E38   How State Opinion Evidence Utilizing Unvalidated Drug Recognition Evaluations Can Mislead Juries

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The goals of this presentation are to provide attendees with: (1) an overview of the use by law enforcement of the Drug Examination and Classification Program (DECP) in America; (2) a summary of why reporting a drug concentration can be misleading; and, (3) why even under the more inclusive *Frye* standard a hearing is required to prevent the introduction of unreliable evidence.

This presentation will impact the forensic science community by examining the ways in which unvalidated drug recognition evaluations influence jurors.

The Unvalidated and Uncorrelated Drug Recognition Evaluation, where the certified Drug Recognition Examiner/Officer (DRE) is correct only 28% of the time about what drug is causing impairment in the arrested Driving Under the Influence (DUI) drugged driver, is perfectly acceptable, according to the International Association of Chiefs of Police (IACP). The previous sentence sounds incredulous, yet it is completely true.

The DECP program claims that upon completion of the 72-hour training regimen, the officer can diagnose: (1) if the suspect is impaired such that he/she cannot operate a motor vehicle safely; (2) if that impairment is caused by drugs; and, (3) which of the seven drug classifications is causing the impairment. DRE officers claim the ability to do this by administering the twelve-step battery of subjective testing.

The gatekeeper function of the court, as applied, requires that before the opinion of a DRE officer who conducted the evaluation can be introduced in court, a foundational hearing should be held to determine whether the opinion passes muster. The defense right to *voir dire* the "expert" regarding the opinion he/she intends to offer is proper and well established yet routinely is overlooked.

The National Academy of Sciences agrees and has recommended: "The degree of science in a forensic science method may have an important bearing on the reliability of forensic evidence in criminal cases. There are two very important questions that should underlie the law's admission of and reliance upon forensic evidence in criminal trials: (1) the extent to which a particular forensic scientific methodology that gives it the capacity to accurately analyze evidence and report findings; and, (2) the extent to which practitioners in a particular forensic discipline rely on human interpretations that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards. These questions are significant. The goal of law enforcement actions is to identify those who have committed crimes and to prevent the criminal justice system from erroneously convicting the innocent. So it matters a great deal whether an expert is sufficiently reliable to merit a fact finder's reliance on the truth that it purports to support." The forum in which to determine the reliability of expert opinion is in a *Frye* or *Daubert* hearing and occurs before the opinion is allowed as evidence.

The DECP program does not comply with the criteria for reliable testing as set forth in the Consensus Report addressing drug concentrations and impaired driving published in the *Journal of the American Medical Association*. Even the most intelligent officers who successfully complete the DRCP program are not equipped to understand how drugs interact in the body. The DRCP program mistakenly believes that 37 hours of substantive classroom lecture is adequate to educate the DRE officer in both the pharmacokinetic effects and pharmacodynamic effects of seven distinct drug classifications.

In order to accurately determine if a suspect is impaired by drugs, the officer must be educated in the interactions of the chemicals found in the drugs with the biological receptors in the brain (pharmacodynamics). The DRE officer must also understand fully how the chemicals from the drugs are absorbed, distributed, and eliminated in the body (pharmacokinetics) and how long that process takes.

The reliability of the DECP program is clearly flawed. Officers lacking any scientific or medical background are admitted into Drug Recognition "Expert" school and later certified after minimal training. Despite the fact that it has been shown that officers' predictions of actual drug classification are commonly incorrect, decertification for poor performance including misidentification is rare, at best. Each day judges continue to allow unreliable DRE testimony to be introduced to juries who in turn have little choice but to convict based on unvalidated DRE opinion evidence cloaked in the aura of science.

Drug Recognition Examination, Unvalidated Opinion, Incorrect Drug Classification