

# **DRUGGED DRIVING CONFERENCE**

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## **Common Challenges in DRE cases**

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# Prosecuting the Drugged Driver

COMMON CHALLENGES AND DEFENSES

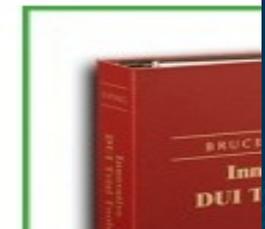
# Common Challenges in DRE



## Nine Ways to Attack a Drug Recognition Evaluator On Cross-Examination

August 20, 2014 / in DUI / by Travis Hise

Driving under the influence of drugs is the new frontier in impaired driving regulation. Your clients may be examined by a Drug Recognition Evaluator (DRE) who will be a key prosecution witness. In this excerpt from *Innovative DUI Trial Tools*, author Bruce Kapsack shows you the nine major areas on which to attack a DRE during cross examination with examples to demonstrate the point.



# Common challenges



# Common Challenges

- DRE Golden Rule - BE PREPARED!
  - On every case anticipate challenges and communicate.
  - Officers - must re-read your case reports before any interview and KNOW YOUR STUDIES!
  - Rely on the matrix!
  - Use a PDR to research prescription drugs.
  - Medication is for diseases - WHO CARES!



# Common Challenges -Be Prepared

- Prosecutors-Meet with your DRE's early on and be the defense attorney for them
- Call the Crime Lab to know what your criminalist will be willing to testify about.
- Study the case reports versus the matrix for any inconsistencies and be ready to address them early on
- Focus should be on the decision to drive while impaired.

# Common challenges - Think it through

- Prosecutors, does the defense ploy really affect reliability or impairment?
- Is it only a diversion/red herring? Should you even object?
- Do the defense arguments work against each other?
- Always, always focus on the impairment.

# Common challenges - Don't let the defense set the argument

- The defense tries to focus on noise
  - What was the reason the officer saw impairment
  - Attacks the studies, program or observations
- **Prosecutors- Focus on the decision to drive while impaired**
- **Prosecutors- Focus on the actual impairment**

# Common Challenges - A reminder

- A Defense Attorney may not cross-examine in chronological order in order to trip up or confuse the officer
- Never assume the defense ploy or question has merit - Don't immediately jump to defend.
- Don't ever accept their language

# Attack # 1- Not a Doctor, Just a Cop !



# Response to # 1- Cop is not a doctor

- **RESPONSE:**

- Focus on the (extensive) DRE training
- Have the cop bring up the studies- John Hopkins to determine ways to detect the drug classes
- Focus on the DRE's Experience
- Always point out that the toxicology **CONFIRMED** the officers determination

## Challenge #2- A Real Expert knows how and why certain drugs cause certain effects

- A DRE isn't an expert because they cannot explain how a particular drug actually works in the human body.

# Response

- Even doctors that prescribe medications cannot describe exactly how various drugs work. That is why doctors (and others) use PDR's!
- “Paxil- The efficacy of paroxetine in the treatment of major depressive disorder...is presumed to be linked to potentiation of serotenergic activity in the central nervous system resulting from inhibition of neuronal reuptake of serotonin (5-hydroxyl-tryptamine,5-HT).

(From 2012 PDR)

## #3 - The Officer rushed to judgement

- The DRE had a preconceived idea the suspect was under the influence and only looked for evidence to support their view.
- Variation- The DRE opinion was only based on the admission of the drug use, the pill bottle, the paraphernalia that wasn't theirs, etc.)
- Basically, the DRE is biased!

## # 3- response

- A DRE investigation is a standardized, extensive, investigation that utilizes a twelve (12) step process that eliminates other causes. It includes an in-depth investigation that asks numerous questions about health and any medications. There is usually a lot of objective evidence. (We just follow the facts.) Go through the process and why we follow it.

## # 3 response - continued

- List the factors against this:
  - Impaired driving – objective
  - Odor/physical signs –objective
  - Drugs/paraphernalia found on the scene-objective
  - Chemical testing confirms drug use (and recently?)(objective)
  - Then finally using their admissions just confirms the facts.

## # 4- Inconsistent observations

- Civilians/First responders/stop officer/DRE all observed different things!

## # 4 Response

- Not uncommon in a drug cases – because symptoms change over time. Does your medicine last forever?
- May be due to poly-drug use
- Stress consistency with the types of drugs found in the lab with your DRE

## # 5 - Observations do not fit the matrix

- Some of the observations the DRE officer made during the 12 step process/evaluation are inconsistent with what is expected in that drug category

# # 5 - Response

- Yeah- Stuff happens!
- It may be due to poly-drug use
- It may be due to “the down side”
- Stress the consistencies and re-emphasize the impairment
  - Was the officer still correct? If so - emphasize!
- Work together with your criminalist and officer to explain the inconsistencies

# # 6- DRE does not know the defendants normal vital signs

- The attack- The DRE does not know this person! The DRE does not know the defendants normal pulse rate, normal blood pressure, his normal eye dilation, etc. so the measurement and reliance on it is useless.

# # 6 - Hmmmmm



## # 6 - Our Response

- However, the entire medical community relies on a normal range. (Thank you defense – You just said our DRE's *are* the same as doctors now.)
- The defendant showed impairment
- Any variations noted were only one of the many factors in the 12 step investigation in the totality of the circumstances (Re-emphasize the 12 steps that eliminate other possibilities.)

# # 7 - Attack the drug categorization

- The seven drug categories have no basis in science and were entirely made up by DRE's.
- Variation- Law Enforcement must identify a specific drug, not just a broad category.

# # 7 - response

- The categories were created based on the observable and documented signs and symptoms
- Distinguishing between drugs in a category is impossible because many drugs have the same signs and symptoms
- How do you distinguish between wine, beer or hard liquor? It's all alcohol.

## # 7 -Response (Continued)

- The DRE protocol has been studied. It has been proven to be scientifically valid.
- Drugs are commonly characterized by medical fields within the medical community also. (The opioid crisis, painkillers, etc.)

# # 8 No *Miranda* Warnings before DRE Investigation

- The case has to be dismissed or the evidence suppressed because the officer did not give *Miranda* warnings before the DRE was performed AND my client was not free to leave!



## # 8- Response --Miranda does not apply !!!!

- Miranda is only a step in a multi-step protocol.
- Like the SFST's, Miranda is not necessary for most of the protocol. Most of it is “non-testimonial” reactions which the defendant has no constitutional rights to keep hidden. (Penn. v. Muniz, 496 US 582)
- Tip - L.E. should always consult with others to make sure Miranda is done. You do not need to re-read it once it is done.
- Tip- L.E.- A difficult suspect- Skip the questions, go right to the exam.

## # 9- Officers had to release before DRE

- Scenario – Officer stops a vehicle for a malfunctioning brake light. He notes bloodshot eyes and a faint odor of marijuana coming from the vehicle. The driver says they have no medical marijuana card and the odor must be from a friend borrowing the vehicle. Officer does an HGN test, with no clues. If the driver taps the brakes and the brake light starts working. Do they have to release or can they do a DRE?

## # 9- Must release before a DRE?

- Answer- they can continue with the DRE investigation.
- Variation- An officer (non-DRE) does a DUI investigation, arrests, and takes the defendant to the police station. A DRE is not available until after they are at the station. Is the DRE examination still admissible?

# # 10 Daubert/Frye/Rule 702 challenge

- The DRE protocol does not meet Rule 702 or the Daubert/Frye tests!

**DRE's are actually nothing but Mad Scientists with no basis in fact!**



# Mad Scientist at work in his secret lab!



With all of the secret Mad Scientist tools and equipment



# # 10 - Response

- Nationwide, all appellate courts have upheld the DRE protocols as meeting *Daubert/Frye standards*. See *State v. Daly*, 278 Neb. 903 ( Neb. 2009) for a long list of the opinions. read (*State v. Motari* 2008WL5066089 (AZ Spm Ct. -Careful!! Memorandum decision!) See also *Logerquist v. McVey* 196 Ariz. 470 (2000) and *State v. Lucero*, 207 Ariz. 301)
- But remember Rule 702 (admissibility of scientific evidence) does not apply to the great majority of the DRE protocols - just like the SFST's. See *State v. Superior Court (Blake)* 149 Ariz. 269 (1986). (non-testimonial observations)

# # 11 - Missing Symptoms

- The DRE report shows that this person did not have the symptoms necessary for this drug because \_\_\_\_\_ was missing!

# # 11 - Response

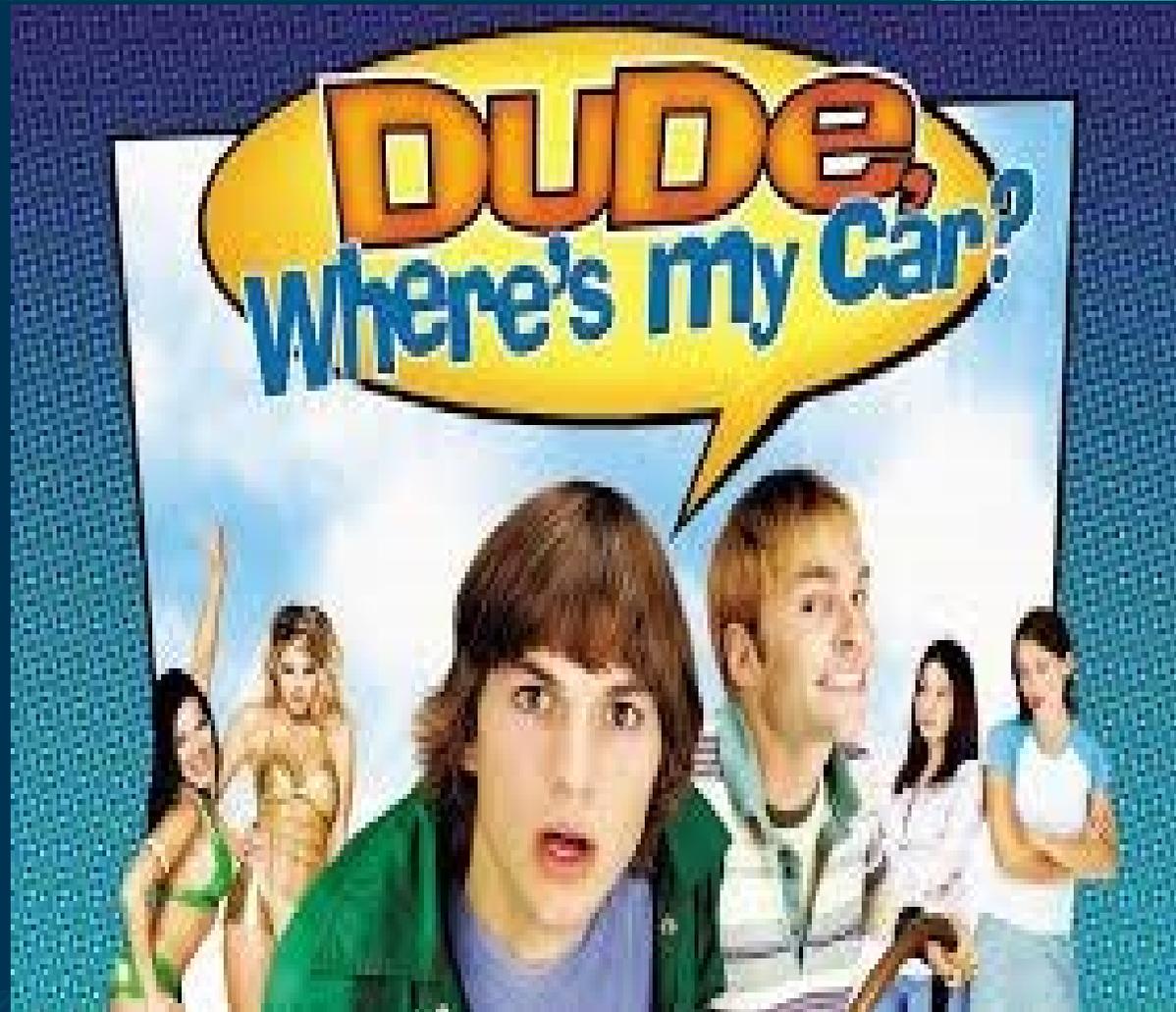
- Totality of the circumstances test
- Not every symptom is seen or common (Use the DRE)
- Not everyone has the same reaction
- Effects can differ by tolerance, poly-drug use, type of alcohol, etc. and context
- *Again, the lab results confirmed the DRE!!*

# Marijuana Challenges - # 12 - Community Attitudes

dribbleglass.com



Because Stoners have saved the Universe!



# What's my tattoo say?



# Heroes of the Universe



# Other Community Challenges- because Marijuana can help you lose weight!



# Take Marijuana and have better sex



# Marijuana challenges - Better sleep!



# And marketing never lies...

<b>Marijuana</b>	<b>Alcohol</b>
<b>Does use contribute to...</b>	
<b>NO</b>	<b>YES</b>
overdose deaths?	
<b>NO</b>	<b>YES</b>
long-term health problems?	
<b>NO</b>	<b>YES</b>
violent crimes?	
<b>NO</b>	<b>YES</b>
serious injuries?	

Without actual studies- marijuana is the new...



# # 12 - Our Response to combat...

- Voir Dire!
- Impairment, Impairment, Impairment!
- Remember, alcohol and aspirin are legal, but you can overdose and die from both.
- Educate - Changes in THC percentages from the 60's.

# # 13- The SFST's show my client isn't impaired

- My client did well on parts of the SFST's! (i.e.- HGN, One Legged stand, etc.)

# # 13 - Response

- Marijuana Impairment looks different from alcohol impairment
- Marijuana has impaired perception of time and distance, with poor driving lateral movement.
- Make sure your DRE knows all the studies! – The Arizona Study, 1994 – Marci Burns, S. California Research Institute, Table 7, p. 42 – DRE is 90% correct in identifying for marijuana!
- Focus on impairment and...the DRE was right.

# # 14- SFST's Not Valid for Marijuana! Only Alcohol.

- Argue vociferously against this! Tell the Judge the defense is misleading the court by pointing to the wrong studies, and should know better.
- The FST's were included as part of the DRE studies. The entire program, including the FST's as part of the multi-step process, were validated for seven categories, which included cannabis (marijuana) as a specific category. All seven categories were studied and validated.

# # 14 Response - Continued

- If you need more:
- *DRE Recognition Expert Examination Characteristics of Cannabis Impairment* by Rebecca L. Hartman, et al (July 2016)
  - Results- A Finger to nose with over three misses is the best indicator. Eyelid tremors alone an 86.1% correct predictor. Recommended overall program:
  - FTN over 3 misses, eyelid tremors, OLS sway, 2 walk and turn curs. If any 2 out of these 4, person is impaired.

# #15- Marijuana stays in your system!

- We all know marijuana stays in your system so the DRE and lab are picking up old stuff that is often non-impairing by now or so small as to be useless. (Often accompanies a confession they smoked a joint sometime in the morning when picked up at night).

Because I always look like this 8 hours later



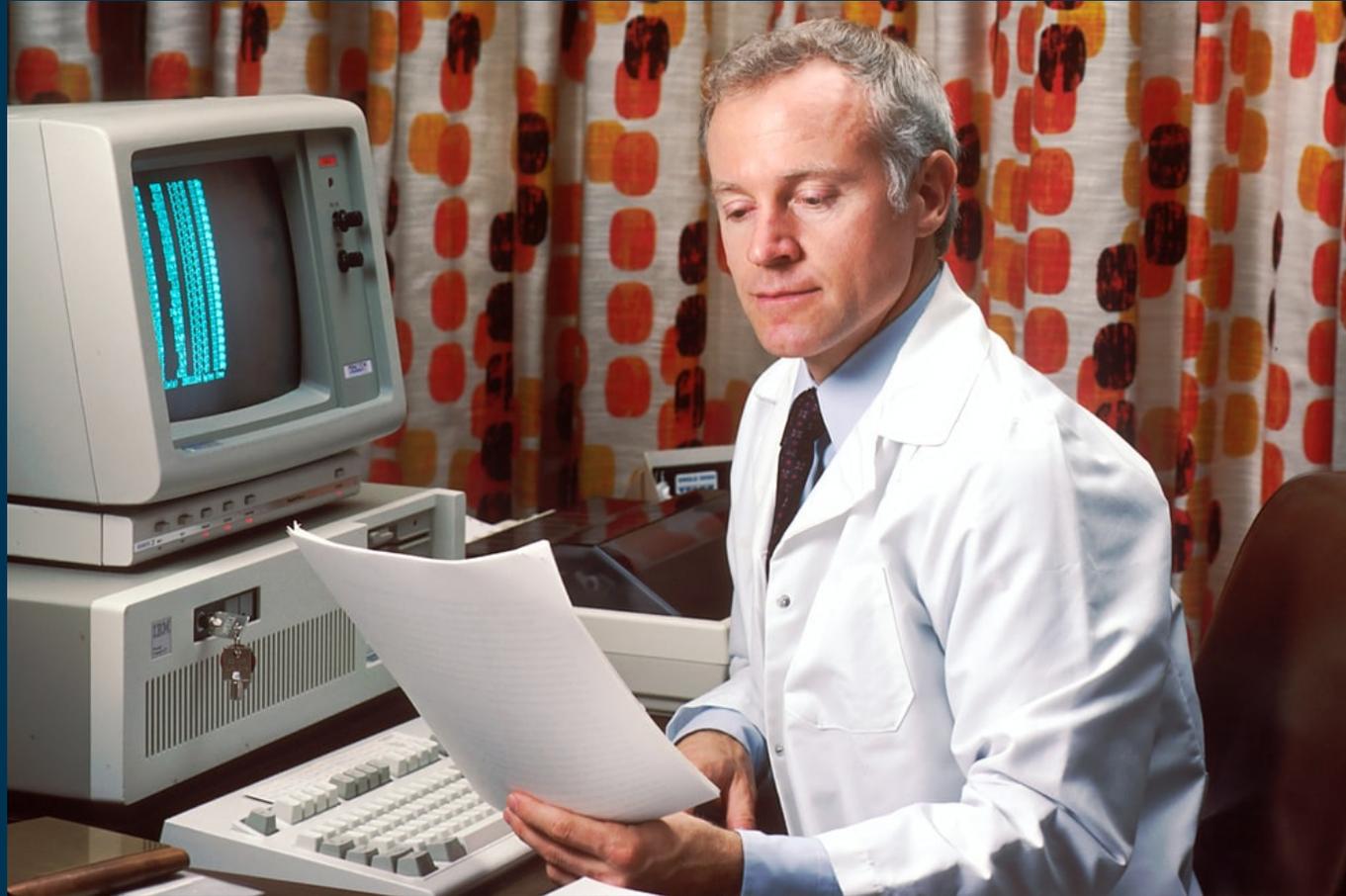
## # 15 - Response

- So why did the FST's show impairment? Why did the lab show active THC?
- If necessary can use the study: *Extended Urinary Delta-9 Tetrahydrocannabinol Excretion in Chronic Cannabis Users Precludes Use as a Biomarker of New Drug Exposure* by Ross H. Lowe, et al., (July 2009) but very dry.

# # 16- Legal Medication defenses (Interference)

- The defendant was prescribed this medication to take by his doctor so it must be safe to use and drive.

Okay....



# # 16 - Response

- First, they can't get there on the (A) (3) unless they have the doctor come in and testify. How often does this actually happen? (*State v. Bayardi*- 230 Ariz. 195 (2019) –affirmative defense. )
- Always ask to see the prescription- including warning labels attached, or look up the medicine in the PDR and the indicated warnings
- Make sure to investigate the prescribed dosage and when taken vs. the amount taken and present in the bottle (pictures) with your criminalist.

# #17 - The Process wasn't correct

- If the process isn't followed exactly correctly, you have to throw everything out! If not, why have it?

## # 17 - Response

- Work with the DRE – The 12 step process is meant to eliminate other explanations. The order it is done in doesn't really matter. The results obtained are what matter and they show impairment.

## # 18- Your HGN was wrong and this is the only valid test

- The other tests are suspect and HGN is the only scientifically valid test. My client had been up for 48 hours straight so its no wonder he failed the tests and the HGN. And the HGN test was done with my client sitting down!

# # 18 - Response

- DRE must know the studies! Motions in Limine
- *Nystagmus testing in intoxicating individuals* - Dr. Karl Citek, et al. November 2003.
- Citek is an ophthalmologist and an expert on HGN. He has studied HGN and VGN testing done on various positions (sitting, standing, lying down). He has confirmed the validity of HGN in many positions, and found that in the case of a person sitting, there is only more false negatives, which only helps the defendant! Similarly, fatigue does not cause HGN or impact the protocol.

## # 19 - My client has a mental condition

- My client has a mental condition along with a medical condition which makes it impossible to pass the tests.

# # 19- Response

- Mental Illness- Focus on impairment and toxicology results. Mental illness doesn't cause eyelid flutters. For any medical condition- the clinical signs are very helpful for the DRE- compare them to the current appearance and evaluate the types of drugs in their system.

## # 20 - Anything else!

- New Arguments will always appear. It is important to share new motions so we can help develop appropriate responses. In most cases they can be answered if you and the DRE really know the three studies: 1) John Hopkins 2) 1986 LA DRE Field Evaluation (AKA LAPD 173 study) and 3) 1994 Arizona DRE Validation study.

# Resources and Help are available

- Thanks to one of the best! APAAC, GOHS and
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# THANK YOU!

