County Criminal Court: CRIMINAL LAW—Evidence. It was error to grant the motion in limine excluding testimony as to Horizontal Gaze Nystagmus test results without permitting State the opportunity to lay a proper predicate. Reversed and remanded. *State of Florida v. Daniel Guida*, No. 14-CF-6632-WS (Fla. 6th Cir. App. Ct. April 1, 2016).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

DANIEL GUIDA,
Appellee.
_____/

UCN: 512014CF006632A000WS
Appeal No: CRC14006632CFAWS
L.T. No: 14-A1MANZET-WS

On appeal from County Court,

Honorable Robert P. Cole,

Tracey Sticco, Esq.,
Office of the State Attorney,
for Appellant,

Kenneth Foote, Esq.,
for Appellee.

ORDER AND OPINION

The trial court erred in granting Appellee's motion in limine excluding testimony as to Horizontal Gaze Nystagmus test results. The order of the trial court is reversed and the cause is remanded for further proceedings.

STATEMENT OF THE CASE AND FACTS

Appellee was charged with driving under the influence in violation of § 319.193, Fla. Stat. Appellee filed a motion in limine to exclude any reference to Drug Recognition Qualifications of State's witness and any reference to Horizontal Gaze Nystagmus (HGN) tests and results. Appellee alleged that any probative value of HGN test results would be substantially outweighed by the risk of unfair prejudice to Appellee, and that

any testimony from a Drug Recognition Expert (DRE) would be compound and prejudicial.[1] State argued that the witness' qualifications as a DRE permitted him to testify as to indicators of impairment by alcohol from HGN test results.

At the hearing on the motion, Appellee argued that HGN testimony is inadmissible to establish blood-alcohol content, and that no special knowledge is required to determine whether or not someone is under the influence of alcohol. Appellee contended that State had listed three officers to testify as to impairment, and therefore testimony regarding HGN would be compound. State argued that it did not intend to use expert testimony regarding HGN to establish a specific blood-alcohol level, but intended to offer HGN results as evidence that Appellee was impaired by alcohol. State requested the opportunity to proffer the testimony, to which the court responded by stating it was going to grant the motion in limine. The trial court granted the motion and State filed a Notice of Appeal challenging the court's interlocutory order granting the motion in limine.[2]

STANDARD OF REVIEW

The trial court's rulings on the admissibility of evidence will not be overturned absent an abuse of discretion. *Blanco v. State*, 452 So. 2d 520 (Fla. 1984); *Hinojosa v. State*, 857 So. 2d 308 (Fla. 2d DCA 2003). The trial court's conclusions of law are subject to de novo review. *State v. Ameqrane*, 39 So. 3d 339, 340 (Fla. 2d DCA 2010).

LAW AND ANALYSIS

State contends it was an abuse of discretion to grant the motion in limine excluding all evidence of HGN test results. State contends Appellee's reliance on *Williams v. State*, 710 So. 2d 24 (Fla. 3d DCA 1998), is misplaced. It is established that the results of HGN tests are admissible in a DUI case as evidence of impairment upon a showing of a traditional predicate. *See id; State v. Meador*, 674 So. 2d 826 (Fla. 4th DCA 1996). At the hearing on the motion, State alleges it attempted to proffer the

[1] Appellee further alleged that prior to the hearing on the motion it was unaware State intended to call a DRE witness to testify. State asserted that Appellee was properly noticed in State's answer to demand for discovery of State's intent to call an expert witness, and that Appellee's motion seeking to exclude DRE testimony was evidence of Appellee's notice and knowledge of the DRE witness' qualifications.

[2] This appeal is authorized by Fla. R. App. P. 9.140(c)(2), and § 924.07(1)(l), Fla. Stat. *See State v. Ratner*, 948 So. 2d 700 (Fla. 2007); *State v. Bjorkland*, 924 So. 2d 971, 974-75 (Fla. 2d DCA 2006).

testimony of the witness State intended to present as an expert witness in order to establish the substance and probative value of the testimony and to rebut Appellee's argument that the evidence was inadmissible pursuant to *Williams*, 710 So. 2d 24. State contends it was error not to permit State to proffer the testimony.

"Without a proper predicate, the danger of unfair prejudice, confusion of issues or misleading the jury from admitting HGN test results outweighs any probative value." *Meador*, 674 So. 2d at 836. "While the lay observations of the police officer performing the HGN test may not require scientific expertise, the significance of the HGN observation is based on principles of medicine and science not readily understandable to the jury," therefore "the HGN test is scientific evidence and there is a danger of unfair prejudice and confusion to the jury if the tests are admitted as lay observations of intoxication." *Id.* at 834. In *Meador*, the Court held that HGN test results are admissible if "the traditional predicates of scientific evidence are satisfied." *Id.* at 836.[3] In *Williams*, the Court held that although "the HGN test when properly administered is a reliable indicator for establishing the presence of alcohol in the blood," HGN results are not "admissible as the sole evidence to establish a precise blood-alcohol content." *Williams*, 710 So. 2d at 35.

State alleges it did not intend to call the expert witness to establish Appellee's specific blood-alcohol content, but to provide scientific evidence of impairment to corroborate lay observations of the three assisting law enforcement officers on the scene. State also alleges it made clear it was prepared to establish a proper predicate to permit the HGN testimony. Such testimony is permissible with the proper predicate. *See id.* In *Williams*, the Court held that "HGN test results . . . are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified DRE." *Id.* at 32-33 (acknowledging "the potential concerns with the physical application of the HGN test portion of the test in the field, and the risk of misdiagnosis due to other causes of nystagmus," but holding that "common sense

[3] Although State alleges courts have permitted the introduction of HGN test results through any properly trained and qualified officer who correctly administered the test, without requiring the witness be qualified as an expert, Appellee correctly states that in such a case the record must contain "a confirmatory blood, breath, or urine test before HGN evidence is admissible," which does not appear in the record in this case. *See Bowen v. State*, 745 So. 2d 1108, 1109 (Fla. 3d DCA 1994).

mandates DRE testimony is relevant in a prosecution for driving under the influence of a controlled substance, because it shows a probability that a person was impaired by alcohol and/or drugs").

State concedes that the determination of whether a witness is qualified to provide HGN testimony is a discretionary decision for the trial court, but contends that the record is devoid of any evidence to support the court's determination that the witness was not qualified to give HGN testimony because the trial court did not permit State to proffer any testimony from the witness regarding his qualifications, training and experience. Appellee responds that the trial court did not abuse its discretion in granting the motion, and that the HGN test results would only be admissible to prove consumption of alcohol and not a specific blood-alcohol level. Appellee admitted to consuming alcohol and three officers on the scene observed that Appellee smelled of alcohol, therefore Appellee contends this fact was not in dispute and the HGN evidence was cumulative and minimally probative. Appellee contends certifying the arresting officer as an expert witness would create a danger of unfair prejudice and mislead the jury, and that the issue of impairment is the ultimate issue of guilt or innocence which the jury should decide.

In *Williams*, the Court found that "HGN is used as indicator of blood alcohol content and drug impairment." 710 So. 2d at 34. Although it is true that "HGN test results alone, in the absence of a chemical analysis of blood, breath, or urine, are inadmissible to trigger the presumption provided by Section 316.1934, and may not be used to establish a BAC of 0.08 percent or more," the Court in *Williams* held that "HGN test results are admissible independently of other evidence as proof that a defendant was impaired under Section 316.193(1)(a)." *Id.* at 36.

The trial court's ruling in this case was contrary to established case law. In *Williams*, the Court held that "[t]he real issue here is not the admissibility of the evidence, but the weight it should receive," which "is a matter for the jury to decide." 710 So. 2d at 36-37. It was error for the trial court to exclude the HGN testimony without permitting State the opportunity to lay a proper predicate. The order of the trial court is

reversed and the cause is remanded for further proceedings consistent with this Opinion.

CONCLUSION

It was error for the trial court to grant the motion in limine excluding any evidence of HGN test results in this case. The order of the trial court is reversed and the cause is remanded for further proceedings.

It is hereby ORDERED that the order of the trial court is REVERSED and the cause is REMANDED for further proceedings.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 1st day of April, 2016.

Original order entered on April 1, 2016, by Circuit Judges Susan Barthle, Shawn Crane and Daniel D. Diskey.