

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Apr 29, 2014, 3:29 pm  
BY RONALD R. CARPENTER  
CLERK

NO. 89666-6

---

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Petitioner,

v.

RYAN R. QUAALE,

Respondent.

---

**BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING  
ATTORNEYS**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JENNIFER P. JOSEPH  
Deputy Prosecuting Attorney

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3<sup>rd</sup> Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>INTEREST OF AMICUS CURIAE</u> .....	1
B. <u>ISSUES PRESENTED</u> .....	1
C. <u>AMICUS CURIAE’S STATEMENT OF THE CASE</u> .....	1
D. <u>ARGUMENT</u> .....	2
1. LONG-STANDING WASHINGTON LAW PERMITS OPINION TESTIMONY ABOUT DEFENDANT’S LEVEL OF INTOXICATION .....	3
2. DIVISION THREE’S OPINION IS CONTRARY TO ESTABLISHED WASHINGTON LAW .....	10
E. <u>CONCLUSION</u> .....	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Frye v. United States, 293 F. 1013  
(DC Cir. 1923) ..... 2, 8, 9, 10, 16

Neil v. Biggers, 409 U.S. 188,  
93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) ..... 13

United States v. Everett, 972 F.Supp. 1313  
(D.Nev. 1997) ..... 11, 12

Washington State:

City of Seattle v. Heatley, 70 Wn. App. 573,  
854 P.2d 658 (1993)..... 4, 5, 7, 13, 14, 15

State v. Baity, 140 Wn.2d 1,  
991 P.2d 151 (2000)..... 2, 7-13, 15, 16

State v. Burrell, 28 Wn. App. 606,  
625 P.2d 726 (1981)..... 13

State v. Dolan, 17 Wash. 499,  
50 P. 472 (1897)..... 3

State v. Forsyth, 131 Wash. 611,  
230 P. 821 (1924)..... 3, 4, 14

State v. Koch, 126 Wn. App. 589,  
103 P.3d 1280 (2005)..... 12

State v. Lewellyn, 78 Wn. App. 788,  
895 P.2d 418 (1995)..... 4, 7

State v. McLean, 178 Wn. App. 236,  
313 P.3d 1181 (2013)..... 7

<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	7, 15
<u>State v. Quaale</u> , 117 Wn. App. 603, 312 P.3d 726 (2013).....	2, 11
<u>State v. Wilber</u> , 55 Wn. App. 294, 777 P.2d 36 (1989).....	6

Statutes

Washington State:

RCW 46.61.502 .....	12
---------------------	----

Rules and Regulations

Washington State:

ER 702 .....	9, 10
ER 703 .....	9, 10

Other Authorities

5B Karl B. Tegland, Washington Practice: Evidence Law and Practice §701.12 (5th ed.2007) .....	5
---	---

A. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that may diminish law enforcement’s ability to thwart drunken driving.

B. ISSUES PRESENTED

Under long-standing Washington law, a lay witness or officer may testify to his or her opinion that a defendant was intoxicated based upon his or her observations. Did the trial court properly admit an officer’s testimony that the defendant was impaired by alcohol, based upon the officer’s observation of the defendant’s performance on a horizontal gaze nystagmus (HGN) test?

C. AMICUS CURIAE’S STATEMENT OF THE CASE

The facts as presented in the briefs of the parties are adequate for resolution of this case.<sup>1</sup>

---

<sup>1</sup> The transcripts are referred to as follows: 1RP (2/13/2012, 2/14/2012, 6/5/2012); 2RP (4/9/2012, 5/17/2012); 3RP (4/9/2012).

D. ARGUMENT

Division Three of the Court of Appeals held that the arresting officer may not give his opinion that defendant's ability to drive was impaired by his intoxication because that testimony expressed a personal opinion about the defendant's guilt. State v. Quaale, 117 Wn. App. 603, 312 P.3d 726 (2013). In so holding, the court conflated the question whether an officer may give an opinion as to intoxication when it is the ultimate factual issue and the admissibility of horizontal gaze nystagmus<sup>2</sup> (HGN) evidence under Frye v. United States, 293 F. 1013 (DC Cir. 1923). The resulting opinion is inconsistent with a century of jurisprudence holding that both lay witnesses and experts may provide their personal opinion of the defendant's intoxication, and with this Court's observation in State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000), that HGN evidence is admissible under Frye. This Court should reverse.

---

<sup>2</sup> "Nystagmus is the involuntary oscillation of the eyeballs, which results from the body's attempt to maintain orientation and balance. HGN is the inability of the eyes to maintain visual fixation as they turn from side to side or move from center focus to the point of maximum deviation at the side." State v. Baity, 140 Wn.2d 1, 7 n.3, 991 P.2d 151 (2000). For a visual demonstration of HGN, see <http://www.tdcaa.com/dwi/videos/with-nystagmus.html> (last visited April 26, 2014).

1. LONG-STANDING WASHINGTON LAW PERMITS  
OPINION TESTIMONY ABOUT DEFENDANT'S  
LEVEL OF INTOXICATION.

Although Division Three's opinion emphasizes that Trooper Stone's opinion was based upon the results of an HGN test, the court's analysis is not limited to that situation. Instead, the court appears to hold that no witness may give an opinion about whether the defendant was impaired. Because that conclusion is at odds with evidentiary rules and over a century of precedent to the contrary, it should be overruled.

This Court has recognized the ability of lay witnesses to offer an opinion as to the defendant's intoxication since at least 1897. State v. Dolan was a murder case in which the defendant claimed that he lacked the necessary mental state because he was intoxicated at the time of the killing. 17 Wash. 499, 504, 50 P. 472 (1897). At trial, his attorney asked a witness to opine "whether or not the defendant, Dolan, then appeared to be so intoxicated that he did not know what he was doing." Id. at 501-02. This Court held that the trial court erred in sustaining an objection: "The witness, having seen, noted, and stated the condition, appearance, and actions of Dolan, had sufficiently shown his qualification to testify as to the extent of his intoxication." Id. at 513.

This Court adhered to that conclusion in State v. Forsyth, 131 Wash. 611, 230 P. 821 (1924), where the only disputed issue was whether

the defendant was intoxicated while he was driving. Forsyth challenged the admission of non-expert opinions on that ultimate fact. Id. at 611. This Court confirmed the ability of lay witnesses to opine about the defendant's intoxication:

There is no question that the witnesses were entitled to give their opinion, after having detailed what came under their observation. The weight of the testimony is a question for the jury to pass on, and it has a right to take into consideration the opportunity the witnesses had for observing the condition which led them to believe that intoxication existed.

131 Wash. at 612. Thus, even where intoxication is the only disputed issue in a drunk driving case, a witness with opportunity to observe the defendant may give his or her opinion as to the defendant's intoxication, and the jury may give that opinion whatever weight it is due. Washington courts have adhered to this approach for decades. See State v. Lewellyn, 78 Wn. App. 788, 895 P.2d 418 (1995) (noting that “[i]t is well settled in Washington that a lay witness may express an opinion regarding the level of intoxication of another,” and holding that the same rule applied to an arresting officer); City of Seattle v. Heatley, 70 Wn. App. 573, 580, 854 P.2d 658 (1993) (“It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected

person); accord, 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice §701.12, at 20-21 (5th ed.2007) (citing cases).

In Heatley, Division One of the Court of Appeals applied this long-standing law to the testimony of the arresting officer in a DUI case. There, Officer Evenson testified about his experience in administering field sobriety tests to determine whether drivers had consumed sufficient alcohol to impair their driving. Id. at 576. When asked for his opinion on the defendant's impairment, the officer testified:

Based on ... his physical appearance and my observations of that and based on all the tests I gave him as a whole, I determined that Mr. Heatley was *obviously intoxicated and affected by the alcoholic drink ...*, he *could not drive a motor vehicle in a safe manner*. At that time I did place Mr. Heatley under arrest for DWI.

Id. (emphasis added). Heatley challenged this testimony on appeal on grounds that it presented an improper opinion on his guilt – the same argument presented in this case.<sup>3</sup> Id. at 577. Division One disagreed. The

---

<sup>3</sup> As the State correctly points out in its Supplemental Brief, Quaale did not object to Trooper Stone's testimony on grounds that it represented an opinion on the defendant's guilt, but rather that it "[g]oes to the ultimate issue." 2RP 33. Additionally, it is worth noting that Quaale's pretrial motions did not seek to prevent Stone from giving an opinion on Quaale's impairment, but only to preclude him from "testify[ing] as to any specific levels of intoxication [] based on his beliefs on the performance of the HGN test." 1RP 21-22. The court ruled that the officer could not testify to any specific level of blood alcohol, but "will be permitted to testify that, based on the results of the HGN, that was another factor that he considered in the determination of probable cause to arrest Mr. Quaale for the charged offenses." 1RP 23. It does not appear that the court revisited this ruling before the second trial. Although it is debatable whether an objection that testimony "goes to the ultimate issue" preserves a challenge based upon a claim that the testimony presents an improper personal opinion on guilt, the Court of Appeals evidently assumed that the issue had not been waived.

court held that whether a witness's opinion on an ultimate issue amounts to an improper opinion on guilt "will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." Id. at 579. "The trial court must be accorded discretion to determine the admissibility of ultimate issue testimony, ... and this court has expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt." Id.

Noting that the officer gave no direct opinion on Heatley's guilt, the court explained, "The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony improper opinion on guilt. '[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.'" Id. at 579 (quoting State v. Wilber, 55 Wn. App. 294, 298, 777 P.2d 36 (1989)) (alterations in original). Because the officer's opinion was based solely on his experience and observations of Heatley's appearance and performance on field sobriety tests, his testimony about Heatley's level of intoxication did not constitute an

impermissible opinion on his guilt on the DUI charge. Id.<sup>4</sup> See also State v. McLean, 178 Wn. App. 236, 248, 313 P.3d 1181 (2013) (rejecting argument that officer gave personal opinion on defendant's guilt by testifying that (1) he arrests drivers for DUI only if he believes they are impaired by alcohol or drugs and (2) he arrested the defendant, because officers are permitted to convey their opinions about intoxication and impairment based on their experience and observations); State v. Lewellyn, 78 Wn. App. 788, 895 P.2d 418 (1995) (agreeing with Heatley).

Thus, for over a century, Washington courts have not seriously questioned the ability of both lay witnesses and experts to give an opinion about the defendant's intoxication, even when such opinions bear on the only disputed factual issue. This Court's decision in State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000), provides no exception.

Baity concerned two defendants who were charged with driving under the influence of drugs and who sought to suppress evidence of the "Drug Evaluation and Classification Program" (DECP), including HGN

---

<sup>4</sup> The Heatley court also rejected the argument that any different rule should apply to an officer who qualifies as an expert, because "if a lay witness may express an opinion regarding the sobriety of another, there is no logic to limiting the admissibility of an opinion on intoxication when the witness is specially trained to recognize characteristics of intoxicated persons." 70 Wn. App. at 580. The court held that the officer's testimony was properly admitted, even if characterized as expert testimony, because "his opinion was of assistance to the trier of fact because it stated the conclusions he had drawn from his observations of the defendant." Id. See also State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008) ("The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion").

test results. 140 Wn.2d at 3. The trial court in Baity recognized a distinction between a Drug Recognition Expert's (DRE's) use of HGN to detect alcohol and the use of the same test to detect the presence of any drug. Id. at 8-9. "The overall ruling of the [trial] court was that the DRE program and protocol did not meet the Frye test for admissibility if the officer were offering an opinion about the presence of a specific *drug* or *category of drug*." Id. at 9 (emphasis added). Thus, on appeal, the specific issue presented was whether the 12-step DRE protocol developed to "determine whether a driver is under the influence of a specific category of drugs *other than alcohol*" satisfied Frye. Id. at 3, 6. Whether officers employing that protocol would be permitted to give their opinions about *alcohol* impairment was not at issue.

After examining a host of authority from numerous other jurisdictions, this Court concluded that "the underlying scientific basis for HGN testing – that an intoxicated person will exhibit nystagmus – is 'undisputed,'" at least with respect to alcohol impairment. Id. at 12. The Court then considered whether HGN tests were also reliable with respect to drug intoxication. Id. at 13-14. Observing that factors that may make HGN unreliable go to weight, not admissibility, this Court held that "the forensic application of HGN to drug intoxication in the DRE context satisfies Frye." Id. at 14.

The next question in Baity was “whether the DRE protocol, as a whole,” and the DRE chart, in particular, “comports with Frye.” Id. at 14. After observing that courts across the country have generally admitted DRE evidence, this Court held that “the DRE protocol and the chart used to classify the behavioral patterns associated with seven categories of drugs have scientific elements meriting evaluation under Frye. We find the protocol to be accepted in the relevant scientific communities.” Id. at 14-17.

Ultimately, the Baity Court held that “[a] properly qualified expert may use the 12-step [drug recognition] protocol and the chart of categories of drugs to relate an opinion about the presence or absence of certain categories of drugs in a suspect’s system.” Id. at 18. The Court explicitly limited its decision to situations where all 12-steps of the protocol have been undertaken. Id. Further, the Court directed that officers “may not testify in a fashion that casts an aura of scientific certainty to the testimony” and “may not predict the specific level of drugs present in a suspect.” Id. at 17. Without deciding whether sufficient foundation justified admitting the officer’s opinion under ER 702 and 703, the Court simply held that DRE evidence satisfies Frye.

2. DIVISION THREE'S OPINION IS CONTRARY TO ESTABLISHED WASHINGTON LAW.

Despite the long-standing law permitting both expert and lay witnesses to opine about the defendant's level of intoxication based upon their observations, Division Three held that such testimony was improper in this case. In doing so, the court erroneously applied Baity's discussion of the limitations of DRE evidence purporting to identify presence of certain drugs to a case involving an inference of alcohol intoxication from a failed HGN test. But Baity expressly recognized that HGN testing – one component of the 12-step protocol it evaluated – has been widely held to be admissible evidence of *alcohol* impairment. 140 Wn.2d at 9, 12-14. The only HGN-related question in Baity was whether a drug recognition protocol that includes HGN is admissible under Frye to support a qualified expert's opinion about the presence or absence of certain categories of drugs in a suspect's system. Whether that opinion was ultimately admissible under ER 702 and 703 was not before the court. 149 Wn.2d at 18 (remanding for district court to evaluate admissibility of DRE's testimony under ER 702 and 703). Thus, Baity is not authority for the proposition that an officer is not allowed to give an opinion on alcohol impairment based on HGN or that such opinion must comply with the

limitations this Court has placed on DRE evidence. To the extent that Quaale so holds, it should be reversed.

The Quaale court also cited Baity as authority that Trooper Stone was “forbidden” to testify that he had “no doubt” that Quaale was impaired because such testimony “overstated the exactness of HGN testing.” 177 Wn. App. at 614-15. But because Baity was limited to the drug recognition context, the limitations expressed therein with respect to identifying the presence, classification, and level of drugs present in a suspect do not necessarily apply in the alcohol impairment context. Further, Stone’s use of the term “no doubt” to describe his opinion that Quaale was impaired did not “cast[] an aura of scientific certainty” on his testimony in the manner about which Baity cautions. The Baity Court emphasized that most of the DRE program was not scientific in nature, but noted that an officer’s opinion whether a driver was under the influence of a certain class of drugs may appear to be a scientific opinion. 140 Wn.2d at 15 (citing United States v. Everett, 972 F.Supp. 1313, 1319 (D.Nev. 1997)). Baity therefore adopted an approach that allows the DRE to “testify to the probabilities, based upon his or her observations and clinical findings,” but does not allow the DRE to “testify by way of scientific

opinion, that the conclusion is an established fact by a reasonable scientific standard.” Id. The Court compared this approach to the way courts admit testimony of officers in an alcohol impairment case. Id. (quoting Everett, 972 F.Supp. at 1324). Trooper Stone did not testify that Quaale’s impairment was a proven scientific fact, but rather that he felt certain of his opinion that Quaale was impaired.

State v. Koch, 126 Wn. App. 589, 103 P.3d 1280 (2005), provides an example of the type of testimony disfavored in Baity. There, a toxicologist testified that HGN is “like 91 or 92% reliable” in establishing a blood alcohol content of .08. Id. at 593. The testimony purported to establish a scientific probability of impairment using the alcohol concentration that constitutes “per se” driving under the influence. RCW 46.61.502(1)(a). In contrast, Trooper Stone did not attempt to correlate Quaale’s HGN test results with any particular level of alcohol in Quaale’s system. Rather, he simply explained the HGN test, how it is administered, how he administered it on this occasion, what clues he looked for, what exactly he observed, and what he concluded based on his observations. 2RP 19-27. His use of the term “no doubt” to describe his conclusion that Quaale was impaired demonstrates the trooper’s own

certainty on that point, but does not imply the sort of scientific infallibility that could mislead the jury.<sup>5</sup>

Stone's opinion that Quaale was intoxicated based upon the HGN test is fully consistent with this Court's recognition that it is "undisputed" that "an intoxicated person will exhibit nystagmus." 140 Wn.2d at 12. In addition, although Trooper Stone was asked to provide his opinion "based on the HGN test alone," Stone had also testified to Quaale's reckless driving, his refusal to take a breath test, and the overwhelming odor of intoxicants on his breath, which forced Stone to open the windows of the patrol car while transporting Quaale to the station. 2RP 12, 28, 33. Trooper Stone's opinion that Quaale was "no doubt" impaired was a reasonable and permissible inference from the evidence.<sup>6</sup>

Stone's opinion as to Quaale's impairment was no different from the opinion of the officer in Heatley that the defendant was "obviously intoxicated" and "could not drive a motor vehicle in a safe manner." 70 Wn. App. at 576. Division Three's attempt to distinguish Heatley

---

<sup>5</sup> Courts routinely allow witnesses to express their level of certainty in their conclusions. For example, an eye-witness's level of certainty is one of the factors to be considered in determining the admissibility of his or her identification of the defendant. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); State v. Burrell, 28 Wn. App. 606, 610, 625 P.2d 726 (1981).

<sup>6</sup> To the extent that Trooper Stone's use of the phrase "no doubt" was problematic under Baity, it was so only because the prosecutor unnecessarily limited the scope of the question to "the HGN test alone." 2RP 28. Given the trooper's observations of Quaale's driving and the stench of alcohol, he should have been asked for his opinion based upon the totality of the circumstances.

because the officer in that case provided more evidence about the defendant's physical condition and performance on other field sobriety tests than Stone is unpersuasive. 177 Wn. App. at 616 (citing Heatley, 70 Wn. App. at 581-82). The court concluded that the Heatley officer's more comprehensive observations put the jury in a better position to evaluate the foundation of the officer's opinion. Id. But as this Court recognized nearly a century ago, the foundation supporting an opinion as to the defendant's level of intoxication goes to the weight of the evidence, not its admissibility. Forsyth, 131 Wash. at 612 ("The weight of the testimony is a question for the jury to pass on, and it has a right to take into consideration the opportunity the witnesses had for observing the condition which led them to believe that intoxication existed.").

Trooper Stone's opportunity for observing Quaale's condition was the focus of cross-examination. Quaale's attorney established that Stone failed to observe or document many tell-tale signs of intoxication: his report included nothing about whether Quaale had watery, droopy, or bloodshot eyes, a flushed or pale face, was uncoordinated, or slurred his words. 2RP 45-46. On this record, Quaale argued that Stone's investigation was inadequate, failed to conform to the standards of the National Highway Traffic Safety Administration and the Washington State Patrol, and produced insufficient evidence of DUI. 3RP at 6-9.

“Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). Here, the jury was correctly instructed that jurors “are the sole judges of the credibility of each witness” and “the sole judges of the value or weight to be given to the testimony of each witness.” 2RP 56. The thorough cross-examination provided ample grounds for the jury to evaluate Trooper Stone’s credibility and give it appropriate weight. As in Heatley, these circumstances indicate very little chance that the trooper’s opinion unduly influenced the jury. See Heatley, 70 Wn. App. at 581-82.

Finally, while the relative lack of substantial evidence to support Trooper Stone’s opinion might have been the basis of a motion to exclude the opinion based upon inadequate foundation, or of a claim of evidentiary insufficiency on appeal, neither claim has been made in this case. Instead, the only objection was that Trooper Stone’s opinion “goes to the ultimate issue.” 2RP 33. Neither Baity nor any other decision from this Court precludes such testimony. This Court should reverse Division Three’s decision to the contrary.

E. CONCLUSION

This Court should adhere to decades of jurisprudence holding that a lay witness or officer may provide his or her opinion as to the defendant's level of intoxication based on his or her observations. This Court should also adhere to its conclusion in Baity that HGN testing meets Frye requirements and is admissible to support an officer's conclusion as to the defendant's impairment.

DATED this 29<sup>th</sup> day of April, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JENNIFER P. JOSEPH, WSBA #35042  
Deputy Prosecuting Attorney  
Attorneys for Washington Association of  
Prosecuting Attorneys  
Office WSBA #91002

Certificate of Service by Mail and E-mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the Brief of Amicus Curiae Washington Association of Prosecuting Attorneys, and a copy of this proof of service, in STATE V. RYAN QUAALE, Cause No. 89666-6, in the Supreme Court, addressed to:

Mark Lindsey  
Andrew Metts  
Deputy Prosecuting Attorneys  
County-City Public Safety Building  
West 1100 Mallon  
Spokane, WA 99260

Jennifer Dobson  
Dana M. Nelson  
Nielsen, Broman & Koch, PLLC  
1908 East Madison  
Seattle, WA 98122

Electronic copies of the Brief of Amicus Curiae Washington Association of Prosecuting Attorneys and a copy of this proof of service were also sent via e-mail to:

[MLindsey@spokanecounty.gov](mailto:MLindsey@spokanecounty.gov)  
[AMetts@spokanecounty.gov](mailto:AMetts@spokanecounty.gov)  
[dobsonlaw@comcast.net](mailto:dobsonlaw@comcast.net)  
[nelson@nwattorney.net](mailto:nelson@nwattorney.net)

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*U Brame*  
Name  
Done in Seattle, Washington

4/29/14  
Date