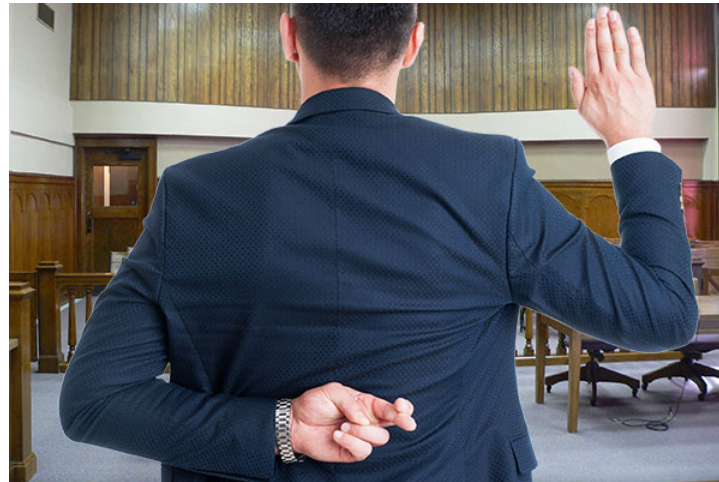


Garden State CLE Presents:

The New Rule on Expert testimony in DWI and Criminal Case



Instructor:



John Menzel, Esquire
N.J. DWI Defense Attorney

Lesson Plan

Introduction

On February 17, 2023, the Supreme Court released an opinion in *State v. Olenowski*, ___ N.J. ___ (2023) that dramatically changed New Jersey law. Prior to the decision, a court's evaluation of the scientific reliability of novel scientific devices or procedures in criminal cases had been decided under the century old decision in *Frye v. United States*, 293 F. 1013 (D.D. Cir. 1923). The Supreme Court has now adopted a radically different standard for expert testimony and has applied it prospectively to DWI and criminal cases in both municipal and Superior Court trials.

Part I - The *Frye* Standard

a.) NJRE 702

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.

To satisfy the rule, it is well-settled that the proponent of expert evidence must establish three things: (1) the subject matter of the testimony must be “beyond the ken of the average juror”; (2) the field of inquiry “must be at a state of the art such that an expert’s testimony could be sufficiently reliable”; and (3) “the witness must have sufficient expertise to offer the” testimony.

The second part of this test is under challenge in *Olenowski*

b.) DRE 12-step protocol - The Olenowski case involves a challenge to the scientific reliability of the 12-step process used by drug recognition evaluators to determine if an arrested suspect is under the influence of intoxicating drugs. At the heart of the case is this question: Is there a reliable scientific basis for a twelve-step protocol that is used to determine (a) whether a person is impaired, and (b) whether that impairment was likely caused by ingesting one or more drugs? For decades, issues of this type in our criminal cases have been analyzed under the test outlined in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). That standard turns on whether the subject of expert testimony has been “generally accepted” in the relevant scientific community.

In the past, the Supreme Court has used the *Frye* test to assess scientific reliability in several situations, often related to DWI. Expert testimony has been found reliable, with some qualifications, in a number of those situations.

State v. Chun, 194 N.J. 45, 65 (2008) (Alcotest device);

Harvey, 151 N.J. at 171-73 Romano v. Kimmelman, 96 N.J. 66, 80-82 (1984) (breathalyzer models).

State v. Harvey, 151 N.J. 117, 171-73 (1997) (Polymarker test)

c.) Limitations of *Frye* - The *Frye* standard permits judges to consider only whether the subject of the testimony has been “generally accepted” in the relevant scientific community; *Daubert* empowers courts to directly examine the reliability of expert evidence and consider a broader range of relevant information. The more restrictive standard in *Frye* is also difficult to apply to certain types of expert evidence, including novel areas.

Frye, however, guides judges to approach the question of reliability indirectly by focusing on general acceptance rather than reliability itself. By doing so, *Frye* obscures the heart of the issue. Instead of directing judges to examine actual measures of reliability -- like the soundness of the methodology used to validate a scientific theory or technique, the strength of the reasoning underlying it, and the accuracy of the theory or technique in practice -- *Frye* only permits judges to consider the views of individuals in the relevant field. As a result, *Frye* has been criticized as “both unduly restrictive and unduly permissive.”

***Frye* also presents a difficult threshold question: identifying the relevant scientific community in which general acceptance must be measured. In some instances, scientific evidence may be studied by multiple scientific communities or none at all.**

Part II - The *Daubert* Standard

a.) Development & adoption - The United States Supreme initially adopted *Daubert* as a replacement for *Frye* based upon its own view of Federal Evidence Rule 702 (which is identical to the N.J. Rule). *Daubert v. Merrell Dow*, 509 U.S. 579 (1993).

The Court in *Daubert* created a new methodology-based standard to determine admissibility:

Faced with a proffer of expert scientific testimony, the trial judge must determine at the outset whether the expert is proposing to testify to:

- (1) scientific knowledge that**
- (2) will assist the trier of fact to understand or determine a fact in issue.**

This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

b.) *Daubert* factors at trial - The Supreme Court went on to provide a non-exclusive list of four factors (commonly referred to as the *Daubert* factors) to help courts apply the new standard.

Those factors are:

- (1) whether the scientific theory or technique can be, or has been, tested;**
- (2) whether it “has been subjected to peer review and publication”;**
- (3) “the known or potential rate of error” as well as the existence of standards governing the operation of the particular scientific technique; and**
- (4) general acceptance in the relevant scientific community.**

The Supreme Court emphasized the inquiry is a flexible one and that its focus must be solely on principles and methodology, not on the conclusions that they generate. Ultimately, consistent with the Federal Rules of Evidence, the new standard was designed to ensure that expert testimony “rests on a reliable foundation

The New Jersey Supreme Court adopted this test for all civil cases in 2018 with its decision in *In re Accutane Litigation*, 234 N.J. 340, 398-99 (2018).

Part III - The decision in Olenowski

The N.J. Supreme Court that *Daubert's* focus on methodology and reasoning, which applies in civil cases, is a superior approach to criminal cases as well.

Nothing in the Olenowski decision disturbs prior rulings that were based on the *Frye* standard. Future challenges in criminal cases that address the admissibility of new types of evidence should be assessed under the new standard outlined above. The same is true for challenges to the admissibility of evidence that has previously been sanctioned but the scientific reliability underlying the evidence has changed.

Note, regardless of how Olenowski is ultimately decided, the scientific reliability of the Alcotest 9510 will be determined under Daubert principles.