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# State of New Jersey vs. Olenowski: A Long and Winding Road

*By Honorable Neil Edward Axel, Senior Judge,  
 District Court of Maryland, Columbia, Maryland*

*Editor's note: In response to the persistence of drug-impaired driving occurrences and the complexities of prosecuting such cases, law enforcement established the Drug Evaluation and Classification (DEC) Program. For decades, the DEC Program has been a tool used to identify drugged drivers. This systematic and standardized process relies on a range of observable signs and symptoms recognized by the medical community as reliable indicators of drug influence. To become a Drug Recognition Expert (DRE), law enforcement officers undergo an intensive training program that includes classroom instruction, hands-on workshops, and rigorous examinations. DREs provide expert testimony in court regarding whether a driver is under the influence of drugs or other substances. Recently, the admissibility of this testimony has been challenged by defendants. In a two-part series, Between the Lines will explore two significant challenges. This month focuses on the case of NJ v. Olenowski, while next month will cover People v. Bowden, a notable case from Michigan.*

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Almost exactly three years before the ink dried on the New Jersey Supreme Court decision in *State v. Olenowski*,<sup>1</sup> the named defendant, Michael Olenowski, passed away. His name, however, will live on in New Jersey jurisprudence as his appellate case will be synonymous with both the adoption of a *Daubert*-type standard for the admissibility of expert evidence in criminal cases, and with the Court's definitive ruling on drug recognition expert testimony in drug impaired driving cases.

### A History of the Case

As noted in my earlier article on this case,<sup>2</sup> in separate incidents in February and August 2015, Michael Olenowski was arrested for impaired driving and submitted to drug influence evaluations by specially trained police officers known as drug recognition experts (DRE).<sup>3</sup>

In 2016, he was convicted of both offenses following trials in which the DREs testified that he was driving under the influence of particular categories of drugs. His convictions were affirmed by the New Jersey Appellate Division in an unreported decision in 2018. The New Jersey Supreme Court granted certification to determine if, and under what circumstances, testimony of a certified DRE may be admissible at trial.

Numerous states around the country have judicially accepted DRE testimony as either scientifically reliable under the expert witness standards set forth in *Frye* or *Daubert*, or admissible under state Rules of Evidence as non-scientific evidence based upon specialized knowledge.<sup>4</sup> Prior to *Olenowski*, the New Jersey appellate courts had not ruled on the issue, but because the trial court record was inadequate to evaluate the validity of the DRE evidence, in November 2019, the Court appointed Judge Joseph F. Lisa as a Special Master to hear testimony and consider whether DRE testimony has achieved general acceptance within the relevant scientific community and therefore satisfies the reliability standard for admissibility in New Jersey.<sup>5</sup>

Following forty-two days of testimony, and a two-and-a-half-year delay occasioned by the COVID epidemic, Judge Lisa issued his 332-page report.<sup>6</sup> Based on all of the evidence presented, Judge Lisa concluded that DRE testimony was reliable, and thus admissible in New Jersey under its *Frye* standard.

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<sup>1</sup> 255 N.J. 529, 304 A.3d 598 (2023).

<sup>2</sup> N. Axel, "The Continuing Saga of State of New Jersey v. Olenowski and the Admissibility of Drug Recognition Expert Testimony," *Highway to Justice* (Summer 2023), to be found at: [www.americanbar.org/content/dam/aba/publications/judicial\\_division\\_record/2023sum-hwtj.pdf](http://www.americanbar.org/content/dam/aba/publications/judicial_division_record/2023sum-hwtj.pdf).

<sup>3</sup> A drug recognition expert is a specially trained police officer who is certified as proficient in administering a 12-step protocol under the Drug Evaluation and Classification Program (DECP). This protocol is a standardized, systematic procedure to examine a suspect under arrest for drug-impaired driving. The drug recognition expert then applies their specialized training and experience to conclude whether their observations fit established indicia of impairment by particular classes of drugs. DRE testimony has been in use for the last half-century, and all fifty States, the District of Columbia, Canada, and several other countries around the world utilize DRE evaluations in assessing whether one is under the influence of drugs.

<sup>4</sup> See e.g. *State v. Aleman*, 145 N.M. 79 (N.M. Ct. App. 2008); *Williams v. State*, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998); *State v. Layman*, 953 P.2d 782 (Utah Ct. App. 1998); *Mace v. State*, 328 Ark. 536 (1997); *United States v. Everett*, 972 F. Supp. 1313 (D. Nev. 1997); *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994); *State v. Baity*, 140 Wash.2d 1 (2000) (en banc); *People v. Quinn*, 153 Misc.2d 139, 580 N.Y.S.2d 818, 826 (Dist. Ct. 1991), *rev'd on other grounds*, 158 Misc.2d 1015, 607 N.Y.S.2d 534 (App. Div. 1993); *State v. Chitwood*, 369 Wis.2d 132 (Wis. Ct. App. 2016); *State v. Daly*, 278 Neb. 903 (2009); *State v. Rambo*, 250 Or.App. 186 (2012); *Poole v. State*, 249 Ga.App. 409 (2001); *State v. Kanamu*, 107 Haw. 268 (2005); *Burton v. State*, 300 S.W.3d 126 (KY 2009); *Everitt v. State*, 407 S.W.3d 259 (Ct.App.Tex. 2013). Additionally, Maine and North Carolina statutorily allow for the admissibility of DRE testimony.

<sup>5</sup> 247 N.J. 242 (2019).

<sup>6</sup> [www.njcourts.gov/sites/default/files/public/notable-cases/smfr.pdf](http://www.njcourts.gov/sites/default/files/public/notable-cases/smfr.pdf)

While Mr. Olenowski's cases were making their way through the appellate process, the New Jersey Supreme Court was in the midst of reconsidering its legal standard for admissibility of expert testimony, and in 2018 abandoned the State's long-held *Frye* standard of admissibility to adopt a *Daubert*-type standard for admissibility in all civil proceedings.<sup>7</sup> Then five years later, *State v. Olenowski* became an appellate opportunity to consider the *Daubert* standard in criminal cases. When considering the Special Master's report, the New Jersey Supreme Court, adopted a *Daubert*-type standard in criminal cases.<sup>8</sup> Since the Special Master had not considered the *Daubert* test of admissibility, the case was referred back to the Special Master to "assess the reliability and admissibility of DRE under the Court's newly adopted standard.

On remand, Judge Lisa reconsidered the evidence and arguments presented, and on April 13, 2023, issued a 57-page supplemental report concluding that DRE testimony is reliable and admissible under the methodology-based *Daubert-Accutane* standard now applicable to criminal and quasi-criminal cases in New Jersey.

### The Ultimate Holding

Ultimately in November, 2023, the Supreme Court of New Jersey, in a 6–2 decision held that DRE evidence is sufficiently reliable under the newly adopted *Daubert*-type standard, and is admissible, but with the following limitations:

1. The DRE may opine only that the evaluation is "consistent with" the driver's ingestion or usage of drugs, and not that impairment was caused by such drugs.
2. If the State fails to make a reasonable attempt to obtain a toxicology report without a 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 proofs.
4. The adoption of model instructions to guide juries about DRE evidence should be considered.

The Court noted that although not perfect, "the DRE protocol is a useful tool that can be helpful to the trier of fact in the search for truth."<sup>9</sup>

### The Court's Limitations and the Holding's Impact

Although some may disagree as to its impact, the decision re-affirms the reliability of the DRE protocol as probative evidence that should be considered along with all the available evidence in determining whether a driver was operating a vehicle while impaired or under the influence of a drug. As noted by the Court:

For many years, the DRE protocol has been widely and regularly used across the country and abroad. No state has discontinued it, and no state's highest court has nullified it. The protocol has been studied multiple times and periodically revised and enhanced. When DRE evidence is presented in courts far and wide, defense attorneys have had repeated opportunities to impeach it on cross-examination and to counter it with competing expert opinion that may be critical of the methodology. Although it has imperfections, the protocol has stood the test of time in its widespread acceptance.<sup>10</sup>

"The DRE protocol is a useful tool that can be helpful to the trier of fact in the search for truth."

<sup>7</sup> *In Re Accutane Litig.*, 234 N.J. 340 (2018).

<sup>8</sup> 253 N.J. 133, 155 (2023).

<sup>9</sup> 255 N.J. at 616, 304 A.3d at 649.

<sup>10</sup> 255 N.J. at 605, 304 at 642–43.

Accordingly, in New Jersey, drug recognition experts may opine that the results of the protocol are consistent with a driver's use of one or more identified drug categories. Although a DRE will not be permitted to testify as to the cause of driver's impairment, evidence from a DRE, when combined with all the facts, circumstances, observations, driving behavior, toxicology results, and admissions, assist the trier of fact in determining whether a driver was operating a motor vehicle while impaired by drugs.

Requiring the State to "make a reasonable attempt to obtain a toxicology report based on a blood or urine sample" places an affirmative duty on the State that is already a part of the DRE 12-step protocol. Fourth Amendment considerations will continue to be at play requiring express consent, exigent circumstances, or a search warrant to obtain blood or urine samples. Unlike other Fourth Amendment considerations, however, if the State does not make a reasonable attempt to obtain blood or urine, the DRE opinion testimony may be excluded. Requiring a toxicology screen might raise certain arguments, and additional motions to suppress where any number of circumstances could explain the absence of a toxicology report.

The long and winding road of the *Olenowski* case has now led to yet another reported appellate decision permitting the use of drug recognition expert testimony at trial in drug-impaired driving cases. As always, testimony from a DRE, when considered along with all the evidence presented, can assist triers of fact in determining guilt or innocence in drug-impaired driving cases.