

"Challenging the admissibility of drug recognition expert (DRE) testimony in a DUI trial"

If you are a practitioner that handles DUI cases and have not been confronted with "DRE testimony", you probably soon will be. The purpose of this article is to offer suggestions on framing and preparing your pre-trial motion to suppress this testimony.

I. Background:

The drug recognition expert program (initially labeled the drug evaluation and classification program) was developed in the early 1970's by the Los Angeles police department. Its genesis was as a transportation safety program focusing on the detection and apprehension of drug impaired drivers. Soon after its initial implementation the curriculum became an international program expanding to approximately 38 states and into Canada.

II. Requirements for Certification:

Basically, the DRE program involves a three phase training curriculum; including:

1. Drug Recognition Expert Preschool (16 hours);
2. Drug Recognition Expert School (56 hours) and;
3. Drug Recognition Field Certification (40 hours).

The training relies heavily upon the standardized field sobriety tests. The officer is trained and eventually certified as a "Drug Recognition Expert" or "Drug Recognition Specialist." DRE's are trained to conduct a standardized and systematic 12-step evaluation procedure.

III. What your Discovery Request Should Include:

- A. The officer's IACP (International Association of Chiefs of Police) certification number for his DRE certification;
- B. Copies of all of his evaluations, proficiency examination checklists, field examination grades and test scores that were part of his certification;
- C. Any and all proficiency testing documented in the officer's certification program. Officers must be recertified every two years;
- D. The most current "rolling log" document for this officer documenting all of his drug influence examinations from the time of certification to present;
- E. As to this particular case any and all documentation for this evaluation; including; but not limited to, the "face sheet", along with any and all notes and reports for this evaluation (these requests should be served upon the DRE's agency personnel department, probably as a Freedom of Information request, as the officer's personnel file should include a lot of this information; along with requesting the

appropriate information as the certifying agency. Typically this information will be kept by the IACP state coordinator).

IV. Areas to be covered in the pre-trial hearing:

1. Fully examine all of the information provided to you through your discovery requests to the prosecutor's office, the police agency and NHTSA as referenced above.
 - Has the officer taken and documented all steps so that his certification was current at the time of the examination in your case?
 - Is his "rolling log" current and up to date?
 - Does his "rolling log" match up with testimony or opinions in other cases (does it show that his opinions are accurate)?

2. As noted above, the DRE drug evaluation includes 12 major and separate components. **Crucially, was the mandated procedure and methodology scrupulously followed at each step?**

1. The breath alcohol test

The DRE will need to know the result of the suspect's breath alcohol test, if taken. This is important to the DRE because he must determine whether or not alcohol accounts for the observed impairment. Normally, if the suspect's blood alcohol level is above the state's limit for DUI (.08% in most states), a DRE drug evaluation is not conducted.

- Was the breath test conducted pursuant to all statutory and regulatory requirements?

2. The Interview of the Arresting Officer

If the DRE did not make the arrest, he will need to interview the arresting officer prior to the evaluation. This allows the DRE to gain an insight on the suspect's driving, conduct at roadside, and their performance of the Standardized Field Sobriety Tests (SFST's).

- Delve into all the particulars of the communications between the DRE officer and the arresting officer if applicable.
- Did the DRE officer make notes during his interview with the arresting officer?
- Was this interview specific enough for the DRE officer to "gain insight" for his subsequent evaluation?

3. The Preliminary Examination

During this step the DRE will perform a preliminary examination checking for any evidence of a medical complication that would warrant terminating the evaluation and requesting medical assistance. The suspect is asked a series of questions, and the DRE conducts a series of eye examinations that assists in making the decision whether the suspect is under the influence of alcohol

and/or drugs or if the impairment may be medically related. If drug impairment is suspected, the DRE proceeds with the evaluation.

- What questions were asked of the suspect and why?
- What series of eye examinations were conducted, and how did they assist you?
- What led you to suspect drug impairment?

4. Examination of the Eyes

In this step, the DRE administers three tests of the suspect's eyes: (1) Horizontal Gaze Nystagmus (HGN), (2) Vertical Gaze Nystagmus and (3) Lack of Convergence.

- Was NHTSA protocol strictly followed in the administration of these three tests?

5. Divided Attention Psychophysical Tests

The DRE conducts a series of psychophysical tests that assists in determining the suspect's condition and if he/she is able to operate a vehicle safely. The DRE administers four divided attention psychophysical tests: (1) the Romberg Balance, (2) Walk and Turn, (3) One Leg Stand, and (4) Finger to Nose.

- Was NHTSA protocol strictly followed in the administration of these four tests?

6. Examination of Vital Signs

The sixth step requires the DRE to make precise measurements of the suspect's pulse rate, blood pressure and body temperature. The suspect's pulse rate is measured three different times during the evaluation. During this step of the evaluation the DR will use medical instruments, including a stethoscope, sphygmomanometer (blood pressure cuff) and an electronic digital thermometer.

- Was each step followed and documented?

7. Dark Room Examinations

During this step in the evaluation process the DRE will take the suspect into a separate room where the DRE can obtain an estimate of the suspect's pupil size in three different lighting conditions. The DRE uses a device called a pupilometer and a penlight to conduct the measurements in room light, near total darkness and direct light.

- Again, delve hard into each requirement of this step for proper procedure, application and documentation.

8. Examination for Muscle Tone

During this step, the DRE inspects the suspect's arm muscles checking for muscle tone.

9. Examination for Injection Sites

Many drug abusers inject drugs. So immediately after checking muscle tone, the DRE then carefully inspects the suspect's arms, hands, fingers, neck for evidence of recent or past hypodermic needle injections.

- Was this step taken and documented properly?

10. Suspect's Statements and Other Observations

In this step of the evaluation, the DRE questions the suspect about specific evidence and observations made during the evaluation.

- Were notes made of this interview?

11. Opinions of the Evaluator

In this step the DRE documents his/her conclusions rendering an expert opinion about the condition of the suspect and the category(s) of drugs causing the impairment.

12. The Toxicological Examination

The final step in the evaluation process is to obtain a blood or urine specimen, which is sent to the laboratory for chemical analysis. The lab analyzes the specimen and reports the findings to the DRE and/or the arresting officer.

- Is the proper chain of custody present?

Based on the testimony and supporting documentation that comes out during this hearing, hopefully you will be in a strong position to argue for suppression. Even if the court is inclined to allow DRE testimony generally, you may be able to successfully challenge the testimony in your case on the grounds of "reliability". Consider patterning your argument along the lines of the 2000 amendment to Federal Rule of Evidence 702. This amendment states, "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied to principles and methods reliably to the facts of the case." (emphasis added).

In summary, a strong argument can be made that in the field of criminal law current jurisprudence requires more for the admissibility of "scientific evidence" than previously under the landmark decisions of Daubert v. Merrell Dow Pharmaceutical, Inc.(1993) and Kumho Tire Co. v. Carmichael (1999). It requires the proper application of the technique in the particular case.

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