Garden State CLE Presents:

Judge Lisa's Opinion
on
DRE Evidence in State vs. Olenowski
What's Next?

Instructors:

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Lesson Plan

I. Introduction
Procedural History and Statement of Facts

Michael Olenowski was charged with driving under the influence of drugs (DUID), in violation of N.J.S.A. 39:4-50(a), on two separate occasions in 2015. At the time of each incident, while under arrest shortly after driving, Olenowski was evaluated by a Drug Recognition Expert (DRE), each of whom formed an opinion that he was driving under the influence of impairing drugs. Before either case went to trial, Olenowski moved to bar the testimony of the DREs, requesting a hearing under Frye vs. United States, 293 F. 1013(D.C.Cir.1923), to assess whether the proposed DRE testimony was sufficiently reliable to be allowed in evidence. The municipal court judge denied the motion and allowed the DREs to testify. Following separate trials in the Hanover Municipal Court, Olenowski was found guilty in April and May 2016 of the DUID charges, which constituted his second and third offenses in violation of N.J.S.A. 39:4-50(a).

After a consolidated trial de novo in the Law Division, Rule 3:23, Olenowski was again convicted of both offenses and the same sentences that had been imposed by the municipal court judge were imposed. Olenowski appealed, and in an unreported opinion the Appellate Division affirmed his convictions and sentences. (State vs. Olenowski, A-4666-16T1, decided 11/27/18.) Olenowski's petition for certification to the New Jersey Supreme Court was granted on March 8, 2019. (State vs. Olenowski, 236 N.J. 622(2019)). After briefing and oral argument, the Court concluded that a *Frye* hearing should have been conducted.

During the pendency of the Special Master proceeding, Michael Olenowski passed away. Nevertheless, because the issue is of significant public importance and likely to recur, the issue has not been rendered moot with Olenowski's passing, and the hearing proceeded to its conclusion.

II. Instructions From the Supreme Court

The Supreme Court's order of November 18, 2019, namely "to consider and decide whether DRE evidence has achieved general acceptance within the relevant scientific community and therefore satisfies the reliably standard of N.J.R.E. 702." The order continued that "as part of the evaluation . . . the Special Master [shall] determine . . . 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."

III. Elements of the Twelve-Step DRE Protocol

The twelve-step protocol used by DREs contains the following steps:

1) Breath alcohol test

2) Interview of arresting officer

3) Preliminary examination and first pulse

4) Eye examinations (Equal tracking and pupil size)
   a) HGN (Smooth Pursuit, Maximum Deviation, Angle of Onset)
   b) VGN
   c) Non-Convergence

5) Divided attention tests:
   – Modified Romberg Balance
   – Walk and Turn
   – One Leg Stand
   – Finger to Nose

6) Vital signs and second pulse

7) Dark room exam of pupil size; ingestion site exam (oral and nasal)

8) Check for muscle tone

9) Check for injection sites and third pulse

10) Interrogation, statements, and other observations

11) Opinion of evaluator

12) Toxicological examination

IV. Foundations of the DRE Programs

The core premises upon which the DRE program has relied for more than a half-century assume the following:

1) The signs and symptoms typically associated with the use of certain defined classes of impairing drugs could be observed by well-trained police officers, some just by general observation, others by the administration of standardized tests that the officers could be trained to administer, and some by ascertaining medically related manifestations of drug ingestion, such as pulse, blood pressure, temperature, muscle tone, certain eye movements and other characteristics, which the officers could also be trained to do;

2) Categorization of the classes of impairing drugs could be achieved, with the input of medical and toxicological experts, resulting in distinct categories based upon expected signs and symptoms, rather than other factors such as molecular structure or therapeutic use;

3) Impairment - These observations would be helpful in ascertaining whether observed impairment was caused by the ingestion of an impairing drug or drugs in one or more of the categories ; and

4) Reliable opinion – These observations and assessments, combined with other information ascertained through other steps in the protocol, would enable these officers, who would come to be known as DREs, to form reliable opinions as to whether the observed impairment of a subject was likely caused by an impairing drug or drugs, and, if so, which category or categories of drugs were responsible.

5) The "other steps in the protocol" referred to above include ruling out alcohol intoxication with an Alcotest examination and the use of ordinary police work. This would include, for example, questioning witnesses, which might include persons who were with the subject, EMTs, etc.; interviewing the arresting officer to ascertain the driving conduct that resulted in police contact and learning of any admissions the subject may have made and whether any drugs or drug paraphernalia were found; and ascertaining the behavior, general demeanor, appearance and conduct of the subject observed by others before the DRE arrived.

6) DRE general observation - Then, the DRE would make his or her own general observations of the subject and engage in a preliminary

inquiry about any health or injury issues, whether the subject had taken any medications, and other pertinent information. Throughout the entire time of interacting with the subject, the DRE would continually gather more information and make more observations along these lines.

7) Urine tests - The DRE would also request a urine sample, but in New Jersey is obligated to advise the subject that he or she has the right to refuse to give one. If the subject waives that right, a urine sample would be provided and sent to a New Jersey State Police laboratory for toxicological assessment. The results of that sample would not be known for at least several weeks, long after the DRE had recorded his or her opinion about drug use and the observations and information supporting that opinion, in a written and filed report.

V. Acceptance of Scientific Proofs

Leading New Jersey Cases are:

State vs. Harvey, 151 N.J. 117, 170(1997)
Daubert vs. Merrell Dow, 509 U.S. 579(1993)
State vs. Chun, 194 N.J. 54(2008)
Frye vs. United States, 293 F. 1013(D.C.Cir.1923)

A proponent of scientific evidence can prove its general acceptance and reliability in three ways:

1) By expert testimony as to which the proffered expert witness based his analysis;

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

3) By judicial opinions that indicate the expert's premises have gained general acceptance." State vs. Harvey, 151 N.J. 117, 170(1997).

Of all of the evidence presented in the case, the most important evidence in Judge Lisa's view was the expert testimony provided by medical and toxicological experts.

VII. The State's Proofs at the Hearing

a) Medical and Toxicological

The State's experts in the Olenowski hearing provided compelling and persuasive evidence that:

> 1) the seven drug categories in the DRE matrix are consistent with comparable matrices used in the medical field and generally accepted in the medical field, and
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> 2) DREs can be and are adequately trained to competently perform all of the scientifically based steps in the DRE protocol and to reliably observe and report on the results, in a manner that is comparable to the training and performance of individuals utilized in the medical field, such as clinical technicians, EMTs, and the like, a practice that is generally accepted in the medical field.

The State's medical and toxicological experts backed up their opinions by reference to recognized medical texts, peer-reviewed articles, and their own extensive and impressive education and experience.

The testimony of these independent witnesses and the State's other scientific witnesses established the general acceptance of the DRE protocol in the medical field because the protocol is based upon methods and procedures that comport with generally accepted medical methods and procedures in identifying likely drug use and the category of the drug or drugs involved.

b) Statistical evidence of reliability

The State's statistical experts who evaluated the New Jersey DRE data were completely independent witnesses. They have had no connection with law enforcement or the DRE program.

They credibly explained how the records revealed that there was a very high degree of reliability demonstrated by the DREs in identifying drivers who had taken impairing drugs before driving who were later determined through toxicological analysis to have such drugs in their system, i.e., "true positives." For non-training cases where toxicology was available, DREs correctly identified true positive cases between 85.3% and 92.3% of the time, depending on the stringency of the match criteria used.

The corresponding "sensitivity" of the New Jersey evaluations, which looks at both true positives and false negatives (i.e., those cases where the DRE opined no impairment but toxicology showed a drug or drugs), showed that, out of the total number of instances where the subjects had drugs in their systems, DREs gave correct opinions between 82.5% and 92.6% of the time for non-training cases, and at a higher rate for all cases overall.

Further, these data revealed that of the 2551 drivers (i.e., non-training cases) with a toxicology report, only eighty-two (or 3.2%) were "false positives," namely where the DRE opined the use of an impairing drug, but none was revealed by the toxicological analysis. As will be explained in this report, this does not necessarily mean that all of those eighty-two false-positive individuals were innocent or falsely charged.

Also telling was that there were 305 individuals who were detained for a potential DUID violation and for whom a DRE evaluation was begun, but as to whom the evaluating DRE concluded that impairment caused by drugs was not present, so no toxicological sample was requested.

This number, when combined with the 92 false negative non-training cases – cases where the DRE opined no impairment, but the toxicology revealed a drug – shows that DREs were not hesitant to opine that a subject was not impaired by drugs when impairment was not clearly shown. They did so in more than 10% of cases.

As with the studies spanning the last several decades, the testimony of the State's statistical experts regarding the New Jersey DRE data provides further support for my finding of reliability in DRE performance. The New Jersey experience in thousands of cases over a two-year period reveals that utilizing the DRE protocol, New Jersey's DREs have performed very well in identifying drivers who are unable to drive a motor vehicle safely because of the presence in their system of impairing drugs.

Accordingly, Judge Lisa found that the studies and reports regarding DRE performance over the years and the statistical analysis of the New Jersey DRE data supported his finding of general acceptance based on the State's expert testimony. They demonstrate that, allowing for the inherent limitations involved in conducting studies of this nature, the overall results were reliable.

He also noted that the State continues to argue before during the hearing, as it did before the Supreme Court, that a body of judicial opinions from other jurisdictions either satisfies the third method of proving general acceptance or persuasively establishes that the DRE protocol is not sufficiently scientific to require the application of the Frye test at all.

VII. Conclusion

Based on the expert testimony in medicine and toxicology that Judge Lisa found that the DRE program replicates generally accepted medical practices in identifying the presence of impairing drugs and the likely category of those drugs in an individual exhibiting indicium of impairment, in which alcohol intoxication has been ruled out by an Alcotest examination and there is no evidence that the impairment stems from medical or injury conditions.

Further, the DRE matrix, with its seven categories and a listing of specific and general signs and symptoms typically associated with each category, comports with the medical matrices designed for the same purpose that are generally accepted in the medical field. This testimony also established that the training DREs receive is at least equivalent to the level of training provided for comparable activities in the medical field and is sufficient to enable reliable application of the DRE protocol.

Judge Lisa also ruled that the DRE protocol is generally accepted in the medical and toxicological fields by implication. Direct proof is elusive because the evidence makes clear that members of the medical profession generally are not familiar with the DRE program. As one key witness remarked, "I don't think the medical field thinks much about DREs, honestly."

Nevertheless, the evidence establishes that the DRE protocol comports with standards and practices generally accepted in the medical and toxicological communities for use in toxidrome recognition.[1] The DRE protocol is a version of toxidrome recognition adapted to law enforcement for use in DUID enforcement.

Accordingly, subject to these caveats, Judge Lisa ruled that DRE evidence satisfies the reliability standard of N.J.R.E. 702 and should be admissible in evidence.

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[1] A toxidrome is a toxic syndrome, identified by ascertaining the presence of a constellation of observed clinical effects and manifestations, which taken together, indicate the category or categories of drugs that are the likely cause.