

IACP Technical Advisory Panel for Impaired Driving Programs

Considerations Document

DRE Post-Incident Review

Preface: Each jurisdiction operates in a unique environment of court procedures, state laws, local ordinances, regulations, judicial and administrative decisions. Because of this, Drug Recognition Experts, prosecutors, law enforcement administrators and officers are cautioned to consult with the prosecuting attorney, the state's Traffic Safety Resource Prosecutor (TSRP), and/or the DRE state coordinator in their jurisdiction about the type of testimony and opinion which may be given in DRE post-incident reviews. This process is commonly referred to in some jurisdictions as DRE Reconstruction.

This document is not intended to be an International Drug Evaluation and Classification (DEC) Program standard.

I. PURPOSE

This document is intended to provide Drug Recognition Expert (DRE) state coordinators, DRE agencies, prosecutors and individual DREs with information for consideration when utilizing the practice of DRE post-incident reviews. The information and practices discussed herein should not be considered an alternative for having a DRE conduct an actual drug influence evaluation whenever possible.

The decision to have a DRE post-incident review conducted and introduced in court should not be taken lightly. The prosecutors and the DREs should carefully review the case when choosing to present a DRE post-incident review in court. The case should have sufficient evidence which allows for an in-depth post-incident review of the facts available. Cases with toxicology results are best suited for this review and will assist in the admissibility of the DRE's testimony.

If a DRE post-incident review is completed, and sufficient facts or data exists to support an opinion, the DRE should express an opinion as to impairment being consistent with a drug category(ies) and not render an opinion that the suspect was in fact under the influence of an actual category(ies).

II. DEFINITIONS

DRE INSTRUCTOR: A trained and certified DRE who has successfully completed the NHTSA/IACP DRE Instructor Development Course (IDC) or an approved equivalent, met

any other state requirements to obtain this certification, and has been credentialed as a DRE Instructor by the International Association of Chiefs of Police (IACP).

DRE POST-INCIDENT REVIEW: 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.

DRUG INFLUENCE EVALUATION: A process of systematically examining a person suspected of being under the influence of a drug, for the purpose of ascertaining what category of drugs (or combination of categories) is causing that person's impairment. A trained DRE can identify, with a high degree of reliability, the distinguishing signs and symptoms of seven broad categories of drugs.

DRUG RECOGNITION EXPERT (DRE): An individual who has successfully completed all phases of the DRE training requirements for certification established by the IACP and NHTSA and who has been approved for certification by the state coordinator for the state wherein they have law enforcement jurisdiction or within their primary state of employment. The word "evaluator," "technician," or similar words may be used as a substitute for "expert", depending upon locale or jurisdiction.

III. QUALIFICATIONS

Careful consideration should be taken before a DRE undertakes the task of performing a DRE post-incident review. DRE post-incident reviews are commonly requested by a law enforcement agency or a prosecutor's office to provide an opinion from a DRE perspective following an impaired driving incident. When requests are made, it is critical to ensure an experienced and qualified DRE is utilized. It is recommended that currently certified DRE instructors be utilized for the DRE post-incident review process. In cases where a post incident review is requested or done, the state coordinator should be made aware as early on as possible.

Items to consider when selecting a DRE for the purpose of a DRE post-incident review:

- Is the DRE currently certified?
- How long has the DRE been certified?
- How many DRE evaluations has the DRE conducted?
- Has the DRE conducted any previous DRE post-incident reviews?
- Are they a DRE Instructor, and do they have experience as an instructor?
- Have they testified as an expert witness in court previously?

- Are they recommended by their DRE state coordinator to perform DRE post-incident reviews?

IV. PROCEDURES - DREs

The collection of facts and evidence will be one of the most critical steps in a DRE post-incident review process. In most DRE post-incident reviews, the DRE will rely primarily on information collected, recorded, or observed by other individuals. Additional facts and evidence should only be sought or obtained by the DRE during the post-incident review through the direction of the prosecuting attorney.

Common sources of data provided by the prosecuting attorney for review by the DRE during the post-incident review process may include, but is not limited to:

- Law enforcement arrest or incident reports
- Body worn videos of any officer in contact with the suspect
- Reports made to a police communication center before, during and after the incident
- Civilian witness observations before, during, and after the incident
- EMT/Paramedic observations and notes
- Doctor/nurse observations and notes
- Hospital records and test results
- Video recordings of the incident or recordings of the suspect
- Suspect's statements
- Direct/indirect evidence found on or near the suspect
- Jail booking information and video, if applicable
- Other records of the suspect's normal behavior and mannerisms
- Collision reconstruction reports
- Toxicological analysis reports

The DRE should work at the direction of the prosecuting attorney by reviewing facts and investigative information provided by the prosecutor. However, the scope of testimony should be carefully assessed by the DRE and prosecutor to ensure consistency with applicable legal standards.

How a DRE presents evidence and the manner in which they testify can have an impact on the jury and can also broadly impact future use of this process in other courts around the country. Prosecutors and DREs should ensure the DRE has the training and experience necessary to properly present clear and factually supported testimony which is tailored for a DRE post-incident review.

V. PROCEDURES – PROSECUTORS

Prosecutors should ensure they are complying with local discovery rules. Most discovery rules will require disclosure of the name of the DRE that will be called to testify. Some jurisdictions will also require disclosure of the DRE's opinion. Be sure to disclose the DRE's CV (Curriculum Vitae), DRE School Training Certificate, DRE Certification Card and Letter and any other training material that would be relevant to laying a thorough foundation of the DRE's experience. Also, decide if the DRE needs to complete a supplemental report to be part of the case file.

Carefully consider who will conduct the DRE post-incident review and testify as a witness. A thorough foundation needs to be laid regarding the DRE's qualifications to admit the DRE post-incident review testimony. This includes details of the DRE's extensive training and experience that qualifies the DRE to conduct a post-incident review (see examples below). It is much easier to admit this type of testimony if the witness is a DRE instructor as an instructor's expertise is much more extensive than simply attending DRE school. In addition, a DRE instructor has received specialized training in teaching others about the program which will translate well in educating a judge and jury. If a DRE instructor is not available to testify, consider having your DRE witness consult with a DRE instructor or the state coordinator to ensure the quality of the case analysis. Have the DRE reference if a consultation was conducted as part of the DRE's testimony. This careful consideration as to the DRE conducting the post-incident review is especially important if this type of testimony is new to your jurisdiction.

In a DRE post-incident review, a DRE's analysis and testimony will be greatly improved if the DRE is able to review all the discovery available to the prosecutor including medical records, EMT/Paramedic reports, officer reports, video, etc. The DRE should be prepared to testify as to the materials the DRE reviewed in preparation for the DRE's testimony. This will be part of the foundation needed to qualify the DRE to testify about the case.

A DRE should not conduct a DRE post-incident review if he/she is not comfortable doing one. The DRE should not form an opinion if there is not enough evidence to do so.

There are many aspects of a DRE's training and experience that support a DRE's ability to conduct a post-incident review. A discussion of the relevant training should be included and emphasized in the DRE's testimony in order to make a complete record. Examples include:

- Incomplete DRE examinations are now included in the DRE curriculum and in appropriate circumstances allowed by the protocol. This is referenced in Session 4 of the DRE 7-Day School, and the DRE Instructor Manual. The latter emphasizes that the DRE should be able to "explain the reasons for this in their narrative report and if they are still able to form an opinion, what evidence and observations support their opinion." Make sure to emphasize this training

regarding incomplete DRE examinations, as well as any additional training received in this regard. If the DRE has experience where the DRE was not able, for whatever reason, to complete all 12 steps but none the less was able to formulate an opinion, that experience should be provided. Point out how this helps prepare for DRE post incident reviews.

- During DRE training, the students watch videos of DRE examinations of drug impaired subjects they did not conduct. They review face sheets and reports that they did not author and describe impairment they did not observe firsthand. They are trained to recognize impairment using these methods. This should enhance their ability to do a DRE post incident review.
- If your witness is a DRE instructor or state coordinator, the person should have experience reviewing DRE reports conducted by others to ensure the DRE rendered the correct opinion based on the evidence presented (for example certification, re-certification, or any other reason). This is really good experience that is applicable to DRE post-incident review.
- Has the DRE previously conducted drug influence evaluations on other suspects who have been under the influence of the drug category(ies) suspected of being used in the current post-incident review?
- If the DRE has served as a scribe for a case where the DRE did not conduct the actual DRE examination and the DRE believes this experience assists with the ability to do DRE post-incident reviews, have the DRE explain why.
- Has the DRE been involved in drug-impaired driving cases where a DRE examination was not conducted, such as when the DRE was the arresting officer, but the person refused to do an evaluation? Was the DRE able to offer an opinion of impairment consistent with a drug category(ies)? If so, have the DRE explain the basis of the DRE's opinion.
- Include in the DRE's testimony any previous DRE post-incident reviews that the DRE completed as well as any training received specific to DRE post-incident reviews.
- Add all relevant experience or training that would assist with a DRE post-incident review including training as an EMT, crash reconstruction training, etc.

Prepare for testimony. Meet with your DRE to discuss how the DRE arrived at an opinion of impairment consistent with a particular drug category(ies). Discuss the DRE's qualifications that enable the DRE to give an opinion even when the DRE did not conduct an evaluation. Be prepared to discuss the general indicators of any drug category observed by the officers present during the incident and how those observations of impairment relate to driving. If the arresting officer gathered evidence of clinical indicators such as the person's pulse or made observations of pupil size being inconsistent

with the lighting conditions, discuss how that evidence is relevant to the DRE's analysis. Be prepared to tie toxicology results, drugs/paraphernalia found, and admissions to the symptoms of impairment observed by officer(s) present on the date of the incident and how those are relevant.

Consider whether the DRE formed an opinion before the DRE knew the toxicology results. If not, prepare for the defense argument that the DRE solely relied on the toxicology results.

In some jurisdictions the court may 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 (if there is one). In this circumstance, do not press the DRE to give an opinion regarding the drug category or impairment to safely operate a motor vehicle if the court specifically does not allow this testimony.

Be careful which cases you choose to use a DRE post-incident review. Make sure the DRE has sufficient information available to form an opinion Consider if this type of testimony is new to your jurisdiction or judge.

Be cognizant as to what the court is willing to allow. If the judge is hesitant, start with calling a DRE for post-incident review as rebuttal evidence rather than in the state's case in chief. Create a good record and include case law from cases where DRE post-incident reviews have been admitted. Make sure the testimony provided is detailed and thorough and that an adequate foundation is laid.

Notes for additional considerations:

- It is much easier to admit this testimony if toxicology results are available.
- Create a good record.
- Ensure testimony is detailed and thorough.
- Start small. Ease your court into it. For example, use in rebuttal.
- Be flexible and anticipate the judge may not admit everything. Have a backup plan.
- Use case law from cases where DRE post-incident review was admitted if there are any applicable court ruling or cases from your jurisdiction.

VI. OPINION AND TESTIMONY

Written or oral testimony about the interpretations of a DRE post-incident review process shall be presented in an ethical and substantiated manner. A DRE post-incident review report should be expressed in a clean and coherent manner and any statements or opinions must be supported by established principles and foundations.

Reports or opinions should be based on the totality of the information available at the time. It is recommended to include in the report that the DRE's opinion may be subject to change based upon new information becoming available.

Any report or opinion should include a list of the materials/evidence relied upon in developing such opinions. It should also be clear that any opinions are based upon a post-incident review and is not a DRE drug influence evaluation or other personal examination of the suspect.

In the case of a DRE post-incident review, DREs and prosecutors should generally limit opinions to interpretation of paralleling lines of evidence without making causal inferences. For example, a DRE may interpret behaviors as consistent with those expected from drug impairment and also opine that a particular drug category(ies) is likely to cause certain types of behaviors. It is generally inappropriate to directly opine that a person was impaired by certain drugs (or categories of drugs) based only upon a post-incident review.

In offering an expert opinion, it is generally acceptable for the qualified DRE to:

- Discuss reports and evidence which they relied upon in developing their opinion. Limitations should also be acknowledged.
- Discuss signs and symptoms consistent with use of the various drug categories as utilized in the DEC Program.
- Discuss if signs and symptoms offered into evidence are consistent with drug impairment.
- In some cases, it may be appropriate to classify certain observations as consistent with a particular drug category, but DREs are reminded that there is significant overlap in category symptomatology and from polycategory drug use that further complicates such interpretations. This type of opinion should generally be reserved for cases where a toxicology report supports the presence of a certain category.

The following are generally inappropriate testimony / opinions for a DRE to offer based solely upon a post-incident review, as they lack consensus with the relevant community or exceed the scope of the DRE's expertise:

- An opinion should not imply the extent of impairment based solely upon quantitative results in a toxicology report.
- An opinion should not include extrapolation calculations for drugs other than ethanol, and ethanol calculations should not be included unless the witness has sufficient training on this topic beyond DRE or DRE Instructor certification.
- An opinion should not be offered that a person used a specific drug based solely upon behavioral observations.

- An opinion should not be offered regarding the exact time a drug was used based solely upon behavioral evidence and toxicology reports.
- Opinions and testimony should not include wording such as “scientific certainty” unless required by local regulations and the DRE and prosecutor have researched and agreed upon applicability in the current case.

VII. CASE LAW

Wooten v. State, 267 S.W.3d 289 (Tx. App. - Houston 2008). [Fatal car crash.] DRE reviewed Wooten’s hospital records and tied them to the presence of marijuana in Wooten’s urine sample. Officer testified extensively about his training and experience. Appellate court ruled it was appropriate to allow the DRE to testify to the general characteristics an individual under the influence of marijuana and alcohol might exhibit as well as their common effects on driving skills. Officer was not allowed to testify Wooten was personally under the influence of marijuana.

State v. Wynne, 182 Conn. App. 706 (App. 2018). [Misdemeanor DUI.] DRE testified to the effects the combination of alcohol and a low to moderate level of marijuana would have on the body including HGN. He referenced several studies, which were helpful. The officer was not called to testify to the defendant’s specific level of intoxication. He was offered only to explain the effects of marijuana and alcohol on a driver. This opinion provides a good example of using a hypothetical based on facts similar to those from the case to admit evidence. The defendant did not bring a *Daubert* challenge in the trial court and failed to preserve several arguments for appeal.

People v. Ciborowski, 55 N.E.3d 259 (IL App. 2016) [Misdemeanor DUI.] DRE allowed to testify for the limited purpose of discussing the effects of the prescription drugs citalopram and quetiapine. Officer was not allowed to testify to his opinion regarding whether or not the defendant was under the influence of antidepressants based on his review of “only” the police reports and video footage taken at the scene of the crash.

State v. Neal, 267 N.C. App. 442 (2019). [Misdemeanor DUI.] Defendant admitted to taking Ambien, Oxycodone, Clonazepam, and marijuana. DRE reviewed the police report, blood report and interviewed the arresting officer. She concluded the impairment exhibited by the defendant was consistent with CNS depressants and narcotic analgesics. Because the Sgt. testified that she compares the signs and symptoms of impairment

described in the reports to corroborate the drug categories identified the blood results and does not determine impairment based on the amount of the drugs in the blood report, the trial court did not abuse its discretion in admitting her testimony.

***Burton v. Commonwealth*, 300 S.W.3d 126 (Kentucky 2009).** [Second-degree manslaughter and second-degree assault.] Appellate court ruled testimony of DRE who did not observe the defendant on the date of violation was improperly admitted under the facts of the case. This case demonstrates the importance of tox results and thorough preparation in these cases. The decision to call the DRE was made at the last minute in response to the defense late disclosure of a defense expert and the urine test results were suppressed pre-trial.

VIII. REFERENCES

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, Arizona. Copyright 2005. Chapter 2: The Role of the Law Enforcement Officer, by Thomas E. Page. 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. Copyright 2004. The Art and Science of Drug Recognition Expert (DRE) Reconstruction, pages 709-716.

Guidelines for Opinions and Testimony in Forensic Toxicology. AAFS Standards Board. Colorado Springs, Colorado.