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Back to the basics: Challenging the accuracy of field sobriety tests

By Rachel J. Hess

Scenario: Police officer observes Defendant's vehicle speeding and initiates a traffic stop on the vehicle. Based on observations made after the stop the officer conducts a DUI investigation. Defendant submits to standardized field sobriety tests including the Horizontal Gaze Nystagmus test ["HGN"]. Defendant is arrested and charged with various offenses of the Illinois Vehicle Code including but not limited to Driving Under the Influence of Alcohol in violation of 625 ILCS 5/11-501(a)(1), (2). Defendant files a motion to quash arrest and suppress evidence. At the hearing, the officer testifies that he administered the tests according to how he was trained but admits that he was not trained in accordance with the standardized field training manual used by the National Highway Traffic Safety Administration ("NHTSA Testing Manual").[1] The issue raised in this scenario is not whether the test results are admissible, but rather, whether or not they are *reliable* based upon the officer's admission that he does not administer the tests according to NHTSA standards.

Argument

Generally, in order for a "test" to be considered valid, it must be supported by a reasonable degree of validity in accordance with *Frye v. United*

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The Illinois Supreme Court rules on the constitutionality of suspension of driving privileges if a person receives court supervision for unlawful consumption of alcohol under 21 years of age

By Lisa L. Dunn

On June 24, 2010, the Illinois Supreme Court filed an opinion declaring that section 6-206(a)(43) of the Illinois Vehicle Code is constitutional. *People v. Boeckmann*, Docket Nos. 108289, 108290 cons. Section 6-206(a)(43) of the Illinois Vehicle Code requires suspension of driving privileges if a person receives court supervision for unlawful consumption of alcohol under 21 years of age.

Facts

This was a consolidated appeal from the circuit court of Clinton County where two defendants were each charged with unlawful consumption of alcohol by a person under 21 years of age (235 ILCS 5/6-20(e)). The Defendants pled guilty to unlawful consumption of alcohol as charged. The Defendants alleged in the trial court that sections 6-206(a)(38) and (a)(43) of the Illinois Vehicle Code, as applied, violated their constitutional rights to due process and equal protection of the law of the United States and

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***(Notice to librarians:** The following issues were published in Volume 19 of this newsletter during the fiscal year ending June 30, 2009: July, No. 1; September, No. 1; December, No. 2; March, No. 3; June, No. 4).*

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pass, fail, etc., because such terms are prejudicial, misleading and invade the province of the trier of fact. *See Sides.* ■

1. U.S. Department of Transportation HS 178 R2/06, DWI Detection and Standardized Field Sobriety Testing, Student Manual (2006).

2. *Citing* National Highway Traffic Safety Administration, U.S. Department of Transportation, Psychophysical Tests for DWI Arrests, No. DOT-HS-802-424 at 39 (June 1977).

3. *Citing* National Highway Traffic Safety Administration, U.S. Department of Transportation, Field Evaluation of a Behavioral Test Battery for DWI, No. DOT-HS-806,475 at 4 (September 1983).

4. 1. HGN testing satisfies the *Frye* standard in Illinois. 2. HGN testing is but one facet of field sobriety testing and is admissible as a factor to be considered by the trier-of-fact on the issue of alcohol or drug impairment. 3. A proper foundation must include that the witness has been adequately trained, has conducted testing and assessment in accordance with the training, and that he administered the particular test in accordance with his training and proper procedures. 4. Testimony regarding HGN testing results should be limited to the conclusion that a "failed" test suggests that the subject may have consumed alcohol and may [have] be[en] under the influence. There should be no attempt to correlate the test results with any particular blood-alcohol level or range or level of intoxication. 5. In conjunction with other evidence, HGN may be used as a part of the police officer's opinion that the subject [was] under the influence and impaired.

5. NHTSA analyzed the Laboratory and field-testing test data of sobriety tests and determined that:

a) the HGN by itself was 77% accurate
b) the Walk-and-Turn by itself was 68% accurate
c) the One-Legged Stand by itself was 65% accurate

6. The National Traffic Law Center (NTLC) has a list of every state's Appellate Court/Supreme Court cases addressing HGN and SFST issues. The materials are available to law enforcement at <http://www.ndaa.org/ntlc_home.html> or by phone (703) 549-4253.

7. "The evidence gathered during the detection process must establish the elements of the violation and must be documented to support successful prosecution of the violator." NHTSA Testing Manual, pg. IV-7.

8. Field notes may be subpoenaed as evidence in court.

The Illinois Supreme Court rules on the constitutionality of suspension of driving privileges if a person receives court supervision for unlawful consumption of alcohol under 21 years of age

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Illinois Constitutions as well as the proportionate penalties clause of the Illinois Constitution. The Secretary of State (Secretary) was granted leave to file an appearance. The trial court found section 6-206(a)(43) unconstitutional on due process grounds as applied to the defendants. The trial court rejected the defendants other constitutional challenges based on the equal protection and proportionate penalties clauses. This appeal to the Illinois Supreme Court followed.

Analysis

Under section 6-206(a)(43) of the Illinois Vehicle Code, the Secretary is required to suspend for three months the driving privileges of any person receiving court supervision for a violation of section 6-20 of the Liquor Control Act (235 ILCS 5/6-20). The Secretary argued that the suspension of the defendants' driving privileges for unlawful consumption of alcohol bears a rational relationship to legitimate governmental interest in highway safety. The prevention of young people who consume alcohol from driving is a reasonable means of furthering the interest in highway safety, argued the Secretary. Finally, the Secretary argued that the suspension of defendants' driving privileges is a reasonable means of promoting the legitimate public interest in deterring underage consumption of alcohol.

The defendants' relied on *People v. Lindner,* 127 Ill.2d. 124 (1989) and argued that suspending their driving privileges does not bear a rational relationship to the public interest in the safe operation of motor vehicles because no vehicle was involved in the commission of their offenses. And, they argued, the suspension of driving privileges in all cases of underage consumption of alcohol is not a reasonable means of promoting the public interest in highway safety.

First, the Supreme Court pointed out that all statues are presumed to be constitutional. Second, the court has held that a driver's license is a non-fundamental property interest. *Lindner,* 127 Ill.2d at 179. Third, the applicable standard of review is the rational basis test. When applying the rational basis test, the Court must identify the public interest the statute intended to protect, determine whether the statute bears a rational relationship to that interest, and examine whether the method chosen to protect or further that interest is reasonable. *Lindner,* 127 Ill.2d at 180.

The court found that the public interest that the statute is intended to protect is "the safe and legal operation and ownership of motor vehicles." *Lindner,* 127 Ill.2d at 182. The court found that since it is reasonable to believe that a young person who disobeys the law by engaging in the underage consumption of alcohol may also lack the judgment to decline to drive after drinking and therefore the statute in question bears a rational relationship to the interest of the state in promoting the safe and legal operation of motor vehicles. The court explained that the rationale in *Lindner* is whether the revocation of driving privileges bears a rational relationship to the public interest in the safe operation of motor vehicles. Since the underage consumption of alcohol will impact one's ability to drive a motor vehicle safely, there is a connection between the offense and ability to drive. Finally, the court concluded that the suspension of the defendants' license for underage consumption of alcohol is a reasonable method of promoting the public interest despite the absence of a motor vehicle or plans to drive.

The court next examined cases in other jurisdictions that upheld similar statutes when there were substantive due process challenges. The court declined to overrule *Lindner* as wrongly decided because it defined the public purpose of the statute too narrowly. Since the parties did not ask the court to overrule *Lindner* herein, the Supreme Court did not consider that but in dicta stated in a future case, parties can ask for *Lindner* to be overruled.

The Defendants also asked the court to find 6-206(a)(43) unconstitutionally arbitrary as applied because the Secretary does not exercise discretion in determining whether to suspend a person's driving privileges

for underage consumption of alcohol. The Court found that section 6-206(a)(43) provides for a mandatory suspension. Finally, the court found that the proportionate penalties clause does not apply because the suspension of driving privileges under section 6-206(a)(43) is not penal in nature because the purpose is to provide for safe highways and protect the public, and not to punish licensees.

Justice Garman, joined by Justice Thomas, specially concurred and indicated they believe that *People v. Lindner,* was wrongly decided. Justice Garman believes that *Lindner* too narrowly defined the public purpose of section 6-205 of the Vehicle Code and that there might be different public purposes that might be served by different statutory provisions that mandate or permit the revocation or suspension of a driver's license, whether contained in section 6-205, 6-206, or elsewhere in the Vehicle Code. However, they find that section 6-206(a)(43) of the Vehicle Code bears a rational relationship to the legitimate purpose of encouraging compliance with section 6-20 of the Liquor Control Act and of protecting young drivers and the public from potentially deadly consequences that may occur if a person whose judgment is impaired by alcohol drives a vehicle.

Justice Freeman dissented and argued that the circuit court correctly followed *People v. Lindner,* 127 Ill.2d 174(1989) and since neither party asked for *Lindner* to be overruled, he cannot express an opinion on whether it should be overruled. ■

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Defending "unlicensed" drivers in the State of Illinois and creation of an Illinois Special Driver's License Certification Program

By Neal Connors, Attorney at Law

Introduction

One of the popular collateral areas of practice for attorneys concentrating in immigration law is traffic and misdemeanor. The outcome of relatively minor traffic and misdemeanor matters for undocumented persons is extremely important since the outcome, to a non-citizen, may be life-changing. For example, a routine traffic stop might result in an individual's extended detention and possible removal from the U.S. by immigration authorities. Currently, methods differ by jurisdiction in Illinois in the handling and treatment of "unlicensed" motorists--a significant and pressing issue for both judicial circuits and the undocumented.

I began handling cases for immigration clients who received one or more tickets for being unlicensed, uninsured, or both, about seven or eight years ago. I attribute this, in part, to the increased influx of undocumented persons into many different parts of the state over the past 10 years. Recently, I encountered a case involving an undocumented individual charged with being "unlicensed" and informed of the possibility that he might receive a 30-day jail sentence after making his first court appearance *pro se.* That brought him to my office where I learned that he possessed a valid foreign driver's license (Mexico) as well as the ever-popular "international driver's license"—a common identity document possessed by undocumented persons obtained either here in the U.S. or in Mexico. While I had previously been able to resolve these types of cases with some general plea negotiation and good-faith bargaining efforts, now it appeared that the bar had been raised enough that a careful re-examination of the Illinois driver's licensing statute would be required. What I discovered in the law surrounding this special class of undocumented and "unlicensed" drivers may surprise you.

The Statute

The first provision that defense lawyers and states' attorneys might already be familiar with is the general provisions under the Illinois Vehicle Code respecting foreign "licensed" drivers. 625 ILCS 5/6-101 (b) states that "No drivers license shall be issued to any person who holds a valid Foreign State license, identification card, or permit unless such person first surrenders to the Secretary of State any such valid Foreign State license, identification card, or permit." 101(c) further states that "any person licensed as a driver hereunder shall not be required by any city, village, incorporated town or other municipal corporation to obtain any other license to exercise the privilege thereby granted."

Under this provision, a German engineer who arrives in the U.S. should be able to rent a vehicle at the airport and lawfully operate it during his stay. Clearly this individual is ineligible to obtain an Illinois driver's license, particularly since he or she likely does not likely hold a social security number, an essential prerequisite for establishing identity and for obtaining a valid Illinois driver's license. The simplest explanation for the reason why a foreign person or an individual temporarily visiting the state does not have to obtain a driver's license to enjoy the benefit of driving in Illinois is *comity,* defined as recognition of the law in other jurisdictions where the public policy behind such law is similar enough to our own public policy requisites. Constitutionally speaking, the foregoing principle is squarely set forth within the "full faith and credit clause," Art. IV, section 1 of the United States Constitution, which provides for recognition of other states' laws and court orders under many circumstances.

Under 6-101, foreign drivers are currently *per se* ineligible from obtaining an Illinois driver's license and no municipality or jurisdiction can contravene this measure outlining the class of persons eligible for a traditional state driver's license. In apparent restatement of the basic rule regarding prohibiting foreign driver's licensing, section 5/6-102 sets forth the class of individuals whom are not required to have an Illinois driver's license, as follows:

1. Any employee of the United States Government or any member of the