Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 5 2015

The Honorable Jeff Barker, Chair
House Judiciary Committee, Members

RE: House Bill 2371

Dear Chair Barker and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to House Bill 2371.

1). HB 2371 is a resurrection of efforts made in 2013 HB 2114 and 2011 HB 2142 to legislatively direct the judiciary to admit testimony, in all instances, of individual component tests and observations of an incomplete drug recognition evaluation (DRE) exam. This evidentiary legal issue is exceptionally complicated: it involves the interplay between scientific evidence, scientific expert opinion testimony, non-scientific expert opinion testimony, and lay person observation testimony. OCDLA submits that HB 2371 is premature, unnecessary, and unwarranted.

2). HB 2371 is premature. Section 2 Subsection 1 directs the Oregon State Police to enact rules to establish the tests and observations that comprise a complete DRE exam. OCDLA has no objection to this rule-making authority. However, OCDLA does assert that the balance of HB 2371 is premature until those rules are first written and this Legislature knows what those rules provide. Subsection 2 would have the Legislature sanction, indeed mandate, the admissibility of any component part of an incomplete DRE before this legislative body even has any ability to discern what it is mandating. OCDLA submits that Subsection 1 might pass of itself, with the remainder of the bill deleted.

3). HB 2371 is unnecessary. The judiciary is the traditional "gatekeeper" of scientific evidence, or evidence that masquerades as such. *Daubert v. Merrell Dow Pharmaceuticals,* 509 US 579 (1993); *State v. Brown,* 297 Or 404 (1984); *State v. O'Key,* 321 Or 285 (1995). The reason why this "gatekeeping function" is so necessary was stated in *O'Key*,

> "Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. The function of the court is to ensure that the persuasive appeal is legitimate." 321 Or at 291.

And as recently stated by the Court of Appeals in *State v. Aman,* 194 Or App 463, 472:

> "Stated another way, nonscientific evidence presented as if it were scientific may be highly persuasive to a lay jury, and the trial court, therefore, is obligated to ensure that what is presented to the jury as valid scientific evidence does, in fact, meet that standard."

4). The Oregon Court of Appeals has been adjudicating in a host of cases the very question at issue in HB 2371: *State v. Sampson,* 167 Or App 489 (2000), *State v. Aman,* 194 Or App 463 (2004), *State v. Bevan,* 235 Or.App. 533 (2010), *State v. Rambo,* 250 Or App 186 (2012), *State v. Beck,* 254 Or App 60 (2012), *State v Wilson,* 266 Or App 286 (2014). There is no conflict among the Court's rulings; the rulings have been articulate and clear, and by in large have been favorable to the state. Given this growing litany of appellate case law, it is difficult to understand a legitimate reason for the Legislature to mandate that a particular ruling must occur in all cases, irrespective of conditions or circumstances.

5). HB 2371 inverts language in *State v. Rambo,* 250 Or App 186 (2012) and turns it on its head. In *Rambo,* Judge (now Justice) Brewer stated:

> "As we have explained before, the admissibility of the complete DRE protocol as scientific evidence does not demonstrate the general admissibility of each component of the protocol. . . . [I]n *Aman,* we concluded that an incompletely administered DRE protocol is not admissible as scientific evidence, although we noted that evidence <u>of individual components of the DRE protocol were not necessarily inadmissible</u> as nonscientific evidence of impairment." *Id.* at 364 (emphasis supplied).

HB 2371 seeks to invert this standard. HB 2371 seeks to mandate that in all instances, the component parts of the DRE exam <u>always "are" admissible</u>.

6). Further, HB 2371 would seek to broaden, if not out-right overrule, the Court of Appeals decisions in the following instances:

- *State v. Rambo* and *State v. Beck* both emphasized: "As we have explained before, the admissibility of the complete DRE protocol as scientific evidence does not demonstrate the general admissibility of each component of the protocol." HB 2114 seeks to reverse that ruling, and mandate in every instance the general admissibility of each component in every judicial or administrative proceeding.

- In *Rambo*, the trial judge correctly excluded under Oregon Rule of Evidence 403 portions of evidence that were a part of an incomplete drug recognition evaluation, such as defendant's pulse rate, temperature, the dark room test, and the muscle examination, because the unfairly prejudicial effect of that evidence, insofar as it suggested a scientific basis, substantially outweighed its probative value. *State v. Rambo, id* at 189.

  Despite the excluded evidence in *Rambo*, the officer was still allowed to testify to a belief that the defendant drove under the influence of a pain killer based on defendant's blood alcohol content, her statements, the HGN test, her performance on the field sobriety tests, her pupil size, and the needle injection sites on her body. 250 Or. App. 186, 189, (2012). HB 2371 seeks to mandate that a trial court may not exercise its traditional role under OEC 403 to exclude such evidence.

- In *State v. Bevan*, 235 Or App 533 (2009), the Court of Appeals held that a proper scientific foundation had not been established for a test called Vertical Gaze Nystagmus (VGN) and thus it was improperly admitted against the defendant. VGN is a component of the 12 step DRE protocol and is admissible when a complete DRE has been conducted, but *Bevan* determined that it is not admissible on its own accord when a complete DRE has not been performed. HB 2371 seeks to overrule that ruling.

7). HB 2371 is unwarranted. OCDLA submits that the courts have superior expertise in determining the admissibility of evidence that borders on science, pseudo-science, and correlative expert witness testimony. HB 2371 is an unwise and unnecessary attempt to circumvent the courts' long-standing duty to admit, reject or control the admissibility of testimony which addresses, sounds like, masquerades as, or has the prejudicial effect of scientific testimony. As the recent Court of Appeals opinions establish, Oregon courts are actively performing this function clearly, uniformly and well. OCDLA submits that the Legislature should defer to the judiciary's expertise in this regard.

Thank you for your consideration of these comments. Please let me know if I may answer any of your questions.

Respectfully submitted,

Gail L Meyer, JD
Legislative Representative
Oregon Criminal Defense Lawyers Association