this test occurs when the subject puts his foot down three or more times, or when the subject can not do the test. Research shows that when a subject produces two or more of the clues, or is unable to do the test, it is likely that the BAC is above 0.10. This criteria has proven to be accurate 65% of the time.

Other issues on the One leg stand may include, the surface the subject is standing on, the type of shoes the subject is wearing and/or previous leg injuries. Imaginary line or real line?

WALK AND TURN:

This test also has two stages: the instruction stage and the walking stage. During the instruction stage, the subject must stand with their feet in heel to toe position, keep arms at the side, and listen to all the instructions.

On this test the officer is looking for eight clues:

- Can't balance during instructions
- Starts too soon
- Stops while walking
- Doesn't touch heel to toe

Steps off the line
Uses arms to balance
Loses balance on turn or turns incorrectly; and
Takes the wrong number of steps.

Each clue may be seen more than once, but only counts as one clue. Inability to complete this test occurs when the suspect steps off the line three or more times, is in danger of falling, or cannot do the test. If the suspect exhibits two or more clues or cannot complete the test, the suspect's BAC is likely to be above 0.10. This has been shown to be accurate 68% of the time.

HORIZONTAL GAZE NYSTAGMUS

This test is determined to be the most reliable field sobriety test. "Nystagmus" means involuntary jerking of the eyes. The more impaired a subject is, the sooner the jerking will begin as the eyes move side to side. The officer should check both eyes and always begin with the left eye.

He will be checking for three specific clues:

- As the eye moves, does it move smoothly or does it jerk noticeably?
- When the eyes moves all the way to the side, and is kept there for several seconds, does it jerk noticeably?
- As the eye moves to the side, does it start to jerk prior to a 45 degree angle?

The maximum number of clues for each eye is three, for a total number of six clues. Original research shows that if four or more clues are evident, it is likely that the suspect's blood alcohol concentration is about 0.10. This test is 77% accurate.

There are three categories of Nystagmus:

1. Vestibular - caused by movement or action to the vestibular system.
 - A. Rotational - when a person is spinning
 - B. Post rotational- when the person stops spinning
 - C. Caloric - then the fluid in the inner ear stimulated by temperature, such as warm water in one ear and cold in the other.

- D. Positional Alcohol - occurs when a foreign fluid, such as alcohol, that alters the specific gravity of the blood is in unequal concentrations in the blood and vestibular system.
- 2. Nystagmus can also result directly from neural activity.
 - A. Optokinetic Nystagmus occurs when the eyes fixate on an object that suddenly moves out of sight, or when the eyes watch sharply contrasting moving images. Such as strobe lights, rotating lights, or rapidly moving traffic in close proximity.
 - B. Physiological Nystagmus is a natural nystagmus that keeps the eyes from tiring. It is the most common and occurs in everyone, all the time, but is too small to see with the naked eye.
 - C. Gaze Nystagmus occurs as the eyes move from the center position. It is separated in three types.
 - 1. **Horizontal**. This is the first and most accurate test. It's presence is most accurate for determining alcohol impairment, but may also indicate use of certain other drugs.
 - 2. **Vertical**. When the eyes gaze upwards. Associated with high doses of alcohol and certain other drugs.
 - 3. **Resting**. When the eyes look straight ahead. Its presence indicates a pathology or high doses of a Dissociative Anesthetic drug such as PCP.
- 3. Nystagmus may also be caused by pathological disorders, including brain tumors and other brain damage or some diseases of the inner ear. Occur very rarely.

Prior to administering the HGN test, the eyes are checked for equal pupil size, resting nystagmus, and equal tracking. If the eyes do not operate equally, pupils are not equal, or there is a nystagmus, the test must not occur as there is a medical condition present. The stimulus should be held 12 -15 inches in front of the suspect and just above eye level.

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Clue Number One: The Lack of Smooth Pursuit. This part of the test requires 2 passes for each eye. Counting 2 seconds out and then the other side. Complete this twice.

Clue Number Two: Distinct and Sustained Nystagmus At Maximum Deviation. Take the eye as far as possible to the side with no white showing. Hold the stimulus in this position for at least 4 seconds. Do the other eye and hold at least four seconds. Repeat the passes. Have to hold because everyone's eye will jerk at maximum deviation, but an unimpaired person's eyes will adjust rapidly.

Clue Number Three: Onset of Nystagmus Prior to 45 Degrees. If the person's eyes begin jerking prior to 45 degrees, it is evident that the person has a BAC above 0.08. The higher the degree of impairment, the sooner the nystagmus will be observable. On this phase of the test, the officer should move very slowly requiring a four second count to get to the 45 degree position. When the eye starts to jerk, stop movement and verify that the jerking continues. This test should also be repeated for a total of two passes for each eye.

Note: Nystagmus may be due to causes other than alcohol. These other causes include seizure medications and some other drugs. A large disparity between the performance of the right and left eye may indicate a medical condition.

Other conditions that may interfere with the suspect's performance of the HGN include wind, dust, etc. irritating suspect's eyes. Also visual or other distractions impeding the test. Suspect should always be facing away from rotating lights, strobe lights, and traffic passing in close proximity.

Reference:

U.S. Department of Transportation 2006, *DWI Detection and Standardized Field Sobriety Testing, Student Manual.*