

## Cases Affirming the Use of DRE Protocol/DRE Testimony

The chart below lists of all of the appellate cases that affirm the admissibility of the DRE Protocol and/or DRE testimony. Under the chart, there are case summaries for each of these cases. There are also additional case summaries in which appeals courts implicitly accepted the DRE Protocol and testimony, or are refinements of the lead case in the state.

<u>Case name</u>	<b>DRE Scientific?</b>	<b>New or Novel?</b>	<b>Frye/Daubert</b>
<u>U.S. v. Everett</u> , 972 F. Supp. 1313 (1997)	<b>No</b>	<b>Not Addressed</b>	<b>Daubert</b>
<u>Williams v. State</u> , 710 So. 2d 24 (Fla. Dist. Ct. App. 1998)	<b>No</b>	<b>No</b>	<b>Frye</b>
<u>State v. Klawitter</u> , 518 N.W.2d 577 (Minn. 1994)	<b>No</b>	<b>No</b>	<b>Daubert</b>
<u>State v. Aleman</u> , 194 P.3d 110 (Ct. App. NM, 2008)	<b>No</b>	<b>Not Addressed</b>	<b>Daubert</b>
<u>People v. Quinn</u> , 580 N.Y.S.2d 818 (1991)	<b>Yes</b>	<b>No</b>	<b>Frye</b>
<u>State v. Sampson</u> , 6 P.3d 543 (Or. Ct. App. 2000)	<b>Yes</b>	<b>No</b>	<b>Daubert</b>
<u>Utah v. Layman</u> 953 P. 2d 782 (Utah App. 1998)	<b>No</b>	<b>Not Addressed</b>	<b>Unclear</b>
<u>State v. Baity</u> , 991 P.2d 1151 (Wash. 2000)	<b>Yes</b>	<b>Yes</b>	<b>Frye</b>
<u>Armstrong v. State</u> , 2012 Tex. App. Lexis 2041	<b>Yes</b>	<b>Not Addressed</b>	<b>Not Addressed</b>

## **Federal**

U.S. v. Everett, 972 F. Supp. 1313 (1997) DRE testimony is not governed by Daubert because it is not scientific in nature.

Based upon the foregoing, it is the DECISION and ORDER of this Court that, upon the appropriate foundation being laid, the Drug Recognition Evaluation protocol conducted by Ranger Bates, together with his conclusions drawn there from, 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. (See page 10)

## **Florida**

Williams v. State, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998) The DRE Protocol in general is not scientific. However, the HGN, VGN and LOC aspects of the test are scientific in nature but do not need to be analyzed under Frye because they are not new or novel.

The defendant contends that the trial court erred in admitting the DRE testimony and evidence because the State failed to establish the reliability of the DRE protocol at the hearing. According to the defendant, the DRE protocol constitutes a scientific test, and fails to meet the Frye standard as generally accepted by the relevant scientific community. We disagree and affirm the trial court's order granting the State's motion to admit the DRE testimony and evidence, including the standardized field sobriety and horizontal gaze nystagmus tests. In order to accurately address the issues as framed by the trial court, we must first distinguish between the general portion of the DRE protocol and its subsets, the HGN, VGN, and LOC. (See page 4)

## **Indiana**

Claywell v. Indiana, 2012 Ind. App. Unpub. LEXIS 180 (2012) The defendant in this case challenged the DRE Protocol on a sufficiency of the evidence argument. (It does not appear a trial objection was made to the DRE Protocol or testimony). The appellate court found the evidence presented, largely DRE, was sufficient to uphold the conviction.

## **Minnesota**

State v. Klawitter, 518 N.W.2d 577 (Minn. 1994) The DRE Protocol is not new or novel scientific test under Frye.

We are of the opinion, however, that the protocol in question does not demand the kind of scrutiny required for the presentation of some novel scientific discovery or technique. The real issue is not the admissibility of the evidence but the weight it should receive, and that is a matter

for the jury to decide without being led to believe that the evidence is entitled to greater weight than it deserves. Therefore, in the courtroom the officer shall not be called a "Drug Recognition Expert." Perhaps the officer can be called a "Drug Recognition Officer" or some other designation which recognizes that the officer has received special training and is possessed of some experience in recognizing the presence of drugs without suggesting unwarranted scientific expertise. (See page 7)

State v. Cammack, 1997 Minn App. LEXIS 278 This case supports the use of DRE protocol and testimony. The defendant argued that the DRE interview should have been videotaped and that the court should have given the jury some cautionary instruction about DRE testimony. The appellate court disagreed.

## **New Mexico**

State v. Aleman, 194 P.3d 110 (2008) The DRE Protocol is not a scientific test but would meet the Daubert standard anyway.

We determine that the Protocol is not scientific in its entirety, but that the State laid an adequate foundation to introduce the individual, scientific steps of the Protocol. Although we conclude that the Protocol as a whole is not scientific, even if we were to hold otherwise, we would affirm because the State established a sufficient scientific foundation for the Protocol under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993). Because the State has established the scientific reliability of the Protocol, we further determine that a DRE may testify as an expert witness regarding the administration and results of the Protocol as it is applied to a particular defendant. Last, we hold that minor variations in the administration of the Protocol do not necessarily undermine the admissibility of Protocol evidence. We therefore affirm the decisions of the district court as to both Defendants, which denied Defendants' motions to exclude the testimony of the DREs. (See page 1)

## **New York**

People v. Quinn, 580 N.Y.S.2d 818 (1991) DRE Protocol is a scientific test and used the Frye test to find that the evidence was admissible.

The court holds that the People have successfully established that both the HGN test and the DRE protocol meet the standards enunciated by *Frye (supra)* and *Middleton (supra)*. In coming to this conclusion, the court has considered the credible and unrefuted testimony of nine witnesses each of whom stated that both HGN and the protocol permit the DRE to reliably and accurately determine whether an individual is impaired, and if so, by what classification of drug. Further, the court found the People's evidence to be persuasive. The protocol is relatively simple. Jurors should have no trouble understanding the testimony of the DRE witness. This is not a case of a procedure so complicated and so technical that a "lay jury [might] rely to an even greater degree

on the expert witness ... [whose] testimony may be accepted and credited without being properly evaluated" (See page 7)

## Oregon

State v. Sampson, 6 P.3d 543 (Or. Ct. App. 2000) DRE Protocol is a scientific test and used modified Daubert test to find that the evidence was admissible.

Our consideration of the various factors that weigh for and against admission of scientific evidence leads us to conclude that the underlying proposition of the DRE protocol--that ingestion of controlled substances causes a variety of symptoms detectable by a trained officer--is sufficiently reliable to justify admission of the protocol's results into evidence. Here, the state is offering the protocol as evidence tending circumstantially to make more probable a fact of consequence--that defendant was under the influence of a controlled substance. For that limited purpose, the DRE protocol is relevant under OEC 401. Furthermore, it meets the helpfulness requirement of OEC 702 by informing jurors of the significance of the results of FSTs and the other components that make up the protocol. (See page 10)

But see Oregon v. Aman 194 Or. App. 463 (2004), the court refines Simpson by saying the the DRE Protocol requires the "corroborating evidence of the urinalysis" to be complete and admissible.

Here, there is no evidence that the methodology employed--an 11-step DRE test without toxicological confirmation--generally has been accepted in the relevant field, has been used in a reported judicial decision, has a known rate of error, is mentioned in specialized literature, or is not a novel, even singular, employment in this state. To the contrary, the omission of the corroborating toxicology report deprives the test of a major element of its scientific basis, and there is no evidence that an examiner's reputation for accuracy constitutes an adequate substitute. (See page 5)

State v. Burshia, 120 P.3d 487 (2004) As interpreted in Oregon, for the DRE Protocol and testimony to be admissible, all 12 steps of the protocol must be completed. In this case in an interlocutory appeal, the state challenged the suppression of a breath test, which resulted in the exclusion of the DRE Protocol and testimony. The appellate court remanded the case to the trial court for trial on the merits.

State v. McFarland, 191 P.3d 754 (2008) The case concludes that a DRE trainee is not qualified to give DRE testimony about the DRE Protocol.

State v. Hernandez, 206 P,3d 197 (2009) The DRE officer in this case did not collect a urine sample because the defendant refused. The appellate court stated the DRE protocol is "scientific evidence." The Court in this case expressed a willingness to admit the non-scientific aspects of the DRE test but the state failed to indicate which parts of the test they intended to use. This case falls squarely under Aman and is important

because it identifies the Oregon response to the defendant's refusal to provide a sample.

State v. Qy Fong, 204 P.3d 146 (2009) The defendant indicated at a pretrial hearing that he intended to object to DRE evidence at trial. He failed to do so, the evidence was admitted and the appellate court did not address it beyond noting this facts.

State v. Bayer, 211 P.3d 327 (2009). The defendant in this case challenged the method used to do the urine testing and argued that the deviation in the testing caused the DRE tests to be incomplete and inadmissible. The appellate court disagreed, reaffirming the logic of Sampson.

## Utah

Utah v. Layman 953 P. 2d 782 (Utah App. 1998) The DRE Protocol is not a scientific test.

Layman claims the trial court erred in admitting Deputy DeCamp's testimony regarding Layman's intoxication without first analyzing that testimony under the test set forth in *State v. Rimmasch*, 775 P.2d 388, 396-99 (Utah 1989). We agree with the State, however, that the *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.

This court has held a *Rimmasch* analysis is required to determine "the admissibility of testimony based on an external scientific process or statistical profile." *State ex rel. G.D., Jr. v. L.D.*, 894 P.2d 1278, 1284 (Utah Ct. App. 1995). 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." *Id.*; see also *Salt Lake City v. Garcia*, 912 P.2d 997, 1000-01 (Utah Ct. App.) (finding no error where trial court allowed testimony on result of field sobriety test without entertaining *Rimmasch* analysis, and court specifically informed jury this was not scientific evidence but rather was "part of the basis of the arresting officer's opinion that the defendant was under the influence"), *cert. denied*, 919 P.2d 1208 (Utah 1996). (See page 3)

## Texas

Armstrong v. State, 2012 Tex. App. Lexis 2041. The DRE protocol was accepted under Rules 401 and 702 of the Texas Rules of Evidence. The opinion does not address Frye/Daubert.

We further conclude that the trial court did not abuse its discretion by admitting the results of the blood test showing appellant had Xanax in his system. The threshold for relevance is low. See *Ex parte Smith*, 309 S.W.3d 53, 61 (Tex. Crim. App. 2010). The evidence was relevant because it assisted the jury in determining whether appellant's intoxication was due to Xanax. See TEX. R. EVID. 401 Evidence is relevant if it tends to make the existence of a consequential fact more or

less probable than without the evidence." ). This is particularly true because of appellant's admission to taking half a Xanax and having no detectable amount of alcohol in his system.

## Washington

State v. Baity, 991 P.2d 1151 (Wash. 2000) The DRE Protocol is a novel scientific test and must be analyzed under Frye. The court determined the protocol and the testimony of the officer were admissible, provided that all 12 steps of the protocol are used.

In summary, after analyzing the DRE protocol and the approach of other courts to its admissibility, we hold the DRE protocol and the chart used to classify the behavioral patterns associated with seven categories of drugs have scientific elements meriting evaluation under *Frye*. We find the protocol to be accepted in the relevant scientific communities. We emphasize, however, that our opinion today is confined to situations where all 12 steps of the protocol have been undertaken. Moreover, an officer may not testify in a fashion that casts an aura of scientific certainty to the testimony. The officer also may not predict the specific level of drugs present in a suspect. The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs. (See page 8)

## Wisconsin

City of Mequon v. Haynor, 791 N.W.2d 406 (2010). The defendant in this case did not directly challenge the scientific basis of the DRE testing. He argued that the testing was unreliable and the court disagreed. The court applied a simple relevancy test to the DRE evidence.

However, despite our skepticism, we reject Haynor's argument that the tests administered by Selk and Moertl are unreliable and the court erred in considering them. Our rejection of Haynor's argument is based primarily on the fact that the general standard for admissibility in Wisconsin is "very low." *Id.*, P14. The keystone is simply relevancy. *Id.* The evidence is admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *WIS. STAT. § 904.01*. The reliability of the evidence is a "question of weight and credibility for the trier of fact to decide." *Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, P23, 693 N.W.2d 324. (See page 8)

(Updated July 19, 2012 by Greg Hurley, NCSC)