

**Garden State CLE Presents:**

**The Modern DWI Trials  
Summer Series**

**Contesting SFST Evidence**



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**Lesson Plan**

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## 1) SFST - In general

The performance of standardized field sobriety tests serves a dual function. If performed before the defendant's formal arrest, the results of the tests can provide evidence of probable cause to believe the defendant operated a motor vehicle while under the influence of drugs/alcohol. The same evidence can also be considered by the trial judge in municipal court as substantive evidence of guilt (or innocence) of the defendant.

## 2) Obligation of the Defendant to Perform SFST - Reasonable Suspicion

No statute requires SFST participation by a defendant. Accordingly, the obligation to perform the tests comes through the case law. The sanction for a failure to perform the tests is a permissive inference of guilt. See State vs. Bryant, 328 N.J.Super 379, 383(App.Div.2000).

As explained in State vs. Bernokeits, 423 N.J.Super 365(App.Div.2011):

In our view, administration of the field sobriety tests is more analogous to a Terry stop than to a formal arrest, and therefore may be justified by a police officer's reasonable suspicion based on particularized, articulable facts suggesting a driver's intoxication. Measured against the important law enforcement interest in ensuring public safety on our roads, both the nature and extent of defendant's detention here are only minimally burdensome on his Fourth Amendment rights and insufficient to warrant application of a more exacting standard. To posit otherwise is to suggest that a police officer must turn a blind eye to new indications of more serious unlawful activity observed after stopping a vehicle for unrelated minor traffic violations.

We have uncovered no authority in this State imposing a probable cause requirement for the administration of roadside

sobriety tests. On the contrary, our courts have consistently, albeit without extended discussion, upheld such routine, standardized testing on the basis of a reasonable, articulable suspicion of driver intoxication.

Indeed, our courts have routinely used the results of field sobriety testing in determining whether probable cause to effectuate a DWI arrest exists. These rulings obviously presume that a police officer may legitimately request a field sobriety test in the process of determining whether probable cause for an arrest exists, rather than only after probable cause for arrest has been established.

Other jurisdictions as well have rejected the idea that probable cause is required before field sobriety tests may be administered.

### 3) Miranda Warnings

The SFSTs are considered to be non-testimonial. State vs. Blair, 45 N.J. 43(1965).

We have previously held that a DWI suspect is not entitled to Miranda warnings prior to administration of field sobriety tests. State vs. Ebert, 377 N.J.Super 1, 9(App.Div.2005); State vs. Green, 209 N.J.Super 347, 350(App.Div.1986); State vs. Weber, 220 N.J.Super 420, 424(App.Div.1987).

### 4) Use of police BWC during SFST

As a practical matter, the State's evidence virtually every DWI stop will now include a video recording of both the defendant's stop and the performance of field sobriety tests (SFST).

With certain exceptions, N.J.S.A. 40A:14-118.5 requires law enforcement officers to activate a body-worn camera (BWC) while on duty. This obligation is further refined by a directive from the Attorney General which requires that body-worn cameras be activated during a DWI stop and detention. *A.G. Dir.* 2022-1.

## 5) Entitlement to discovery by Defendant

The defense is entitled a copy of the video as per Rule 7:7-7(b)(6):

(b) **Discovery by Defendant.** Unless the defendant agrees to more limited discovery, in all cases, the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross-complaint case, shall be provided with copies of all relevant material, including, but not limited to, the following:  
(6) books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form....

## 6) As Evidence at Trial

a) N.J.R.E. 1001(a) and (b) define a video recording to be a writing:  
N.J.R.E. 1001. Definitions

(a) Writings. “Writings,” which include recordings, are defined in Rule 801(e).

(b) Photographs. “Photographs” include still photographs, X-ray films, videos, motion pictures and similar forms of reproduced likenesses.

As a result, the video should be treated like any other type of evidence involving a writing:

i) N.J.R.E. 401 - It must be relevant (a tendency in reason to prove or disprove any fact of consequence to the determination of the action).

ii) Marked for identification.

iii) Authenticated under N.J.R.E. 901: The proponent must present evidence sufficient to support a finding that the item is what its proponent claims (*e.g.*, the video fairly and accurately depicts the events surrounding the performance of SFSTs at the time of the defendant’s motor vehicle stop or arrest).

iv) Formally introduced in evidence after it has met the above threshold steps.

b) Narration testimony from a lay witness. Police officers who were not present at the DWI stop can testify to basic, neutral background information, such as the location of the video, the viewing angle, the duration of the video, and whether the clip is a composite of multiple videos to aid the fact-finder in understanding what he is watching. Although investigators can describe what appears on a recording, they may not offer opinions about the content. Law enforcement officers should not provide continuous commentary during a video if the witness testimony is based only on viewing the recording. Importantly, a witness without personal knowledge of the underlying events cannot comment on factual issues that are reasonably disputed. In other words, so long as there is a good faith dispute about the evidence shown on a

video, the witness is not permitted to put his thumb on the scale and provide his subjective analysis of what he believes the evidence shows. State vs. Watson, 254 N.J. 558(2023); State vs. Allen, 254 N.J. 530(2023).

## 7) Video Evidence on Appeal

State vs. S.S., 229 N.J. 360, 379-80(2017)

It is vitally important to both the prosecution and defense that the trial court make specific factual findings about the probative value of the SFST as portrayed on the video. These findings will be of enormous significance on appeal to the Law Division or Appellate Division.

An appellate court should afford a degree of deference to a trial court's factual-findings, even those findings are based solely on video or documentary evidence. The exercise of deference best advances the interests of justice in a judicial system that assigns different roles to trial courts and appellate courts.

Our system of justice assigns to the trial court the role of fact-finder in matters not relegated to the jury. Trial judges in our Criminal Part routinely hear and decide suppression motions in which defendants seek to exclude evidence based on alleged violations of the Fourth and Fifth Amendments of the United States Constitution and corollary provisions of our State Constitution and common law. Our trial judges have ongoing experience and expertise in fulfilling the role of fact-finder.

By contrast, the task of appellate courts generally is limited to reviewing issues of law. Because legal issues do not implicate the fact-finding expertise of the trial courts, appellate courts construe the Constitution, statutes, and common law *de novo* - “with fresh eyes” - owing no deference to the interpretive conclusions of trial courts, unless persuaded by their reasoning.

A policy of deferring to findings of fact of a trial court based on its review of video and documentary evidence has certain tangible benefits. When more than one reasonable inference can be drawn from the review of a video recording, say of an interrogation, then the one accepted by a trial court cannot be unreasonable and the alternative inference accepted by an appellate court cannot be superior. In such a scenario, a trial court's factual conclusions reached by drawing permissible inferences cannot be clearly mistaken, and the mere substitution of an appellate court's judgment for that of the trial court's advances no greater good.

Acknowledging that a trial court's factual findings are entitled to deference does not mean that appellate courts must give blind deference to those findings. Appellate courts have an important role to play in taking corrective action when factual findings are so clearly mistaken - so wide of the mark—that the interests of justice demand intervention. Deference ends when a trial court's factual findings are not supported by sufficient credible evidence in the record.

## 8) Types of SFST used by New Jersey Police

### a) In general.

These tests were developed by the National Highway Traffic Safety Administration (NHTSA) in an effort to combat drunk driving on our nation's roadways. There are three recognized standard tests that are approved by NHTSA:

- ☑ Horizontal Gaze Nystagmus (HGN)
- ☑ Walk and Turn
- ☑ One-Leg Stand

According to the research conducted over the years by NHTSA, when standardized field sobriety tests are used in combination, a trained police officer can accurately predict which subjects will ultimately have a blood alcohol level in excess of .08%. The officers who administer

these tests are trained to look for various clues from the test subjects. A combination of these clues raises an inference of intoxication. By the same token, the perception of the clues is somewhat subjective. Moreover, the tests are administered in the field where performance may be affected by weather, terrain and a wide variety of other factors.

b) HGN.

Under the formerly used Frye standard, the horizontal gaze nystagmus test (HGN) has not met the test of admissibility required in New Jersey as novel scientific evidence. State vs. Doriguzzi, 334 N.J.Super 530(App.Div.2000). However, the HGN tests appear to be permitted for the purpose of establishing probable cause to arrest for DWI.

c) Walk and Turn.

The DUI suspect is told to place his left foot on a line (real or imaginary) and to place his right foot in front of his left foot touching heel to toe. The DUI suspect must place the arms at his side. The DUI suspect remains in this “Instructional Position” while the police officer explains the test instructions. The DUI suspect cannot start the test until the police officer states, “Begin.”

The instructions are:

- When told to begin you will walk nine heel to toe steps, turn, and take nine heel to toe steps back.
- During the turn keep your front foot on the line and execute the turn by taking a series of small steps with your other foot.
- While walking, keep your arms at your sides, watch your feet at all times and count out loud each step.
- Do not stop until you have finished the test.

The suspect is asked if he has any questions. If there are none, the police officer will tell the suspect to begin the test. The police officer is

looking for the inability to remain in the “Instruction Position,” starting the test too soon, stopping during the test, failing to touch heel to toe, stepping off the line, using the arms for balance, executing an improper turn and finally taking an incorrect number of steps.

If the DUI suspect misses heel to toe once with a gap of one-half inch or greater, the suspect will have failed the heel to toe requirement. The police officer looks for other clues as well. These include eight total clues, two in instruction phase, and six in walking phase.

#### Instruction Phase

- 1) Cannot keep balance
- 2) Starts too soon

#### Walking Phase

- 3) Stops while walking
- 4) Misses heel to toe
- 5) Steps off line
- 6) Uses arms to balance
- 7) Improper turn
- 8) Wrong number of steps

#### d) One Leg Stand

The One Leg Stand is the final standardized field sobriety test which requires the DUI suspect to raise either foot of the ground six inches. The suspect's arms must be at the sides during the test. He must look at his raised foot and point his toe forward. The DUI suspect must count one thousand and one, one thousand and two, one thousand and three, and so forth until the police officer tells the suspect to stop. The police officer will require him perform this test for 30 seconds.

The police officer looks for the DUI suspect to sway during the test, raise his arms six inches away from his body, drop his foot and note if

the suspect hops during the test. The police officer looks for four clues overall.

### One Leg Stand

- 1) Swaying
- 2) Uses arms to balance
- 3) Hopping
- 4) Puts foot down.

### e) Rhomberg and Alphabet Test

These are not standardized field sobriety tests. There are no consistent recognized guidelines for administration or judging performance. Education, language barriers, nervousness and the subjective nature of the officer's evaluation renders this test potentially unreliable.

### 9) The SFST Manual

[https://www.nj.gov/njsp/division/investigations/pdf/adtu/2023\\_DWI\\_Detection\\_and\\_Standardized\\_Field\\_Sobriety\\_Testing-Participant\\_Guide.pdf](https://www.nj.gov/njsp/division/investigations/pdf/adtu/2023_DWI_Detection_and_Standardized_Field_Sobriety_Testing-Participant_Guide.pdf)

\*\*\*Based on these tests, you must decide whether there is sufficient probable cause to arrest the driver for DWI.... (p.86; session 4, p.6)

It is necessary to emphasize this validation applies only when the tests are administered in the prescribed and standardized manner, the standardized clues are used to assess the subject's performance, and the standardized criteria are employed to interpret that performance. If any one of the SFST elements is changed, the validity may be compromised. (p.225; session 8, p.2)

W&T: The original SCRI studies suggested individuals over 65 years of age or people with back, leg, or inner ear problems had difficulty performing this test. Less than 1.5% of the test subjects in the original

studies were over 65 years of age. Also, the SCRI studies suggest individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes. Officers should consider all factors when conducting SFSTs. (p.254; session 8, p.41)

OLS: The original SCRI studies suggested individuals over 65 years of age, people with back, leg or inner ear problems, or people who are overweight by 50 or more pounds may have difficulty performing this test. Less than 1.5% of the test subjects in the original studies were over 65 years of age. (p.262; session 8, p.49)

10) SFST BWC from Little Silver Police - Analysis and Commentary

Bodycam DUI Arrest - Daytime Drunk Driving on 2 Flat Tires - YouTube