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House Bill (HB) 1392 & Senate Bill (SB) 1037

Courts - Impaired Operation of Vehicle or Vessel - Expert Witnesses and Evidence

DATE : March 6, 2024
COMMITTEE: House Judiciary & Senate Judicial Proceedings
POSITION: FAVORABLE WITH AMENDMENT

Dear Chairman and Committee Members:

PURPORTED PURPOSE:

HB1392 and SB1037 have two provisions, the first addresses the admissibility of drug recognition expert (DRE) testimony under the *Daubert* standard, and the second creates a rebuttable presumption that a person whose blood test positive for 5 nanograms of Delta 9-tetrahydrocannabinol (Delta 9 THC) is operating a vehicle or vessel while impaired. We support the component relating to the admissibility of DRE testimony and oppose the component relating to *per se* impairment of 5 nanograms per milliliter of blood.

ADMISSIBILITY OF DRUG RECOGNITION EXPERT TESTIMONY UNDER *DAUBERT* STANDARD

The first provision of HB1392 and SB1037 is in response to the Court of Appeals of Maryland's (now the Supreme Court of Maryland) decision in *Rochkind v. Steveson*, 471 Md. 1 (2020) that the standard for admissibility of expert testimony is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (*Daubert*), overruling *Read v. State*, 283 Md. 374 (1978)(also known as the *Frye-Reed* standard).

Driving by drug impaired persons is a dangerous public safety risk across the State and across the nation and the threat is growing. The purpose of this bill is to ensure that prosecutors have the necessary tools to combat this scourge on our State, especially in light of the new marijuana legalization laws. We are asking the legislature to recognize statutorily that the drug recognition protocol which is used by drug recognition expert officers throughout the country and across the world, be accepted in the State of Maryland.

A Drug Recognition Expert (DRE) is a specially trained officer that is called on after a person has been arrested for suspicion of driving while impaired by a substance other than alcohol. After the defendant has submitted to the alcohol concentration test, the DRE requests that the defendant submit to the twelve-part Drug Evaluation and Classification System (DEC).

The United States' Department of Transportation, National Highway Traffic Safety Administration (NHTSA) approves the use of Drug Recognition Experts and the DEC to detect and prosecute drug impaired drivers. To date, every state in the nation currently uses the DEC and have actively employed DRE's performing evaluations and testifying in court as to their observations and opinions. Case law nationwide overwhelmingly supports the utilization of DRE's in the battle against drugged driving. Since its implementation in the 1980's, no state has discontinued it, and no State's highest court has nullified it.

The upshot is that the use of DREs in impaired driving cases from drugs is at risk because there is no appellate Maryland case that holds that such testimony complies with the new *Daubert* standard. So, defense counsel could ask for a *Daubert* hearing in all 23 counties and Baltimore City challenging the use of DREs to opine whether someone was impaired due to a certain drug.

In New Jersey, in *State v. Olenowski*, 255 N.J. 529 (2023) (*Olenowski*), the court held a *Daubert* hearing before a special master that lasted 42 days. The New Jersey court appointed a special master to review all of the relevant data from the results of several years-worth of DRE evidence to determine the accuracy and admissibility of the protocol. This was the watershed analysis of the protocol as it included the review of 5,855 DRE reports and spanned all of the data from 2017 through 2018, admitted hundreds of exhibits, and utilized the reports and opinions of sixteen experts in their relevant fields from both the prosecution and the defense.

After reviewing all of that data and testimony, the State of New Jersey upheld the use of the DRE protocol and found that it did meet the *Daubert* standard, the same legal standard recently adopted by our courts. The Special Master in *Olenowski* found that expert analysis of the New Jersey data for those two years established that DREs in New Jersey, in actual, real-time enforcement situations, correctly opined the presence of impairing drugs in arrestees who did have such drugs in their systems as established through toxicology testing (true positives) at an extremely high rate, at or approaching 90%.

The legal support is not limited to case law alone. Several States (Maine, North Carolina, and Oklahoma) have even passed laws expressly supporting the DEC and the use of DREs. Specifically in Maryland, The General Assembly in enacting § 16-205.1 of the Transportation Article acknowledged the efficacy of the DRE protocol by requiring that only trained and certified DREs are permitted to request a blood test of drivers suspected of being impaired by drugs or controlled dangerous substances. *See* Transportation Article § 16-205.1(j).

Finally, the DRE protocol is also utilized internationally and is currently in use throughout the United Kingdom, Canada, and Australia. Likewise, Canada has a national law supporting the use of DREs and the DEC.

HB 1392 and SB 1037 are needed because Maryland recently adopted the *Daubert* standard of evaluating expert testimony. Previously there have been challenges raised in Maryland under the old standard and it showed the issue that we will face again today; the fact that the courts will never receive this issue to the appellate level. Should the State hold a *Daubert* hearing and lose,

the State is statutorily precluded from appealing the issue. See, Courts Article §§ 12-302 and 12-401. The State has won multiple trial court level challenges on this issue and the defense has repeatedly refused to appeal the issue for a final resolution of the argument. This issue is capable of repetition yet evading review.

So, instead of reinventing the wheel, HB1392 and SB1037 allows trained and certified DREs to opine that someone driving is impaired due to a certain drug and that opinion is admissible under *Daubert*. If this does not pass, one or all jurisdictions in Maryland may lose the ability to use DRE testimony for years while this is sorted out in the appellate courts.

There are currently 33 agencies that have active DREs in the Maryland DRE Program; 189 DRE's in the Maryland DRE Program; and 52 DRE Instructors in the State of Maryland.¹ Those experts should be able to testify regarding driver impairment under the *Daubert* standard as recently adopted by Maryland because the DRE methodology is already recognized as a predicate to allowing a blood draw of drivers suspected of being impaired by statute and the protocol has passed muster as reliable under the *Daubert* standard as found in a thorough and exhaustive review of a Special Master and the New Jersey Supreme Court in *Olenowski*.²

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¹ <https://mddre.maryland.gov/>(last visited February 20, 2024)

² <https://www.njcourts.gov/sites/default/files/public/notable-cases/smfr.pdf> (last visited February 20, 2024).