

Affirmed and Opinion filed August 31, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00831-CR

RUDY SALAZAR A/K/A RODOLFO SALAZAR, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 34,840**

OPINION

Rudy Salazar appeals his conviction by jury for the offense of driving while intoxicated. After finding the enhancement paragraphs true, the trial court assessed punishment at thirteen years' confinement in the Texas Department of Criminal Justice, Institutional Division. In one point of error, appellant contends that the trial court erred in overruling appellant's objection to testimony concerning the results of the horizontal gaze nystagmus (HGN) test. We affirm the judgment of the trial court.

BACKGROUND

On the evening of February 6, 1998, Department of Public Safety Trooper Barry Adams observed appellant's vehicle weaving within its lane. After observing appellant swerve onto the center stripe, Trooper Adams initiated a traffic stop. The trooper noted that appellant's speech was slurred and that a strong odor of alcohol emanated from appellant. Trooper Adams then asked appellant to participate in a horizontal gaze nystagmus test. Trooper Adams had received 40 hours of training in field sobriety testing and held a practitioner's certificate to give an HGN test. The trooper then asked appellant to perform a one leg stand, but appellant refused, claiming that he had an injured foot. Appellant even refused to raise his "bad" foot while resting his weight on the good one. Trooper Adams then asked him to do a walk and turn test. After being unable to stand heel to toe, appellant refused to perform this test, as well. Trooper Adams testified that appellant had difficulty maintaining his balance and that his eyes were glassy and bloodshot. Based upon his observations, Trooper Adams arrested appellant for driving while intoxicated. Appellant was transported to the Clute Police Station where he refused to take a breathalyzer test.

Appellant stipulated to two prior driving while intoxicated convictions. He rested without calling any witnesses in his behalf and without taking the stand himself.

DISCUSSION

Appellant claims that the State failed to establish a predicate of reliability for the HGN test because Trooper Adams failed to ask appellant if he was taking drugs or had any brain damage or neurological disorders. Defense counsel took Trooper Adams on voir dire and elicited the following testimony:

COUNSEL: Officer Adams, back on February 6, of 1998, at the time that you indicated you arrested Mr. Salazar, prior to giving Mr. Salazar the HGN test, did you ask him had he been on any medication?

ADAMS: No, sir, I did not.

COUNSEL: Did you ask him had he been on any drugs?

ADAMS: No, sir, I did not.

COUNSEL: Did you ask him whether or not he had any eye injuries?

ADAMS: No, sir, I did not.

COUNSEL: Did you ask him whether or not he had any neurological disorders?

ADAMS: No, sir, I did not.

COUNSEL: Isn't it a fact that your manual, your training manual, requires that prior to administering the HGN test that you inquire as to these things?

ADAMS: Not to my knowledge, they don't require it. The only thing that I know that they require of us to ask is if they're wearing contact lenses. The individual was wearing glasses. So, I didn't ask the question.

COUNSEL: That's the only thing you asked him? You didn't even ask him that? You just started the test?

ADAMS: I started the test. That's correct.

The trial court overruled defense counsel's objection to the admission of Trooper Adams's testimony concerning the results of the HGN test.

The pamphlet used in Texas to train officers to administer the HGN test is *DWI Detection and Standardized Field Sobriety Testing*, published by the National Highway Traffic Safety Administration (NHTSA). According to that pamphlet, an officer must look for the following three criteria in the HGN test: 1) an inability to pursue smoothly an object, or stimulus, moving sideways across the suspect's field of vision; 2) distinct, or pronounced, nystagmus at the eye's maximum horizontal deviation; and 3) an angle of onset of nystagmus of less than or equal to 45 degrees. *See DWI Detection Manual* at VIII-13. The officer must look for these criteria in each eye, for a total of six "clues." *See id.* at VIII-15. In order to ascertain the existence of these clues, the officer moves a stimulus, such as a pen light, in front of the suspect's eyes. If the officer identifies four or more clues, then the officer classifies the suspect as intoxicated. *See id.* The testing procedure also calls for the officer to screen the suspect for factors such as corrective lenses, brain damage, medical disorders, or

blindness, which could lead potentially to an incorrect determination as to whether the suspect is intoxicated. *See id.* at VIII-14--VIII-15.

In *Emerson v. State*, the Court of Criminal Appeals first took judicial notice that the theory underlying the HGN test was reliable pursuant to Rule 702 of the Texas Rules of Evidence. *See Emerson v. State*, 880 S.W.2d 759, 768-69 (Tex. Crim. App. 1994). The Court then found that the technique employed in the HGN test “as designed by NHTSA is reliable,” citing the NHTSA publication, *Improved Sobriety Testing* (the source of its previous statement about the efficiency of the HGN test). *Id.* In Texas, officers administering the test receive “standardized training in its administration and must follow the standardized procedures” outlined in NHTSA’s *DWI Detection Manual*. *Id.* These standardized procedures require that the officer “screen for factors other than alcohol that may contribute to cause nystagmus, such as drugs, neurological disorders, and brain damage, prior to administering the test.” *Id.* Because of these required procedures, the Court held that the technique employed in the HGN test “is a *reliable indicator of intoxication.*” *Id.* (emphasis supplied).

The record shows that Trooper Adams was certified to perform the horizontal gaze nystagmus test and had 40 hours of training in conducting the HGN and other standardized field sobriety tests. However, Trooper Adams did not screen for factors other than alcohol that may contribute to cause nystagmus. The Court of Criminal Appeals stated in *Kelly v. State* that scientific evidence is admissible only if it is “sufficiently relevant and reliable to help the jury in reaching accurate results.” *See Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992). Such evidence is reliable only if both the scientific theory and the technique for applying it are both valid and the valid technique has been properly applied in the case before the court. *See id.* at 573. Because Trooper Adams did not screen for factors that may cause HGN as required by both *Emerson* and NHTSA procedures, we hold that the trial court erred in admitting testimony concerning the results of the HGN test.

Having found error, we now conduct a harm analysis in accordance with TEX. R. APP. P. 44.2. As the error involved is not constitutional in nature, Rule 44.2(b) is implicated. Rule 44.2(b) provides: “Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” It requires us to disregard the error and affirm unless harm is affirmatively shown in the record. *See Merritt v. State*, 982 S.W.2d 634, 636 (Tex. App.–Houston [1st Dist.] 1998, pet. ref’d, untimely filed).

Based upon a close inspection of the record, we conclude that in the instant case the error was harmless. First, there was no evidence in the record of any use of drugs, brain damage, or neurological impairment on the part of appellant. Second, during trial, the jury heard the potential problems with the HGN test. While on direct, Trooper Adams testified that head injuries can cause nystagmus. He also testified that a very small percentage of the population has natural nystagmus. Third, the evidence of guilt was overwhelming. Appellant weaved several times within his lane while driving. Appellant swung out onto the center stripe while making a turn. Appellant strongly smelled of alcohol, and his speech was slurred. Appellant’s balance was unstable. He refused to do a one leg stand on either his good foot or his “bad” foot. He also refused to do the walk and run test and was unable to stand heel to toe. Appellant’s eyes were glassy and bloodshot. He refused to take a breathalyzer test. Appellant did not take the stand in his behalf, nor did he call a witness to refute the evidence presented against him.

Based upon the record before us, we find the error harmless, overrule appellant’s sole point of error, and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed August 31, 2000.
Panel consists of Justices Amidei, Anderson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).