

SUPREME COURT OF NEW JERSEY
A-56 September Term 2018
082253

FILED

NOV 18 2019

Heather J. Sale
CLERK

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORDER

MICHAEL OLENOWSKI,

Defendant-Appellant.

This matter having come to the Court on a grant of certification, 236 N.J. 622 (2019), to determine whether the testimony of an officer who is a certified Drug Recognition Expert (DRE) is admissible at trial and, if so, under what circumstances; and

Defendant having been charged with driving while intoxicated, contrary to N.J.S.A. 39:4-50, and related offenses, and the Municipal Court having denied defendant's motion to hold a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), to assess the admissibility of DRE evidence at trial; and

The State, over defendant's objection, having introduced evidence of the twelve-step process that officers apply to assess drug influence and

impairment, as well as the specific results against defendant, through the testimony of certified DREs; and

Defendant having introduced a written report and testimony of an expert witness, who asserted there has been insufficient scientific study to date to conclude that drug influence evaluations performed by DREs are reliable and valid, and that such evaluations should include toxicological screening for various types of substances; and

Defendant having been convicted in Municipal Court and, after a trial de novo, in the Superior Court, and that conviction having been affirmed on appeal; and

The Court having granted amicus curiae status to the Attorney General of New Jersey, the American Civil Liberties Union and the Public Defender, the New Jersey State Bar Association, the Association of Criminal Defense Lawyers, the County Prosecutors Association, the DUI Defense Lawyers Association, the National College for DUI Defense, and the New Jersey State Association of Chiefs of Police; and

The parties and amici having raised and argued questions about the scientific reliability and admissibility of DRE evidence, and having submitted extensive scientific literature, which has not been examined at an evidentiary hearing, in support of their respective positions; and

The Court having determined on prior occasions that, when resolution of a critical issue depends on a full and complete record, the Court should await, before decision, the development of such a record, see State v. Cassidy, 230 N.J. 232, 232-33 (2017); State v. Henderson, 208 N.J. 208, 228, 305-06 (2011); State v. Moore, 180 N.J. 459, 460-61 (2004); and

The Court having heard argument of the parties and having concluded that the existing factual record is inadequate to test the validity of DRE evidence; and

The Court having concluded that, until such a record is established, the Court should not address the question of the admissibility of the DRE evidence presented in this case under N.J.R.E. 701 or 702; and for good cause shown:

It is ORDERED that the matter is remanded summarily to a Special Master for a plenary hearing to consider and decide whether DRE evidence has achieved general acceptance within the relevant scientific community and therefore satisfies the reliability standard of N.J.R.E. 702, see Cassidy, 235 N.J. at 491-92; State v. J.L.G., 234 N.J. 265, 301 (2018); Frye, 293 F. at 1014; and it is further

ORDERED that, as part of that evaluation, the parties shall address and the Special Master determine, among other relevant issues, whether each individual component of the twelve-step protocol is reliable; whether all or

part of the twelve-step protocol is scientifically reliable and can form the basis of expert testimony; and whether components of the process present limitations, practical or otherwise; and it is further

ORDERED that the Honorable Joseph F. Lisa, retired Presiding Judge of the Appellate Division serving on recall, is appointed to serve as the Special Master, with his consent; and it is further

ORDERED that, subject to any rulings by the Special Master regarding the proofs to be submitted on remand, defendant and the State shall each present testimony, scientific studies, and other proofs, including expert testimony, in support of their respective positions; and it is further

ORDERED that the Special Master shall determine the extent of the participation of the amici identified above in developing the record; and it is further

ORDERED that the Special Master shall make findings of fact and conclusions of law after hearing testimony and the parties' arguments; and it is further

ORDERED that the State shall make arrangements to ensure that the Special Master receives transcripts of the remand proceedings conducted under this Order; and it is further

ORDERED that after the hearing is completed, the Special Master shall expeditiously complete and submit a written report of his findings to the Court; and it is further

ORDERED that upon the filing of the Special Master's report on remand, the parties and amici shall each have thirty days to serve and file briefs and appendices with the Court, and ten days thereafter to file any responding briefs, and that no further submissions will be permitted unless requested by the Court; and it is further

ORDERED that after briefing is completed, the Clerk of the Court shall schedule the matter for additional oral argument; and it is further

ORDERED that jurisdiction is otherwise retained.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 18th day of November, 2019.



CLERK OF THE SUPREME COURT