Daubert and Expert Testimony of Impairment

Author : Shea Denning

Categories : Evidence, Motor Vehicles

Tagged as : Daubert, DRE, DWI, expert testimony, HGN, Rule 702

Date : July 1, 2014

With the amendment of Rule 702 of the North Carolina Rules of Evidence in 2011, North Carolina became a *Daubert* state. That change means that trial judges in this state, like their federal counterparts, serve as gatekeepers when faced with a proffer of expert testimony. *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) (interpreting the role of the judge under Rule 702 of the Federal Rules of Evidence, which is substantially similar to amended N.C. Evid. R. 702). The judge must determine, at the outset, whether the expert is purporting to testify to scientific, specialized or technical knowledge that will assist the trier of fact to understand or determine a fact in issue. Kumho Tire v. Carmichael, 526 U.S. 137 (1999) (recognizing applicability of *Daubert* principles to all types of expert testimony admitted under Rule 702). This requires the court to preliminarily assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be applied to the facts in issue. Factors that may be relevant to that consideration are whether the theory or technique upon which the expert relies has been tested, whether it has been subject to peer review or publication, the known or potential rate of error, and whether the theory or technique enjoys general acceptance within the relevant scientific community.

She blinded me with science. The purpose of these requirements is to ensure that expert testimony is reliable and relevant. The gatekeeper "make[s] certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire, 526 U.S. at 152 (1999). One federal magistrate judge explained the rationale in a way any child of 1980s is sure to appreciate: "[Such evidence] must not be cloaked in an aura of false reliability, lest the fact finder, like the protagonist in the Thomas Dolby song, be 'blinded by science' or 'hit by technology.'" United States v. Horn, 185 F. Supp. 2d 530, 551 (D. Md. 2002).

More than tort reform. While the changes to Rule 702 were enacted as a component of tort reform, the changes impact criminal as well as civil cases. Experts in criminal court are proffered to testify to items ranging from firearm toolmark identification, *see* State v. Britt, 217 N.C. App. 309, 314 (2011), to the "science" of the use of force, *see* State v. McGrady, 753 S.E.2d 361, 365 (N.C. Ct. App. 2014) *review allowed*, 2014 WL 2652419 (N.C. June 11, 2014). Such testimony frequently is offered in impaired driving cases to establish a defendant's alcohol concentration or the fact of a defendant's impairment by alcohol or other drugs.

Rule 702(a1). Before the 2011 amendments to Rule 702, which incorporated the *Daubert* gatekeeper requirements, the Rule was amended in 2006 to allow certain expert testimony regarding a defendant's impairment. That portion of Rule 702 remains, and provides:

> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.

Human Services, shall be qualified to give the testimony under this subdivision.

A few years after the enactment of Rule 702(a1), and before the *Daubert* amendments, the state court of appeals interpreted the new subsection "as obviating the need for the State to prove that the HGN testing method is sufficiently reliable" as a condition of admitting the result. State v. Smart, 195 N.C. App. 752, 756 (2009). The *Smart* court rejected the defendant's argument that a person testifying about HGN results must be an expert in the methodology underlying the test, explaining that such an interpretation "would make the subsection nothing more than an example of the requirements of subsection (a), which . . . states that " 'a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.' " *Id.* (quoting former Rule 702(a)). The state's appellate courts have not considered the requirements of Rule 701(a1)(2), pertaining to DRE testimony, but given that the subsection is similarly worded, one might have expected the same reasoning to apply – at least before the 2011 amendments.

Daubert vs. Smart. It is unclear whether the *Smart* analysis controls under current Rule 702. If the trial court cannot consider the reliability of the HGN test or the DRE protocol, then it arguably cannot fulfill its gatekeeper role under Rule 702(a). On the other hand, one might interpret Rule 702(a1) as expressing the legislature's intent that the trial court ***not*** exercise this gatekeeper function with respect to these categories of expert testimony. If that interpretation controls, and the legislature's imprimatur of this methodology does not violate a defendant's right to due process, then one can expect the State to have a relatively easy time introducing expert testimony on the results of HGN analysis and conclusions based upon a DRE examination. Indeed, before the supreme court in *Kumho Tire* clarified that *Daubert* applied to all types of expert testimony under Rule 702, not just to scientific testimony, some courts concluded that HGN and DRE testimony was not subject to *Daubert* because it was not scientific. See United States v. Everett, 972 F. Supp. 1313, 1321 (D. Nev. 1997) (finding that DRE testimony was not governed by *Daubert* "on the basis that the DRE's testimony is not 'scientific' in nature, but based upon observation, training and experience" and permitting DRE to 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"); State v. O'Key, 899 P.2d 663, 670 (Or. 1995) (holding that admissibility of HGN "is subject to a foundational showing that the officer who administered the test was properly qualified, that the test was administered properly, and that the test results were recorded accurately").

If, however, the amendments to Rule 702(a) call for the trial judge to assess the reliability of all expert testimony, including HGN and DRE testimony, the State will have to satisfy a higher, though likely surmountable, threshold. *Cf.* State v. Aleman, 194 P.3d 110, 120 ("[W]hether the [DRE] Protocol is deemed non-scientific or scientific, every case called to our attention that has considered the issue [has] held the DREs' testimony to be generally admissible.") This may require, however, that the State establish the reliability of the scientific principles underlying such testing, which may involve the testimony of a witness other than the arresting officer or evaluating DRE. One state appellate court has concluded, for example, that evidence of DRE procedures and results are admissible as scientific evidence only when corroborated by a toxicology report. The Court of Appeals of Oregon explained in State v. Aman, 95 P.3d 244 (Or. App. 2004) that "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." *Id.* at 472-73. The same court concluded in a subsequent case that a police officer was properly allowed to testify as to his "nonscientific expert opinion" that the defendant was under the influence of a narcotic analgesic where that opinion was based on a foundation that included evidence encompassed in a DRE test. *See* State v. Rambo, 279 P.3d 361, 365 (2012) review denied, 296 P.3d 1275 (Or. 2013).

A fine line? I'd say. What's happening in your trials? Is the gate swinging wide open for DRE and HGN testimony or is it guarded by a skeptical judge?

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.