

1 Q. In either eye?

2 A. No.

3 Q. In which eye was there nystagmus in
4 prior to 45 degrees?

5 A. Both of them.

6 Q. And did each eye exhibit nystagmus at
7 the maximum deviation?

8 A. Yes.

9 Q. So you're saying he failed every single
10 part of this test?

11 A. Yes, he did.

12 Q. So if somebody has nystagmus, can they
13 even tell themselves?

14 A. I don't know.

15 Q. Do you know whether it affects your
16 vision?

17 A. I would think it would.

18 Q. So you think that it impairs somebody's
19 ability to drive if they have nystagmus?

20 A. No.

21 Q. But you think it impacts the vision?

22 A. It could. I'm not a doctor. I don't
23 know.

24 Q. What test did you do next then?

25 A. The walk and turn.

1 Q. Did you conduct this from a manual or
2 you have no manual in the car?

3 A. I have no manual in the car.

4 Q. And he's supposed to walk a certain
5 number of steps in one direction and then a
6 certain number of steps back in another
7 direction?

8 A. That's correct.

9 Q. Can you give me the instructions exactly
10 as you gave them to him?

11 A. I told him, the next check I'm going to
12 check his balance. I showed him how I want him
13 to stand by placing one foot on an imaginary
14 line. His left foot on the imaginary line. His
15 right foot in [REDACTED] of it, touching heel to toe,
16 standing with his arms at his side.

17 I advised him to stay like that
18 until I'm finished explaining the test and ask
19 if he understands.

20 Q. Did you demonstrate the test for him at
21 all yourself?

22 A. Yes, I did.

23 Q. How many steps did you walk?

24 A. I walked three and then I stayed to
25 nine.

1 Q. How long was this imaginary line that we
2 were walking on?

3 A. However long it takes him to walk nine
4 steps.

5 Q. And where was this? Was it on the
6 sidewalk?

7 A. On the sidewalk.

8 Q. In the cracks on the sidewalk during
9 this whole thing?

10 A. I think so.

11 Q. So he took it when you asked him to take
12 the test?

13 A. Yes.

14 Q. He didn't start before you asked him to
15 take it?

16 A. No.

17 Q. He wasn't loud, rude or violent or
18 anything at that time, was he?

19 A. No.

20 Q. And you didn't threaten him or trick him
21 into taking it, he took it voluntarily?

22 A. Yes.

23 Q. The point of the test is to give you
24 some idea about foot coordination, balance and
25 his ability to understand instructions?

1 A. Correct.

2 Q. So this is a subjective test, right?

3 A. Yes.

4 Q. It's your opinion whether he passes or
5 fails it?

6 A. Well, there's certain clues --

7 Q. Okay.

8 A. -- that if he exhibits.

9 Q. How many clues is a pass or how many
10 clues is a fail?

11 A. It's subjective, like you said.

12 Q. So it's different for different
13 individuals or different for different officers
14 or both?

15 A. I would think both.

16 Q. So there's no form or chart by which you
17 determine whether he passed or failed?

18 A. Yes. There is a chart of what are the
19 clues.

20 Q. So when you give instructions, it's
21 important he understands the instructions,
22 right?

23 A. That's correct.

24 Q. Because if you give instructions, he
25 doesn't understand the instructions, he's not

1 doing the test as you think you're giving it to
2 him?

3 A. That's why I ask if he understands
4 before he starts.

5 Q. So besides -- you already said you have
6 500 DUI arrests?

7 A. I would estimate that.

8 Q. And besides that you've stopped people
9 for routine traffic violations.

10 A. Very often, yes.

11 Q. And a lot of these people are sober?

12 A. Yes.

13 Q. And they weren't being investigated for
14 anything as serious as drunk driving?

15 A. No.

16 Q. And for the most part are not in any
17 jeopardy of going to jail, are they?

18 A. I don't think so.

19 Q. And despite these sober people who have
20 no possibility of going to jail, a lot of them
21 are nervous?

22 A. Correct.

23 Q. And sometimes their hands shake?

24 A. Yes.

25 Q. And sometimes it's simply because of

1 anxiety or a fear?

2 A. Yes.

3 Q. Some of them even have difficulty
4 understanding you speaking to them clearly?

5 A. I would suppose.

6 Q. So when you ask my client to take this
7 test it was no secret he was under investigation
8 for DUI, was it?

9 A. He was -- I was administering a field
10 sobriety test. At that point he wasn't under
11 arrest. He was being investigated.

12 Q. But this is much more serious than most
13 of your traffic stops.

14 A. I would say so.

15 Q. And even the people that are stopped for
16 a simple non-serious traffic stops can be
17 frightened or nervous?

18 A. Correct.

19 Q. And that affects their ability to listen
20 to you sometimes?

21 A. Sometimes.

22 Q. And this is the first time you saw my
23 client, is that correct?

24 A. That's correct.

25 Q. And altogether you were with him for,

1 what, an hour and a half before he left your
2 custody or how long?

3 A. I would say about an hour, hour and a
4 half, somewhere in that range.

5 Q. And all the information you got
6 regarding his background and health is contained
7 in your police reports?

8 A. Yes.

9 Q. So you don't know of any health
10 conditions that he has?

11 A. I asked when I put him in the cell block
12 and he stated no.

13 Q. And people with poor health could fail
14 these tests, right?

15 A. I would think so.

16 Q. A person with naturally poor
17 coordination or balance would fail the test?

18 A. Perhaps.

19 Q. I would fail the test. Do you think I
20 would fail the test?

21 A. I don't know.

22 Q. Well, you're not supposed to give this
23 to anybody over 50 pounds overweight, are you?

24 A. I don't know about that.

25 THE COURT: The walk and turn?

1 MR. MADSEN: Yes.

2 Q. You never heard of a large thigh
3 syndrome, anything like that?

4 A. I consider myself overweight and I can
5 do it just fine with 50, 40 pounds of gear on.

6 Q. But we can both agree somebody that's
7 fearful and anxious can have their balance
8 affected?

9 A. Perhaps.

10 Q. So the straight line you asked my client
11 to walk down was an indeterminate length?

12 A. Correct.

13 Q. And there was no actual line?

14 A. No.

15 Q. And you've given this test multiple
16 times before?

17 A. Yes.

18 Q. And I imagine if you have a line to use,
19 you use that line?

20 A. That's correct.

21 Q. Do you have chalk available in the cars?

22 A. No, I do not.

23 Q. Do you have anything you can draw a line
24 with available?

25 A. (Indicating.)

1 Q. What was my client wearing at that time?

2 A. I believe he had a pair of pants and a
3 jacket. A shirt, I assume, under the jacket.

4 Q. And what was on his feet?

5 A. I don't remember if they were like dress
6 type shoes or sneakers. I don't remember.

7 Q. So you can't tell us exactly what were
8 on his feet?

9 A. No.

10 Q. Can you tell us -- he had shoes on his
11 feet?

12 A. Yes, he had shoes.

13 Q. You would agree that different types of
14 footwear can affect this test?

15 A. Could.

16 Q. So oversized boots would affect the test?

17 A. Yes.

18 Q. Undersized dress shoes would affect the
19 test?

20 A. Perhaps.

21 Q. So you asked him to walk nine steps in
22 each direction.

23 A. Yes.

24 Q. So in his first seven steps, how many
25 did he get correct?

1 A. He kept his balance. He didn't start
2 too soon. He stopped walking on the first set
3 of nine. He missed the heel to toe on the first
4 set of nine. He stepped off the line once. And
5 he did not turn how I showed him to.

6 Q. At how many steps did he miss his heel
7 to toe?

8 A. I don't remember.

9 Q. How much did he miss it by?

10 A. It was not heel to toe, I know that.

11 Q. But you can't tell me how much he missed
12 it by?

13 A. It was not how I instructed him to do.

14 Q. And how much did he step off of this
15 imaginary line by?

16 A. He stepped off the line, off the
17 straight line that he was walking.

18 Q. At what step was that?

19 A. I don't recall which step that was
20 either.

21 Q. You didn't ask him to stop the test,
22 though, did you?

23 A. No, I did not.

24 Q. And he didn't ask to stop the test?

25 A. No, he did not.

1 Q. When he gets to the first end of nine
2 steps, what happens, he turns around?

3 A. I showed him when I explained the test
4 how to turn.

5 Q. Okay.

6 A. And then replace that foot back on the
7 line and then take heel-to-toe steps up the
8 line.

9 Q. You asked him to -- he's facing one
10 direction and then you ask him to turn around
11 after taking his eye off the imaginary line and
12 place his foot back on the imaginary line?

13 A. He keeps his eyes down on his feet the
14 entire time. So when he takes nine, on his
15 ninth step he keeps his [REDACTED] foot planted and
16 turns by taking a series of small steps with his
17 right foot. He places that foot back on the
18 line and then places --

19 Q. And he did that? He turned around
20 well?

21 A. He turned around, but not as I showed
22 him.

23 Q. And how about the second set of nine
24 steps, what happens there?

25 A. He only took eight steps and he missed

1 the heel to toe once.

2 Q. So he missed the heel to toe once on the
3 second set of steps?

4 A. Correct.

5 Q. And he only walked eight steps?

6 A. That's correct.

7 Q. But other than that everything was fine?

8 A. Yes.

9 Q. So he missed a total of two steps?

10 A. He had five clues total.

11 Q. But he missed a total of two steps?

12 A. Yes.

13 Q. Out of 18 steps?

14 A. Correct.

15 Q. So that's essentially he walked 90
16 percent of the steps right approximately?

17 A. Approximately.

18 Q. And so this sidewalk had cracks in it,
19 you said, previously?

20 A. What is that?

21 Q. The sidewalk had cracks in it?

22 A. Just normal cracks that a sidewalk has.

23 Q. So it wasn't exactly a flat surface?

24 A. It was a flat surface. It just had the
25 normal cracks that a sidewalk has.

1 Q. Do you think people hungover would do
2 poorly on this test?

3 A. Perhaps.

4 Q. The next one we have here is the one-leg
5 stand, correct?

6 A. That's correct.

7 Q. And you didn't give this test from a
8 manual either?

9 A. No, I did not.

10 Q. And this test, can we both agree that
11 you're not supposed to give this to fat
12 people?

13 A. It's a test for people -- if a person
14 has problems with back, legs, which he did not
15 state that he has.

16 Q. But you didn't write that down in your
17 report.

18 A. I wouldn't have gave the test if he
19 would have said that.

20 Q. And it's not supposed to be given to
21 people over 60 years old either.

22 A. I suppose.

23 THE COURT: Is that over 60?

24 MR. MADSEN: Yes.

25 Q. And not supposed to be given to people