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Garden State CLE Presents:



Drunk Science or Junk Science **Will DRE Evidence be Admissible in DWI Cases?**

Instructors



**Joseph P. Rem, Jr.,
Certified Criminal
Trial Attorney**



John Menzel, Attorney

Part I

a) Novel Scientific Evidence – The Frye Test

A novel scientific test not previously approved by the Appellate Division or the Supreme Court, must meet the test articulated in Frye vs. U.S., 293 F. 1013(D.C.1923) in order to be deemed admissible in evidence.

Initially, under the Frye test, expert testimony in fields involving novel scientific tests or technology, must meet the standard of “state of the art” scientific reliability. Scientific reliability under Frye can be proven in three different manners.

First, the expert may simply testify that the scientific community in his field accepts as reliable the foundational bases of his opinion.

Secondly, scientific literature can evidence reliability where that literature reveals a consensus of acceptance regarding the technology.

Finally, a party proffering expert testimony may demonstrate reliability by pointing to existing judicial decisions of appellate authority that announce that particular evidence or testimony is generally accepted in the scientific community.

The burden of proof when demonstrating scientific reliability in a criminal case is by clear and convincing evidence.

b) The New Jersey View

In the landmark expert opinion case of State vs. Harvey, 151 N.J. 117, 171(1997), the Supreme Court ruled that the proof of general acceptance within a scientific community can be elusive, and satisfying the test involves more than simply counting how many scientists accept the reliability of the selected technique. General acceptance entails the strict application of the scientific method, which requires an extraordinarily high level of proof based on prolonged, controlled,

consistent, and validated experience. The proponent of the technique has the burden to clearly establish general acceptance.

The Frye test remains the accepted method of determining scientific reliability in criminal and quasi-criminal cases in New Jersey. By contrast, a different standard is applied in civil cases under Daubert vs. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593–95(1993).

c) Examples

Child Sexual Assault Accommodation Syndrome - State vs. J.L.G., 234 N.J. 265(2018).

Horizontal Gaze Nystagmus Test – State vs. Doriguzzi, 334 N.J.Super 530(App.Div.2000).

Breathalyzer model 900A - Romano vs. Kimmelman, 96 N.J. 66(1984).

Alcotest 7110 - State vs. Chun, 194 N.J. 54(2008).

d) Commentary

It is critical to note that, even under Frye, the view of the general scientific reliability of a technique may change over time. By way of example, Child Sexual Assault Accommodation Syndrome (CSAAS) was initially accepted in 1993 by the New Jersey Supreme Court as sufficiently scientifically reliable to be admitted in evidence during of sex offenses perpetrated on young children. At that time, the Court found that CSAAS would allow an expert witness to describe traits found in victims of such abuse to aid jurors in evaluating specific defenses. However, as the years went on, serious questions were raised in the scientific community as to the reliability of CSAAS. These doubts and concerns culminated in the rejection of CSAAS in 2018 as reliable evidence except to explain delayed disclosure by the child victim. See State vs. J.L.G., 234 N.J. 265(2018). This history should serve as an example as to the dynamic nature of scientific evidence.

By contrast, in 2000, the Appellate Division ruled that evidence developed by way of the Horizontal Gaze Nystagmus test did not meet the Frye standard of scientific reliability. However, in the intervening decades, there has been additional published case law in other jurisdictions accepting this procedure. Accordingly, it may well be that given the developments in the law around the United States since the year 2000, a New Jersey court of Appellate Authority today may well find that the Horizontal Gaze Nystagmus test is now deemed to be sufficiently reliable to be used as evidence in a drunk-driving trial.

Part II

The Olenowski Challenge

a) Appellate Division Unpublished Decision
State vs. Olenowski, 2018 WL 6174766

N.J.R.E. 702 provides for the admission of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Expert testimony that is scientific in nature is only admissible if the method used by the expert has “a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth.” State vs. Kelly, 97 N.J. 178, 210(1984) (citations omitted). In State vs. Bealor, 187 N.J. 574, 592-93(2006), the Court noted that: “As part of their required course of study, police officers must be trained in detecting drug-induced intoxication.” When dealing with scientific evidence, this State has adopted the Frye standard of admissibility as set forth in State vs. Harvey, 151 N.J. 117, 169-

70(1997). A proponent of a newly devised scientific technology can prove its general acceptance in three ways:

(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis;

(2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and

(3) by judicial opinions that indicate the expert's premises have gained general acceptance.

The judge found DRE evidence “qualifies as scientific evidence subject to judicial gatekeeping,” and stated:

[B]ecause of the scientific background of many of the steps of the protocol, DRE evidence, taken as a whole, qualifies as being scientific enough to trigger a ruling under the Frye-Harvey standard. The [c]ourt agrees with [d]efendant that DRE evidence is indeed scientific.

As to the reliability of DRE evidence here, Judge DeMarzo found:

Nevertheless, New Jersey's continued reliance on DRE evidence indicates the willingness that it still finds it to be generally acceptable and reliable in the scientific community. As previously stated, a scientific method can be disputed, but the evidence it procures remains admissible. Moreover, Dr. Pandina's disagreement of such acceptance cannot in itself overturn the reliability of certain scientific subject-matter because its acceptability does not turn on a unanimous or

universal agreement. For these reasons, DRE evidence satisfies the three requirements outlined in Harvey.

Certification granted 236 N.J. 622 (2018)

b.) Olenowski November 18, 2019 Order appointing a special master.

c) Progress of the hearing before Judge Lisa and discussion of potential range of outcomes.

SUPREME COURT OF NEW JERSEY
A-56 September Term 2018
082253

FILED

NOV 18 2019

Heather J. Sale
CLERK

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORDER

MICHAEL OLENOWSKI,

Defendant-Appellant.

This matter having come to the Court on a grant of certification, 236 N.J. 622 (2019), to determine whether the testimony of an officer who is a certified Drug Recognition Expert (DRE) is admissible at trial and, if so, under what circumstances; and

Defendant having been charged with driving while intoxicated, contrary to N.J.S.A. 39:4-50, and related offenses, and the Municipal Court having denied defendant's motion to hold a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), to assess the admissibility of DRE evidence at trial; and

The State, over defendant's objection, having introduced evidence of the twelve-step process that officers apply to assess drug influence and

impairment, as well as the specific results against defendant, through the testimony of certified DREs; and

Defendant having introduced a written report and testimony of an expert witness, who asserted there has been insufficient scientific study to date to conclude that drug influence evaluations performed by DREs are reliable and valid, and that such evaluations should include toxicological screening for various types of substances; and

Defendant having been convicted in Municipal Court and, after a trial de novo, in the Superior Court, and that conviction having been affirmed on appeal; and

The Court having granted amicus curiae status to the Attorney General of New Jersey, the American Civil Liberties Union and the Public Defender, the New Jersey State Bar Association, the Association of Criminal Defense Lawyers, the County Prosecutors Association, the DUI Defense Lawyers Association, the National College for DUI Defense, and the New Jersey State Association of Chiefs of Police; and

The parties and amici having raised and argued questions about the scientific reliability and admissibility of DRE evidence, and having submitted extensive scientific literature, which has not been examined at an evidentiary hearing, in support of their respective positions; and

The Court having determined on prior occasions that, when resolution of a critical issue depends on a full and complete record, the Court should await, before decision, the development of such a record, see State v. Cassidy, 230 N.J. 232, 232-33 (2017); State v. Henderson, 208 N.J. 208, 228, 305-06 (2011); State v. Moore, 180 N.J. 459, 460-61 (2004); and

The Court having heard argument of the parties and having concluded that the existing factual record is inadequate to test the validity of DRE evidence; and

The Court having concluded that, until such a record is established, the Court should not address the question of the admissibility of the DRE evidence presented in this case under N.J.R.E. 701 or 702; and for good cause shown:

It is ORDERED that the matter is remanded summarily to a Special Master for a plenary hearing to consider and decide whether DRE evidence has achieved general acceptance within the relevant scientific community and therefore satisfies the reliability standard of N.J.R.E. 702, see Cassidy, 235 N.J. at 491-92; State v. J.L.G., 234 N.J. 265, 301 (2018); Frye, 293 F. at 1014; and it is further

ORDERED that, as part of that evaluation, the parties shall address and the Special Master determine, among other relevant issues, whether each individual component of the twelve-step protocol is reliable; whether all or

part of the twelve-step protocol is scientifically reliable and can form the basis of expert testimony; and whether components of the process present limitations, practical or otherwise; and it is further

ORDERED that the Honorable Joseph F. Lisa, retired Presiding Judge of the Appellate Division serving on recall, is appointed to serve as the Special Master, with his consent; and it is further

ORDERED that, subject to any rulings by the Special Master regarding the proofs to be submitted on remand, defendant and the State shall each present testimony, scientific studies, and other proofs, including expert testimony, in support of their respective positions; and it is further

ORDERED that the Special Master shall determine the extent of the participation of the amici identified above in developing the record; and it is further

ORDERED that the Special Master shall make findings of fact and conclusions of law after hearing testimony and the parties' arguments; and it is further

ORDERED that the State shall make arrangements to ensure that the Special Master receives transcripts of the remand proceedings conducted under this Order; and it is further

ORDERED that after the hearing is completed, the Special Master shall expeditiously complete and submit a written report of his findings to the Court; and it is further

ORDERED that upon the filing of the Special Master's report on remand, the parties and amici shall each have thirty days to serve and file briefs and appendices with the Court, and ten days thereafter to file any responding briefs, and that no further submissions will be permitted unless requested by the Court; and it is further

ORDERED that after briefing is completed, the Clerk of the Court shall schedule the matter for additional oral argument; and it is further

ORDERED that jurisdiction is otherwise retained.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 18th day of November, 2019.



CLERK OF THE SUPREME COURT