

Circuit Court for Montgomery County
Case No. 128037-C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2261

September Term, 2015

PATRICK ALAN MARLEY

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 22, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This Court has been assiduous in its application of the requirement of preservation of issues for appellate review.¹ We shall be none the less so in our consideration of the instant appeal.

Patrick Alan Marley was charged with, and convicted by a jury of, incarcerable motor vehicle violations, including driving while impaired by drugs and driving while impaired by a controlled dangerous substance.² In this appeal, Marley assigns error to the admission by the trial court of evidence of a drug recognition and classification protocol (“DRC”) conducted by a police officer certified as a Drug Recognition Expert (“DRE”), following his arrest.³ He asserts that the testimony of the DRE about the DRC steps and evaluation was subject to a *Frye-Reed* review as a prelude to admissibility.⁴

¹ Maryland Rule 8-131 provides, in relevant part:

Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]

Rule 8-131(a).

² Routine testing disclosed no alcohol in his system.

³ The drug recognition and classification protocol consists of a universal 12-step evaluation that includes:

(1) a breath alcohol test; (2) interview of the arresting officer; (3) preliminary examination and first pulse; (4) eye examination (horizontal gaze nystagmus (HGN), vertical gaze nystagmus (VGN), and lack of ocular convergence); (5) divided attention psychophysical tests (the Romberg balance, the walk-and-turn, the one-leg stand, and the finger-to-nose tests); (6) vital signs and second pulse (blood pressure, temperature, and pulse); (7) darkroom examinations (examining the subject's pupil size under different lighting conditions to determine if they are dilated, constricted, or normal); (8) examination for muscle tone (firm or flacid [sic]); (9) check for injection sites and third pulse; (10) subject's statements and other

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In response, the State argues that Marley’s challenge to the admission of the testimony of the DRE has not been preserved for appellate review. We agree.

Maryland Rule 4-323 provides that “[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.” Md. Rule 4-323(a). *See Clemons v. State*, 392 Md. 339, 361 (2006) (“when a motion *in limine* to exclude evidence is denied, the issue of admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial.” (internal quotation omitted)). *See also Tretick v. Layman*, 95 Md. App. 62, 75 (1993) (“when a party has the option of objecting, his failure to do so while it is still within the power of the trial court to correct

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observations (after reading *Miranda* warnings, the subject is asked questions regarding drug use); (11) analysis and opinions of the evaluator (the evaluator applies the results obtained in the earlier tests and applies the drug symptomatology matrix); and, (12) toxicological examination (blood test).

8 LEONARD R. STAMM, MARYLAND PRACTICE: DUI HANDBOOK § 7:61 (2016 ed.).

From the arrestee’s responses and exhibited clues of these 12 steps, the DRE then draws conclusions regarding the extent, if any, to which the arrestee was under the influence of controlled substances at times relevant to his arrest.

⁴ “*Frye-Reed*” refers to the Maryland standard governing admissibility of scientific evidence and expert testimony. The name of this standard comes from two cases: *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), which established the proper threshold test for admitting scientific and expert evidence; and *Reed v. State*, 283 Md. 374 (1978), which is the Maryland case that formally adopted acceptance of the test in *Frye* as this State’s standard governing the admissibility of such evidence.

the error is regarded as a waiver estopping him from obtaining a review of the point or question of appeal.” (quoting *Lohss and Sprenkle v. State*, 272 Md. 113, 119 (1974)).

Marley’s trial counsel filed a pre-trial motion entitled “*Frye-Reed* Motion to Exclude Drug Evaluation & Classification Program Evidence.” The Motion did not include a request for a hearing and, when the court addressed the motion, counsel offered neither testimony nor documentary evidence in support of the motion. The trial court observed that, reaching the *Frye-Reed* question would require an extensive hearing. Still, counsel did not request a hearing or offer evidence. Accordingly, the court denied the motion. At trial, Marley offered no evidence to support his claim that the Drug Recognition and Classification Protocol is not based on accepted scientific principles.

At trial, the State’s proffer of the testing officer as a certified DRE was met with apparent acquiescence. During the opportunity to *voir dire* the officer’s qualifications and certification, no challenge was raised. Marley did not object to the court’s acceptance of the officer as a qualified DRE, did not attempt to limit the scope of the officer’s testimony, and made no motion to strike the testimony.

Because Marley failed to present to the trial court sufficient evidence to support his motion, or to timely object to the admission of the DRE’s testimony, we conclude that the issue has not been preserved for our review and the court did not err in admitting the evidence.⁵

⁵ In reaching our conclusion, we express no opinion on acceptance of the DRC by the scientific community, whether such acceptance is required as a condition of admissibility in Maryland courts, or if, in fact, the DRC is a scientific protocol.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED; COSTS
ASSESSED TO APPELLANT.**