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THE "DAUBERT" STANDARD AND LAW ENFORCEMENT TESTIMONY

From the Courts

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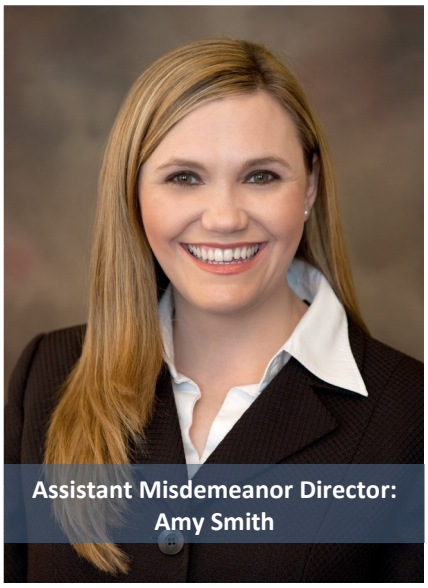
YOUR OPINION MATTERS: THE "DAUBERT" STANDARD AND LAW ENFORCEMENT TESTIMONY

Assistant Misdemeanor Director: Amy Smith

The successful prosecution of driving under the influence and possession of cannabis cases continues to be a high priority for our county court prosecutors. The majority of these cases rely heavily on the observations and opinions of law enforcement officers. For example, during DUI trials, we elicit opinion testimony from law enforcement officers about the defendant's impairment and performance on field sobriety exercises. Similarly, during a trial for possession of cannabis, we rely on the investigating officer to identify the alleged illegal substance as cannabis.



Recently, there has been an increase in the number of "Daubert" motions filed in county court. A "Daubert" motion, as it applies to law enforcement, is an attempt by the defendant to exclude and/or limit law enforcement opinion testimony. The "Daubert" motion challenges the officer's authority to testify as an expert on a matter at issue. These motions are often filed on the morning of jury trial and require the law enforcement officer to testify extensively regarding his background, training, and experience. Therefore, it is important for law enforcement officers to understand the purpose and effect of the "Daubert" motion.

On July 1, 2013, the Florida Legislature amended Florida Statutes Section 90.702 and codified the federal standards for determining the admissibility of expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Pursuant to Section 90.702, Fla. Stat. (2014),

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3)The witness has applied the principles and methods reliably to the facts of the case.

In its most basic terms, this evidentiary rule, otherwise referred to as the "Daubert" standard, calls upon the trial court to act as a gatekeeper, making a pre-trial determination that the witness is qualified to testify to the matter at issue and that the witness based his or her opinion on sufficient facts or data that were correctly applied to reliable principals and methods.

When we receive a "Daubert" motion, we first determine if the challenged testimony is lay witness testimony or expert testimony. The admissibility of lay opinion testimony is guided by Florida Statutes Section 90.701 and provides as follows:

If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

If the challenged opinion testimony qualifies as admissible lay witness testimony, a pre-trial "Daubert" hearing is not necessary. For example, lay witness opinion testimony about impairment has historically been admissible in DUI trials. State v. Meador, 674 So.2d 826, 831 (Fla. 4th DCA. 1996)(citing Cannon v. State, 91 Fla. 214 (1996) and City of Orlando v. Newell, 232 So.2d 413 (Fla. 4th DCA 1970)). On the other hand, Horizontal Gaze Nystagmus is viewed as scientific

evidence and opinion testimony regarding a defendant's performance on this field sobriety exercise will not be admissible at trial unless the State is able to establish that the testifying officer maintains the required skill, training, knowledge, and education to perform the exercise and the officer performed the exercise pursuant to the standardized principals and methods. Testimony regarding psychomotor field sobriety exercises falls somewhere in the middle. In Meador, the Court concluded that psychomotor field sobriety exercises, such as the walk-and-turn, are non-scientific. The trial court will still act as the gatekeeper for the admissibility of the non-scientific opinion evidence but will focus less on the scientific reliability of the exercises and more on the officer's qualifications to administer and evaluate the defendant's performance.

The key to preparing for a "Daubert" challenge is to learn your resume. For example, in a possession of cannabis case where the Defendant is challenging a law enforcement officer's ability to identify cannabis, that officer should be prepared to testify to the following matters:

- The first time he or she came into contact with cannabis (maybe high school or college);
- The unique characteristics of cannabis including odor, texture, color, appearance and packaging;
- Training involving cannabis in the classroom and/or field training, including at the academy, at the agency, and any continuing education courses;
- Experience as an instructor, and what, if any, courses he or she taught that involved cannabis;
- Any specialized drug detection assignments or training;
- The number of Cannabis investigations he or she has participated in or conducted;
- The number of arrests that the officer has made for Possession of Cannabis;
- The policy and procedure for field testing Cannabis; and
- The number of times the officer has substantiated his identification of suspected Cannabis with a field test or by FDLE testing.

Similarly, in a DUI case where the Defendant is challenging a law enforcement officer's ability to perform and testify to the defendant's performance on HGN, that officer should be prepared to testify to the following:

- The first time he or she was first introduced to HGN;
- The unique characteristics of HGN;
- Define HGN and distinguish for other forms of Nystagmus;
- The standardized procedures for administering HGN;
- Law enforcement training beginning with the academy, and including in-classroom and field training involving HGN;
- If the officer is an instructor, any courses he or she taught regarding HGN;
- The number of DUI investigations and the number of times the officer has performed HGN; and
- Specialized training in conducting DUI investigations.

The opinion testimony of law enforcement is crucial to the prosecution of our county court cases. Therefore, you need to anticipate these motions at the onset of the criminal investigation. If you are a less experienced law enforcement officer, you may want to call upon a more experienced officer to assist in your investigation. If you are a more experienced officer, you need to learn your resume and be prepared to show the trial courts that you have the knowledge, skill, education, and experience to testify to these matters in court. Finally, if you have any questions or concerns regarding an upcoming "Daubert" motion, make sure you communicate with the prosecutor assigned to the case. By working together, we will be able to smoothly navigate through these pre-trial motions and continue to successfully prosecute our misdemeanor cases.

If you have any questions or concerns regarding a "Daubert" motion, please feel free to call Amy Smith, Assistant Director of Misdemeanor, at (863)534-4915.

FROM THE COURTS...

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EVIDENCE – STATEMENTS OF DEFENDANT – INVOCATION OF RIGHTS

The defendant was arrested for First Degree Murder. As he was being transported to jail, he spontaneously asked the transporting officer if his lawyer would be at the jail. The officer responded that he would not, but he told the defendant he was sure he would get a lawyer, but not here. The defendant responded that he needed to speak to his lawyer because he "killed a life." The defendant was placed in a holding cell and not questioned until the detectives arrived at the jail one and a half hours later. The transporting officer informed the detectives about the defendant's statements during the transport. Before questioning the defendant, the detectives informed the defendant they knew about his comments to the transporting officer and then read him *Miranda*. Thereafter, the detectives reaffirmed the defendant's right to counsel several times. The defendant stated that he wanted to talk to the detectives "to say the truth." In a motion to suppress, the defendant asserted that he had invoked his right to remain silent to the transporting officer and therefore the detectives were prohibited from questioning him unless the defendant initiated contact. The trial court denied the motion to suppress. On appeal, the Fourth District affirmed the trial court's denial of the motion to suppress because the defendant's statements to the transporting officer could not serve as an effective invocation of his Fifth Amendment right to counsel because at that time the custodial interrogation had not begun and was not sufficiently imminent. The court cited *Sapp v. State*, 690 So. 2d 581, 586 (Fla. 1997), holding that the rule of law '"requiring the invocation to occur either during custodial interrogation or when it is imminent, strikes a healthier balance between the protection of the individual from police coercion . . . and the State's need to conduct criminal investigations.'" *Funesvalle v. State*, 38 Fla. L. Weekly D2612a (Fla. 4th DCA December 11, 2013).

EVIDENCE INSUFFICIENT FOR FELONY OBTAINING PROPERTY BY WORTHLESS CHECK

The defendant was charged with felony obtaining property by worthless check for paying the installer of a business sign upon completion of the work. The jury convicted the defendant of the felony. On appeal, the Fifth District reversed, holding that although the check was for a felony amount, it was written for a pre-existing debt. In reducing the conviction to a misdemeanor, the court held that to prove a felony, it must be proven that the check was written to induce the furnishing of goods or services. *Duncan v. State*, 39 Fla. L. Weekly D69b (Fla. 5th DCA January 3, 2014).

AIRBAG CONTROL SYSTEM COMPUTER GENERATED REPORT WAS NOT TESTIMONIAL HEARSAY

In this Second DCA case, the defendant in a leaving the scene of a crash involving death, argued that the computer generated airbag control system report was testimonial hearsay and he therefore had the right to confront the computer, pursuant to the Sixth Amendment. The Second District rejected the defendant's argument that his conviction should be reversed, holding that the airbag computer report was not accusatory and did not describe any specific wrongdoing of the defendant. The report "merely established the existence or absence of some objective fact, i.e., if and when the brakes were applied in [the defendant's] car before the accident and the speed the car was traveling. *Peterson v. State*, 39 Fla. L. Weekly D75 (Fla. 2d DCA January 3, 2014).