

DRUG RECOGNITION EXPERTS (DREs)

Evidence has been presented to you from a Drug Recognition Expert (DRE).¹

The expert testified that the driver showed signs consistent with the usage of certain drugs. However, evidence that the driver shows signs consistent with drug usage is not proof of drug use. In other words, this testimony is not proof that particular drugs or categories of drugs were ingested by the driver and caused the driver to be impaired.²

The DRE's testimony, in and of itself, without more, cannot be proof beyond a reasonable doubt that the driver's impairment was the result of ingesting a particular drug or category of drugs. It is, however, a circumstance to be considered with the other evidence in determining whether the State has proven defendant's impairment by drugs beyond a reasonable doubt.

Impairment instead must be proven by the State with independent evidence. Such evidence can include, but is not limited to, specific factual observations of the police officers or the DRE at the scene, any alleged statements of the driver, information from passengers or other observers about the driver's recent behavior, any evidence recovered from the car, or a toxicology report.

It is important to note that a toxicology report cannot prove the driver was drug impaired while driving. Toxicology can detect only the presence of drugs. It cannot establish the amount or timing of the driver's drug usage. It may not detect some combinations of drugs or newer "designer drugs" that are resistant to detection. You may consider the toxicology report in deciding what weight, if any, to give the DRE's testimony.

¹ Prior to a DRE's testimony, the trial court should make a determination as to the reliability and admissibility of the DRE testimony as applied to each case. State v. Olenowski, 255 N.J. 529, 612-13 (2023). Defense counsel must have a fair opportunity to impeach or rebut testimony through cross-examination and with counterproofs. Id. at 613-14.

² Olenowski, 255 N.J. at 609-12.

[CHARGE WHEN THERE IS NO TOXICOLOGY REPORT]

DRE officers must make a reasonable attempt to obtain a toxicology report when it is possible to do so – and preferably to obtain a blood sample rather than a urine sample. If you find that the State established a reasonable justification for the lack of toxicology report, you may give the DRE’s opinion testimony whatever weight you deem appropriate. As previously stated, the DRE’s testimony is limited to whether the driver showed signs consistent with the usage of certain drugs.

[CHARGE WHEN DEFENDANT ALLEGES THAT APPEARANCE OR CONDUCT WAS NOT THE RESULT OF IMPAIRMENT]

There has been some testimony from which you may infer that defendant’s appearance or conduct was not the result of impairment. Specifically, you heard testimony that [INSERT FACTS ELICITED ON DIRECT EXAM, CROSS-EXAM, OR THROUGH DEFENSE EXPERT]. If you find these explanations credible, you should not draw any inference of the defendant’s impairment from the DRE’s testimony. If, after a consideration of all the evidence, you find these explanations not credible, you should give the DRE’s testimony whatever weight you deem appropriate.

[CHARGE IN ALL CASES]

You are not bound by the expert’s opinion, but you should consider the opinion and give it the weight to which you deem it is entitled, whether that be great or slight, or you may reject it entirely. In examining the opinion, you may consider the reasons given for it, if any, and you may also consider the qualifications and credibility of the expert.

It is always within the special function of the jury to determine whether the facts on which the answer or testimony of an expert is based actually exist. The value or weight of the opinion of the expert is dependent upon, and is no stronger than, the facts on which it is based.

In summary, the State must prove beyond a reasonable doubt that defendant was impaired, and that impairment was caused by drugs. There must be independent evidence of drug impairment in order for the State to prove the cause of impairment. It is for you as judges of the facts to decide whether or not expert testimony and independent evidence shows that the defendant was impaired by ingesting a particular category of drugs and how much weight to give that evidence.

The ultimate determination of whether or not the State has proven defendant's guilt beyond a reasonable doubt is to be made only by the jury.