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DRE Post-Incident Review: Something to Consider in Cases Without a DRE

By Beth Barnes

Ideally, in any drug-impaired driving case, a complete drug recognition evaluation (DRE) is conducted during the initial investigation. Too often, however, a DRE is not called or is not available and no evaluation is performed. The absence of a contemporaneous DRE evaluation does not always mean the expertise of an experienced DRE officer cannot be beneficial. A DRE post-incident review (often referred to as a DRE reconstruction) may be worth considering.¹

¹ The term "DRE post-incident review" has been recommended by the International Association of Chiefs of Police, Technical Advisory Panel (TAP) DRE Review Working Group in place of "DRE reconstruction" to avoid the potential of implying the standards used to admit crash reconstruction evidence should be applied to DRE post-incident reviews.

DRE post-incident reviews are not new. Tom Page and others started conducting them in the 1990s. They have, however, become a hot topic of late. Accordingly, the International Association of Chiefs of Police (IACP) Technical Advisory Panel (TAP) recently formed a working group that is preparing a list of considerations for those contemplating pursuing one.² This group defined a DRE post-incident review as: “a process utilized by certified Drug Recognition Experts to provide follow-up investigative steps to collect, review, analyze, and interpret evidence and facts post-incident to render articulable facts and information, which may include opinions related to impairment.” In other words, a post-incident review is the use of a qualified, experienced DRE to conduct an after-the-fact investigation to determine if there is enough information available to develop an expert opinion. The DRE then reports those findings and often testifies to them in court as an expert witness.

A DRE evaluation conducted on the date of violation is always superior to and much more likely to be admitted into evidence than a DRE post-incident review. One should never fail to call a DRE on the date of violation on the assumption that a DRE post-incident review can be conducted later.

Whether to pursue a post-incident review should be **carefully** considered and undertaken with caution. DRE post-incident reviews are not for every case, or even most cases, where a DRE examination was not conducted. While they are a very useful tool, they should only be used under ideal circumstances, especially if they are new to a prosecutor’s jurisdiction; do not risk creating bad law.

Below are some suggestions for deciding whether a DRE post-incident review is appropriate for a given case and tips for executing one.

Selecting a DRE

Because the State will have to qualify the DRE as an expert, thought should go into determining who will conduct the DRE post-incident review and testify as a witness. When DRE post-incident reviews are performed, be sure to use a DRE with the extensive training and experience necessary to qualify him/her in court as an expert to conduct a DRE post-incident review.

To increase the likelihood the testimony will be admitted at trial, it is recommended currently certified, long-serving DRE instructors who have conducted a large number of DRE evaluations are used. A DRE instructor’s expertise and experience is much broader than only attending DRE school. These credentials better lend themselves to DRE post-incident reviews. Prior experience testifying as an expert is also beneficial.

Evaluating the Case

DRE post-incident reviews should not be casually embarked upon. The importance of scrupulously assessing the case to determine if it is appropriate for a DRE post-incident review cannot be overstressed. The likelihood it will be admitted in court should also be evaluated. A prosecutor should review his/her case to ensure there is information sufficient to allow the DRE to reliably form a supportable opinion. It is much easier to admit this type of testimony if toxicology results are available. In fact, trial courts often refuse to allow the testimony when toxicology results are lacking. If there are no tox results, there must be other, independent evidence of drug use such as drugs, drug paraphernalia, admissions, or witness statements.

DREs need to be certain there is enough information available. If the DRE determines there is insufficient evidence for a supportable opinion, this decision must be respected by the other parties. Avoid pressuring the DRE to do a DRE post-incident review if he/she is not comfortable doing one. Do not pressure the DRE to form an opinion. The DRE should not provide an opinion if there is not enough evidence to solidly support it.

² Much of the content of this article is derived from a draft of that document, as well as: *Medical-Legal Aspects of Abused Substances, Old and New—Licit and Illicit*, Marcelline Burns, Ph.D., Thomas E. Page, M.A., Lawyers and Judges Publishing Company, Inc., Tucson, AZ (2005), Chapter 2: The Role of the Law Enforcement Officer, Subsection: The Art and Science of DRE Reconstruction, pages 23–32; *Drug Information Handbook for the Criminal Justice Professional*, Marcelline Burns, Ph.D., Thomas E. Page, M.A. Lexi-Comp, Inc. Hudson, Ohio. Second Edition (2004), The Art and Science of Drug Recognition Expert (DRE) Reconstruction, pages 709–716. These documents are more comprehensive than this article; if a prosecutor is contemplating a DRE post-incident review, it is recommended he/she reviews them.

Collecting Evidence

A common mistake made by parties new to DRE post-incident reviews is to rely only on the police report, tox results, and other evidence from the initial investigation. The prosecutor and DRE need to collaborate to collect as much evidence as possible to allow for a comprehensive review.

Just as in the case of traditional DRE evaluations, the DRE should interview the investigating officers and other witnesses. Not only does this provide the DRE with more information, it is also one of the standard steps of the DRE protocol and, accordingly, something the trial judge may want. A review of trial and appellate court rulings suggests the more closely the DRE post-incident review resembles a typical DRE evaluation, the more likely it will be admitted during trial.

Customary, additional sources of data to be obtained by the DRE or provided by the prosecutor include: police reports, EMT or paramedic observations and reports, doctor and nurse observations and records, medical records and test results, body worn recordings of officer contact with the suspect, 911 or dispatch recordings, civilian witness observations, relevant video recordings, the suspect's statements, circumstantial evidence found on or near the suspect such as paraphernalia, crash reports, jail booking information and toxicology reports. This list is by no means all-inclusive. Much thought needs to be put into what relevant evidence might be available and the DRE should be prepared to testify to all the evidence that was reviewed.

Prosecutors must comply with local discovery rules and decide if the DRE needs to complete a supplemental report. Reports, opinions, and testimony should include an account of the evidence relied on as well as any limitations. They should also clearly state that the opinions are based upon a post-incident review, not a DRE drug influence evaluation or personal observation of the defendant.

Court Preparation and Testimony

The limits of testimony and form of expressed opinions should be carefully thought out by the DRE and prosecutor to ensure consistency with local legal constraints. Testimony can impact the fact finder as well as the future admissibility of this type of evidence across the country. The DRE should be cautious about rendering an opinion that the defendant was actually impaired or under the influence of a drug category. Testimony the defendant exhibited symptoms of impairment consistent with drug use of a category or consistent with the reported toxicology results is a safer option and much more likely to be admitted.

The prosecutor will have to lay sufficient foundation in court to qualify the DRE as an expert for DRE post-incident reviews. This foundational showing should address more than the usual training and experience testimony and be specifically tailored to the DRE post-incident review issue. Much of the training and experience obtained by DREs, and especially instructors, lends itself quite well to this issue. Be sure to point out during testimony how the DRE's training and experience helps prepare for DRE post-incident reviews.

Examples of areas to explore include: the fact that incomplete DRE examinations are included in the DRE curriculum and in appropriate circumstances allowed by the protocol, cases in which the DRE was not able to complete the entire protocol steps but was still able to form an opinion, the fact that during training DRE students watch videos of DRE examinations they did not conduct and review face sheets they did not prepare and then describe impairment and form opinions, any experience serving as a scribe, any drug impaired driving cases where a DRE examination was not conducted but the DRE was able to form a relevant opinion, any previous DRE post-incident reviews, any training received for DRE post-incident reviews, and all relevant experience or training that would assist with a DRE post-incident review including training as an EMT, crash reconstruction training, etc.

If the witness is a DRE instructor or state coordinator, the person should have experience reviewing DRE reports conducted by others to ensure the DRE made the correct call based on the evidence presented. This is particularly helpful experience that applies to DRE post-incident reviews.

Prepare for testimony. Put thought into how to explain the ability to give an opinion even though the DRE did not conduct an evaluation on the date of violation. Be ready to discuss the general indicators of impairment

observed by the witnesses and how those observations of impairment relate to driving. If there is documented evidence of indicators such as the person's blood pressure or pupil size, discuss how that evidence is relevant to the analysis. Be prepared to tie toxicology results, drugs, paraphernalia, and admissions to the symptoms of impairment exhibited on the date of violation and how those are relevant. If the DRE knew the toxicology results before forming the opinion, prepare for the defense argument that the DRE merely relied on the toxicology results to form the opinion.

A prosecutor should create a good record and consider providing the court with a pleading that incorporates case law from his/her jurisdiction and others where DRE post-incident reviews have been admitted. Make sure the testimony provided is detailed and thorough and that an adequate foundation is laid.

In the case of a DRE post-incident review, the DRE should avoid testifying that a person was impaired by certain drugs or drug categories of drugs based solely on the post-incident review, behavioral observations, or upon a quantitative toxicology result. Instead, it is preferable to explain the observed signs and symptoms are consistent with use of the various drug categories or impairment. This type of opinion should generally be limited to cases where toxicology results support the presence of a certain category. Polycategory drug use must also be taken into consideration.

It appears from a review of transcripts and case law that most courts only allow the DRE to testify that the signs and symptoms of impairment the defendant exhibited on the date of the incident are consistent with the drugs that were in the blood or urine sample, or something similar. Rarely is the DRE allowed to give an opinion regarding the defendant's impairment to safely operate a motor vehicle.

If this testimony is new to a prosecutor's jurisdiction, or if there is concern regarding the court's willingness to admit this type of testimony, a prosecutor may want to begin by using DRE post-incident review as rebuttal evidence rather than in the State's case in chief.

Case Law

The use of DRE post-incident review, or otherwise calling a DRE who did not participate in the investigation on the date of violation, has not been widely litigated. Published opinions allowing this type of testimony include: *Wooten v. State*, 267 S.W.3d 289 (Tx. App.–Houston 2008); *State v. Wynne*, 182 Conn.App. 706 (App. 2018); *People v. Ciborowski*, 55 N.E.3d 259 (IL App. 2016); and *State v. Neal*, 267 N.C. App. 442 (2019). This type of testimony has been used in a few additional states.

Conclusion

A DRE evaluation conducted at the time of the incident will always be preferable to a DRE post-incident review and the post-incident review should never be considered a replacement for the traditional DRE evaluation. However, if appropriately used, a DRE post-incident review can be an effective tool to strengthen a case where a contemporaneous DRE evaluation was not conducted.

About the Author

Beth Barnes serves as Arizona's Traffic Safety Resource Prosecutor (TSRP) through a grant from the Arizona Governor's Office of Highway Safety and the Arizona DUI Abatement Council. She has been an assistant city prosecutor with the City of Phoenix Prosecutor's Office for 30 years, specializing in the prosecution of DUI cases. Ms. Barnes also serves as the national prosecutor representative on the International Association of Chiefs of Police (IACP) and NHTSA Technical Advisory Panel for Impaired Driving Programs.

Ms. Barnes was named the 2021 Distinguished Public Lawyer for the State of Arizona. She has also been awarded the Arizona Supreme Court Judicial Branch Achievement Award for Serving the Public by Improving the Legal Profession, the GOHS Prosecutor Award, the Arizona Prosecuting Attorneys' Advisory Council (APAAC) Prosecutor of the Year Award, the Arizona MADD Prosecutor of the Year Award, the APAAC Lifetime Achievement Award, multiple City of Phoenix Excellence Awards and the title of DRE Ambassador by IACP.