

**AMERICAN PROSECUTORS
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**NATIONAL TRAFFIC LAW
CENTER**



**DRUG RECOGNITION EVALUATION
(DRE) CASE LAW**

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American Prosecutors Research Institute

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Drug Recognition Evaluation Case Law

The following cases may be obtained by contacting the National Traffic Law Center. This case list is organized into two sections: (1) published state case law; and (2) published federal case law. The National Traffic Law Center continuously tracks DRE cases throughout the country. In many of these cases, DRE admissibility is resolved in a lower court motion or order. Because these decisions are from a trial level court, most are unpublished.

I. Published State Case Law

Arkansas

Mace v. Arkansas, 944 S.W.2d 830 (Ark. 1997).

The Arkansas Supreme Court held that a police officer trained in DRE qualifies as an expert under Rule 702 of the Arkansas Rules of Evidence. The circuit court did not err in qualifying the police officer as an expert under Rule 702 because the officer had specialized knowledge of the cause of defendant's impairment. The trial court did not conduct a separate hearing to address the issue of the reliability of the DRE protocol.

"The circuit court specifically stated that it was qualifying [the police officer] as an expert for a narrow purpose – whether [the defendant] was impaired because of some kind of intoxicant. We agree that [the police officer's] specialized training and knowledge aided the circuit court in determining this fact in issue."

Florida

Williams v. Florida, 710 So.2d 24 (Fla. 3rd Dist. Ct. 1998), *reh'g denied*, 725 So.2d 1111 (1998).

The court distinguished between the general portion of the DRE protocol and its subsets, HGN, VGN and lack of convergence:

1. DRE Protocol - Although Florida has adopted the URE/FRE, it continues to follow *Frye*. The court held that *Frye* is inapplicable to the DRE protocol because neither the protocol or any of its subsets (excluding HGN, VGN and lack of convergence) are "scientific" within the meaning of *Frye*. According to

the court, DRE testimony and evidence is admissible because it is reasonably accurate, reliable and relevant.

2. HGN, VGN, LOC - Although HGN, VGN and LOC are “quasi-scientific”, they are not new or novel and therefore the *Frye* standard does not apply to them either. The court also held that HGN test results alone, in the absence of a chemical analysis of blood, breath, or urine, are inadmissible to trigger the presumption of impairment as expressed in the statute (316.1934). HGN may not be used to establish a BAC of .08 percent or more.

The district court agreed with the trial court that it is somewhat misleading for the State to present the officers as ‘Drug Recognition Experts.’ The district court held that the State must lay a proper predicate before referring to a DRE as anything other than a DRE or Drug Recognition Evaluator or Examiner.

“These tests [the twelve-step evaluation] are clearly within the common experience and understanding of the average person.”

“The fact that some of the examinations in the protocol are borrowed from the medical profession, does not elevate the protocol to scientific status.”

“Objective observations based on observable signs and conditions are not classified as ‘scientific’ and thus constitute admissible testimony.”

“The bulk of the scientific research and the weight of the experts’ testimony establish the relevancy of the DRE evidence in determining impairment.”

“We take judicial notice that HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified DRE.”

Minnesota

Minnesota v. Klawitter, 518 N.W.2d 577 (Minn. 1994).

Minnesota is yet another state that has adopted URE/FRE but continues to follow *Frye*. The Minnesota Supreme Court affirmed the lower court's ruling that horizontal gaze nystagmus satisfies the *Frye* standard and expressly refused to address the issue of whether Minnesota should abandon *Frye* in favor of applying the standard articulated in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786 (1993). *Klawitter* held that the drug recognition evaluation is not a novel scientific discovery or technique and that DRE evidence is admissible. The Court further stated, however, that an officer may not be referred to in the courtroom as a “Drug Recognition Expert” because the use of the term “expert” suggests unwarranted scientific expertise. The Court indicated that the term “Drug Recognition Officer” would be acceptable.

"Given proper foundation and subject to other qualifications, opinion testimony by experienced police officer trained in use of so-called drug recognition protocol is generally admissible in evidence in a trial of a defendant for driving while under the influence of a controlled substance."

The trial court stated, "there is nothing scientifically new, novel, or controversial about any component of the DRE protocol itself. The symptomatology matrix used by DREs to reach their conclusions is not new and is generally accepted in the medical community as an accurate compilation of signs and symptoms of impairment by the various drug categories."

New York

New York v. Villeneuve, 232 A.D.2d 892 (N.Y. App. Div. 3rd Dept. 1996).

Defendant challenged the admissibility of the DRE's testimony claiming the DRE was not qualified to testify as an expert. The DRE had "testified about his training, the tests given the defendant, the process of metabolization of drugs by the body and specifically the metabolism of cocaine by this defendant." The appellate court rejected the challenge and allowed the testimony to stand due to the defendant's failure to provide any evidence to support his allegations.

"The attack on Murphy's [DRE] expertise was not supported by any evidence. Defendant's conclusory [sic] allegations as to Murphy's limitations as an expert fail to make out a ground for exclusion of his testimony."

New York v. Quinn, 580 N.Y.S.2d 818 (Dist. Ct. 1991).

New York courts apply the *Frye* standard in assessing admissibility of scientific evidence. The District Court held that the DRE protocol meets the *Frye* test. On appeal the case was reversed due to failure of the record to contain a written jury waiver. *See People v. Quinn*, 607 N.Y.S.2d 534, 158 Misc.2d 1015 (NY Supreme Ct. 1993). On appeal, the court did not address the trial court's finding as to the reliability of HGN and the DRE protocol. Nevertheless, since the case has been overturned, it is of limited use as precedent.

Oregon

Oregon v. Sampson, 6 P.3d 543 (Or. Ct. App. 2000).

Under an *O'Key/Brown* analysis (somewhat similar to a *Daubert* analysis), DRE testimony is scientific evidence subject to the judicial gatekeeping function. The scientific nature of HGN is well established in case law; other procedures performed in a DRE exam are also based on medical science, the results of which are compared to established scientific research. The court analyzed the admissibility of DRE testimony in the context of being offered as evidence that tends to make the

existence of a fact of consequence more probable than not. The court found that universal acceptance is not necessary for admissibility and that the DRE protocol was generally accepted in the relevant scientific communities. Additionally weighing in favor of admissibility, the DRE program is certified and regulated by the IACP and NHTSA, the evidence presented to the court pertaining to the rate of error was not persuasive for finding the protocol unreliable, sufficient literature existed to satisfy the peer-review standard, and that the protocol was “sufficiently established” to satisfy the novelty test. The court noted that any false positive resulting from administration of the test or from the subjective nature of interpretation of the protocol would be remedied by the toxicological test required in the final step. Finally, DRE evidence is admissible only upon a showing of the officer’s adequate training regarding test administration and interpretation.

Utah

Utah v. Layman, 953 P.2d 782 (Utah 1998).

The appellate court affirmed the trial court’s decision to admit testimony concerning the drug recognition evaluation. The court concluded that DRE testimony is opinion and not scientific testimony and, therefore, does not have to meet the test for scientific evidence as outlined in *State v. Rimmasch*, 775 P.2d 388 (Utah 1989).

“This court has held a Rimmasch analysis is required to determine ‘the admissibility of testimony based on an external scientific process or statistical profile.’”

“[T]he Rimmasch analysis applies only to expert testimony based on scientifically derived facts or determinations, and not to an expert’s personal observations and opinions based on his or her education, training, and experience.”

“Where the expert testimony is opinion testimony based on the witness’s training and experience, Rimmasch is not applicable, ‘as there [is] no scientific process on which to apply such an analysis.’”

Washington

Washington v. Baity, 991 P.2d 1151 (Wash. 2000).

The Erye test applies to determine the admissibility of DRE evidence because the DRE protocol and the drug chart used to classify the behavioral patterns associated with the seven categories of drugs have “scientific elements.” The Court especially focused on the use of the HGN test in the context of drug recognition as a scientific element requiring the Erye analysis. Although the forensic use of HGN to detect certain drugs was considered novel scientific evidence, the court held its general acceptance in the relevant scientific community satisfied the Erye test. As a whole,

the DRE protocol and drug chart are also accepted in relevant scientific communities (*i.e.*, pharmacologists, optometrists, and forensic specialists).

Based upon a suspect's behavior and physical attributes, a properly trained DRE may testify as to his or her opinion about the presence or absence of certain categories of drugs in a suspect's system. The DRE may not predict the specific level of drugs present in the suspect, nor may the DRE testify in a fashion that "casts an aura of scientific certainty to the testimony." The Court emphasized that its holding applied only to situations where all twelve steps of the protocol were completed.

"... the principal step of the protocol that qualifies as novel scientific evidence is the assertion that persons who have ingested certain drugs evidence nystagmus."

"Although HGN testing is scientific in nature it is generally accepted in the relevant scientific communities. Thus, we hold the forensic application of HGN to drug intoxication if the DRE context satisfies Frye."

"DRE evidence is admissible under Frye because it is generally accepted in the relevant scientific communities. A properly qualified expert may use the 12-step protocol and the chart of categories of drugs to relate an opinion about the presence or absence of certain categories of drugs in a suspect's system."

II. Published Federal Case Law

District of Nevada

United States v. Everett, 972 F.Supp.1313 (D. Nev. 1997).

A magistrate judge in the United States District Court of Nevada admitted DRE testimony. The magistrate found that *Daubert* did not apply to the DRE protocol because the protocol was made up of nothing more than physical observations. The magistrate states that multiple physical observations "used in concert, to reach a conclusion, does not necessarily elevate the result from the technical to the scientific. The pertinent components of the DRE protocol have long been established and used in the medical community as part of physical examinations...."

"[U]pon the appropriate foundation being laid, the Drug Recognition Evaluation protocol conducted by Ranger Bates, together with his conclusions drawn therefrom, shall be admitted into evidence to the extent that the DRE can testify to the probabilities, based upon his or her observations and clinical findings, but cannot testify, by way of scientific opinion, that the conclusion is an established fact by any reasonable scientific standard. In other words, the otherwise qualified DRE cannot testify as to scientific knowledge, but can as to specialized knowledge which will assist the trier of fact to understand the evidence."

III. Unpublished Decisions

Arizona

Arizona v. Johnson, Nos. 90-56865, 90-35883 Tucson Mun. Ct. (Ariz. Mun. Ct. Nov. 2, 1990).

Although Arizona has adopted URE/FRE Rules, the trial court ruled that the DRE protocol satisfies the *Frye* standard and is therefore admissible. The Arizona Supreme Court later rejected the application of *Frye* to the DRE testimony during oral argument in *Johnson* and declined jurisdiction to reconsider the lower court opinion. The *Frye* standard does not apply to DRE testimony because, as Chief Justice Stanley Feldman observed, “the component examination procedures had been established for fifty years,” thus they were not new or novel. Instead, DRE testimony was admissible as simple observations of physical signs and symptoms of drug influence. (Information taken from the May/June/July 1992 issue of *The DRE*.)

Colorado

Colorado v. Constantino, Criminal Action No. 96M1511, Mesa County (Colo. County Ct. Jan. 15, 1998)

The county court held the DRE process is not novel scientific evidence. In addition, the court found the twelve step DRE process does provide a trained officer with the ability to make a reliable opinion.

Colorado v. Turner, Case No. 92T413 Kit Carson County (Colo. County Ct. Nov. 29, 1993).

The county court ruled that a police officer received sufficient and extensive training to qualify as a DRE expert under Colorado Rule 702. His testimony is thus admissible. Moreover, the court determined that a proper foundation for a lay opinion would also permit the police officer to testify. The court considered the “proper foundation” as both the police officer’s observation of the defendant’s behavior and statement about drug use.

Colorado v. Hernandez, No. 92-M181 Boulder County (Aug. 14, 1992).

Although Colorado has adopted URE/FRE Rules it continues to follow *Frye* in reference to novel scientific evidence. The County Court in *Hernandez* found no novelty in the DRE procedures and therefore used Rule 702 to determine the admissibility of DRE testimony. DRE evidence held admissible.

Florida

Florida v. Beam et al., 2 Fla. L. Weekly Supp. 444 Dade County Ct. (August 22, 1994).

Florida granted the state's motion to admit DRE testimony. Florida follows the *Frye* rule for admitting expert testimony, but the court in this case found that *Frye* does not apply because DRE, while relevant in determining whether the defendant was driving under the influence of drugs, is not new or novel. The court also held that even if *Frye* did apply, DRE evidence is generally accepted in the scientific community.

Hawaii

Hawaii v. Chuen Cheung et al., Case Nos. TD1A to TD2A, District Court of the First Circuit, Honolulu Division (April 8, 1999). (ruling on defendants' motion in limine)

The trial court denied the defendants' motion to suppress DRE testimony. The court found the scientific standard is inapplicable to the DRE protocol because the underlying procedures are technical not scientific, and the procedures are not new or novel. Hawaii follows *Frye* but has adopted the federal rules. Even under a *Frye - Daubert* analysis, the court concluded the DRE witness can testify because the technique utilized by the Drug Recognition Experts is relevant, reliable, trustworthy, and valid.

Hawaii v. Padamada et al., District Court of the Third Circuit, North and South Hilo Division (February 27, 2001).

The 12-step DRE protocol is not a new or novel scientific procedure...[It] has been widely accepted as a valid means of determining drug impairment by law enforcement officers....

No independent assessment of reliability of DRE protocol is necessary, since the DRE protocol is sufficiently reliable for the court to take judicial notice of this protocol.

An officer may qualify to testify as an expert regarding drug impairment of a driver if the officer is properly trained and certified as a DRE officer by the IACP.

The results of the DRE examination may be admitted into evidence in the subject cases if a foundation is established that the DRE protocol was properly followed by the certified DRE officer....

Iowa

Iowa v. Sanders, No. OWCR041844, Johnson County District Court (October 31,

1997) (ruling denying defendant's motion to exclude evidence).

The court held DRE testimony is governed by Iowa Rule 702, but not by *Daubert* because a DRE's testimony is not "scientific in nature." Even under a *Daubert* analysis, the court concluded the DRE witness can testify because the *Daubert* factors have been met.

Maryland

Maryland v. Squire, Case No. 892099008, Baltimore City (Md. Cir. Ct. Oct. 13, 1992) (order denying State's motion to reconsider).

In an earlier oral opinion, the trial court denied the admissibility of DRE testimony. In denying the State's motion to reconsider that ruling, the trial court stated its belief that a DRE is an expert and that it was not established that DRE is a technique that "has been 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" Had the court found the DRE to be a lay witness, the testimony would be admissible as lay opinion testimony provided the witness "has had the opportunity to observe the facts upon which he bases his opinion."

Minnesota

Minnesota v. Cammack, 1997 Minn. App. LEXIS 278, 1997 WL 104913 (Minn. Ct. App. 1997).

The Court of Appeals of Minnesota held that a DRE officer need not complete the entire twelve step evaluation for the officer's opinion to be admissible as long as there is sufficient admissible evidence that supports the DRE's opinion.

Nebraska

Nebraska v. Pride et. al., Case No. CR97-2770 and Case No. CR98-1565, Hall County Court (December 30, 1998).

Following the *Frye* standard, the court found HGN and the protocol involving drug recognition experts are generally accepted in the scientific community and, therefore, are accepted scientific evidence. The court would allow a DRE to testify regarding drug recognition protocol.

Oregon

Oregon v. Uriate-Guerrero et. al., Case No. Z-235697, Multnomah County Circuit Court (October 12, 1998). (88 cases were consolidated - the opinion is cited with the

first defendant and first case number).

The court held DRE evidence is scientific. In order to be admitted, the State must establish that the DRE officer completed the prescribed training and was certified. Once this is established, the court, in specific detail, listed which subjects a DRE officer can give his opinion. These subjects include the basis for requesting a urine test, whether the subject was “under the influence” of a drug and if the subject’s responses were consistent with the subject being impaired. The court further stated that an officer can **not** testify that the subject’s observed impairment was caused by ingestion of the drug predicted. In addition, the court held a DRE officer should be referred to as the “drug recognition evaluation” officer or “drug recognition evaluator.” In this case, the court admitted the DRE evidence.

Oregon v. Blankenship et. al, Case No. 96-60882 Lane County/District Court Oregon (September 8, 1998). (8 cases were consolidated - the opinion is cited with the first defendant and first case number).

The District Court held DRE was scientifically based on the same analysis as in *State v. O’Key*, 321 Or 285 (1995) (holding HGN was a scientifically valid test). The court used the *Brown* test standard to establish DRE admissibility. *State v. Brown*, 297 Or 404 (1984) (test sets out various factors including a general acceptance standard). In this case, the court found the State failed to lay the foundation for DRE admissibility by not presenting any evidence as to the validity of the VGN and LOC tests in the medical community. Additionally, the court noted that the State did not “call any toxicologist involved in the studies relied upon by the State or any other expert to rebut the testimony” of the Defendant’s expert witnesses. Therefore, the court held the DRE evidence was inadmissible.

Oregon v. Buford, Case No. 97CR0207MI Douglas County Circuit/District Court (Oregon July 8, 1997).

The court found that the DRE protocol is scientific evidence and must satisfy *Daubert*. The court held that the DRE protocol does in fact satisfy *Daubert*, the DRE evidence is relevant, the evidence will assist the trier of fact to reach a conclusion and that its probative value outweighs the prejudicial effect to the defendant. The court also held that the DRE protocol meets the seven criteria of *State v. Brown*.

Oregon v. Davis, Case No. 9560740 Lane County/District Court (Oregon February 25, 1997).

The District Court held that DRE was scientific evidence. However, the State did not present “sufficient testimony or evidence that DRE testing is based on scientifically valid principles.” Therefore, DRE evidence in this particular case was inadmissible.

Oregon v. Wallace, No. 96020425 Linn County Circuit/District Court (July 15, 1996).

The court held that DRE evidence was admissible under the seven factors espoused in the Oregon case of *State v. Brown*. The seven factors include (1) the technique's general acceptance in the field, (2) the expert's qualifications and stature, (3) what use has been made of the technique, (4) the potential rate of error, (5) the existence of specialized literature, (6) novelty of the technique and (7) the extent to which the technique relies on the subjective interpretation of the expert. DRE technology "does well in regard to almost all [of these factors]." Furthermore, the court held that the Oregon State troopers qualified as experts.

Washington

Washington v. Harrison, No. 24406-3-II, 2000 Wash. App. LEXIS 1741 (Wash. Ct. App. Sept. 8, 2000).

The trial court proceedings took place in February 1999, prior to the Washington Supreme Court's decision in *Baity*. The court held a DRE's testimony admissible over objections that DREs had not been recognized in Washington courts because the officer testified only on the basis of his experience as a police officer and not as an expert. The officer testified that he had considered the defendant impaired based on his speech, the rises and falls in agitation, the dilation of his pupils, and the odor of alcohol. Neither the state nor the defense brought up the issues of the officer's DRE certification or whether he had undergone training.

Seattle v. Mandell, No. 2886205 Municipal Court of the City of Seattle (June 11, 1997).

The trial court admitted testimony concerning the drug recognition evaluation. Although the court stated that *Frye* applied to only some of the steps of the evaluation, and that almost all of those steps were not novel, it appears that the entire protocol satisfies the *Frye* standard. The court concluded that DRE evidence is admissible "where there is evidence of drug use contemporaneous or near-contemporaneous with driving...."

IV. Other Decisions

Hawaii: In August 1996, a trial court in Hawaii (Maui) held that DRE testimony was admissible. There is no written opinion.

Idaho: Also in 1996, an Idaho trial court was asked to consider the admissibility of DRE evidence. No formal written opinion has been issued.

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