



POLICE FIELD EXERCISES: Scientific Evidence or More Government Lies?

Courtesy of Attorney Jim Medley

Every year thousands of Houston motorists are stopped and accused of DWI. If police stop a motorist in Houston, and officers suspect drinking, the driver will likely be asked to perform a series of exercises the government claims will reveal intoxication. Participation in these exercises is not required by law, but the typical naïve motorist will try to prove their innocence by cooperating. The majority of people in this scenario are shortly thereafter arrested and charged with DWI.

Other than a chemical measurement of alcohol content in the body, Texas law defines “intoxication” as not having the normal use of mental or physical faculties.

The two most common exercises believed by police to measure alcohol impairment are:

Walk & Turn (W&T): The driver is instructed to stand in a heel-to-toe position while listening to instructions, walk down a line with a specific number of heel-to-toe steps, turn in a precise manner, and walk back down the line a specific number of heel-to-toe steps. If the driver has certain balance problems or doesn’t follow certain instructions precisely, the government tells officers to conclude the driver is intoxicated.

One Leg Stand (OLS): The driver is instructed to stand on one foot and is timed for 30 seconds. If the driver has certain problems balancing, the government tells officers to conclude the driver is intoxicated.

Both of the above exercises were designed by police officers. No toxicologists, physical therapists, or physicians were involved in the development of these exercises. In fact, in Scotland, where physicians are employed by police to assess impairment in DWI cases, 60% of the most experienced

police doctors surveyed disapprove of the use of the W&T and OLS in assessing intoxication.¹ Some Scottish forensic physicians interviewed by BBC Scotland’s Frontline regarded the tests as “unscientific and unfair,” and one doctor described the tests as “hopeless,” expressing concerns that “...someone who is completely normal can fail these tests.”¹¹

Forensic Evidence: Before examining the truth about research behind police exercises, it is important to examine the standards of forensic science by which they must be

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evaluated. Forensic evidence is facts or opinions derived from the application of a scientific theory, used in court to prove an issue in dispute. Since forensic evidence is not conclusive proof (e.g., even DNA evidence has a margin of error), expert opinions derived from theories must be qualified by the known rate of error of the theory being applied. Scientific evidence is only considered reliable enough for use in criminal court against a defendant if the theory being applied is 95-99% accurate.ⁱⁱⁱ (e.g., polygraph tests are known to be 85-90% accurate, however courts consistently hold that this is an unacceptable rate of error for use as evidence in court).

Police exercises are based on a scientific theory that contains two implicit premises:

1. People who have consumed enough

alcohol to be over the legal limit will not be able to successfully complete the tasks demanded in the W&T and OLS.

2. The balancing and attention tasks required in the W&T and OLS are simple enough for people who are under the legal limit to complete successfully.

The National Highway Traffic Safety Administration (NHTSA) began conducting experiments in 1975 to examine how often officers could make correct arrest decisions using these exercises. In these experiments, some subjects had no alcohol, some had alcohol but were under the legal limit, and some were intoxicated. The legal limit was the chosen criterion that correct or incorrect arrest decisions would be defined by. In every government validation study, the arrest of someone under the limit is considered incorrect.

The framework NHTSA applied for evaluating the police exercises was fallacious, and led to inflated results and misleading data for the following reasons :

1. The “correct arrest decision rate” ignores premise number 2. The dispute in any DWI charge with regard to police exercises is whether poor performance of the tasks prove intoxication to the exclusion of all other explanations. Even if NHTSA data were valid proof of the rate at which intoxicated persons “fail” police exercises, the rate at which people “fail” who are not intoxicated would remain an unanswered question. For example, if a group of drivers were required to perform a gymnastics back-flip, no doubt the exercise would have a 100% accuracy rate in “failing” intoxicated people. The unfairness of the back-flip would only be revealed by looking at the ratio of innocent people wrongfully incriminated; the back-flip would also have about a 100% error rate with sober people.

POLICE FIELD EXERCISES:

2. Defining validation in terms of “correct arrest decision” rates allows any research results to be inflated by the number of test subjects in the experiment who are in fact intoxicated. If, for example, a sample contained 90% of subjects over the limit, then the maximum potential for “incorrect arrest decisions” would be only 10%. This was a bias factor in all NHTSA field experiments.

3. The “correct arrest decision” rate was also a function of the degree of intoxication of test subjects. In all NHTSA experiments a large ratio of subjects who were intoxicated were highly intoxicated. This allowed officers to make easy arrest decisions and to inflate the government’s “correct arrest decision” rate in the final results. This was a bias factor in almost all government research.

4. Most NHTSA experiments were conducted primarily by carefully selected, highly trained, and very experienced officers. These officers were not representative of the typical officer administering exercises in Anytown, USA. NHTSA further acknowledges that in all experiments the officers made many arrest and release decisions contrary to the indications of NHTSA scoring criteria. Therefore, correctness of arrest decisions was attributable to the individual officers’ skills, not the “accuracy” of the scoring criteria for the exercises.

How then should police exercises be evaluated?: The only appropriate criterion for validating a police exercise is by examining the accuracy of premise number 2- how accurately people within the legal range of alcohol content “pass” police exercises; after all, no one goes to trial complaining they were incorrectly released. Every criminal defendant is presumed innocent until proven otherwise by the evidence, therefore the forensic accuracy of a police exercise has to be weighed based on how

accurately the exercise has been proven to correctly release the innocent.

The rates of incorrect identification of innocent people in each study are summarized below:

- 1975 NHTSA Laboratory experiment
 - almost half of arrest decisions were wrong (.10 standard)
- 1979 NHTSA Laboratory experiment
 - 1/3 of arrest decisions were wrong (.10 standard)
 - almost 1/5 subjects with no alcohol were scored impaired
- 1994 Cole/ Nowaczyk Lab experiment
 - almost half of subjects with no alcohol were scored impaired
- 1995 NHTSA study (real arrests)
 - almost 2/5 of all motorists under .08 were arrested
 - 1/5 motorists with no alcohol were arrested
- 1997 NHTSA study (real arrests)
 - 1/5 of all motorists under .08 were arrested
 - almost 2/3 of all motorists under .08 “failed” W&T
 - over 1/3 of all motorists under .08 “failed” OLS
- 1998 NHTSA study (real arrests)
 - almost 1/3 of all motorists under .08 were arrested
 - over half of all motorists under .08 “failed” the W&T
 - over 2/5 of motorists under .08 “failed” the OLS

Police exercises have been proven in every study to implicate the innocent at unacceptable rates. Perhaps more disturbing though is the fact that NHTSA doesn’t tell police officers anything about these proven rates of incorrect “failures.” Officers are simply told in their training about high rates of “correct arrest decisions.”

So police officers come daily into courtrooms, testifying about how “accurate” their exercises are, but they themselves do not know enough about the true data to answer important questions about the rates at which these exercises incorrectly “fail” the innocent. This misinformation deprives DWI defendants of the ability to meaningfully confront their accusers in court- a right guaranteed by the U.S. and Texas Constitutions. The inability of the officers to answer these questions has obvious advantages for the government’s agenda- to convict everyone accused of DWI.

Police exercises examine a level of faculties more demanding than one’s range of normal usage of faculties in a normal day. The police exercises involve unfamiliar, awkward, and abnormal balance and attention demanding tasks, which are administered typically to nervous motorists, late at night, under a variety of distracting and complicating conditions. Officers are taught not to explain to drivers the criteria by which they will be evaluated, then performance is scrutinized by rigid scoring criteria. Officers then testify in court that the exercises prove “normal faculties” have been lost.

According to the results of the 1997 NHTSA study, 64% of real motorists below the limit “failed” the W&T. In the 1998 study, 41% of innocent drivers “failed” the OLS. This data suggests that of the 36% of innocent motorists who may “pass” by the W&T, as few as 59% of them may then also be “passed” by the OLS. This reveals that as many as 79% of innocent motorists could “fail” at least one of the two exercises by the time both are administered.

The official scoring criteria for “failure” of these exercises were decided from experiments conducted on only 15 non-randomly selected people. These were volunteers, who had no cause to be nervous, were test-

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ed in the middle of the day (not fatigued) and in an indoor controlled environment (comfortable temperature, perfect surface, and ideal lighting). For almost 30 years now over 40 million drivers have been judged by comparison to how those 15 volunteers performed in the laboratory in 1975. There have been no follow up government experiments to see how differently sober people may perform who are nervous, tired, sleepy, injured, ill, overweight, or older.

There have also been no experiments to simply identify how balancing abilities are distributed among the general sober population. Even the latest NHTSA field validation report warns, "The normal variation in human physical and cognitive abilities ... result in uncertainties when arrest decisions are made exclusively on the basis of performance tests."^{iv} This warning is not contained in any materials given to police officers in their training to become the government's "experts" in using those very performance tests to make arrests.

What if a driver "passes" the first exercise administered? Should the officer then administer a second one anyway to see if the motorist "fails" it? If a driver "fails" one exercise but passes the other, what does that mean? In fact, it is common for officers to keep administering different exercises to drivers who "pass" some exercises until the driver finally "fails" enough to make an arrest. In essence, the government mentality is that "failing" an exercise proves guilt, but "passing" an exercise does not prove innocence. This government approach to DWI is very reminiscent of Salem witch trial jurisprudence of the 1690's.

Officers often try to rationalize that some people are just impaired even if below the legal limit. This is a common government theory when drivers pass the breath test in spite of "failure" of police exercises. This grab for straws denies the fact that NHTSA's own 1979 lab experiment showed that 1/5 volunteers who had consumed no alcohol at all were regarded as impaired following police exercises, and 1/5 real drivers with no alcohol in the 1995 study were arrested. The 1994 Cole/Nowaczyk experiment revealed that 46% of alcohol free volunteers were regarded as "impaired" by officers after watching them perform police exercises. It is also important to remember that NHTSA validation was based on the legal drinking

limit, and that arrests of persons below the limit based on the W&T and OLS are considered incorrect in every government study.

Conclusion

Drivers are not required to submit to police exercises, and no person can be legally required to prove to a police officer they are not committing a crime to avoid arrest, including DWI.

Police exercises have proven to implicate innocent people at alarming rates, and police officers are taught misleading information on this topic in their government training.

If an exercise is "passed," officers may keep administering exercises until one or more is "failed."

If an officer doesn't have probable cause to arrest before asking for the exercises, a polite request for the counsel of an attorney first should not create probable cause for arrest. Likewise, if an officer has cause to arrest a driver before requesting the exercises, then passing the exercises will not prevent an arrest.

If police exercises do not go well for a driver, police are likely to charge a driver with DWI even if they pass the breath test.


A driver has everything to lose and potentially nothing to gain from participating in police roadside exercises or in government breath testing. Whether a driver is sober or intoxicated, attempting these tests can place them in a circumstance where government politicians will try to use them as another number to show voters something is being done about drunk driving.

ⁱ Okeefe, M. Drugs, driving- standardized field sobriety tests: a survey of police surgeons in Strathclyde, *Journal of Clinical Forensic Medicine* (2001) 8, 57-65 at 63.

ⁱⁱ ¹ Drug driving test doubts. BBC, November 19, 2002.

ⁱⁱⁱ Wu, Alan H.B. Hill, Dennis, Crouch, Dennis, Hodnett, C., McCurdy, H., Minimal Standards for the Performance and Interpretation of Toxicology Tests in Legal Proceedings, *J Forensic Sci* 1999; 44 (3): 516-522.

^{iv} Stuster, J., Burns, M. (1998) Validation of the Standardized Field Sobriety Test Battery ay BACs Below .10 Percent. Anacapa Sciences, Inc. (San Diego Field Study), p.4.



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