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GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

···> our mission

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

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Photo courtesy: Pima County Sheriff's Office, Arizona

feature article >

As the number of driving under the influence of drugs cases increases, so does the number of challenges to the Drug Recognition Expert Program. At present, there are essentially two cases in Georgia that discuss the DRE (Drug Recognition Expert) – McKee v. State, 258 Ga. App. 99 (2002) and Poole v. State, 249 Ga. App. 409 (2001). This issue of the GTP highlights Georgia's standard for the admissibility of scientific evidence and presents case law from other states to assist Georgia prosecutors in formulating arguments to address these challenges.

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Admissibility of Scientific Evidence in Georgia: A Different Standard

By: Patricia Hull, Traffic Safety Resource Prosecutor, Prosecuting Attorneys' Council of Georgia

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Scientific Evidence and Forensic Science Since Daubert: Maine Decides to Sit out the Dance, 56 Me. L. Rev. 101 (2004). Thomas L. Bohan, Of counsel, Bohan, Mathers & Associates

Ten Years After Daubert: The Status of the States, Joseph A. Keierleber, M.F.A. and Thomas L. Bohan, Ph.D.

Georgia's New Expert Witness Rule: Daubert & More, Georgia Bar Journal, Volume 11, Number 2, October 2005. Robert E. Shields and Leslie J. Bryan, Doffermyre, Shields, Canfield, Knowles & Devine, LLC. Copyright State Bar of Georgia. Statements expressed within this article should not be considered endorsements of products or procedures by the State Bar of Georgia.

In determining the admissibility of scientific evidence, courts generally follow either the "standard" from the *Daubert* decision or from the *Frye* decision. Georgia, however, along with only a few other states within the United States, is a non-*Frye*/non-*Daubert* state and follows its own "*Harper* standard" in criminal cases. [1]

"Before there was *Daubert*, there was *Frye*, the scientific-evidence standard set out in 1923 by the Court of Appeals for the District of Columbia as it affirmed the pre-trial exclusion of 'lie detector' evidence by a lower court. Although that ruling did not constitute legal precedent in any jurisdiction outside the District of Columbia, the rule it stated eventually was adopted by most state and federal jurisdictions throughout the United States. It said that proffered scientific testimony, in order to be admissible as evidence in court, [must be based on a theory or technique that is] sufficiently established to have gained general acceptance in the particular field in which it belongs."[2] This is the *Frye* standard, which is often referred to as the "general acceptance" standard.

In 1993, the "*Daubert* rule" emerged. The "*Daubert* rule" refers, loosely, to four United States Supreme Court opinions: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[3] *General Electric Co. v. Joiner*,[4] *KumhoTire Co. v. Carmichael*,[5] and *Weisgram v. Marley Co.*[6] These four cases essentially establish the basis for admitting expert testimony in the federal courts.

In *Daubert*, the plaintiffs alleged that the ingestion of the anti-nausea drug Benedectin during pregnancy caused birth defects. At issue was the standard for ruling on the admissibility of the plaintiffs' expert causation evidence. The trial court rejected the plaintiffs' expert testimony, holding that the experts' opinions were not "sufficiently established to have general acceptance."[7] The United States Court of Appeals for the Ninth Circuit affirmed.[8] The United States Supreme Court granted certiorari to resolve a split in the circuits.

Like the facts, the Court's holding was simple, but its impact has been enormous. In *Daubert*, the Supreme Court held that, because of the adoption of the Federal Rules of Evidence, the standard for determining the admissibility of scientific opinion evidence could no longer be the "general acceptance" test that originated in *Frye v. United States*[9] because Rule 702 of the Federal Rules of Evidence supplanted *Frye* with a more "flexible" approach.[10] This more flexible approach is sometimes referred to as the scientific reliability test. The trial judge, as the "gatekeeper" of the admissibility of evidence, should determine whether expert testimony is scientifically reliable and "fits" the facts of the case before it can be presented to the jury. The Court's holding in *Daubert* was codified in 2000 by an amendment to Rule 702.

The Georgia Court of Appeals and the Supreme Court of Georgia have declined to adopt the *Daubert* rule on several occasions. In *Orkin Exterminating Co v. McIntosh*, the Court of Appeals rejected the *Daubert* rule

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on the ground that it was based on the Federal Rules of Evidence, which had not been adopted by the Legislature in Georgia.[11] The Court of Appeals ruled similarly in *Jordan v. Georgia Power Co.*[12] The Court of Appeals also refused to adopt the *Daubert* Rule in *Norfolk Southern Railway v. Baker*.[13] The Supreme Court of Georgia twice granted certiorari to consider whether to adopt the *Daubert* rule, but in both instances, after briefing and oral argument, it ruled that certiorari was improvidently granted.[14]

Georgia's historic rule on the admissibility of expert testimony was much broader than either former Federal Rule 702 or Rule 702 as amended to incorporate the *Daubert* standard. Georgia law did not provide for the broad "gatekeeper role" described in *Daubert*.[15]

The basis for Georgia's historic rule was O.C.G.A. § 24-9-67, which provides in part, "The opinions of experts on any question of science, skill, trade or like questions shall always be admissible."[16] Thus, the Supreme Court of Georgia repeatedly held that, provided an expert is properly qualified in the field in which he or she offers testimony and the facts relied upon are within the bounds of the evidence, whether there is a sufficient basis upon which to base an opinion goes to the weight and credibility of the testimony, not its admissibility.[17]

The Supreme Court of Georgia in 1982 adopted an exception to the general rule in a criminal case, *Harper v. State*.[18] In *Harper*, the court was asked to evaluate the standard for determining whether the results of an interview, conducted while the defendant was under the influence of truth serum, were admissible. The Court rejected the *Frye* rule of "counting heads" and instead held that it was proper for the trial judge to decide whether the procedure or technique in question had reached a scientific state of "verifiable certainty." This decision to reject *Frye* was based upon the following: First, an expert is selected and compensated by a party seeking to demonstrate a specific premise: that the scientific principle sought to be proved either is or is not accepted in the scientific community. Such a process may result in a battle between each party's experts at trial. Second, there are limits on what any one "expert" may understand about a particular discipline. And, last, wide variations in intradisciplinary opinions frequently exist.[19]

The "verifiable certainty" test is "whether a given scientific principle or technique is a phenomenon that may be verified with such certainty that it is competent evidence in a court of law."[20] In Georgia, it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether the procedure "rests upon the laws of nature."[21] The trial court may make this determination from evidence presented to it at trial by the parties; in this regard expert testimony may be of value. The trial court may also base its determination on exhibits, treatises or the rationale of cases in other jurisdictions. "The significant point is that the trial court makes this determination based on the evidence available to him rather than by simply calculating the consensus in the scientific community. Once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature."[22]

The Georgia appellate courts have subsequently applied the "scientific stage of verifiable certainty" test to a number of procedures. In some instances, the appellate courts addressed the procedure's validity only as to the case on appeal.[23] However, "once a procedure has been utilized for a significant period of time, and expert testimony has been received thereon in case after case, the trial court does not have to keep reinventing the wheel; a once novel technology can and does become commonplace."[24]

Footnotes

[1] See "Ten years after Daubert: The Status of the States," Joseph A. Keierleber, M.F.A. and Thomas L. Bohan, Ph.D., Journal of Forensic Sciences, Vol. 50, Issue 5 (September 2005), for a complete offering of what constitutes a *Daubert* state, and classification of the fifty states into three categories: *Frye* states (15 states, 10 with codified evidence rules patterned after the Federal Rules of Evidence (FRE)); *Daubert* states (26 states, 24 with FRE-based rules), and non-*Frye*/non-*Daubert* states (9 states, 7 with FRE-based rules). The authors discuss how the reliability requirement varies among the non-*Frye* states, and examine how particular types of evidence have fared in the *Daubert* era.

[2] *See* Faigman DL, Kaye DH, Saks MJ, Sanders J. Modern scientific evidence: the law and science of expert testimony, admissibility of scientific evidence: testability (falsifiability), §1-3.4.1. St. Paul: West Publishing Co., 2002.

[3] 509 U.S. 579 (1993).

[4] 522 U.S. 136 (1997).

[5] 526 U.S. 137 (1999).

[6] 528 U.S. 440 (2000).

[7] *Daubert v. Merrell Dow Pharm.*, Inc., 727 F. Supp. 570, 572 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *vacated and remanded*, 509 U.S. 579 (1993).

[8] *Daubert v. Merrell Dow Pharm.*, Inc., 951 F.2d 1128 (9th Cir. 1991), *vacated and remanded*, 509 U.S. 579 (1993).

[9] 293 F. 1013 (D.C. Cir. 1923).

[10] The Court interprets the legislatively-enacted rules as it would any statute. *Daubert*, 509 U.S. at 587.

[11] 215 Ga. App. 587, 592-93, 452 S.E.2d 159, 165 (1994).

[12] 219 Ga. App. 690, 693, 466 S.E.2d 601, 604-05 (1995).

[13] 237 Ga. App. 292, 294, 514 S.E.2d 448, 451 (1999).

[14] *Orkin Exterminating Co. v. Carder*, 258 Ga. App. 796, 575 S.E.2d 664 (2002), *cert. granted* on whether to adopt the *Daubert* rule (Apr. 29, 2003), *cert. vacated* (Sept. 8, 2003); *Jordan v. Georgia Power Co.*, 219 Ga. App. 690, 466 S.E.2d 601 (1995), *cert. granted* on whether to adopt the *Daubert* rule (Apr. 12, 1996), *cert. vacated* (Nov. 22, 1996).

[15] To the extent that prior Georgia law allowed trial judges to act as a "gatekeeper" at all, that role was appropriate only when a party attempted to introduce the results of a novel test or technique.

[16] Section 7 of Senate Bill 3, codified at O.C.G.A. § 27-9-67.1 in 2005, attempts to adopt Rules 702 and 703 of the Federal Rules of Evidence. Rule 702, as amended in 2000, is the codification of the Daubert rule. Subsection (a) of the new Georgia statute is word-for-word the same as Rule 703. Subsection (b) of Section 7 of Senate Bill 3 is almost word-for-word Rule 702. It is the "almost" that presents an apparent internal conflict in the statute. Another fundamental difference between the new statute and Federal Rules 702 and 703 is the fact that the new statute **only** applies in **civil** cases. Criminal cases will continue to be tried under the "shall always be admissible" standard. Neither the statute nor the legislative debate reveals the reason for this exclusion, but the original version of the new statute did not exclude criminal cases.

[17] *Chandler Exterminators, Inc. v. Morris*, 262 Ga. 257, 259, 416 S.E.2d 277, 278 (1993); *King v. Browning Co.*, 246 Ga. 46, 47-48, 268 S.E.2d 653, 655 (1980).

[18] 249 Ga. 519, 292 S.E.2d 389 (1982).

[19] *Id.* at 525. *See also*, Harold L. Korn, "Law, Fact, and Science in the Courts," 66 Columbia L. Rev. 1086-1092 (1966).

[20] *Harper v. State*, 249 Ga. 519, 525-26 (1982); *United States v. Lopez*, 328 F.Supp. 1077 (E.D.N.Y. 1971); McCormick on Evidence, "Judicial Notice," p. 757, 764.

[21] Lectures in "Evidence," Irving Younger, National Practice Institute, Continuing Professional Education Lecture Series.

[22] *Harper v. State*, 249 Ga. 519, 526 (1982).

[23] See, e.g., *Caldwell v. State*, 260 Ga. 278, 285 (1) (b), 393 S.E.2d 436 (1990) (testimony by ten expert witnesses demonstrated that DNA identification techniques were based on sound scientific theory); *Izer v. State*, 236 Ga. App. 282, 283, 511 S.E.2d 625 (1999) (absence of expert testimony regarding laser speed detection's verifiable certainty required reversal).

[24] *Hawkins v. State*, 223 Ga. App. 34, 36 (1), 476 S.E.2d 803 (1996).

Photo Courtesy: National Highway Traffic Safety Administration

Drug Recognition Evaluation States and Case Law

Courtesy: American Prosecutors Research Institute, National Traffic Law Center

Currently, there are 41 States and the District of Columbia that have been endorsed as DEC (Drug Evaluation and Classification) states.

The following chart lists the states that have case law on DRE with the corresponding citation. CAUTIONARY NOTE: Some of the cases in the following chart are lower court cases or unpublished, and thus may not be cited as precedent. However, they may be of some assistance in formulating arguments for future cases.

Arizona

Arizona v. Johnson, Nos. 90-56865, 90-35883 Tucson Mun. Ct. (Ariz. Mun. Ct. Nov. 2, 1990). (Unpublished)

Although Arizona has adopted URE/FRE Rules, the trial court ruled that the DRE protocol satisfies the Frye standard and is therefore admissible. The Arizona Supreme Court later rejected the application of Frye to the DRE testimony during oral argument in Johnson and declined jurisdiction to reconsider the lower court opinion. The Frye standard does not apply to DRE testimony because, as Chief Justice Stanley Feldman observed, "the component examination procedures had been established for fifty years," thus they were not new or novel. Instead, DRE testimony was admissible as simple observations of physical signs and symptoms of drug influence. (Information taken from the May/June/July 1992 issue of The DRE.)
Other cases: Harris v. Schmidt, 885 P.2d 1125 (1994); Arizona v. Hammands, 968 P.2d 601 (1998)

Arkansas

Mace v. Arkansas, 944 S.W.2d 830 (Ark. 1997).

The Arkansas Supreme Court held that a police officer trained in DRE qualifies as an expert under Rule 702 of the Arkansas Rules of Evidence. The circuit court did not err in qualifying the police officer as an expert under Rule 702 because the officer had specialized knowledge of the cause of defendant's impairment. The trial court did not conduct a separate hearing to address the issue of the reliability of the DRE protocol.

"The circuit court specifically stated that it was qualifying [the police officer] as an expert for a narrow purpose – whether [the defendant] was impaired because of some kind of intoxicant. We agree that [the police officer's] specialized training and knowledge aided the circuit court in determining this fact in issue."

California

People v. S.Z., 2003 Cal. App. Unpub. Lexis 8664 (2003)

The court stated that the Officer who testified showed that he "had sufficient personal knowledge and experience to testify as a DRE. Thus, the trial court did not abuse its discretion in refusing to exclude Thacker's testimony either under the Kelly/Frye rule of Evidence code section 720."

Colorado

Colorado v. Constantino, Criminal Action No. 96M1511, Mesa County (Colo. County Ct. Jan. 15, 1998) (Unpublished)

The county court held the DRE process is not novel scientific evidence. In addition, the court found the twelve step DRE process does provide a trained officer with the ability to make a reliable opinion.

Colorado v. Turner, Case No. 92T413 Kit Carson County (Colo. County Ct. Nov. 29, 1993). (Unpublished)

The county court ruled that a police officer received sufficient and extensive training to qualify as a DRE expert under Colorado Rule 702. His testimony is thus admissible. Moreover, the court determined that a proper foundation for a lay opinion would also permit the police officer to testify. The court considered the "proper foundation" as both the police officer's observation of the defendant's behavior and statement about drug use.

Colorado v. Hernandez, No. 92-M181 Boulder County (Aug. 14, 1992). (Unpublished)

Although Colorado has adopted URE/FRE Rules it continues to follow Frye in reference to novel scientific evidence. The County Court in Hernandez found no novelty in the DRE procedures and therefore used Rule 702 to determine the admissibility of DRE testimony. DRE evidence held admissible.

Florida

Williams v. Florida, 710 So.2d 24 (Fla. Dist. Ct. App. 3d Dist. 1998), reh'g denied, 725 So.2d 1111 (1998).

The court distinguished between the general portion of the DRE protocol and its subsets, HGN, VGN and lack of convergence:

DRE Protocol–Although Florida has adopted the URE/FRE, it continues to follow Frye. The court held that Frye is inapplicable to the DRE protocol because neither the protocol nor any of its subsets (excluding HGN, VGN and lack of convergence) are "scientific" within the meaning of Frye. According to the court, DRE testimony and evidence is admissible because it is reasonably accurate, reliable and relevant.

HGN, VGN, LOC – Although HGN, VGN and LOC are "quasi-scientific", they are not new or novel and therefore the Frye standard does not apply to them either. The court also held that HGN test results alone, in the absence of a chemical analysis of blood, breath, or urine, are inadmissible to trigger the presumption of impairment as expressed in the statute (316.1934). HGN may not be used to establish a BAC of .08 percent or more.

The district court agreed with the trial court that it is somewhat misleading for the State to present the officers as 'Drug Recognition Experts.' The district court held that the State must lay a proper predicate before referring to a DRE as anything other than a DRE or Drug Recognition Evaluator or Examiner.

"These tests [the twelve-step evaluation] are clearly within the common experience and understanding of the average person."

"The fact that some of the examinations in the protocol are borrowed from the medical profession does not elevate the protocol to scientific status."

"Objective observations based on observable signs and conditions are not classified as 'scientific' and thus constitute admissible testimony."

"The bulk of the scientific research and the weight of the experts' testimony establish the relevancy of the DRE evidence in determining impairment."

"We take judicial notice that HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified DRE."

Florida v. Beam et al., 2 Fla. L. Weekly Supp. 444 Dade County Ct. (August 22, 1994). (Unpublished)

Florida granted the state's motion to admit DRE testimony. Florida follows the Frye rule for admitting expert testimony, but the court in this case found that Frye does not apply because DRE, while relevant in determining whether the defendant was driving under the influence of drugs, is not new or novel. The court also held that even if Frye did apply, DRE evidence is generally accepted in the scientific community.

Hawaii

State v. Kanamu, 107 Haw. 268 (Haw. Ct. App. 2005)

An officer, a certified drug recognition ex-

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pert (DRE), saw defendant's car weaving and speeding. He pulled defendant over and noticed his eyes were bloodshot, his speech was slurred, and he appeared nervous and paranoid. The officer found crystal methamphetamine ("ice") and drug paraphernalia in the car, which defendant denied owning. The officer administered a DRE exam and concluded that defendant was under the influence of a central nervous system stimulant, possibly ice. He was not charged with driving under the influence of an intoxicant (DUI), but the trial court ruled that the State could introduce evidence of DUI in rebuttal if defendant testified that he did not own or use the drugs found in his car. The appellate court rejected defendant's claim that the officer was not qualified to testify as a DRE; his arguments went to the weight, and not the admissibility, of the officer's opinion.

Hawaii v. Cheung Case Nos. 098304309, 098304512, (Haw. Dist. Ct. Apr. 21, 1999). (ruling on defendants' motion in limine) (Unpublished)

The trial court denied the defendants' motion to suppress DRE testimony. The court found the scientific standard is inapplicable to the DRE protocol because the underlying procedures are technical not scientific, and the procedures are not new or novel. Hawaii follows Frye but has adopted the federal rules. Even under a Frye - Daubert analysis, the court concluded the DRE witness can testify because the technique utilized by the Drug Recognition Experts is relevant, reliable, trustworthy, and valid.

Hawaii v. Padamada et al., District Court of the Third Circuit, North and South Hilo Division (February 27, 2001). (Unpublished)

The 12-step DRE protocol is not anew or novel scientific procedure…[It] has been widely accepted as a valid means of determining drug impairment by law enforcement officers….

No independent assessment of reliability of DRE protocol is necessary, since the DRE protocol is sufficiently reliable for the court to take judicial notice of this protocol.

An officer may qualify to testify as an expert regarding drug impairment of a driver if the officer is properly trained and certified as a DRE officer by the IACP.
The results of the DRE examination may be admitted into evidence in the subject cases if a foundation is established that the DRE protocol was properly followed by the certified DRE officer….

Iowa

Iowa v. Sanders, No. OWCR041844, Johnson County District Court (October 31, 1997) (ruling denying defendant's motion to exclude evidence)

The court held DRE testimony is governed by Iowa Rule 702, but not by *Daubert* because a DRE's testimony is not "scientific in nature." Even under a *Daubert* analysis, the court concluded the DRE witness can testify because the *Daubert* factors have been met.

State v. Dennison 571 N.W.2d (Iowa 1997)

This case briefly describes the DRE evaluation process and answers the question of whether the evaluation process rises to the level of an "arrest" or is merely part of the investigative process. The case does not address the issue of admissibility. Controlling standard for admission of scientific or expert testimony is Leaf v. Goodyear Tire and Rubber, 590 N.W. 2d 525 (Iowa 1999).

Maryland

United States v. Horn, 185 F. Supp. 2d 530 (D. Md. 2002)

In a case of first impression, the federal court had to apply the newly revised Fed. R. Evid. 702 and the Daubert/Kumho tests to the (1) horizontal gaze nystagmus test, (2) the walk and turn test, and (3) the one leg stand test, also known as the three standard field sobriety tests (SFSTs). At issue was the nature of the testimony that the officer administering the SFSTs could give and how the results of the SFSTs could be used. In turning to state court decisions on the latter issue, the results of the SFSTs could not be used as direct evidence of intoxication. The court took issue with the degree of their general acceptance within an unbiased scientific or technical community. *He found the tests, used singly or in combination, had not been shown to be as reliable as asserted, either in earlier expert testimony or in National Highway Transportation Safety Administration publications. Any testimony made by the arresting officer had to be limited to lay opinion testimony in compliance with Fed. R. Evid. 701. It could not use a scientific or technical basis thereby becoming expert testimony under Fed. R. Evid. 702.*

Maryland v. Squire, Case No. 892099008, Baltimore City (Md. Cir. Ct. Oct. 13, 1992) (order denying State's motion to reconsider). (Unpublished)

In an earlier oral opinion, the trial court denied the admissibility of DRE testimony. In denying the State's motion to reconsider that ruling, the trial court stated its belief that a DRE is an expert and that it was not established that DRE is a technique that "has been 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" Had the court found the DRE to be a lay witness, the testimony would be admissible as lay opinion testimony provided the witness "has had the opportunity to observe the facts upon which he bases his opinion."

Minnesota

State v. Klawitter, 518 N.W.2d 577 (Minn. 1994).

Minnesota is yet another state that has adopted URE/FRE but continues to follow *Frye*. The Minnesota Supreme Court affirmed the lower court's ruling that horizontal gaze nystagmus satisfies the *Frye* standard and expressly refused to address the issue of whether Minnesota should abandon *Frye* in favor of applying the standard articulated in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786 (1993). ***Klawitter* held that the drug recognition evaluation is not a novel scientific discovery or technique and that DRE evidence is admissible.** The Court further stated, however, that an officer may not be referred to in the courtroom as a "Drug Recognition Expert" because the use of the term "expert" suggests unwarranted scientific expertise. The Court indicated that the term "Drug Recognition Officer" would be acceptable.

"Given proper foundation and subject to other qualifications, opinion testimony by experienced police officer trained in use of so-called drug recognition protocol is generally admissible in evidence in a trial of a defendant for driving while under the influence of a controlled substance."

The trial court stated, "there is nothing scientifically new, novel, or controversial about any component of the DRE protocol itself. The symptomatology matrix used by DREs to reach their conclusions is not new and is generally accepted in the medical community as an accurate compilation of signs and symptoms of impairment by the various drug categories."

Minnesota v. Cammack, 1997 Minn. App. LEXIS 278, 1997 WL 104913 (Minn. Ct. App. 1997). (Unpublished)

The Court of Appeals of Minnesota held that a DRE officer need not complete the entire twelve step evaluation for the officer's opinion to be admissible as long as there is sufficient admissible evidence that supports the DRE's opinion.

Missouri

Duffy v. Director of Revenue, 966 S.W. 2d 372 (1998)

The Missouri Court of Appeal upheld the administrative suspension of the defendant's license for driving under the influence of drugs based in part on testimony of the DRE officer. The court rejected defendant's argument that the Director of Revenue failed to give a proper Frye foundation for the testimony of the DRE, and explained that "*where scientific proof of sobriety is offered to established reasonable grounds that an individual was driving while intoxicated sufficient to revoke an individual's driving privileges…. It is not necessary to lay a Frye foundation.*"

Nebraska

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

A magistrate judge in the United States District Court of Nevada admitted DRE testimony. The magistrate found that *Daubert* did not apply to the DRE protocol because the protocol was made up of nothing more than

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physical observations. The magistrate states that multiple physical observations "used in concert, to reach a conclusion, does not necessarily elevate the result from the technical to the scientific. The pertinent components of the DRE protocol have long been established and used in the medical community as part of physical examinations…."

"[U]pon the appropriate foundation being laid, the Drug Recognition Evaluation protocol conducted by Ranger Bates, together with his conclusions drawn therefrom, shall be admitted into evidence to the extent that the DRE can testify to the probabilities, based upon his or her observations and clinical findings, but cannot testify, by way of scientific opinion, that the conclusion is an established fact by any reasonable scientific standard. In other words, the otherwise qualified DRE cannot testify as to scientific knowledge, but can as to specialized knowledge which will assist the trier of fact to understand the evidence."

New York

People v. Villeneuve, 232 A.D.2d 892 (N.Y. App. Div. Dept. 1996).

Defendant challenged the admissibility of the DRE's testimony claiming the DRE was not qualified to testify as an expert. The DRE had "testified about his training, the tests given the defendant, the process of metabolization of drugs by the body and specifically the metabolism of cocaine by this defendant." The appellate court rejected the challenge and allowed the testimony to stand due to the defendant's failure to provide any evidence to support his allegations.

"The attack on Murphy's [DRE] expertise was not supported by any evidence. Defendant's conclusary [sic] allegations as to Murphy's limitations as an expert fail to make out a ground for exclusion of his testimony."

People v. Quinn, 580 N.Y.S.2d 818 (N.Y. Dist. Ct. 1991).

New York courts apply the Frye standard in assessing admissibility of scientific evidence. The District Court held that the DRE protocol meets the Frye test. On appeal the case was reversed due to failure of the record to contain a written jury waiver. See People v. Quinn, 607 N.Y.S.2d 534, 158 Misc.2d 1015 (NY Supreme Ct. 1993). On appeal, the court did not address the trial court's finding as to the reliability of HGN and the DRE protocol. Nevertheless, since the case has been overturned, it is of limited use as precedent.

Oregon

State v. Aman, 194 Ore. App. 463 (Or. Ct. App. 2004)

At issue was whether the results of an incompletely administered 12-step Drug Recognition Expert (DRE) protocol were admissible as scientific evidence to prove that defendant was under the influence of a controlled substance. Defendant had failed to produce a urine sample, which was required to complete the twelfth step of the DRE protocol. The court held that there was no evidence that the methodology employed, an 11-step DRE test without toxicological confirmation, generally had been accepted in the relevant field, had been used in a reported judicial decision, had a known rate of error, was mentioned in specialized literature, or was not a novel, even singular, employment in the state. An incompletely administered DRE protocol was not, itself, admissible as scientific evidence. Accordingly, the trial court erred in admitting evidence of the DRE procedures and results as scientific evidence. In response to the State's argument that any error in admitting the DRE protocol results was harmless, the court, in reversing and remanding, concluded that it could not say that there was little likelihood that the error in admitting the incomplete DRE protocol results affected the verdict.

State v. Burshia, 201 Ore. App. 678 (Or. Ct. App. 2005)

The court held that the absence of [**491] the twelfth step, a urine test corroborating the DRE officer's opinion, rendered the DRE evidence inadmissible. HN13Because, as defendant argues, every step of the DRE is crucial in establishing its foundation as scientific evidence, then it follows that each and every step is evidence of the crime of DUII, including the breath test.

Oregon v. Sampson, 6 P.3d 543 (Or. Ct. App. 2000).

Under an *O'Key/Brown* analysis (somewhat similar to a *Daubert* analysis), DRE testimony is scientific evidence subject to the judicial gatekeeping function. The scientific nature of HGN is well established in case law; other procedures performed in a DRE exam are also based on medical science, the results of which are compared to established scientific research. The court analyzed the admissibility of DRE testimony in the context of being offered as evidence that tends to make the existence of a fact of consequence more probable than not. The court found that universal acceptance is not necessary for admissibility and that the DRE protocol was generally accepted in the relevant scientific communities. Additionally weighing in favor of admissibility, the DRE program is certified and regulated by the IACP and NHTSA, the evidence presented to the court pertaining to the rate of error was not persuasive for finding the protocol unreliable, sufficient literature existed to satisfy the peer-review standard, and that the protocol was "sufficiently established" to satisfy the novelty test. The court noted that any false positive resulting from administration of the test or from the subjective nature of interpretation of the protocol would be remedied by the toxicological test required in the final step. Finally, DRE evidence is admissible only upon a showing of the officer's adequate training regarding test administration and interpretation.

Oregon v. Uriate-Guerrero et. al, Case No. Z-235697, Multnomah County Circuit Court (October 12, 1998). (88 cases were consolidated - the opinion is cited with the first defendant and first case number). (Unpublished)

The court held DRE evidence is scientific. In order to be admitted, the State must establish that the DRE officer completed the prescribed training and was certified. Once this is established, the court, in specific detail, listed which subjects a DRE officer can give his opinion. These subjects include the basis for requesting a urine test, whether the subject was "under the influence" of a drug and if the subject's responses were consistent with the subject being impaired. The court further stated that an officer can not testify that the subject's observed impairment was caused by ingestion of the drug predicted. In addition, the court held a DRE officer should be referred to as the "drug recognition evaluation" officer or "drug recognition evaluator." In this case, the court admitted the DRE evidence.

Oregon v. Blankenship et. al, Case No. 96-60882 Lane County/District Court Oregon (September 8, 1998). (8 cases were consolidated – the opinion is cited with the first defendant and first case number). (Unpublished)

The District Court held DRE was scientifically based on the same analysis as in *State v. O'Key*, 321 Or 285 (1995) (holding HGN was a scientifically valid test). The court used the *Brown* test standard to establish DRE admissibility. *State v. Brown*, 297 Or 404 (1984) (test sets out various factors including a general acceptance standard). In this case, the court found the State failed to lay the foundation for DRE admissibility by not presenting any evidence as to the validity of the VGN and LOC tests in the medical community. Additionally, the court noted that the State did not "call any toxicologist involved in the studies relied upon by the State or any other expert to rebut the testimony" of the Defendant's expert witnesses. Therefore, the court held the DRE evidence was inadmissible.

Oregon v. Buford, Case No. 97CR0207MI Douglas County Circuit/District Court (Oregon July 8, 1997). (Unpublished)

The court found that the DRE protocol is scientific evidence and must satisfy *Daubert*. The court held that the DRE protocol does in fact satisfy *Daubert*, the DRE evidence is relevant, the evidence will assist the trier of fact to reach a conclusion and that its probative value outweighs the prejudicial effect to the defendant. The court also held that the DRE protocol meets the seven criteria of *State v. Brown*.

Oregon v. Davis, Case No. 9560740 Lane County/District Court (Oregon February 25, 1997). (Unpublished)

The District Court held that DRE was scientific evidence. However, the State did not

continued >

present "sufficient testimony or evidence that DRE testing is based on scientifically valid principles." Therefore, DRE evidence in this particular case was inadmissible.

Oregon v. Wallace, No. 96020425 Linn County Circuit/District Court (July 15, 1996). (Unpublished)

The court held that DRE evidence was admissible under the seven factors espoused in the Oregon case of *State v. Brown*. The seven factors include (1) the technique's general acceptance in the field, (2) the expert's qualifications and stature, (3) what use has been made of the technique, (4) the potential rate of error, (5) the existence of specialized literature, (6) novelty of the technique and (7) the extent to which the technique relies on the subjective interpretation of the expert. DRE technology "does well in regard to almost all [of these factors]." Furthermore, the court held that the Oregon State troopers qualified as experts.

Texas

Hooker v. State, 932 S.W. 2d 712 (1996)

The court held that there was sufficient evidence to sustain a prosecution for driving while intoxicated by prescription drugs where the defendant initially refused to submit to a DRE evaluation. The arresting officer was a DRE and only two tests were actually performed. The court recognized the officer's experience and training and held that '[b]ased on the testimony and exhibits before the jury… we find that any rational trier of fact could have found, beyond a reasonable doubt, that appellant had lost the normal use of his mental or physical faculties from ingesting the controlled substance Vicodin on the night in question.

Utah

State v. Layman, 953 P.2d 782 (Utah 1998).

The appellate court affirmed the trial court's decision to admit testimony concerning the drug recognition evaluation. The court concluded that DRE testimony is opinion and not scientific testimony and, therefore, does not have to meet the test for scientific evidence as outlined in *State v. Rimmasch*, 775 P.2d 388 (Utah 1989).

"This court has held a Rimmasch analysis is required to determine 'the admissibility of testimony based on an external scientific process or statistical profile."

"[T]he Rimmasch analysis applies only to expert testimony based on scientifically derived facts or determinations, and not to an expert's personal observations and opinions based on his or her education, training, and experience."

"Where the expert testimony is opinion testimony based on the witness's training and experience, Rimmasch is not applicable, 'as there [is] no scientific process on which to apply such an analysis."

Washington

Washington v. Baity, 991 P.2d 1151 (Wash. 2000).

The Frye test applies to determine the admissibility of DRE evidence because the DRE protocol and the drug chart used to classify the behavioral patterns associated with the seven categories of drugs have "scientific elements." The Court especially focused on the use of the HGN test in the context of drug recognition as a scientific element requiring the Frye analysis. Although the forensic use of HGN to detect certain drugs was considered novel scientific evidence, the court held its general acceptance in the relevant scientific community satisfied the Frye test. As a whole, the DRE protocol and drug chart are also accepted in relevant scientific communities (*i.e.*, pharmacologists, optometrists, and forensic specialists).

Based upon a suspect's behavior and physical attributes, a properly trained DRE may testify as to his or her opinion about the presence or absence of certain categories of drugs in a suspect's system. The DRE may not predict the specific level of drugs present in the suspect, nor may the DRE testify in a fashion that "casts an aura of scientific certainty to the testimony." The Court emphasized that its holding applied only to situations where all twelve steps of the protocol were completed.

". . . the principal step of the protocol that qualifies as novel scientific evidence is the assertion that persons who have ingested certain drugs evidence nystagmus."

"Although HGN testing is scientific in nature it is generally accepted in the relevant scientific communities. Thus, we hold the forensic application of HGN to drug intoxication if the DRE context satisfies Frye."

"DRE evidence is admissible under Frye because it is generally accepted in the relevant scientific communities. A properly qualified expert may use the 12-step 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."

State v. Rios-Gonzales, 2005 Wash. App. LEXIS 2791 (Wash. Ct. App. 2005)

The Court explained and distinguished the Baity decision and stated that Baity does not require a full DRE protocol to establish probable cause to arrest for a drug-based DUI.

State v. Harrison, 2000 Wash. App. LEXIS 1741 (Wash. Ct. App. 2000) (Unpublished)

The trial court proceedings took place in February 1999, prior to the Washington Supreme Court's decision in Baity. The court held a DRE's testimony admissible over objections that DREs had not been recognized in Washington courts because the officer testified only on the basis of his experience as a police officer and not as an expert. The officer testified that he had considered the defendant impaired based on his speech, the rises and falls in agitation, the dilation of his pupils, and the odor of alcohol. Neither the state nor the defense brought up the issues of the officer's DRE certification or whether he had undergone training.

Seattle v. Mandell, No. 2886205 Municipal Court of the City of Seattle (June 11, 1997). (Unpublished)

The trial court admitted testimony concerning the drug recognition evaluation. Although the court stated that *Frye* applied to only some of the steps of the evaluation, and that almost all of those steps were not novel, it appears that the entire protocol satisfies the *Frye* standard. The court concluded that DRE evidence is admissible "where there is evidence of drug use contemporaneous or near-contemporaneous with driving…."

Photo Courtesy: National Highway Traffic Safety Administration

Planning Ahead...

2008 Joint Police and Prosecutor Training

Between 1996 and 2003 alcohol and drug-impaired drivers were involved in 84,113 automobile crashes, causing 43,108 injuries and 2,907 fatalities in Georgia. Successfully investigating and prosecuting DUI and vehicular homicide cases require that all law enforcement work, train, and learn together. Below are some of the training events that the Prosecuting Attorneys' Council will host in cooperation with the Georgia Governor's Office of Highway Safety in 2008. Please contact Patricia Hull or Fay McCormack at 404-969-4001 for more details.

Prosecuting the Drugged Driver

April 1-3, 2008

Prosecuting the Drugged Driver is a three-day training course that provides the knowledge and skills necessary for prosecutors to successfully try impaired driving cases involving drugs other than alcohol using a drug recognition expert (a specially trained police officer) as an expert witness. Participants are given a "hands on" opportunity to improve trial skills by:

- Participating in phases of a mock trial
- Conducting a direct examination of an actual drug recognition expert (DRE)
- Receiving critiques on the "live" performance from a faculty of experienced prosecutors

The curriculum for the course contains the following topics:

- An overview of the law enforcement officer's training to become a certified drug recognition expert
- The drug recognition evaluation - reading the police report and understanding the evaluation procedure
- Introduction to drugs of impairment - common signs and symptoms
- The role of the toxicologist in a drug impaired driving case
- How to qualify the DRE as an expert witness in court
- Responses to common defense challenges
- Developing persuasive trial skills - jury selection, opening statements, direct examination, cross examination and closing argument

Who Should Attend?

Prosecutors who have one year or more of experience and are currently prosecuting impaired driving cases and Law Enforcement Officers who specialize in DUI Detection (i.e., H.E.A.T., DUI Task Force, S.T.E.P.) and DREs who need the current updates, a refresher in DUI Drugs, and who would like to participate in direct and cross examination exercises.

Lethal Weapon (Vehicular Homicide)

Fall 2008

Lethal Weapon is a three-day training program designed to improve the investigation and prosecution of crimes stemming from automobile crashes and uses the team-building approach with officers and prosecutors. Each profession will gain first-hand knowledge of the challenges and difficulties the other encounters in cases arising out of automobile crashes. This course will give police officers a greater understanding of what evidence prosecutors must have in these kinds of cases. At the same time, this course teaches prosecutors what to reasonably expect from officers at the scene and to ask better questions of the officers in the courtroom.

Both prosecutors and officers will become more effective as a result of interactive training classes in:

- Kinematics and Dynamics of Crash Reconstruction
- Crash Reconstruction Methodologies
- Technical Investigation
- Direct and Cross Examination of Officer and Expert Witness
- Toxicology and Forensic Analysis of Alcohol & Dealing with other Impairing Substances
- Victim Issues and Rights
- Legal Aspects of the Vehicular Homicide Investigation (Including Charging Vehicular Homicide Cases – Indictment/Accusation)

Who Should Attend?

Prosecutors who have one year or more of experience and are currently prosecuting vehicular homicide cases and law enforcement officers who conduct crash investigations and/or reconstructions.

Joint Police and Prosecutor DUI Training

To schedule a joint training in your jurisdiction, please contact Patricia Hull or Fay McCormack at 404-969-4001

This is a four-hour training that is brought to your jurisdiction and conducted by an SFST/DRE Instructor and a Traffic Safety Resource Prosecutor. This specialized training includes:

Effective Report Writing

This session is designed to enhance the participant's ability to effectively document the elements of DUI offenses by utilizing in car video, field notes and prior training in Standardized Field Sobriety Testing. Officers and prosecutors will be asked to articulate the challenges and problems in creating and using DUI reports.

Standardized Field Sobriety Tests

As breath test refusals increase, so does the importance of SFSTs. This segment refreshes and updates the participant as to the National Highway Traffic Safety Administration's recommended standardized field sobriety testing process. Topics will include the proper procedure for administering the Horizontal Gaze Nystagmus, Walk and Turn, and One Leg Stand examinations.

Case Law Update

This session brings participants up-to-date with recent cases that impact the investigation and prosecution of DUI cases. The session will also cover responses to defenses concerning the Alco-Sensor, HGN, the NHTSA manual and constitutional challenges to SFSTS.

Courtroom Testimony

Volunteers will role play and observe direct and cross examination of the arresting officer. This session will cover evidentiary rules concerning refreshing recollections, recorded recollections, as well as strategies for dealing with common defense tactics and defense cross examination.

GEORGIA traffic PROSECUTOR

Prosecuting Attorneys' Council of Georgia
Traffic Safety Program
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traffic safety program staff

The Prosecuting Attorneys' Council of Georgia is proud to produce the "Georgia Traffic Prosecutor" which addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editors Fay McCormack or Patricia Hull at The Prosecuting Attorneys' Council of Georgia.

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····> **fact:**

Drunk driving is the nation's most frequently committed violent crime,
killing someone every 31 minutes.

Because drunk driving is so prevalent, about three in every ten Americans will be involved in an alcohol-related crash at some time in their lives. In 2003, an estimated 17,013 people died in alcohol-related traffic crashes in the United States. These deaths constituted 40 percent of the nation's 42,643 total traffic fatalities.

-Statistics courtesy MADD