



When Is Weaving Enough?

by: Ike Avery, TSRP

On March 17, 2009, the Court of Appeals filed an opinion in a drug possession case that will impact DWI prosecution. In the case of *State v. Fields* 673 SE 2d 765, the Court held that weaving to the right three times over 1.5 miles did not justify a stop. A stay pending further appeal of this decision was obtained by the AG's office on April 2, 2009 NC Lexis 332. Therefore, you can argue that *Fields* is not controlling. Despite the stay of *Fields*, the Court of Appeals relied upon *Fields* in *State v. Peele*, 2009 N.C. App. LEXIS 507 (May 5, 2009) and held that an anonymous tip along with weaving once within the travel lane is insufficient to justify a stop (petition for discretionary review has been filed in the Peele case).

The facts in *Fields* are that at 4:00 p.m. on May 19, 2005, Detective Heath Little of the Columbus County SO Drug Enforcement Unit was patrolling Highway 74 when he observed defendant's car. Detective Little followed defendant's car for approximately 1.5 miles. On three separate occasions, Detective Little saw defendant's car swerve to the white line on the right side of the traffic lane. Due to defendant's weaving, Detective Little stopped the car under suspicion of DWI. There was no odor of alcohol or evidence of impairment but Detective Little later obtained the defendant's consent to the search. While searching defendant's car, Detective Little recovered 112 grams of marijuana and 124 grams of cocaine in the glove compartment. *Fields* attacked the stop claiming Detective Little lacked reasonable articulable suspicion.

The Court in *Fields* said:

We have previously held that weaving can contribute to a reasonable suspicion of driving while impaired. However, in each instance, the defendant's weaving was coupled with additional specific articulable facts, which also indicated that the defendant was driving while impaired. See, e.g., *State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990) (weaving within lane, plus driving only forty-five miles per hour on the interstate), *appeal dismissed, disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991); *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989) (weaving towards both sides of the lane, plus driving twenty miles per hour below the speed limit), *appeal dismissed, disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (weaving within lane five to six times, plus driving off the road); *State v. Thompson*, 154 N.C. App. 194, 571 S.E.2d 673 (2002) (weaving within lane, plus exceeding the speed limit).

When determining if reasonable suspicion exists under the totality of circumstances, a police officer may also evaluate factors such as traveling at an unusual hour or driving in an area with drinking establishments. In *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004), the defendant was weaving within his lane and touching the designated lane markers on each side of the road. We concluded that the defendant's weaving combined with the fact that he was driving at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of driving while impaired. *Id.* Similarly, we found that the facts in *State v. Watson*, 122 N.C. App. 596, 599-600, 472 S.E.2d 28, 30 (1996), established a reasonable suspicion, due to the fact that the defendant was weaving within his lane and driving on the dividing line of the highway at 2:30 a.m. on a road near a nightclub.

The Court concluded:

Similarly, we hold that defendant's weaving within his lane, standing alone, is insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol. To hold otherwise would extend the grounds for reasonable suspicion farther than our Courts ever have. The facts in this case are clearly distinguishable from the circumstances in *Jacobs* and *Watson*. Here, Detective Little did not observe defendant violating any laws such as driving above or significantly below the speed limit. Furthermore, defendant was stopped at approximately 4:00 p.m., which is not an unusual hour, and there was no evidence that defendant was near any places to purchase alcohol. The totality of circumstances do not give rise to a reasonable, articulable suspicion of criminal activity justifying the stop of defendant's vehicle.

In order to justify a stop based upon weaving within a lane of travel during daylight hours other circumstances to develop may include:

- Training and/or experience of the officer - Why were the actions of the vehicle significant to this officer? - see *U.S. v Arvizu*, 534 US 266;
- LEO received training on NHTSA's visual cues - *State v Bonds*, 139 NC App 627;
- Was the weaving toward the centerline? (in *Fields* all of the weaving was to the right or toward the shoulder of the road, not other traffic);
- Was there other traffic in the area? (LEO could not wait to see if defendant would correct weaving or the defendant might crash into another vehicle);
- Did defendant drive on and/or cross the center line or fog line in a violation of GS 20-146(d)(1)?;
- Was the stop close to a location of businesses that sell alcohol?
- What was the speed of vehicle? (under/over the posted limit);
- Was the defendant hitting the brakes erratically?; and
- Any other circumstance that raised the officer's suspicions based upon the officer's training and/or experience.

Consider having the officer illustrate the weaving on the board to emphasize how dangerous the driving was. Under *Fields* weaving within a lane during daylight hours will require additional proof to justify a stop.

HGN is Admissible

by: Ike Avery, TSRP

On March 17, 2009, the Court of Appeals in *State v. Smart*, 674 S.E.2d 684 (2009) upheld admission of HGN testimony under the 2006 amendments to the Rule of Evidence 702. In this case, Officer Tiffany Silsbee of Cary PD stopped Smart for speeding and tailgating. Smart had a strong odor of alcohol but denied drinking. He refused the Alco-sensor. Officer Silsbee performed HGN in accordance with her training and obtained several indicators of impairment. She then began instructing Smart on how to perform the walk and turn test. Smart stated he knew how to do it and began walking five steps, turned and then started walking away. He refused to stop and was arrested.

The Court of Appeals noted that “Before Officer Silsbee testified as to her administration of the HGN test, defense counsel subjected her to extensive voir dire regarding her training and her experience administering the test. She also testified as to the accuracy rate of the test in assessing intoxication as measured by various studies.” Smart was convicted of habitual DWI. On appeal, the Court said “We interpret this amendment to Rule 702(a1) as obviating the need for the State to prove that the HGN testing method is sufficiently reliable.” This was the issue in *State v Helms*, 348 NC 578 (1998) which held that the State had shown HGN was admissible. The Court of Appeals next noted that Smart did not challenge Officer Silsbee’s training and experience only the method of proof.

This opinion means that HGN is properly admitted when the officer can demonstrate training and/or experience for administering HGN. Testimony as to reliability of HGN goes to the weight the judge or juror should give to HGN and should be used for that purpose. Reliability of HGN as a test that shows impairment has been established by the legislature and need not be proved again in order to have the HGN test result admitted. The studies should be introduced to persuade the finder of fact of the accuracy of HGN.

HALL OF FAME

On March 9, 2009, ADA Hugh Bailey qualified Officer M.L Lankford with Sanford PD as an expert in HGN in front of The Honorable Resson Faircloth.

In a losing effort that had absolutely nothing to do with the DRE or the ADA, Tom Langan, ADA 17-B qualified Trooper Howard “Sonny” Hiatt of Surry County as an expert in pharmacology (testifying as to the properties and physiological effects of various controlled substances) based on his DRE credentials. This was in Stokes County Superior Court on February 27, 2009.

On March 4, 2009, ADA Nick Yates qualified Lt Tim Tomczak, Raleigh, PD as a Drug Recognition Expert in front of Judge Lori Christian in Wake County. The defendant was found guilty despite his claim of hypoglycemia. This case was a DRE reconstruction, not a full DRE Evaluation.

On March 6, 2009, ADA Tom Carruthers Judge Joseph Turner qualified Deputy Scott Ingram with Guilford County SO as an expert witness in DRE, SFST administration and HGN and its administration. Judge Turner found the defendant GUILTY of DWI with a .07 AC.

Officer Pete Manukas, Raleigh PD was qualified on April 29, 2009 as an expert in HGN and DRE by ADA John Parker.

ADA Meredith Bishop on April 29, 2009 qualified Trooper Brian Leventhal as an HGN expert in District Court in front of Chief District Court Judge Roberson.

ADA Dale Morrill in Durham qualified Brian Smith, with Forensic Tests for Alcohol, as an expert in Retrograde Extrapolation in front of District Court Judge Hill. Dale also qualified Brian Smith as a DRE in a separate case in front of Judge Hill.

ADA Mike Bulleri in Durham also qualified Brian Smith, FTA, as a DRE Brian reconstructed the observations of the officer and the admissions of the defendant and was able to educate the court as to the medications consumed, their impairing attributes and the signs and symptoms observable. This was also in front of Judge Hill.

All three cases of these cases were with Durham officer Kevin Watt’s cases. He was qualified as an expert in SFSTs.

NEW DRE's

Kevin Marcus Klinglesmith of Cabarus County SO

Jeffrey Marti Smith of Durham County SO

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