

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT**

Case No. [REDACTED]

STATE OF NEW MEXICO,
Plaintiff,

vs.

[REDACTED],

Defendant.

**MOTION IN LIMINE TO EXCLUDE OPINION TESTIMONY REGARDING
DEFENDANT'S ALLEGED PERFORMANCE ON "FIELD SOBRIETY TESTS"**

COMES NOW the Defendant, by and through his attorneys of record, (redacted), and hereby moves this Court for an order excluding any opinion testimony by the officers herein about the conduct or results of any so-called "Field Sobriety Tests" in this case. In support of this Motion, the Defendant offers the following:

1. Opinion testimony by police officers, if based on some sort of particular training or experience, is expert testimony subject to the foundational requirements of NMRA 11-702. See Kumho Tire Co., Ltd. v. Carmichael, 116 S.Ct. 1167 (1999). Thus, any opinion testimony by police officers that Defendant "failed" a particular field sobriety test (FST), or that, based upon his training and experience, the officer concluded that Defendant was "under the influence," is not admissible unless the State can establish a proper foundation for such expert testimony.

2. In State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993), the New Mexico Supreme Court followed the lead of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and established that "it is error to admit expert testimony involving scientific knowledge unless the party offering such testimony first

establishes the evidentiary reliability of the scientific knowledge.” Alberico at 166-69, 861 P.2d at 202-05. This approach replaced the “general acceptance” standard of Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) in favor of an approach based more directly on the language of the Rules of Evidence, particularly NMRA 11-702.

3. While not bound by interpretations of the Federal Rules of Evidence, New Mexico has found that the interpretation of the Federal Rules of Evidence is instructive in the interpretation of identical provisions in our Rules of Evidence. See e.g. State v. Lopez, 123 N.M. 599, 603 (Ct. App. 1997); see also Alberico at 167, 861 P.2d at 203 (noting that Federal Rule of Evidence 702 is identical to New Mexico Rule of Evidence 702).

4. In State v. Torres, 127 N.M. 20, 30, 976 P.2d 20, 29 (N.M. 1999), our Supreme Court extended the reach of Daubert and Alberico by holding that the required reliability analysis applied to all scientific evidence, rather than just to “novel” scientific evidence, as other courts have held.

5. In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), the United States Supreme Court extended the Daubert/Alberico/Torres rationale one crucial step further by noting that the language of Rule 702 “makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge.” Id. at 147. In reaching its opinion, the Court stated:

Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. There is no clear line that divides the one from the others. . . .

Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called “general truths derived from. . . specialized experience” (internal citation omitted) . . . And whether the specific expert

testimony focuses upon specialized observations, the specialized translation of those observations into theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own" (internal citation omitted). The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

Id. at 148. The Kuhmo Tire Court thus held that the Daubert "gatekeeping" function of the trial court applies to all forms of expert testimony, not just to those deemed "scientific."

6. Each time a police officer renders an opinion based upon his "training and experience," he is testifying in an "expert" capacity. As a matter of simple logic, any opinion which is based on some specialized "training and experience" is, by its own terms, no longer "lay" testimony. Thus, it would be error to allow a police officer to give his opinions without first engaging in the reliability inquiry required under Daubert. This is especially true in light of the fact that the improper admission of a police officer's opinion testimony cannot reasonably be viewed as harmless. See Clark v. State, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991) (error in the admission of evidence in a criminal trial cannot be considered harmless if there is a reasonable possibility that the evidence might have contributed to the conviction).

7. In United States v. Horn, 185 F. Supp. 2d 530 (D. Md. 2002), the United States District Court for the District of Maryland undertook an exhaustive review of Standardized Field Sobriety Tests (SFSTs) in determining their admissibility in light of Daubert and its progeny. The Horn Court reviewed every major SFST study conducted over the past thirty years, heard testimony from the foremost SFST experts in the country, and reviewed case law from every state. In short, the court performed the most thorough SFST legal analysis thus far reported. In light of the great lengths undertaken by the Horn Court, the conclusions reached in that case are particularly instructive on the utility of SFSTs at trial.

8. According to the Horn Court, “If the SFSTs are introduced by the testimony of a sponsoring witness who is testifying as to scientific, technical or specialized matters, the admissibility of the SFSTs is dependent on whether the witness's testimony meets the requirements of . . . Fed. Rule of Evid. 702 and the Daubert/Kumho Tire standards.” Horn at 534. The Horn Court concluded that SFST evidence does not meet the requirements of Daubert and Rule 702 and is therefore inadmissible as direct evidence of intoxication or impairment. Id. at 557 (emphasis added).

9. In addition, the Horn Court noted that, “As for the sufficiency of the facts and data underlying the assertions in the NHTSA articles that SFSTs are reliable in predicting specific BAC . . . there is insufficient data to support these claims of accuracy.” Id. at 556. Therefore, performance on the SFSTs may not be used to determine the particular blood alcohol content of the defendant, nor may performance be used to correlate with any particular blood alcohol content.

10. With respect to what purpose, if any, the results of SFTS may be admitted, the Horn Court indicated the following:

On the record before me there are not sufficient facts or data about the [One Leg Stand] and [Walk and Turn] SFSTs to support the conclusion that, if a suspect exhibits two out of eight possible clues on the WAT test or two out of four clues on the OLS, he has "failed" the tests . . . To permit a police officer to testify about each of the SFSTs in detail, their claimed accuracy rates, the number of standardized clues applicable to each, the number of clues exhibited by the suspect, and then offer an opinion about whether he or she passed or failed, stopping just short of expressing an opinion as to specific BAC, invites the risk of allowing through the back door of circumstantial proof evidence that is not reliable enough to enter through the front door of direct proof of intoxication or impairment. Such testimony clearly is technical, if not scientific, and may not be admitted unless shown to be reliable under the standards imposed by Rule 702 and Daubert which has not been done in this case.

Horn at 555-57. In sum, an officer may not testify regarding the specific requirements of the SFSTs, nor may he indicate that the defendant may have “failed” any particular test. As stated above, this evidence is not reliable.

11. The Horn Court further stated that, “If offered as circumstantial evidence of alcohol intoxication or impairment, the probative value of the SFSTs derives from their basic nature as observations of human behavior, which is not scientific, technical or specialized knowledge,” Id. at 559, and the interjection of technical terminology or the opinions of an officer that the defendant “failed” a test, “unfairly cloaks it with unearned credibility [and] any probative value these terms may have is substantially outweighed by the danger of unfair prejudice resulting from words that imply reliability.” Id. at 559-60.

12. At the conclusion of the opinion, the Horn Court summarized its findings as follows:

I therefore hold that when testifying about the SFSTs a police officer must be limited to describing the procedure administered and the observations of how the defendant performed it, without resort to terms such as "test," "standardized clues," "pass" or "fail," unless the government first has established a foundation that satisfies Rule 702 and the Daubert factors regarding the reliability and validity of the scientific or technical underpinnings of the NHTSA assertions that there are a stated number of clues that support an opinion that the suspect has "failed" the test.

The officer should not, however, be permitted to interject technical or specialized comments to embellish the opinion based on any special training or experience he or she has in investigating DWI/DUI cases. Just where the line should be drawn must be left to the discretion of the trial judge, but the officer's testimony under Rule 701 must not be allowed to creep from that of a layperson to that of an expert--and the line of demarcation is crossed if the opinion ceases to be based on observation and becomes one founded on scientific, specialized or technological knowledge.

Id. at 559-60.

13. Finally, the New Mexico Court of Appeals has concluded that there is no

correlation between performance on FSTs and impairment. State v. Lasworth, 131 N.M. 739, 742-43 (Ct. App. 2002). After reviewing many of the same studies reviewed in Horn, and after hearing testimony from Dr. Marcelline Burns, one of the psychologists responsible for the development of the FSTs, the Court quoted the findings of Dr. Burns (who was testifying on behalf of the state) that, “The only appropriate criterion measure to assess the accuracy of SFSTs is BAC. Measures of impairment are irrelevant because performance of the SFSTs must be correlated with BAC level, rather than driving performance.” Id. at 742 (emphasis added).

WHEREFORE Defendant respectfully requests that this Court limit police officer testimony relating to field sobriety testing in the following manner:

- (A) That the officer be prohibited from describing the field sobriety tests as “standardized;”
- (B) That any mention of the field sobriety tests correlating to an estimated breath score be prohibited;
- (C) That the officer be prohibited from testifying about whether the defendant “passed,” or “failed,” the field sobriety tests;
- (D) That the officer be prohibited from testifying that defendant was “impaired” by alcohol based upon the results of field sobriety testing.

Respectfully submitted,

([REDACTED])

By: _____

I hereby certify that on this ____ day
of January, 2009 a true and correct copy
of the foregoing was placed into the incoming
box of the District Attorney:

([REDACTED])