

The Impact of the New Standardized Field Sobriety Test Legislation on Police Officers and Prosecutors

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Overview of Public Act 242

On September 22, 2016, a new law will go into effect which impacts the Standardized Field Sobriety Test (SFST) battery in Michigan. Pursuant to Public Act 242, a witness will be allowed to testify to SFST results and how they relate to impairment if the witness is qualified by knowledge, skill, experience, training, or education. The law specifically states that the Horizontal Gaze Nystagmus (HGN) is admissible under this provision by an officer trained in how to perform the test. Furthermore, Public Act 242 will not preclude the admissibility of a non-standardized field sobriety test if it complies with the Michigan Rules of Evidence.

“Standardized Field Sobriety Test” means one of the standardized tests validated by the National Highway Traffic Safety Administration (NHTSA). A field sobriety test is considered a SFST under this section if it is administered in **substantial compliance** with the standards prescribed by NHTSA.

In essence, Public Act 242 states that in order for the tests to be admitted in Court, the officer has to administer the tests in substantial compliance with NHTSA’s standards.

Webster Dictionary defines “substantial” as follows: “Of or having substance, real actual, strong, solid, firm, of considerable worth or value; important.”

Webster Dictionary defines “compliance” as follows: “A complying, or giving in to a request, wish, or demand; acting in accordance with a request, or a command, rule or instruction.”

The Preface to NHTSA's Student Manual states as follows:

“The procedures outlined in this manual describe how the Standardized Field Sobriety Tests (SFSTs) are to be administered under ideal conditions. We recognize that the SFSTs will not always be administered under ideal conditions in the field, because such conditions will not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, i.e. the inability to find a perfectly smooth surface at roadside, may have some affect on the evidentiary weight given to the results. However, this does not necessarily make the SFSTs invalid.”

SFST Validation Studies

SFSTs are designed as **divided attention** or **psychophysical** tests which involve requiring the subject to concentrate on both mental and physical tasks at the same time.

These tests are designed to mimic the different abilities and tasks involved in operating a motor vehicle. These include information processing, short-term memory, judgment and decision making, balance, steady and sure reactions, clear vision, small muscle control and coordination of limbs.

SFSTs have undergone extensive testing and research as to their reliability. NHTSA has undertaken scientific research studies of the SFSTs since 1975.

NHTSA has found the following with regards to SFST:

The HGN by itself was 77% accurate. The Walk and Turn (WAT)

by itself was 68% accurate. The One Leg Stand (OLS) by itself was 65% accurate.

By combining HGN and WAT, an 80% accuracy was achieved.

**The above findings represent a person with a Breath/Blood Alcohol Content (BAC) of .10 or above.

Three SFST validation studies were undertaken between 1995 and 1998. Those results are as follows:

Colorado – 1995 **Correct arrest decisions were made 93% of the time based on the SFST battery (HGN, WAT, OLS) at .05 BAC and above.

Florida – 1997 ** Correct arrest decisions were made 95% of the time based on the SFST battery at .08 BAC and above.

San Diego – 1998 **Correct arrest decisions were made 91% of the time based on the SFST battery at 0.08 BAC and above.

How to Properly Perform the SFSTs

Listed below are instructions for all three SFSTS as well as what clues to look for and the number of clues indicative of poor performance on the tests.

If the officer follows these instructions, he or she will be administering these tests in substantial compliance with NHTSA's standards. The three-test battery should always be performed in the following sequence: HGN, WAT, and OLS.

HGN Instructions: (4 out of 6 clues)

- 1) Please remove your glasses (if worn).
- 2) Put your feet together, hands at your side. Keep your head still and follow this stimulus with your eyes only.
- 3) Keep looking at the stimulus until the test is over.
- 4) Do not move your head.

5) Do you understand the instructions?

Keep in mind that the HGN and Vertical Gaze Nystagmus (VGN) test can be used by an officer to determine if a driver is impaired, regardless of whether the driver is standing, seated, or supine. The officer will then position the stimulus 12-15 inches from the suspect's nose and slightly above eye level. He or she will first check to see if both pupils are equal in size (if they aren't, this may indicate a head injury). The officer will then make sure the eyes are able to track together (called equal tracking) across the suspect's entire field of vision. Here the officer is looking to see if the eyes track the stimulus together or if one eye lags behind the other (this would indicate medical disorder, injury or blindness). After this is done, the officer continues with the test as listed below:

Procedures for HGN Testing: The Three Clues (3 in each eye, 6 total)

- 1) **The Lack of Smooth Pursuit** – the eyes can be observed to jerk or bounce as they follow a smoothly moving stimulus, such as a finger or penlight. The eyes of an unimpaired person will follow smoothly, i.e., a windshield wiper gliding across a wet windshield; whereas the eyes of an impaired person will follow in a jerking manner, i.e., a windshield wiper moving across a dry windshield.
 - a. Instruct the subject to hold their head still and to follow the stimulus with their eyes only.
 - b. Move the stimulus smoothly, all the way to the subject's left, then all the way to the right, then back again all the way to the left, then once again all the way back to the right.
 - c. While the eye is moving, examine it for evidence of a lack of smooth pursuit.
 - d. Each eye counts as one clue for scoring purposes.

2) Distinct and Sustained Nystagmus at Maximum Deviation

– distinct and sustained nystagmus is observed when the eye is held at maximum deviation for a minimum of four seconds. People’s eyes exhibit a slight jerking at maximum deviation even when unimpaired, but this jerking will not last more than a few seconds. In alcohol-impaired individuals, the jerking is larger, more pronounced, sustained for more than four seconds, and easily observable. Nystagmus at maximum deviation is observed when the eye is moved to the point where there is no longer any white left in the side of the eye. The nystagmus can be observed to act in a back and forth “popping” motion.

- a. Position the stimulus as before.
- b. Move the stimulus all the way to the subject’s left side and hold it there so that the subject’s eye is turned as far to the side as possible.
- c. Hold the eye at that position for a minimum of 4 seconds to check carefully for any jerking that may be present.
- d. Then move the stimulus all the way to the subject’s right side and hold it there for a minimum of 4 seconds checking again for any jerking that may be present.
- e. Repeat both steps b and d (check each eye twice).
- f. A definite, strong jerking must be seen; a slightly or barely visible tremor is not sufficient enough to count as a clue.
- g. Each eye counts as one clue for scoring purposes.

3) Onset of Nystagmus Prior to 45 Degrees – the point at which the officer first observes nystagmus or jerking in the eye. If the jerking begins prior to 45 degrees (typically when the stimulus is aligned with the subject’s shoulder), recent studies have shown that the jerking corresponds with a 0.08-plus BAC. The higher the degree of impairment, the sooner the nystagmus will be observable.

- a. Position the stimulus as before.
- b. Slowly move the stimulus to the subject's left side, carefully watching the eye for the first sign of jerking.
- c. When you think that you see the eye jerk, stop moving the stimulus and hold it still.
- d. Make sure to verify that the eye is in fact jerking.
- e. Once you have established that you have located the point of onset, estimate the angle.
- f. Repeat this procedure on the subject's right eye.
- g. Repeat both steps b and f (check each eye twice).
- h. Each eye counts as one clue for scoring purposes.

Walk and Turn Instructions: (2 out of 8 clues)

- 1) Put your left foot on the line, then your right foot on the line ahead of your left. Keep your arms at your side.
(Demonstrate)
- 2) Do not start until I tell you to do so.
- 3) Do you understand? (Officer must receive an affirmative response)
- 4) When I tell you to begin, take 9 heel-to-toe steps on the line.
(Demonstrate) To turn around, keep one foot on the line and return nine steps.
- 5) When you turn on the ninth step, keep your front foot on the line and turn taking several small steps with the other foot.
(Demonstrate) Take 9 heel-to-toe steps back down the line.
- 6) Keep your arms at your side at all times, watch your feet, and count each step out loud. Once walking begins, do not stop until you've completed the test.
- 7) Do you understand the instructions?
- 8) You may begin.
- 9) If suspect doesn't understand some part of the instructions, officer should repeat only that part which suspect does not understand.

The Walk and Turn Test is divided into two phases: 1)

Instruction Stage and 2) Walking Stage.

During the Instruction Stage, the subject must stand with their feet in heel-to-toe position, keep their arms at their sides, and listen to the instructions. During the Walking Stage, the subject must perform and complete the exercise as instructed.

There are **8 clues** that an officer is looking for during the WAT exercise.

Instructions Stage clues:

- 1) Can't balance during instructions
- 2) Starts too soon

Walking Stage clues:

- 3) Stops while walking
- 4) Doesn't touch heel-to-toe
- 5) Steps off line
- 6) Uses arms for balance
- 7) Loses balance on turn or turns incorrectly
- 8) Takes the wrong number of steps

WAT Testing Conditions – WAT requires a designated straight line (although a line is NOT required to administer the exercise), and should be conducted on a reasonably dry, hard, level, and non-slippery surface. There should be sufficient room for suspect to complete nine heel-to-toe steps. ****Note:** Recent field validation studies have indicated that varying environmental conditions have not affected a suspect's ability to perform this exercise.

Original research also indicated that certain individuals over 65 years of age and those with back, leg or middle ear problems had difficulty performing this exercise. ****This does not mean that it is an excuse that is available to every subject in this category, rather it should be just ONE factor that needs to be considered when evaluating the case.**

One-Leg-Stand Instructions: (2 out of 4 clues)

- 1) Stand with your feet together and your arms at your side.
(Demonstrate)
- 2) Maintain position until told otherwise.
- 3) When I tell you to, I want you to raise one leg (either leg) approximately six inches off the ground, foot pointed out, both legs straight, and look at the elevated foot. Count out loud in the following manner: 1001, 1002, 1003, and so on, until told to stop.
- 4) Do you understand the instructions?
- 5) You may begin the test.

Please note that timing is very critical during this test. The original research has shown that many impaired subjects are able to stand on one leg for up to 25 seconds but that few can do so for 30 seconds or more.

The One-Leg-Stand is divided into two phases: 1) **Instruction Stage** and 2) **Balance and Counting Stage**.

During the Instruction Stage, the subject must stand with their feet together, keep their arms at their sides, and listen to the instructions.

During the Balance and Counting Stage, the subject must perform and complete the exercise as instructed.

There are **4 clues** that an officer is looking for during the OLS exercise. They are as follows:

- 1) Sways while balancing
- 2) Uses arms for balance
- 3) Hops
- 4) Puts foot down

OLS Testing Conditions – OLS requires a reasonably dry, hard, level, and non-slippery surface. The original research indicated that

certain individuals over 65 years of age, those with back, leg or middle ear problems, and people who are overweight by 50 or more pounds had difficulty performing this exercise. **This does not mean that it is an excuse that is available to every subject in this category, rather it should be just ONE factor that needs to be considered when evaluating the case.

The following exercise has not been validated and included in the SFST battery, but is often performed along with the other exercises especially if the officer will not be allowed to testify to the HGN in court. Any exercise that requires a person to demonstrate two of more capabilities simultaneously is potentially a good divided attention or psychophysical test. Therefore, other exercises other than the three listed above can be and often are used when conducting impaired driving investigations.

Finger to Nose Instructions:

- 1) Please stand with your feet together, arms at your side and your index fingers pointed.
- 2) Do not start the test until I tell you to do so.
- 3) Do you understand the instructions so far? (Make sure suspect indicates understanding with verbal response)
- 4) When I tell you to start, close both eyes and tilt your head back.
- 5) When I tell you to, bring the hand I direct upward, touching the tip of your finger to the tip of your nose.
- 6) After touching your nose, immediately bring your hand down to your side.
- 7) Do you understand all the instructions so far? (Make sure suspect indicates understanding with a verbal response)
- 8) Test will be conducted in the following sequence – left, right, left, right, right, left.

In conclusion, it is imperative that in order to admit SFST evidence at trial, the officer will have to substantially comply with NHTSA

standards in administering these tests. Failing to do so after September 22nd, 2016, will likely result in this critical evidence being suppressed and not admitted at trial.