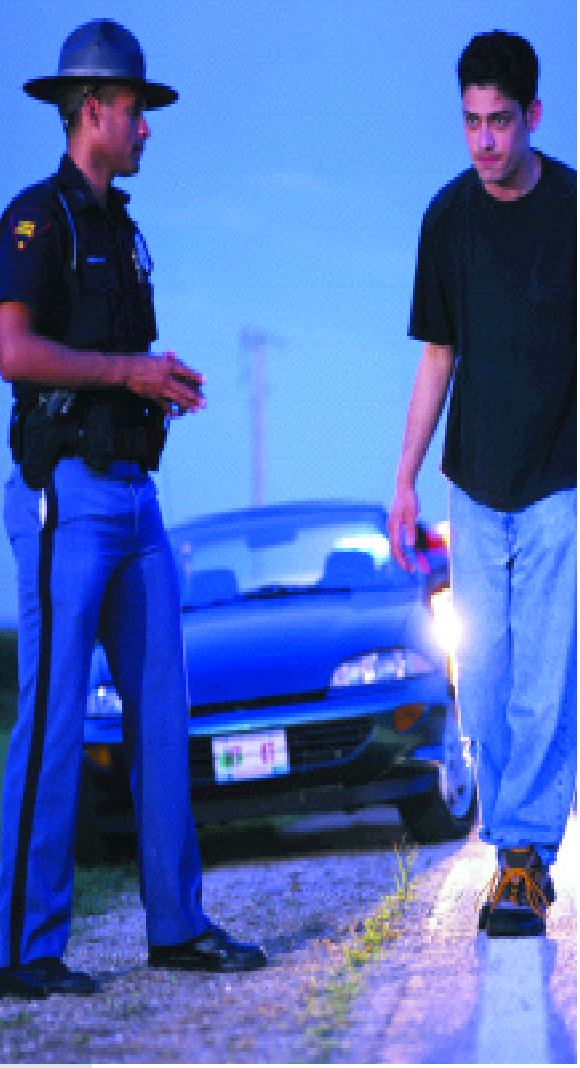


DWI

BY LEONARD R. STAMM

I may be crazy, but I ain't drunk — the psychiatric defense to drunk driving

In the defense of drunk driving cases, every now and then defense counsel confronts the case of the client who appears to suffer from a diagnosable psychiatric disorder. The illness may have manifested itself in the client's unusual actions when confronting the police officer, prior to or after arrest. The officer concluded the abnormal behavior was a sign of impairment. In *White v. State*,[1] the Maryland Court of Special Appeals recognized the right of the defendant to place before the jury, expert testimony regarding a psychiatric profile that provides a psychiatric explanation for conduct appearing to result from alcohol impairment. Surprisingly, although symptoms of psychiatric disorders have long been recognized as being confused with alcohol impairment in the scientific community,[2] there have been very few reported decisions discussing when and whether psychiatric testimony may be used in drunk driving cases where the defendant is not raising a defense of not criminally responsible.[3] *White*, then, appears to represent something of a breakthrough.

Facts

According to the testimony presented at trial, Officer Chad Zirk of the Howard County Police Department first noticed the appellant when she stopped to ask him for directions in Columbia, Maryland, at 11:30 on the night of July 17, 1999.[4] The officer observed slurred speech and instructed the appellant to follow him to a parking lot.[5] After they arrived he observed watery, glassy and bloodshot eyes. He then asked for and received the appellant's license.[6] He smelled the odor of an alcohol beverage on the appellant's breath and she told him she had consumed one drink of vodka earlier in the day. [7]

Officer Zirk requested the appellant to perform field sobriety tests.[8] He noted a lack of smooth pursuit, nystagmus at maximum deviation and onset of nystagmus prior to 45 degrees in both eyes.[9] On cross-examination he conceded that there are about 30 reasons for nystagmus other than alcohol. [10]On a walk and turn test on an imaginary line, the appellant did not stay in a heel to toe position during the instructions, started before the instructions were complete, missed heel to toe on 18 steps by about one and a half inches, raised her arms at least 6 inches,made a quick turn instead of taking little steps,and stepped off the imaginary line one time.[11] However, she took the correct number of steps and did not stop while walking.[12] On a one leg stand test, the appellant got to the count of eight and advised Officer Zirk she had bad ankles. [13] She stated her ankles were getting ready to go out on her and Officer Zirk advised she could stop the test.[14] Officer Zirk did not testify to observing any "clues"[15] during this test.

Officer Zirk then arrested the appellant.[16] He subsequently found a full bottle of whiskey in her car.[17] At the station, the appellant was "loud and obnoxious" and yelling at "about everybody."[18] He added, "She wouldn't cooperate with anything we had to do in order to process her."[19] Later, after leaving, Officer Zirk was called back to the police station because the appellant had attempted suicide by trying to hang herself with her bra.[20] He filed a petition to have an emergency evaluation under Md. Code Ann., Health-Gen. I, §§ 10-622 *et. seq.* (1999). The petition was admitted at trial as a defense exhibit.[21] The State rested after Officer Zirk left the stand. [22]

The appellant called her roommate/boyfriend to testify to her history of bad ankles.[23] The appellant also testified that she suffered from post-traumatic stress disorder (PTSD) and "lifetime major depression."[24] She testified she was currently taking medication for these problems, but had not been at the time of her arrest because as she stated, "I was actually doing much better." [25]

She said she stopped on the median strip after attracting the officer's attention since she had been lost for an hour and a half in Columbia.[26] The appellant was wearing flip-flops.[27] She stated that when the officer asked her to do field tests she began to panic, although she attempted to hide it.[28] She was apprehensive of the officer and was looking around rather than listening to the instructions for the test.[29] The appellant had a history of problems with her ankle and they bothered her on the leg raise test.[30] After arrest, she started yelling and was crying.[31] Her shoe broke when they put her hands and legs in chains.[32] She was told she would have to wait until the weekend was over to see a commissioner. Her request to see a doctor was ignored.[33] "After banging my head against the wall, and nothing was helping, I took my bra off and I tried to strangle myself, then they called the ambulance that took me to the hospital."[34]

Motions relating to psychiatric testimony

Before the trial began, and during the trial, the court considered the State's motion *in limine* to exclude the testimony of Dr. Leonard Hertzberg, whose report the State had received prior to

trial from the appellant's public defender.[35] Hertzberg, an expert psychiatrist, stated in his report that he reviewed a numerous sources of information to come to his conclusions, including:

A letter from White's family physician, dated 2/23/00.

Evaluation from a court appointed psychologist (who determined the appellant was competent and responsible for this offense) dated 4/4/00.

Discovery Materials from Howard County State's Attorney Office Including Arrest Report.

Victim Impact Statement Prepared by the Defendant Dated 3/28/89.

Handwritten Statement Written by the Defendant (Undated).

Audio Tape State v. B. (the Defendant's ex-husband) Dated 4/11/89.[36]

He also interviewed the appellant in two-hour sessions.

The report detailed the appellant's history of physical and sexual abuse. This included abuse at a young age and as an adult.

> She described an extremely abusive marital relationship in which she was sadistically abused physically and sexually. She reported that she was tied up on a number of occasions, and while discussing this situation,she cried uncontrollably at times. She stated that she was locked up in the home as well as tied up at various times and forced to submit to much abusive physical and sexual behavior.[37]

This information was corroborated by information relating to the prosecution of her ex-husband, J. B.,in Montgomery County, Maryland, in 1989.

The appellant's past included a lengthy history of depression and numerous suicide attempts. She had been in treatment with a clinical psychologist from 1982 to 1989 and received Prozac for depression, and Xanax for anxiety.[38] She had not been under mental health treatment since 1989, but her family physician prescribed the anti-psychotic medication Risperdal for delusions when needed and Effexor for depression. This information had also been corroborated by the appellant's family physician.

Dr. Hertzberg's report also recited how, on the date of her arrest, according to the appellant, she had one drink of vodka in the afternoon and later that night had become lost in Columbia, Maryland. At the time of her arrest she blew a preliminary breath test (PBT) of .05.[39] She believed she had difficulty on the field tests because of the flip-flops she was wearing and an ankle problem.[40] As the encounter with the officer became more and more custodial, she experienced increasing levels of anxiety. At the police station her shoe broke as she was placed in leg irons. She was told a commissioner would not see her until the next morning, and she was placed in a cell where she developed vaginal bleeding.[41]

> Ms. White became increasingly frightened and reported that the situation reminded her of having been severely abused by her husband in the late 1980s. She had been beaten up and chained on a number of occasions and while in the cell, she felt like she was suffocating. She began experiencing much panic, accompanied by dizziness and a hot sensation in her head. She began screaming uncontrollably and began pounding her head against the wall. She removed her bra and wrapped it around her neck in an attempt to strangle herself.[42]

Dr. Hertzberg's conclusion was read to the court:

> However, in light of the severity of psychiatric diagnoses, including borderline personality disorder, post-traumatic stress disorder and major depressive disorder, Ms. White has been experiencing significant emotional symptoms at the time of the alleged charges, and these diagnoses played an integral role in how she responded to the police officers prior to being arrested,as well as her severe reaction while incarcerated.[43]

The court granted the State's motion to exclude Dr. Hertzberg's testimony because "this is a general intent crime" and because there was no plea of not criminally responsible filed.[44] The appellant's counsel offered the report as an exhibit for the record.[45] After a jury was selected, the appellant's counsel again offered Dr. Hertzberg's report as an exhibit, and the court indicated it would hold the matter *sub curia* and

review the report. [46]

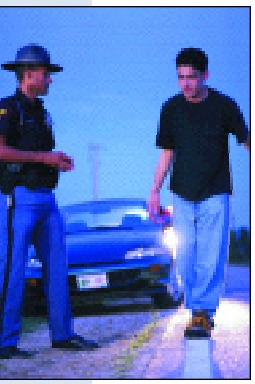
Prior to the defense resting its case, the court reaffirmed its ruling, after reading Dr. Hertzberg's entire report, precluding the defense from calling Dr. Hertzberg because, "the information talks about the examination after the date in question,so it doesn't change my ruling on the motion."[47]

During it's rebuttal closing argument, the State argued, " We have no other evidence other than her testimony that she had this panic disorder."[48]

The jury found the appellant not guilty of driving while intoxicated and guilty of driving while under the influence of alcohol.[49] Subsequent to the filing of the appeal by the public defender, the appellant's psychotherapist wrote a letter warning that if the appellant was incarcerated, she faced a significant risk of committing suicide. At the request of the appellant's newly retained private counsel, the court granted a stay of the jail portion of the sentence pending appeal.[50]

Appeal

The defense in this case was that the appellant, who suffered from PTSD and other diagnosed disorders, suffered a panic attack, when after asking a police officer for directions, he began to investigate her for driving under the influence of alcohol. Since the court prohibited her expert psychiatrist from confirming this, the State was able to effectively argue that she was a liar since her claim of a panic attack was uncorroborated.



Prior to this case, no Maryland court, and few others outside of Maryland, had considered the question of when and whether psychiatric testimony would be admitted in defense of a drunk driving charge. Maryland Rule 5-702 governs the use of experts.[51] The decision to allow an expert is normally within the discretion of the trial court, as was noted in *Wilson v. State*.[52]

> "[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute a ground for reversal." *Myers v. Celotex Corp.*, 88 Md.App. 442, 460, 594 A.2d 1248 (1991), *cert. denied*, 325 Md. 249,600 A.2d 418 (1992). "A trial judge's decision to admit or exclude expert testimony will be reversed only if it is founded on an error of law or some serious mistake, or if the judge has abused his discretion." *Franch v. Ankney*, 341 Md. 350, 364, 670 A.2d 951 (1996) (citation omitted).[53]

In *Simmons v. State*,[54] the Maryland Court of Appeals did not find an abuse of discretion in the exclusion of a defense psychiatrist. Rather the court found that the trial court had committed an error of law by failing to exercise any discretion at all. The court reviewed the ground rules for admission of expert testimony, particularly psychiatric testimony, in criminal cases where the defendant does not make a claim of not criminally responsible. The court noted first that a criminal defendant is permitted "to introduce any evidence relevant to the asserted defense . . . which tends to establish or disprove a material fact."[55] The proposed testimony must be proper for expert testimony and the expert must be qualified to give the opinion. The proposed expert testimony must be based on a "legally sufficient factual foundation."[56] However, the diagnosis need not be based on admissible evidence, if the evidence is a type reasonably relied upon by experts in the field.[57]

The *Simmons* Court concluded:

> While experts are permitted to testify as to the ultimate issue of fact in Maryland, we are not prepared to suggest that Dr. McDaniel should have been permitted to testify that the defendant was *in fact* acting under an honest belief that self-defense was necessary at the time of the homicide. There were no witnesses to the start of the violent altercation and psychiatric testimony to the effect that Simmons was *in fact* acting under a belief that he was in mortal danger would impermissibly suggest that the victim was the aggressor. Moreover, we concur with the trial court in *Johnson* [*v. State*], 303 Md.[487] at 515,495 A.2d [1]at 15 [(1985)], that a psychiatrist cannot precisely reconstruct the emotions of a person at a specific time.
>
> On the other hand, the proffered testimony has some relevance in that consistency between the specific subjective belief testified to by Simmons and Simmons's psychological profile tends to make it more likely that Simmons in fact held that subjective belief. Had the trial judge appreciated that the second proffer fell within the limitation described in the preceding paragraph, the judge might well have exercised his discretion to admit the evidence. *See* [*State* v.] *Allewalt*, 308 Md. [89] at 109, 517 A.2d [741] at 751 [(1986)]. Here the judge did not purport to exclude the evidence by the exercise of discretion so that no issue of discretion is before us. The judge erroneously ruled, as a matter of law, that the evidence could not, under any circumstances, be admitted. As the evidence sought to be admitted may have been sufficient to convince the jury that the defendant, if guilty, was guilty of a crime less than murder, its exclusion constitutes reversible error.[58]

In *Hartless v. State*,[59] the court of appeals affirmed the exclusion of a defense psychiatrist's opinion about the defendant's actual intent at the time of the offense, citing *Simmons*.[60] As to the psychological profile, it appears the defendant in *Hartless* never articulated a psychological profile that could be related to the defense that the defendant had no premeditation or intent to murder. The Court distinguished *Simmons*, noting that "the psychological testimony standing alone, had little or no rational nexus to the issues of premeditation and intent."[61] Additionally, the opinion was based on interviews with the defendant and others who knew him, none of whom testified. This was not reasonable reliance on information customarily relied upon by experts in the field.[62]

As noted, cases dealing with this precise issue, whether expert psychiatric testimony may be offered in a drunk driving case, are rare. In *Ventura v. State*,[63] the defendant was charged with driving while intoxicated. The court noted that the question of approval of expenses for an expert for an indigent defendant was "analogous" to the question of admissibility.[64] The defendant was required to demonstrate a "specific need" for the expert. Counsel proffered that he needed an expert:

> to relate the characteristics of the symptoms of an ailment suffered by the Defendant to those symptoms exhibited by a person who is actually 'under the influence', or intoxicated, and is anticipated to show that the Defendant was actu-

ally 'normal' at the time in question as it relates to her, which would/should have a direct impact in this case as to guilt or innocence.[65]

In light of this proffer, the court held the denial of funds was error.[66] However, the error was deemed harmless since the evidence the defendant sought was heard by the jury anyway.

> At trial,appellant testified that she had not had any alcohol on the day of her arrest. She also testified that she suffered from manic depression. After both sides closed, the State disclosed potentially exculpatory evidence. Dr. John Sparks, Bexar County psychiatrist, had reviewed the videotape and informed the prosecutor that in his opinion the videotape showed appellant in the manic stage of manic depression. The prosecutor informed the trial court and defense counsel of this matter. The trial court reopened the case, and Dr. Sparks testified on behalf of appellant. He testified that the videotape was "a classic picture of a person in a manic episode of a manic depressive illness." Dr. Sparks pointed out specifically how appellant's actions on the videotape fit the symptoms of a manic episode, such as rapid speech, grandiose and exhibitionistic behavior, and expansive and exaggerated movement among others.[67]

Since the jury heard the expert testimony, the conviction was affirmed.

In *Gombar v. Dept. of Transportation*,[68] the court reversed a one-year license suspension for refusing a breath test. The question for the court was whether the defendant had made a knowing and conscious refusal to submit to chemical testing. Under Pennsylvania law, the defendant bears the burden of proving, by competent medical testimony an incapacity to comply with the request for chemical testing and that the refusal was not caused in whole or in part by consumption of alcohol.[69] Although evidence was produced that the appellant had driven off the road in snow and was found wandering aimlessly by a citizen, her expert offered significant testimony regarding PTSD. The appellant had been in a motor vehicle accident in 1987 which traumatized her and led her to seek psychiatric treatment. She was in treatment for over five years up to the time of her accident. Her doctor testified that she suffered from PTSD.[70] The court related the expert's testimony about PTSD as

> involv[ing] recurring nightmares and flashbacks relating to the initial traumatic event that diminish over time.Specifically, Shaud testified that "any kind of accident such as she describes occurred in January of 1994, would create a flashback-like experience in which she would have somewhat of a diminished capacity to be aware of her surroundings and to participate in a process that might need to follow."[71]

Her doctor also indicated the person would suffer "[r]ecurrent and intrusive distressing recollections of the events that interfere with ability to focus."[72] Additionally, and significantly, he stated that alcohol impairment would make it less likely for a person to have a panic attack.

> On cross-examination Shaud admitted that, although it was possible that the ingestion of a substantial or even a fair amount of alcohol could cause disorientation, confusion or dizziness in an individual, alcoholic consumption would not have produced increased stress in Gombar's case but, on the contrary, would have made Gombar more comfortable with her 1994 accident because alcohol is a sedative drug that would make it less likely that she would be emotionally tense.[73]

The appellant also had testified to impaired recollection of the events. The court concluded that the trial court had applied the wrong legal standard and found the appellant had proven the alcohol she consumed, if any, did not contribute to her refusal.[74]

Court's opinion

The Maryland Court of Special Appeals reversed White's conviction, finding an abuse of discretion in the trial court's refusal to allow White's psychiatrist to rebut evidence first introduced by the State about White's *post-arrest* conduct. Given the limited nature of the psychiatrist's proffer, the court found that the exclusion of testimony regarding the *pre-arrest* conduct was proper.

The appellate court had little difficulty explaining the flaws in the reason-

ing of the trial court. The trial court's exclusion of psychiatric testimony because it was a "general intent crime," and because the defendant had not filed a not criminally responsible plea misunderstood the purpose for which the psychiatric testimony was advanced.

> We agree with appellant that expert testimony establishing that a defendant suffered from PTSD could be used to mount a defense to DWI or DUI where such evidence seeks to explain away objective observations leading to a jury inference of intoxication. While PTSD would not be a defense to the mental state element of such a general intent crime, in certain cases it could be used to counter a jury inference of intoxication based on evidence of the accused's demeanor prior to and after her arrest.[75]

The opinion then focused on the proffer of the psychiatrist's testimony and its relevance to the defense in the case. Dr. Hertzberg's report stated the following, under the heading "Summary and Recommendation":

> During the course of being arrested and placed in a cell, Ms. White became increasingly anxious and panic stricken. She had been physically abused during a 3-4 year period during the late 1980s by her third husband. The incarceration in the cell which included being placed in leg-irons reactivated fears relating to having been physically and sexually abused by her third husband. Ms. White became distraught emotionally and began screaming and yelling for medical assistance for her emotional distress as well as vaginal bleeding. . . . The level of distress resulted in an attempt to strangle herself with a bra and at that point medical attention was forthcoming.

In the report, the doctor diagnosed appellant with several psychiatric disorders, including PTSD.

> As a consequence, Ms. White has developed intense fear, helplessness, and horror. She has become increasingly phobic and avoidant during the past decade.... Ms. White has experienced significant identity disturbance as well as impulsivity which has included substance abuse as well as numerous suicidal behaviors.... [D]uring periods of extreme stress, Ms. White has experienced psychotic symptoms of a paranoid nature....[76]

Although the psychiatric opinion concluded that White's condition contributed to both pre-arrest and post-arrest conduct, it did not explain how the condition contributed to pre-arrest conduct. As a result, the court held that testimony was properly excluded.[77]

The post-arrest proffer was different.

> The report does, however, extensively explain how appellant's post-arrest treatment at the police station — *i.e.*, being handcuffed and placed in a locked cell — could have brought on a PTSD-induced panic attack by acting as a "trigger" of her post-arrest behavior. At trial, the prosecution was permitted to introduce evidence of appellant's post-arrest behavior to encourage a jury inference that appellant was intoxicated *before* her arrest. Because this evidence was admitted, we hold that the trial court abused its discretion in excluding Dr. Hertzberg's testimony seeking to explain away that post-arrest behavior as something unrelated to the effects of alcohol. Dr. Hertzberg's testimony regarding appellant's post-arrest behavior should have been admitted to rebut the State's evidence of her post-arrest conduct. By excluding this evidence,the trial court effectively denied appellant the opportunity to put on a full defense on a critical issue.[78]

Finally, rejecting the last basis asserted by the trial court for excluding the psychiatric testimony, the appellate court noted that Maryland has long recognized the admissibility of forensic testimony based in part on an examination after the date of an incident.[79]

Looking forward

White appears to be the first reported appellate decision explicitly holding that a psychiatric profile is admissible in a criminal drunk driving case to show the defendant is not impaired by alcohol. The doctor's proffer as to how the appellant's pre-arrest conduct could have been caused by PTSD was found to be lacking on the record in *White*, and the court only found error in the exclusion of expert testimony relating to post-arrest conduct. However, the court's opinion left room in this case on remand, as well as in other future cases, for psychiatric evidence relating to pre-arrest conduct to be admitted if the expert can tie the pre-arrest conduct to the psychiatric diagnosis. An example of such a proffer is contained in the *Gombar* opinion, quoted above. While there are not many cases where psychiatric symptoms are confused with signs of alcohol impairment, *White* may be the first case to expressly recognize the psychiatric defense to drunk driving, and it constitutes an extra arrow for defense counsel's quiver in an appropriate case.

Notes

1. 142 Md.App. 535, 790 A.2d 754 (2002).
2. A.W. Jones, *Medicolegal Alcohol Determinations, Blood or breath alcohol con - centration?*, 12 FORENSIC SCI.REV. 23,26 (2000)
3. *See*, *e.g.*, Gombar v. Dept. of Transportation, 678 A.2d 843 (Pa.Commw.Ct. 1996), *appeal denied*, Pennsylvania v. Jacobs, 549 Pa. 705, 700 A.2d 443 (1997); Ventura v. State, 801 S.W.2d 225 (Tex.Crim.App. 1990).
4. Transcript (T)-87,91.
5. T-91.
6. T-92.
7. T-93,124.
8. T-94.
9. T-109.
10. T-127.
11. T-113-120.
12 T-119-20.
13. T-121.
14. T-121-22.
15. The National Highway Traffic Safety Administration (NHTSA) recognizes four "clues" during the administration of the one leg stand "test:" putting one's foot down, swaying, hopping, or raising arms more than six inches from one's side. U.S. Department of Transportation, DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING, STUDENT MANUAL (1995) at pp. VIII-11.
16. T-122.
17. T-122.
18. T-123.
19. T-123.
20. T-123.
21. T- 128.
22. T- 133.
23. T-141.
24. T-147.
25. T-148.
26. T-152.
27. T-150.

28. T-154-55.
29. T-155.
30. T-156-57.
31. T-157-58.
32. T-158.
33. *Id.*
34. T-159.
35. T-7-15, 82, 175; Record (R)-43-44, 95.
36. R-95, Report of Leonard Hertzberg, M.D., P.A., p. 1.
37. R-95, p.4.
38. *Id.* at p. 5.
39. *Id.* at p.2; TS-16. A preliminary breath test may be offered by the defendant in a criminal case in Maryland, pursuant to Md. Code Ann., Transp. Art. § 16-205.2. Under Md. Code Ann.,Cts. & Jud. Proc. Art., § 10-307(b), a .05 reading means the defendant is presumed *not* to be under the influence of alcohol. The appellant's trial counsel did not introduce the PBT result.
40. R-95, p.2.
41. *Id.*
42. *Id.* at p.3.
43.T-14,R-95 at p. 11.
44. T-15.
45. *Id.*
46. T-82.
47. T-175.
48. T-200.
49. T-205.
50. R-88-90,91.
51. Maryland Rule 5-702 provides:
TESTIMONY BY EXPERTS: Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.
52. 136 Md.App. 27, 764 A.2d 284 (2000).
53. *Wilson*, 136 Md.App. at 42,764 A.2d at 292.
54. 313 Md. 33,542 A.2d 1258 (1988).
55. *Id.* at 41,542 A.2d at 1261-62.
56. *Id.*
57. Hartless v. State, 327 Md. 558,578-579, 611 A.2d 581, 591 (1992); Maryland Rule 5-703.
58. *Simmons*, 313 Md. at 47-48, 542 A.2d at 1265.
59. 327 Md. 558,611 A.2d 581 (1992).
60. *Hartless*, 327 Md. at 573,611 A.2d at 588.
61. *Hartless*, 327 Md. at 577,611 A.2d at 590.
62. *Id.* at 578-89,611 A.2d at 591.
63. 801 S.W.2d 225 (Tex.Crim.App. 1990).
64. *Id.* at 227.
65. *Id*.
66. *Id*.
67. *Id.* at 227-28.
68.678 A.2d 843 (Pa.Commw.Ct.1996), *appeal denied*, Pennsylvania v. Jacobs, 549 Pa.705,700 A.2d 443 (1997).
69. *Id.* at 847.
70. *Id.* at 846.
71. *Id*.
72. *Id.*, n.5.
73. *Id*.
74. *Id.*
75. *White*, 142 Md.App. at 547,790 A.2d at 761.
76. *Id.* at 549-50,790 A.2d at 762.
77. *Id.* at 550,790 A.2d at 763.
78. *Id.*,790 A.2d at 762-63 (emphasis in original).
79. Beahm v. Shortall,279 Md. 321,368 A.2d 1005 (1977)

About the Author

Leonard R. Stamm has been defending DWI cases since 1984. He is recognized as an authority in the area of drunk driving defense and Motor Vehicle Administration hearings in Maryland. He represented Ms. White in the successful appeal of her conviction and is representing her on remand before the trial court. He has been qualified as a practitioner and instructor in standardized field sobriety tests in accordance with standards set forth by the International Association of Chiefs of Police (IACP) and the National Highway Traffic Safety Administration (NHTSA).

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