

Garden State CLE Presents:

Admissibility of DRE Evidence



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Lesson Plan

Introduction

In State vs. Bealor, 187 N.J. 584(2006), the Court held that lay opinion testimony about the fact of a driver's intoxication is always admissible, but lay testimony ascribing the cause of intoxication is admissible only when the alleged cause is alcohol.

In a similar manner, in driving while under the influence of drug cases, facts of intoxication must be linked to proofs of the cause of intoxication.

Thus, in a DUI drug case, the State must prove beyond a reasonable doubt two essential elements:

- 1) The defendant was intoxicated; and
- 2) The cause of the intoxication was narcotics, hallucinogens, or habit-producing drugs.

The implementation and limitation on the proofs establishing these elements has now been defined by the Supreme Court in what will be referred to as Olenowski II.

In State vs. Olenowski, ___ N.J. ___ (2023) (Olenowski II) the Court's majority ruled that DRE testimony does not, in and of itself establish impairment. However, such testimony is sufficiently reliable to be admitted for a less ambitious purpose and with critical safeguards. These include the following:

- 1) The DRE testimony must be confined to an opinion that the evaluation is "consistent with" the driver's ingestion or usage of one or more of the identified drug categories. The DRE may not present opinions as to whether the driver's observed impairment was actually caused by such drugs and, if so, to what extent.
- 2) If feasible, the State must make a reasonable attempt to obtain a toxicology report based on a blood or urine sample from the driver. If the State fails to make such a reasonable attempt without persuasive justification, the DRE opinion testimony must be excluded.
- 3) The defense must be afforded a fair opportunity to impeach the DRE and present competing proof.
- 4) Model instructions to guide juries about DRE evidence should be considered.

Part I

DRE 12 - Step Protocol

Detecting and proving that a driver ingested and was under the influence of drugs while behind the wheel can be challenging. To enable such detection, law enforcement officials and researchers developed a twelve-step protocol:

- 1) a breath alcohol test;
- 2) an interview of the arresting officer;
- 3) a preliminary examination and first pulse check;
- 4) a series of eye examinations;
- 5) four divided attention tests;
- 6) a second examination and vital signs check;
- 7) a dark room examination of pupil size and ingestion sites;
- 8) an assessment of muscle tone;
- 9) a check for injection sites;
- 10) an interrogation of the driver by the DRE;
- 11) a final opinion, based on the totality of the examination, about whether the driver is under the influence of a drug or drugs; and
- 12) a toxicological analysis.

A) Analysis of the Protocol

The twelve-step DRE process is elaborate and standardized. It is grounded in a program that has been used across the nation and abroad for decades and is periodically modified. The program adheres to a standardized manual and uses a uniform seven-column matrix card and other tools for each DRE's evaluation. The more than 400 certified DRE's in the State who are deployed to perform the evaluations have been extensively trained and are supervised and recertified.

The DRE 12-step protocol does not conclusively establish that a driver is actually impaired or that the drug categories identified by the DRE are definitively the cause of any such impairment. A toxicology report, particularly one based on a blood sample instead of a urine sample can help corroborate the presence of such drugs in the driver's system.

But even that toxicology report cannot prove that the driver was actually impaired by drugs while behind the wheel because there are no per se driving while under the influence of drugs violations in our statutes. Further, no studies in this record identify a drug level that establishes impairment per se.

B) Confirmation Bias

The Court also recognized that there are palpable risks of confirmation bias when a DRE officer administers the protocol, particularly in the more subjective aspects of the examination, such as the SFST's and the eye tests. Such bias may consciously or subconsciously affect the DRE's opinion concerning a driver, despite an officer's good faith and training to remain objective. In many instances, drivers admit to the arresting officer or DRE that they have been using drugs which potentially influences how the DRE evaluates other steps of the protocol. DRE's are called only when there is a suspected drugged driver.

C) Opinion Evidence as to Intoxication at Trial

First and foremost, a DRE's opinion must not be allowed to prove too much. The majority rejected the notion that the DRE's opinion at Step 11 establishes causation, i.e., that particular drugs or categories of drugs were ingested by the driver and caused the driver to be impaired. Impairment instead must be proven by the State with independent evidence as we held in Bealor. That evidence can include, for example, specific factual observations of impaired behavior by the arresting officer or the DRE, a driver's admissions, information from a passenger or other observer about the driver's recent drug use, or drugs or paraphernalia found in the vehicle.

At trial, a municipal court judge may draw inferences connecting the simultaneous presence of objective facts of intoxication and proof of the presence of a cause of intoxication to conclude that the defendant drove while intoxicated.

The DRE's opinions tying such factual observations and the protocol results to specific drug categories must be more restricted. Accordingly, a DRE is only allowed to opine in court that the protocol has presented indicia that are "consistent with" the driver's usage of certain categories of drugs.

The DRE's expert opinion testimony must not go further than that.

D) Importance of Toxicology Reports

A toxicology report corroborating a DRE's opinion is important evidence. The toxicology report can strengthen the State's case or alternatively, undermine it. However, a toxicology report can detect only drug presence, it cannot establish the amount or timing of the driver's drug usage. Moreover, the toxicology report may not detect some combinations of drugs or newer designer drugs that are resistant to detection.

Because toxicology can be relevant and helpful to a trier of fact, the majority encouraged that it be performed. It went on to hold that DRE officers must make a reasonable attempt to obtain a toxicology report when it is feasible to do so and preferably to obtain a blood sample rather than a urine sample when their protocol indicates at Step 11 an opinion of consistency with drug use.

If the Court finds no reasonable attempt was made, despite its feasibility, the DRE evidence shall be excluded. However, if the State establishes a reasonable justification for the lack of a toxicology report, then the DRE evidence is admissible, subject to defense impeachment and counterproof.

E) Mounting a Defense – Cross Examination

The defense shall have a fair opportunity to impeach or rebut it through cross-examination of the DRE and with counterproof. The adversarial process can then explore the probative strengths and weaknesses of the DRE evidence.

For example, defense attorneys can explore any doubts and inconsistencies within the DRE findings, such as discrete indicators that the DRE found or did not find and whether they could be consistent or inconsistent with several categories about which the DRE did or did not opine. The defense may also show that there are benign medical or other reasons why a driver may appear impaired. Additionally, the defense may call qualified experts who can opine about flaws within the DRE process and urge that the trier of fact ascribe little or no weight to the DRE's testimony.

These impeachment techniques are not exclusive. Counsel may pursue other avenues to undermine the DRE's opinion within the usual boundaries of the Rules of Evidence.

Part II

Standard of Review

A) Typically, the decision by a trial judge to admit evidence is reviewed on appeal under a deferential “abuse of discretion” standard. In DRE cases, a decision to admit evidence based upon the Daubert Standards will be reviewed de novo by the appellate court.

B) Daubert Factors

- 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.

Daubert factors should not be applied rigidly. They are now the standard in both civil and criminal trials in New Jersey.