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Marijuana Behind the Wheel

By: Brian Thiede and Kenneth Stecker

Federal law provides a system of classifying both prescription and recreational drugs based on their harm to users and harm to society.[1] The ultimate purpose of this drug classification system is public safety. The Controlled Substances Act (CSA) defines a Schedule 1 drug as one that has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks accepted safety for use under medical supervision.[2] Marijuana is a Schedule 1 drug.[3]

In 2015, over 35,000 people were killed in traffic crashes.[4] Nearly a third of those involved an impaired driver.[5] The National Roadside Survey conducted by the National Highway Traffic Safety Administration (NHTSA) demonstrates the increased use of marijuana by our nation's drivers. In the 2013-2014 roadside survey of weekend nighttime drivers, 8.3 percent had some alcohol in their system and 12.6 tested positive for THC[6] – up 48 percent from the number in 2007.[7] Since a majority of states have legalized marijuana for medical and/or recreational use,[8] marijuana-impaired driving cases will continue to present unique challenges for prosecutors and law enforcement.

Marijuana is the most commonly used illicit substance[9] and has become the most commonly detected non-alcohol substance among drivers in the United States.[10]

Since a majority of states have legalized marijuana for medical and/or recreational use,[8] marijuana-impaired driving cases will continue to present unique challenges for prosecutors and law enforcement.

Generally, impaired driving statutes allow for prosecution of a person who drives (1) while impaired by alcohol, drugs, or any combination thereof, (2) while having a specified level of alcohol in his or her system, or (3) while having any measurable amount of alcohol or drugs in his or her system (e.g., zero tolerance).

Numerous scientific studies demonstrate the relationship between alcohol and the impairment of driving function supporting these "per se" laws. There are challenges, however, to provide the same support for marijuana "per se" laws.

It is difficult to parse out statistical information about impaired driving prosecutions in which marijuana was the impairing substance or even the broader category of drugs in general. This is largely the result of how impaired driving laws are written. Generally, a prosecutor does not need to "prove" what the impairing substance is, only that it impaired the driver. This can be done with circumstantial

evidence as well. For example, a driver who exhibits clues of impairment and is found to

(Continued on page 7)

1. Controlled Substance Act, 21 USC §801 et seq.
2. 21 USC §812(b)(1).
3. 21 USC §812(c) Schedule I (c)(10).
4. NHTSA press release, "Traffic fatalities up sharply in 2015," https://www.nhtsa.gov/press-releases/traffic-fatalities-sharply-2015, accessed February 23, 2017. See also Traffic Safety Facts: Research Note. 2015 Motor Vehicle Crashes: Overview, DOT HS 812 318, August 2016.
5. Traffic Safety Facts: Research Note. 2015 Motor Vehicle Crashes: Overview, DOT HS 812 318, August 2016.
6. THC is Delta 9 Tetrahydrocannabinol and is the psychoactive substance in marijuana.
7. Traffic Safety Facts: Research Note. Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers, by Amy Berning, Richard Compton, and Kathryn Wochinger, DOT HS 812 118, February 2015.
8. http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx, accessed February 23, 2017.
9. https://www.drugabuse.gov/publications/media-guide/most-commonly-used-addictive-drugs, accessed February 23, 2017.
10. "Establishing legal limits for driving under the influence of marijuana," Injury Epidemiology 1:26, Kristin Wong, Joanne E Brady and Guohua Li (2014).

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Mixing Alcohol and Marijuana is a Serious Threat to Traffic Safety

DRIVERS TESTING POSITIVE FOR ALCOHOL AND MARIJUANA ARE FIVE TIMES MORE LIKELY TO BE RESPONSIBLE FOR CAUSING FATAL TWO-VEHICLE CRASHES THAN SOBER DRIVERS INVOLVED IN THE SAME CRASHES

COLUMBIA UNIVERSITY | MAILMAN SCHOOL of PUBLIC HEALTH

Use of marijuana in combination with alcohol by drivers is especially dangerous, according to a latest study conducted at Columbia University's Mailman School of Public Health. Drivers who used alcohol, marijuana, or both were significantly more likely to be responsible for causing fatal two-vehicle crashes compared to drivers who were involved in the same crashes but used neither of the substances. The findings are published in the journal, *Annals of Epidemiology.*

"The risk of crash initiation from concurrent use of alcohol and marijuana among drivers increases by more than fivefold when compared with drivers who used neither of the substances," said Dr. Guohua Li, professor of epidemiology at the Mailman School of Public Health. The study also indicates that when used in isolation, alcohol and marijuana increase crash culpability by 437 percent and 62 percent, respectively.
http://www.sciencedirect.com/science/article/pii/S1047279716304380

The researchers analyzed data for 14,742 fatal two-vehicle crashes between 1993 and 2014 recorded in the Fatality Analysis Reporting System, a database containing information on crashes that resulted in at least one fatality within 30 days and that occurred on U.S. public roads. Included in the study were 14,742 drivers who were responsible for causing the fatal crashes and 14,742 non-culpable drivers who were involved in the same crashes. Crashes involving single vehicles, more than two vehicles, commercial trucks, and two-vehicle crashes in which both drivers were responsible were excluded from the analysis.

Since the mid-1990s, the prevalence of marijuana detected in fatally injured drivers has increased markedly.

Drivers who were responsible for the crashes were significantly more likely than non-culpable drivers to test positive for alcohol (28 percent vs. 10 percent), marijuana (10 percent vs. six percent), and both alcohol and marijuana (four percent vs. one percent). Drivers who tested positive for alcohol, marijuana, or both were more likely than those who tested negative to be male, aged 25 to 44 years, and to have had a positive crash and violation history within the previous three years.

The three most common driving errors that led to these fatal crashes were failure to keep in proper lane (43 percent), failure to yield right of way (22 percent), and speeding (21 percent).

Since the mid-1990s, the prevalence of marijuana detected in fatally injured drivers has increased markedly. During the same time period, 28 states and the District of Columbia have enacted legislation to decriminalize marijuana for medical use, including eight states that have further decriminalized possession of small amounts for adult recreational use. Although toxicological testing data indicate a continuing increase in marijuana use among drivers, a positive test does not necessarily infer marijuana-induced impairment.

"While alcohol-impaired driving remains a leading cause of traffic fatalities in the United States, driving under the influence of marijuana and other drugs has become more prevalent in the past two decades," said Dr. Li, who is also the founding director of Columbia University's Center for Injury Epidemiology and Prevention. "Countermeasures targeting both drunk driving and drugged driving are needed to improve traffic safety."

The research was supported by the National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (grant 1 R49 CE002096).

Co-authors from the Mailman School of Public Health: Ms. Hina Tai and Ms. Grace Lee, department of socio-medical sciences; and Ms. Cecilia Choi, Heilbrunn department of population & family health.

Editor's Note: This article is reprinted with the permission of Columbia University's Mailman School of Public Health.

The Current Landscape of Impaired Driving in Michigan

By: Kenneth Stecker and Kinga Gorzelewski

In the mid-1970s, alcohol was a factor in over 60% of traffic fatalities.[1]

When Mothers Against Drunk Driving (MADD) was founded in 1980, an estimated 25,000 people were killed in drunk driving crashes every year in the United States.[2] We've come a long way since then. That deadly number is now down by more than half. [3]

There are many reasons for this reduction. Society no longer views drunk driving as accidental or as something that everyone does. The federal government and states have made great strides in reducing drunk driving deaths.

Effective measures included actively enforcing existing .08 BAC laws, and enacting minimum drinking age and zero tolerance laws for drivers under 21 years old.[4] These efforts have helped prevent thousands of injuries and deaths from alcohol-impaired driving.

We now have another hazard on our roads that threatens the safety of Michigan drivers—drugged driving.

The national media recently reported driving under the influence of drugs was deadlier in 2015 than driving while drunk.[5] Positive drug tests were more common than the presence of alcohol among fatally injured drivers who were tested in 2015, according to the Governors Highway Safety Association. [6]

The report noted 43% of motorists who died were under the influence of drugs compared to 37% of those who tested positive for alcohol in the same year.[7] Of the more than 400 drugs the National Highway Traffic Safety Administration tracks, marijuana accounted for 35% of these positive tests. [8]

In Michigan, traffic deaths increased 10 percent in the last year, from 963 in 2015 to 1,064 in 2016. That's according to the Michigan State Police Criminal Justice Information Center. The last year Michigan exceeded 1,000 traffic fatalities was 2007.

The report noted 43% of motorists who died were under the influence of drugs compared to 37% of those who tested positive for alcohol in the same year.[7]

Positive progress was noted in several areas. For example, alcohol-involved traffic deaths fell 11 percent, from 303 in 2015 to 271 in 2016. However, drug-involved fatalities increased from 179 in 2015 to 236 in 2016. That's up 32 percent.

As Michigan and other states continue to address this issue, it's important to provide law enforcement and prosecutors the tools and best practices they need to combat the serious problem of drug-impaired driving.

The Michigan Traffic Safety Resource Prosecutors (TSRPs) assist prosecutors and law enforcement in this area by providing specialized training, technical assistance, and other resources dealing with drugged driving. Training topics include the law and penalties for drugged driving, case law updates, and how to effectively testify in a drugged driving trial.

The Michigan Office of Highway Safety Planning (OHSP) has also implemented a special program to train qualified law enforcement officers to become drug recognition experts (DREs).

The OHSP worked hard to bring the Drug Recognition Expert (DRE) Program to Michigan. It assigned a state DRE Program Coordinator to determine the feasibility of Michigan becoming a DRE state. In October 2010, Michigan became the 47th DRE state and ran its first school in 2011.

Michigan's DRE Program is unique in that Michigan is the only state that invites prosecutors to attend the school. Michigan now has 113 officers and 32 prosecutors that are DRE-trained.

Law enforcement and prosecutors can also attend a two-day in-person Advanced Roadside Impaired Driving Enforcement (ARIDE) training or take the course online. ARIDE training focuses on teaching officers how to observe signs of drug impairment in drivers. It's designed to close the gap between Standardized Field Sobriety Test training and DRE School.

We need to bring awareness to the threat of drugged driving on Michigan's roadways, much in the same way we have with drunk driving. While the substances are different, the results are the same – deaths and serious injuries.

Editor's Note: Kenneth Stecker and Kinga Gorzelewski are the Michigan Traffic Safety Resource Prosecutors. For more information on this article and PAAM training programs, contact Traffic Safety Resource Prosecutors Kenneth Stecker at steckerk@michigan.gov or Kinga Gorzelewski at gorzelewskik@michigan.gov. Please consult your prosecutor before adopting practices suggested by reports in this article. Discuss your practices that relate to this article with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practice.

1. Report.nih.gov/nihfactsheets/ViewFactSheet.aspx?csid=24
2. Madd.org/drunk-driving/about/history.html
3. National Highway Traffic Safety Administration's Fatality Analysis Reporting System
4. Guide to Community Preventive Services. Motor vehicle-related injury prevention: reducing alcohol-impaired driving. Available at http://www.thecommunityguide.org/mvoi/AID/index.html
5. "Drugged driving surpasses drunken driving among drivers killed in crash, report finds," By Robert Jimison, CNN, April 28, 2017.
6. Ghsa.org/sites/default/files/2017-04/GHSA_DruggedDriving2017_Final.pdf
7. Id.
8. Id.

DREs in Court

The purpose of this article is to familiarize judges, prosecutors, and law enforcement officers with why a Drug Recognition Expert (DRE) officer is so important in a drugged driving case.

Michigan Compiled Law 257.625 reads in pertinent part, as follows:

Sec. 625.

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

Based on this statute, the prosecution must prove that the person was "operating while intoxicated," that is he/she is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

To be "under the influence" within the meaning of Criminal Jury Instruction 2d 15.3 means as follows:

"That because of drinking alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened.

To be under the influence, a person does not have to be what is called "dead drunk," that is, falling down or hardly able to stand up. On the other hand, just because a person has drunk alcohol or smells of alcohol does not prove, by itself, that the person is under the influence of alcohol. The test is whether, because of drinking alcohol, the defendant's mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner."

Recently, the Michigan Supreme Court in People v. Koon, 494 Mich 1; 832 NW2d 724 (2013), stated the following in a footnote:

"Significantly, 'under the influence' is a term of art used in other provisions of the Michigan Vehicle Code. See, e.g., MCL 257.625(1)(a) (stating that a person is 'operating while intoxicated' if he or she is 'under the influence of . . . a controlled substance . . .'). See also People v Lambert, 395 Mich 296, 305; 235 NW2d 338 (1975) (concluding that an acceptable jury instruction for 'driving under the influence of intoxicating liquor' included requiring proof that the person's ability to drive was 'substantially and materially affected'); Black's Law Dictionary (9th ed), p 1665 (defining 'under the influence' as 'deprived of clearness of mind and self-control because of drugs or alcohol')."

A DRE is a law enforcement officer who is trained to recognize impairment in drivers who are the under the influence of drugs other than, or in addition, to, alcohol.

In an effort to address the serious problem of drugged driving, the Michigan Office of Highway Safety Planning (OHSP) implemented a special program to train qualified law enforcement to become DREs.

In 2009 the OHSP asked the National Highway Traffic Safety Administration (NHTSA) to assess Michigan's Standardized Field Sobriety Testing Program. One of the recommendations made was that Michigan become a Drug Evaluation and Classification Program (DECP) state.

The OHSP began efforts to do so right away. It assigned a state DRE Program Coordinator to determine the feasibility of Michigan becoming a DECP state. The DRE Program Coordinator created a

DRE Steering Committee which included four current DREs in the state, the Traffic Safety Resource Prosecutor, and a retired DRE-trained Los Angeles Police Department Sergeant who served as a consultant.

The Steering Committee drafted Michigan's DRE Policy and Procedures which were submitted to the International Association of Chiefs of Police (IACP) for approval. In October 2010 the IACP granted approval. Michigan became the 47th DECP state and was now allowed to start conducting its own DRE Schools.

Currently, there are 113 DRE-trained law enforcement officers in Michigan. A DRE is a law enforcement officer who is trained to recognize impairment in drivers who are the under the influence of drugs other than, or in addition, to, alcohol.

Although DREs may initiate their own arrests for operating under the influence of drug(s), the usual case is for a different officer, the arresting officer, to request the expertise and assistance of the DRE officer after making an arrest for drugged driving.

A DRE should be requested to conduct an evaluation for drug influence when the arrestee's signs and symptoms are not consistent with their blood-alcohol concentration (BAC). Simply stated, the arrestee may appear more intoxicated than the alcohol level alone would suggest. Law enforcement agencies may seek a drug-influence evaluation whenever an individual is arrested for OWI and produces a BAC below .08% or whenever the arrestee's degree and/or type of intoxication is not consistent with their BAC.

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It's Just a Vape Pen, Right?

By: Officer Jermaine Galloway, aka Tall Cop Says Stop

Vape pens are sweeping the country, but what we are quickly finding out (and many people still don't know) is what is actually inside those vape pens. First, there are no absolutes when you talk

a vape pen or e- cigarette. There are vapes that work for nicotine, flavored oils without nicotine, marijuana and even synthetics. Many people are vaping marijuana, right in front of you, and you may have no idea. Therein lies the rub.

Now, we are not saying that everyone is smoking drugs out of vape pens. However, a lot of law enforcement officers are finding that many are using them for drugs.

WHAT'S INSIDE THAT PEN?

Last year in the January/February issue of *Campus Safety* magazine, I wrote an article on the use of marijuana concentrates and their popularity. Marijuana concentrates and vape pens are the perfect marriage. Concentrates come in oil, wax or crystal form, and the current version of vape pens can work for all three.

Here is where the hurdles occur. You can't simply look at someone smoking from a vape pen and know what is inside that they are inhaling from. So, how can you figure out what someone is actually smoking?

First, we need to understand these pens a little better. **The baseline when dealing with vape pens is there are NO ABSOLUTES.**

When law enforcement officers and the public were first introduced to vape pens, many of us learned an electric device vaporizes a liquid form of nicotine. Many forms of nicotine are found in vape shops, convenience stores, gas stations, grocery outlets, and even alcohol outlets depending on the state.

Many of the pens you see that are being used for nicotine look similar to some of the pens in the drug world and vice/ versa.

NO ONE SUSPECTS YOU'RE INHALING A DRUG

Over the last few years, vape pens for drug use have become popular. They can be colorful, small and very discrete, with the latter being a large selling point to these various pens. **Imagine: sitting in class, at a stop light next to a police car, in a dance club or even in a movie theater taking a hit of a drug and no one around you even suspects drug use?** Or sitting in a class room and the professor turns their back for a few seconds as they write on the dry erase

You can't simply look at someone smoking from a vape pen and know what is inside that they are inhaling from.

board….meanwhile the person next to you is "vaping" but in actuality are taking a hit of something. What is that something you ask? If it is a drug, there is a good chance, it is marijuana.

So how can this be done and others might not detect it? As mentioned in the previous article, marijuana concentrates can be hard to detect, carry very little odor and are not a green, leafy substance. Once you place these various forms of marijuana into a quality vape pen, that pen can produce little to no odor thereby reducing or eliminating the known odor of marijuana. Furthermore, the user is receiving a stronger high. Also, any odor that is present, and the lingering smell of marijuana, is reduced, again making it hard to detect.

HOW TO DETERMINE WHAT TYPE OF VAPE PEN IS BEING USED

First, you should open it. Inside of the pen you might see a raised wick surrounded by a coil, or a flat coil or just a cylinder. The packed or used residue of the product will be inside these areas.

Wax inside of a vape pen will generally test with law enforcement kits. Also, if the pen had been smoked recently, there sometimes will be the odor of smoked marijuana coming from inside of the pen.

It should be noted that a closed pen, with wax on the inside, will produce very little to no smell. Also, if you choose to open it, I would recommend wearing gloves as you don't know the extraction method or what else it might contain.

Here are the substances we seem to be finding the most in vape pens during traffic stops, in schools, in hospitals, and in other public places: dry herbal marijuana, marijuana, wax, and marijuana oil.

In the end, vape pens are hard to identify, offer a new way of use, are VERY discrete, produce less of an odor and therefore can make some means of drug use easier to use and more mobile.

To view our photo gallery of vape pens, visit CampusSafetyMagazine.com.

Officer Jermaine Galloway travels the nation teaching campus personnel and law enforcement. He can be reached through his website, www.TallCopSaysStop.com or on Facebook.

Updates from the Traffic Crash Reporting Unit

By: Sgt. Scott Carlson, Michigan State Police

DRIVER DISTRACTED BY

The entire UD-10 Traffic Crash Report is the investigating officer's opinion as to how they interpret the events of the traffic crash. There is no burden of proof needed on the part of the investigating officer when completing the UD-10. The Driver Distracted By field is no different, and the officer is not obligated to prove beyond a reasonable doubt or any other standard that one of the choices truly distracted the driver. It is simply the officer making a decision based upon their personal observations while investigating the traffic crash. A special note on choice #8, involving distractions outside the vehicle. It is extremely helpful for traffic safety experts when officers list the specific distraction that was observed in the remarks section on the UD-10.

Also note that distractions should also be listed for other units if applicable (pedestrians, train engineers and bicyclists). Many times these types of units are distracted when they are struck by a motor vehicle. A bicyclist can be distracted by something in the environment, or a pedestrian could be texting while crossing the road, etc.

DRIVER DISTRACTED BY
1. Not Distracted
2. Manually Operating an Electronic Communications Device (Texting, Typing, Dialing)
3. Talking on Hands-Free Electronic Device
4. Talking on Hand-Held Electronic Device
5. Other Activity, Electronic Device (Book Player, Navigation Aid)
6. Passenger
7. Other Activity Inside the Vehicle (Eating, Personal Hygiene)
8. Outside the Vehicle (Includes Unspecified External Distractions)
9. Unknown

NARRATIVE/REMARKS

The narrative is a free text area for the officer to provide a brief description as to the events of the traffic crash and to provide any additional remarks about the crash that need to be noted. It is extremely important that personal information never be included in the narrative section or on the diagram. The general public has various ways of obtaining traffic crash reports, but only has access to sanitized UD-10s through the Freedom of Information Act. A sanitized UD-10 does not contain personal information such as names, dates of birth, driver's license numbers, addresses, or phone numbers, which could be used to steal an identity.

Another important factor is the length of the narrative. With electronic crash reporting the narrative cannot exceed 2,048 characters, and can include letters, numbers, spaces, and punctuation.

DRIVER IS OWNER

This new field was added for the 2016 UD-10 revision and is used to indicate if the driver of the vehicle is also the vehicle's registered owner. This is meant to simplify completing the UD-10 by no longer having to repeat this information in the owner section on the UD-10. Because this is not a required field, be aware that by not selecting this box, the printed UD-10E may populate the word NO under this field.

Michigan Sees 10 Percent Increase in Traffic Fatalities in 2016

	2016	2015	2014	2013	2012
Crashes	312,172	297,023	289,699	289,061	273,891
Injuries	79,724	74,157	71,378	71,031	70,519
Fatalities	1,064	963	876	951	936

For the second year, Michigan traffic deaths increased 10 percent, up from 963 in 2015 to 1,064 in 2016, according to just-released information from the MSP Criminal Justice Information Center (CJIC). The last year Michigan exceeded 1,000 traffic fatalities was 2007. Crashes, injuries, and serious injuries were up as well:

- Crashes: 297,023 in 2015 to 312,172 in 2016, up 5 percent.
- Injuries: 74,157 in 2015 to 79,724 in 2016, up 8 percent.
- Serious injuries: 4,865 in 2015 to 5,634 in 2016, up 16 percent.

Progress was noted in several areas, including alcohol-involved traffic deaths which fell 11 percent, from 303 in 2015 to 271 in 2016, and a 7 percent decline for young driver-involved fatalities (age 16-20), from 158 in 2015 to 147 in 2016.

"Some trends are emerging, especially with regard to drug-impaired traffic deaths, and our office is aligning resources accordingly," said Michael L. Prince, OHSP director. "More resources are available to train law enforcement officers in the detection of drug-impaired drivers, and the OHSP is continuing federal funding for impaired driving traffic patrols throughout the year. In addition, planning is underway to use new earmarked federal funds to help address the state's bicyclist and pedestrian crashes and fatalities.

"Our core programs, focused on increasing seat belt use and reducing impaired driving remain as important as ever," he added.

The increases are part of a national trend of rapidly rising traffic deaths. Researchers believe an improved economy and lower gas prices have contributed to an increase in miles driven.

In other areas:

- Bicyclist fatalities increased from 33 in 2015 to 38 in 2016, up 15 percent.
- Commercial motor vehicle-involved fatalities increased from 85 in 2015 to 120 in 2016, up 41 percent.
- Drug-involved fatalities increased from 179 in 2015 to 236 in 2016, up 32 percent.
- Motorcyclist fatalities increased from 138 in 2015 to 141 in 2016, up 2 percent.
- Pedestrian fatalities decreased from 170 in 2015 to 165 in 2016, down 3 percent.

More detailed 2016 crash information will be posted to Michigantrafficcrashfacts.org in the coming months. Statewide crash information can be found at Michigan.gov/crash.

For Your Information

Research Indicates Trends Five Years After Motorcycle Helmet Law Change

April 2017 marked the fifth anniversary of Michigan's partial universal motorcycle helmet law repeal. Since April 2012 there has been a 25 percent decline in statewide helmet use and a 14 percent increase in head injuries among crash-involved motorcyclists, according to the American Journal of Public Health.

The University of Michigan Injury Center has developed a policy fact sheet on the statewide impact of Michigan's partial universal motorcycle helmet law repeal. Since the change, helmet use among all motorcyclists has declined while head injuries among hospitalized riders have increased.

Although the statewide fatality rate did not change significantly overall, the fatality rate among unhelmeted riders was nearly two times higher than that of helmeted riders.

Researchers found that:

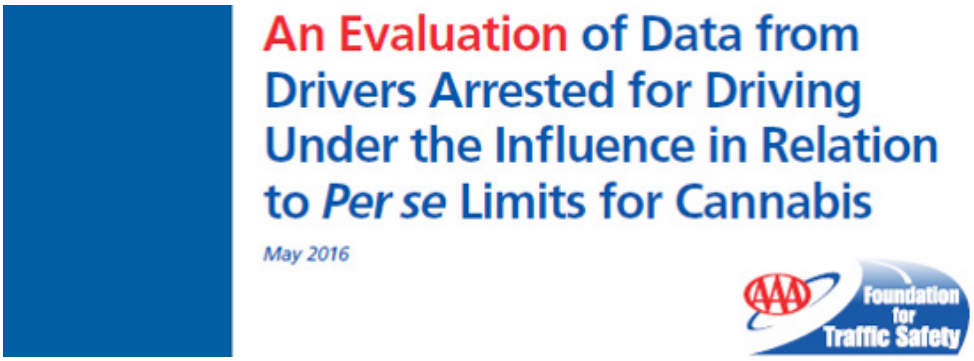
- Among those with head injuries, a greater percentage were attributable to skull fractures following the change, with fewer injuries occurring as a result of minor concussions.
- The need for invasive neurosurgical procedures nearly doubled following the change.
- The average acute care cost for non-helmeted riders who are hospitalized after a crash is about $33,000, which is 35 percent higher than the cost for helmeted riders.

For more information, please go to http://injurycenter.umich.edu/programs/effect-michigan-helmet-lawrepeal-fact-sheet

An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis

Final Report
Slide Show
Fact Sheet

While the exact relationship between cannabis use and increased risk for crash involvement remains unclear, cognitive and psychomotor effects of cannabis use in the period immediately after use can impact vehicle control and judgment and present some risk for deterioration in driving performance.



Marijuana Behind the Wheel *(continued from page 1)*

have a "bong" in his or her car as well as a bag containing a green leafy substance could be successfully prosecuted for DUI even without any chemical test to prove marijuana in his or her system. To change current laws to add a separate charge for drug-impaired driving generally, or marijuana-impaired driving specifically, for purely statistical reasons would likely complicate prosecutions by requiring proof of the impairing substance. Prosecutors may be able to obtain this information from toxicology labs, but may not collect all data for other reasons (e.g., private laboratory not subject to governmental rules or laws, suspect refusal to submit sample for chemical testing, etc.).

As mentioned, a suspect's refusal to submit to chemical testing presents a significant challenge to data collection. Other limitations on data collection include the availability of resources for officer training to detect the signs and symptoms of drug or marijuana impairment, toxicology testing, and the lack of widely available roadside testing mechanisms for drugs or marijuana. Additionally, if an impaired driving suspect submits to a breath test and the results reveal a level of alcohol above the legal limit, there is frequently no further testing performed for drugs and results in the underreporting of drug or marijuana-impaired cases.

While marijuana use has been shown to impair cognitive or executive function, driving performance, and increase crash risk, scientific studies have not yet demonstrated support for marijuana "per se" levels similar to alcohol in impaired driving legislation. Marijuana contains tetrahydrocannabinol (THC), more specifically Delta 9 THC, which is the psychoactive component of marijuana that causes impairment. Delta 9 THC can only be detected in blood. 73-90 percent of this is eliminated in as little as 45 minutes to approximately an hour and a half.[11]

11."Effect of Blood Collection Time on Measured Delta-9-Tetrahydrocannabinol Concentrations: Implications for Driving Interpretation and Drug Policy," Clinical Chemistry 62:2, Rebecca L. Hartman, Marilyn A. Huestis, et al. (2016).

Marijuana Behind the Wheel *(continued from page 7)*

On the other hand, marijuana metabolites, the byproducts in the blood as a result of the body metabolizing the marijuana, remain in the blood for a much longer period of time. Detection of the metabolites may be the result of marijuana consumption several days or weeks prior to the sample collection and may not scientifically equate to impairment.

Some of the issues surrounding the challenges to studies that would scientifically support a marijuana "per se" level include:

- **Varying concentrations of THC in marijuana.** Generally, the concentrations used in studies are much lower than what is available in real-life settings. Additionally, concentrations vary depending on the form of marijuana ingested.
- **Differences between users of marijuana.** A chronic, frequent user may develop tolerance to some effects of marijuana but not all effects, including the impairing effect. The effect of THC consumption on impairment of driving performance may be higher for occasional, recreational users than for frequent users.
- **Differences in ingestion of marijuana**. Smoked marijuana leads to a different absorption rate and release rate of the psychoactive ingredient than does eating marijuana edibles.
- **Combined use of marijuana and alcohol or marijuana and other drugs.** Various studies have demonstrated that the combined use is associated with significantly greater cognitive impairment and crash risk than the use of one alone.[12]

In terms of marijuana-impaired driving, legislative change has occurred more quickly than the pace of the scientific research on the issue.[13] This leaves fundamental questions about a standard for determining whether an individual's ability to operate a vehicle safely is impaired by marijuana as well as the means which the individual's present status may be measured.

Some practical items to consider prior to setting a "per se" level for marijuana impairment:

• **Lack of scientific research.**
There is little scientific research supporting marijuana "per se" levels similar to alcohol. Setting a limit for marijuana is strictly based on public policy and in no way means an individual testing below the level is not impaired at the time of driving.

• **Even a low "per se" level will miss significant numbers of impaired drivers.** Based on the THC concentration distribution in the larger population 2 data set of arrested drivers and similar observations by other groups, indiscriminate selection of a 5 ng/mL threshold for *per se* laws virtually guarantees that approximately 70 percent of all cannabis using drivers, whose actions led to them being arrested, will escape prosecution under a 5 ng/mL *per se* standard. [14]

• **Sample collection and toxicology testing**. Blood testing is the most effective testing method for marijuana, but is the most invasive and costly. Securing a blood sample requires a search warrant that may add a significant delay in specimen collection. This in turn may inhibit the ability to secure information about marijuana in the blood at the time of driving (and the inference of impairment at driving) because of how quickly marijuana transfers from blood to lipid soluble tissues in body. Further, obtaining a search warrant in a routine impaired driving case takes valuable time from the necessary duties of a law enforcement officer.

• **Standardized protocols needed.**
Standardized testing protocols would need to be developed for each type of sample secured.

• **Required additional resources.**
Dedicated resources would likely be needed to train law enforcement officers in the signs and symptoms of marijuana impairment and how to properly document it and train and certify officers as Drug Recognition Experts (DRE). Most police officers that make traffic stops are not trained to become experts in drug recognition due to the costs involved and the requirement that officers respond to numerous types of crimes on any given shift. One-way is to train officers to detect the signs and symptoms of cannabis use in drivers stopped at roadside. Initial suspicion of cannabis use would lead to a field sobriety test (SFST). This process could be coupled with rapid, on-site oral fluid screening for evidence of drug use. The technology to detect certain drugs (including cannabis) in a specimen of oral fluid quickly at roadside is improving and could be used in a manner comparable to preliminary breath testing devices currently used to test for alcohol. The suspect would then be taken for a complete drug evaluation by a DRE. This approach requires enhancing the complement of DRE officers available to conduct assessments for impairment.[15]

Also, additional resources would likely be needed for new laboratory equipment, training, laboratory technicians, and toxicologists since many state laboratories may not be equipped or prepared to conduct THC blood testing. Funding may also be required for other experts to support the prosecution at trial.

• "**Per se" limit for marijuana when combined with alcohol or other drugs.**
If a "per se" limit is to be established, consider legislative change establishing strict liability for an individual found to have any level of marijuana (THC) in his blood at the time of testing when combined with any level of alcohol or the presence of any other drug. Including "time of testing" language may help minimize the problem created by the quick dissipation of THC out of the blood as well as avoid attempts to relate amounts back to the time of driving.

Editor's Note: Brian Thiede is the Mecosta County, Michigan Prosecuting Attorney. Kenneth Stecker is a Michigan Traffic Safety Resource Prosecutor. An excerpt of this article is in the National District Attorneys Association April 20, 2017 White Paper captioned "Marijuana Policy: The State and Local Prosecutors' Perspective."

12.See "Establishing legal limits for driving under the influence of marijuana," Injury Epidemiology 1:26, Kristin Wong, Joanne E Brady and Guohua Li (2014).
13."Cognitive and Clinical Neuroimaging Core," Marijuana Investigations for Neuroscientific Discovery, Dr. Staci Gruber, http://drstacigruber.com/mind/, accessed on February 23, 2017.
14.AAA Foundation.org. "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to *per se* Limits for Cannabis," May 2016, p. 25.
15.Id., at p. 27.

DREs in Court *(continued from page 4)*

A DRE is trained to determine whether:

- The arrestee's impairment is not consistent with the BAC;
- The arrestee is suffering from a medical condition that requires immediate attention or is under the influence of drugs; and
- The individual is under the influence of a specific category (or categories) of drugs.

In order to reach these determinations, DREs use a 12-step standardized and systematic process. It is standardized because all DREs, regardless of agency, use the same procedure in the same order on all suspects. It is systematic in that it logically proceeds from a BAC, through an assessment of both clinical and psycho-physical signs of impairment, to toxicological analysis for the presence of drugs.

Based on the totality of the evaluation, the DRE forms an opinion as to whether or not the subject is impaired. If the DRE determines that the subject is impaired, the DRE will indicate what category or categories of drugs may have contributed to the subject's impairment. The DRE bases these conclusions on his or her training and experience and the DRE Drug Symptomatology Matrix, which is broken down into seven drug categories. The seven drug categories contained in the matrix are as follows:

1. Central Nervous System Depressants
2. Central Nervous System Stimulants
3. Hallucinogens
4. Dissociative Anesthetics
5. Narcotic Analgesics
6. Inhalants
7. Cannabis

While the DREs use the drug matrix, they also rely heavily on their general training and experience. After completing the evaluation, the DRE normally requests a blood sample from the subject for a toxicology lab analysis.

The DRE process is not a test; rather, it is a method for collecting evidence. Nevertheless, there have been challenges to the admissibility of DRE testimony and evidence.

In Michigan, courts employ the *Daubert* standard for determining the admissibility of scientific evidence.

The *Daubert* standard derives from United States Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pursuant to *Daubert*, courts serve as a "gatekeeper" for all scientific evidence, regardless of newness or novelty. Scientific evidence is admissible if the court determines that the underlying "reasoning or methodology" is "scientifically valid."

Although Michigan higher courts have not addressed the issue of DRE testimony and evidence under the *Daubert* standard, other *Daubert* states have found DRE testimony admissible under *Daubert.* Some of these states include Nevada, Oregon, Iowa, Hawaii, New Mexico, and Nebraska.

A prosecutor dealing with a *Daubert* motion should emphasize that the DRE protocol is not novel or new, but rather a list of procedures that have been used by medical science and the law enforcement community for years.

The DRE Program in Michigan is one of the most effective tools in the battle against impaired driving. Impaired drivers kill and injure thousands of people on our roadways every year. While DRE officers cannot prevent this from happening, they can certainly help minimize it. Our streets, highways, and communities deserve it!

Prosecuting Attorneys Association of Michigan
116 West Ottawa
Suite 200
Lansing, Michigan 48913

Phone: (517) 334-6060
Fax: (517) 334-6787
Email: steckerk@michigan.gov

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PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

The Yellow Light Legal Update

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Clicking on case names (highlighted in blue text) will take you directly to the PDF version of the opinions online.

Published Cases

United States Court of Appeals Sixth Circuit

The sole question before the United States Court of Appeals for Sixth Circuit was whether the district court erred in holding that the government did not violate the defendant, Riley's Fourth Amendment rights by compelling AT&T to disclose, and then by subsequently using, the real-time GPS location of Riley's cell phone over the course of approximately seven hours.

On June 23, 2015, a state court in Kent County, Michigan, issued an arrest warrant for Riley, having found probable cause to believe that he had committed armed robbery of a local Check 'n Go store. Riley had allegedly entered the store, pointed a gun at the clerk, instructed her to open the safe, and fled on foot with a "money box and money bags."

On June 25, Riley purchased a cell phone serviced by AT&T. A member of Riley's family gave this phone's telephone number to Riley's girlfriend "so she could contact him while he was 'on the run.'" Riley's girlfriend in turn disclosed the number to Special Deputy Joel Bowman, a member of the United States Marshal Service Grand Rapids Apprehension Team. On June 26, Bowman applied for and received a court order compelling AT&T to produce telecommunications records of Riley's cell phone under federal electronic-surveillance laws. See 18 U.S.C. §§ 2703, 3123, 3124.

The court order compelled disclosure of call metadata such as inbound and outbound phone numbers and cell-site location (CSL) data, as well as real-time tracking or "pinging" of the latitude and longitude coordinates of Riley's phone.

Within hours of the issuance of the surveillance order, U.S. Marshals received real-time GPS data revealing that Riley's phone was located at the Airport Inn in Memphis. Task-force deputies in the Marshals' Memphis office went to the motel, showed the front-desk clerk a picture of Riley, and determined that Riley had checked in under the name "Rico Shawn Lavender" and was in Room 314.

The GPS tracking thus provided no greater insight into Riley's whereabouts than what Riley exposed to public view as he traveled "along public thoroughfares," id. at 774, to the hotel lobby.

The deputies went to Riley's room and knocked. Riley opened the door and immediately attempted to shut it, but the deputies entered the room and arrested Riley. A Smith & Wesson .22-caliber pistol was in plain view on the bed, and Riley was subsequently indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

The Court held the government's detection of the defendant's whereabouts, which included tracking Riley's real-time GPS location data for approximately seven hours preceding his arrest, did not amount to a Fourth Amendment search under our precedent in *United States v. Skinner,* 690 F.3d 772, 781 (6th Cir. 2012).

The government used Riley's GPS location data to learn that Riley was hiding out at the Airport Inn in Memphis, Tennessee—but only after inquiring of the front-desk clerk did the government ascertain Riley's specific room number in order to arrest him. The GPS tracking thus provided no greater insight into Riley's whereabouts than what Riley exposed to public view as he traveled "along public thoroughfares," id. at 774, to the hotel lobby.

Therefore, under *Skinner,* Riley has no reasonable expectation of privacy against such tracking, and the district court properly denied Riley's motion to suppress evidence found upon Riley's arrest.

Affirmed.

United State of America v. Riley, case no. 16-6149, decided June 5, 2017.

Michigan Court of Appeals

Defendants pleaded guilty to OWI third offense and possession with intent to deliver marijuana. Both challenged imposition of costs as unconstitutional. First, the court addressed costs under MCL 769.1j claiming that the minimum $68 cost mandated by that statute was an unconstitutional tax violating separation of powers. Adopting the recent analysis in *People v Cameron,* __ Mich App __ (2017), the court held that while it was a tax, "even if our Legislature delegated some of its taxing authority to the circuit courts, the Michigan Constitution does not require an absolute separation of powers."

The second issue addressed the constitutionality of the 20% penalty for

failure to pay a penalty, fee or cost within 56 days contained on MCL 600.4803(1), again finding the fee constitutional. Defendant relies upon Bearden v Georgia, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983), for the proposition that a defendant cannot be subject to a greater penalty merely because of his inability to pay a fine or cost imposed by the court. But this concern is addressed by the last sentence in MCL 600.4803(1), which grants the trial court the authority to waive the penalty.

Thus, a mechanism is in place to excuse the imposition of the penalty for a defendant who is unable, through no fault of his or her own, to pay the fine, fee or cost upon which the 20% penalty is being imposed.

Therefore, there is no due process violation."

Affirmed.

People v. Shenoskey, case no. 332735, decided June 8, 2017.

Defendant moved to quash the bind over arguing that MCR 6.110, requiring the court to conduct a preliminary examination "in accordance with the Michigan Rules of Evidence" trumped MCL 766.11b, which allowed admission of the report.

The circuit court granted the motion to quash and the prosecutor appealed. The Michigan Court of Appeals reversed the Circuit Court

The Court noting the rules irreconcilably conflicted, the court nevertheless examined whether MCL 766.11b was a procedural or substantive rule and held it was the latter: "Read in light of this history, the current version of MCL 766.11b continues the Legislature's long-adopted goal of reducing the number of times a laboratory professional has to testify in a criminal case by suspending the hearsay rule during the preliminary examination. This policy conserves local and state law-enforcement resources, and while there may be some similar savings to district courts, the policy does, in fact, go beyond mere court administration or the dispatch of judicial business."

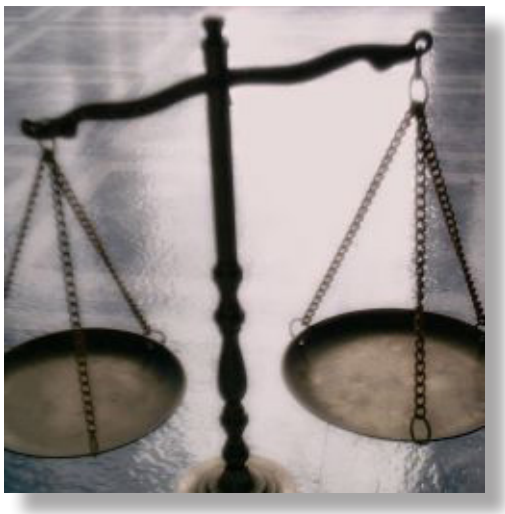
Therefore, the Court ruled "MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one. Accordingly, the specific hearsay exception in MCL 766.11b takes precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110 (C)." (Emphasis added).

The Court concluded "The district court properly admitted the laboratory report pursuant to the statutory hearsay exception in MCL 766.11b. The circuit court abused its discretion by remanding defendant's case to the district court for continuation of the preliminary examination."

The Court reversed the circuit court's order and remanded this action for continuation of the proceedings before the circuit court.

People v. Parker, case no. 335541, decided May 25, 2017.

This case involved the Michigan Medical Marihuana Act (MMMA). The



defendant was charged with delivering or manufacturing 20 or more, but less than 200 marijuana plants; possessing marijuana with intent to deliver; maintaining a drug house; and possessing a firearm during the commission of a felony (felony-firearm).

The trial court dismissed the charges after ruling that defendant was entitled to immunity under MCL 333.26424 (§ 4)2 of the MMMA. The prosecution appealed.

The Court of Appeals affirmed. The Court held that "The trial court properly concluded that defendant was entitled to Section 4 immunity, and therefore did not abuse its discretion by dismissing the charges against him."

The pertinent facts are that on May 14, 2014, Michigan State Police Detective Sergeant Charles Rozum executed a search warrant at defendant's home. Defendant was registered as a primary caregiver under the MMMA and had five associated qualifying patients. On the day of the search, Rozum arrived at defendant's home and encountered defendant and another man, Michael Lauria, in the driveway close to the garage, which was attached to defendant's home.

Rozum testified that he recovered 12 marijuana plants sitting on a freezer in the open garage. Defendant explained that Lauria had just delivered "12 clones" for which defendant paid $120. According to defendant, at the precise moment he "wanted to go to the basement, the police raided the house." Rozum testified that "there wasn't a grow operation in the garage," but there was a grow operation in defendant's basement. Rozum explained that the grow operation in defendant's basement was located behind a locked door, but there was a key on a keyring with several other keys already inserted into the locking mechanism, which allowed him to access the room. Rozum testified that he found two unlocked padlocks, and defendant explained that he secured the door with the two padlocks. Defendant testified that the padlocks were not in place and the keys were in the door locks because he was planning to put the plants he purchased from Lauria into the grow room.

Rozum stated that he found 59 marijuana plants inside the grow room and also found "tins containing suspected marijuana buds." Defendant moved to dismiss the charges under Section 4 of the MMMA.

At an evidentiary hearing on the motion, Rozum testified that he weighed the suspected marijuana using a digital scale at his office after the search. Rozum testified that the tins held 1,195 grams of what was later determined to be marijuana. Rozum described the marijuana he encountered in the tins on the day of the search as "dried marijuana." Explaining how he knew it was not moist, he stated, "When you touch the marijuana

your hands didn't get wet, there was no moisture content. When you felt it, it felt stiff, rough, dry." He explained that the marijuana was "crunchy" and testified that, based on his training and 10 years of experience as a narcotics officer, he believed the marijuana was ready to be used. The marijuana was then delivered to the Michigan State Police Crime Laboratory in Lansing, Michigan. Sandra Jean Schafer, a forensic scientist with the Michigan State Police Crime Laboratory, weighed the marijuana without any packaging on July 2, 2014. She reported that it weighed 1,068 grams, a difference of 127 grams.

Frank Telewski, a professor of plant biology at Michigan State University, testified that the difference of 127 grams was a "rather large discrepancy." Telewski opined that the discrepancy was not likely the result of inaccuracies in the scales, but rather could be easily explained by a loss of moisture. Telewski explained, "The material on the earlier date weighed more because it had a higher moisture content than the

material that was subsequently weighed several weeks later." Telewski testified that plant material can "take anywhere from a few days to 14 days" to dry. Defendant testified that he began drying the marijuana "two or three days" before the police executed the search warrant, and planned to keep the marijuana drying in the tins "[a]bout six, seven days more." Defendant further explained that he did not put all of the marijuana in the tins on the same day or at the same time.

The Court noted the defendant was both a qualifying patient and a primary caregiver for five patients, so he was allowed to cultivate up to 72 marijuana plants and to possess up to 15 ounces, or approximately 425.24 grams, of usable marijuana under the MMMA." The Court stated "It is clear that defendant stayed

"The material on the earlier date weighed more because it had a higher moisture content than the material that was subsequently weighed several weeks later."

within the cultivation limitation because he only possessed 71 marijuana plants." However, the Court noted the defendant also possessed marijuana in tins that weighed in at 1,195 grams, 1,068 grams, and 1,169 grams, or nearly two-and-a-half-times the legally permitted amount of "usable" marijuana.

The first issue was whether this marijuana was "usable" for purposes of the MMMA.

The Court relying on *People v Randall,* unpublished opinion per curiam of the Court of Appeals, issued January 13, 2015 (Docket No. 318740), held "Given Telewski's expert testimony that the weight differential of 127 grams was most likely due to a loss of moisture, and defendant's testimony that the harvested marijuana was in various stages of drying because not all of it had been placed in the tins at the same time, and had only been in the tins two to three days, we are not definitely and firmly convinced that the trial court made a mistake when it found that the marijuana was in 'various stages of drying' and therefore was not usable under the MMMA. Put simply, the marijuana was 'drying' not 'dried,' and therefore was not usable under the statutory definition."

The next issue is whether the plants were "kept in an enclosed, locked facility."

The Court of Appeals held "The law only requires that an enclosed room be secured by one locked door to constitute an 'enclosed, locked facility' for purposes of the MMMA. Yet defendant's grow room was secured by not one, but two locked doors, the first of which was also secured by two padlocks. Defendant explained that he installed the extra padlocks 'just to make sure nobody can go inside, make it hard.' Far from flouting the law, these facts demonstrate that defendant went to excessive measures to comply with the statutory requirements of Section 4. Under the circumstances, we are not definitely and firmly convinced that the trial court made a mistake by finding that defendant kept his 71 marijuana plants in an enclosed, locked facility."

The next issue is whether the defendant engaged in the medical use of marijuana in order to satisfy Section 4 immunity. The prosecution argued that defendant purchased 12 marijuana plants from Lauria, with whom he was not connected under the MMMA, which was enough to show that he was not engaged in the medical use of marijuana. The Court of Appeals disagreed.

The Court held "The MMMA is silent as to how a qualifying patient or primary caregiver is to obtain marijuana plants for cultivation. The MMMA does, however, define the medical use of marijuana to include 'the acquisition . . . of marihuana . . . .' MCL 333.26423(h) (emphasis added). Therefore, acquiring marijuana plants that do not exceed the statutory limits cannot rebut the presumption that defendant was engaged in the medical use of marijuana. Defendant was neither transferring to Lauria, from whom he was purchasing the marijuana, nor was the item involved a marihuana-infused product. Therefore, the trial court properly found that defendant was engaged in the medical use of marijuana."

Affirmed.

People v. Manuel, case no. 331408, decided April 18, 2017.

Unpublished Cases

(An unpublished opinion is not binding as precedent but may have persuasive value in court. See, Michigan Court Rule 7.215)

At trial, an eye-witness, Mr. George Brandau, testified when he was a little more than a mile from his home, he noticed that another vehicle

was following him. Brandau pulled into the driveway of his home and the other vehicle followed and parked behind his car in the driveway. Defendant was the driver of the other vehicle. Defendant did not know Brandau, and the defendant had no reason to go to his house. The defendant did not get out of his vehicle after he entered the driveway.

Mr. Brandau's wife called the police. After the police arrived, they administered two field sobriety tests to defendant, which he failed. Testing revealed that defendant's blood-alcohol level was .32 grams per 210 liters of breath. The police arrested the defendant for OWI.

Defendant argued that the prosecution failed to present sufficient evidence to convict him of operating a vehicle while intoxicated. The Court of Appeals disagreed.

Defendant relied on *People v Burton,* 252 Mich App 130, 142; 651 NW2d 143 (2002), in which the Michigan Court of

Appeals held that the defendant could not be convicted of operating a vehicle while intoxicated where the intoxicated defendant was found behind the wheel of his vehicle at a golf course parking lot with his seatbelt fastened while the engine of the stationary vehicle running and the vehicle's transmission in either park or neutral. The *Burton* Court concluded: "The evidence does not sufficiently establish that defendant was intending to use his truck as a motor vehicle as opposed to just a shelter. The mere fact that the engine was running does not sufficiently establish that defendant had or

"A reasonable trier of fact could also infer from defendant's intoxicated state when he was found in Brandau's driveway that he was intoxicated while he was driving behind Brandau shortly beforehand."

was intending to put the vehicle in motion. As one of the arresting officers conceded, it was possible that defendant was simply keeping the truck warm while he slept."

In the present case, the Court of Appeals stated the "Instant case is factually distinguishable from *Burton* and more akin to *People v Solmonson,* 261 Mich App 657; 683 NW2d 761 (2004), where the police found the defendant unconscious in the driver's seat of a Chevrolet Cavalier station wagon with an open can of beer between his legs at 3:45 a.m."

The *Solmonson* Court distinguished *Burton* on the ground that "The prosecutor in *Solmonson* did not claim that the evidence established defendant was operating the vehicle at the point the police found him unconscious . . . ." Instead, the prosecutor in *Solmonson* "argued that the evidence at trial presented a compelling circumstantial case that defendant had driven while intoxicated to the location where the police found him." Id. at 662.

In the present case, the Court noted "The prosecutor did not claim that defendant was operating the vehicle at the point the police arrived at Brandau's residence and found defendant intoxicated inside his parked truck. Rather, as in *Solmonson,* the prosecutor maintained that defendant actually operated his vehicle while intoxicated before the police arrived. In her closing argument, the prosecutor reviewed the evidence that Brandau saw defendant's vehicle being driven behind him, and that the vehicle pulled into Brandau's driveway. There was no evidence that any person other than defendant operated his vehicle at any time during this sequence of events. The prosecutor argued that Brandau's testimony was direct evidence that defendant drove his vehicle, and that circumstantial evidence proved that he did so while intoxicated. The evidence of defendant driving while intoxicated in this case is more compelling than it was in *Solmonson."*

The Court held "A reasonable trier of fact could also infer from defendant's intoxicated state when he was found in Brandau's driveway that he was intoxicated while he was driving behind Brandau shortly beforehand."

Therefore, the evidence was sufficient to support defendant's conviction.

Affirmed.

People vs James, case no. 331593, decided June 15, 2017.

The defendant appealed by right from his convictions following a bench trial of one count of carrying a concealed weapon (CCW), MCL 750.227, and one count of operating a motor vehicle with a high blood alcohol content, MCL 257.625(1)(c).

Defendant's argument is the police officer who stopped his vehicle did not have the requisite reasonable suspicion to do so, and therefore the stop was illegal and all evidence obtained from the stop should have been suppressed. More specifically, the defendant's argument is that at the time of the traffic stop, neither officer involved had personally and directly observed defendant either consuming alcohol or driving in an erratic, unsafe, or improper manner; and the information the officer did have, came from unreliable informants. The Court of Appeals disagreed.

The Court noted "A police officer may briefly stop a person for further investigation where the officer had a reasonable, articulable suspicion to believe that the person has committed or is committing a crime given the totality of circumstances."

The facts showed the police officers testified that employees at an AT&T store identified defendant as visibly intoxicated and described the vehicle he was driving in substantial detail. Additional reports were received from motorists of a vehicle also matching that description driving in an erratic manner. The officers used what

data they had to corroborate defendant's identity and home address. Defendant's vehicle and license plate matched the descriptions received, and the officer testified that he would not have stopped the vehicle had its tag not matched.

Additional facts additionally showed the AT&T employees were not directly identified does not make them truly anonymous because they could easily have been identified, and the information they gave was sufficiently consistent to indicate that it was reliable.

The Court also made it clear the "State's interest in preventing drunk driving is strong, see *Michigan Dep't of State Police v Sitz,* 496 US 444, 449-451; 110 S Ct 2481; 110 L Ed 2d 412 (1990), and "erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop." *People v Christie,* 206 Mich App 304, 309; 520 NW2d 647 (1994).

Therefore , the Court held "Under the totality of the circumstances, the police had a reasonable suspicion to conduct an investigative stop of defendant's vehicle even if they did not have probable cause to make an arrest at that time.

Affirmed.

People v. Stapley, case no. 331413, decided April 27, 2017.

Defendant appealed as of right his conviction for operating while visibly impaired (OWVI), MCL 257.625(3).

The facts are that City of Novi Police Officer Robert Manar, observed defendant's vehicle on the side of the road, angled so that its front end was towards the middle of the road. The vehicle's lights were on and its engine was running. Officer Manar approached the vehicle and saw that the driver's side window was open.

At trial, defendant explained that he was tired when the officer roused him from his sleep, that he had bad balance due to an injury on his foot, and that he was confused regarding the officer's instructions for the ABCs and counting tests. Based on defendant's admission that he was drinking, the position of his car, his performance on the field sobriety tests, and his general confusion, Officer Manar believed that defendant was

"This claim lacks merit. "[A] defendant is on notice when charged that he or she may be found guilty of a necessarily included lesser offense of the offense charged."

likely intoxicated. Officer Manar placed defendant under arrest and took him back to the police station. Once there, Officer Manar procured a warrant for defendant's blood. The results of defendant's blood samples revealed a blood alcohol level of 0.23 grams per 100 milliliters of blood.

An expert testified on behalf of defendant that the amount of alcohol defendant consumed that night could not have resulted in this high of an alcohol content. The expert explained that the sample was likely tainted by bacteria and then fermented, causing the level to appear higher than defendant's actual level at the time the blood was drawn. The prosecution's expert disagreed with this suggestion.

Before trial, defendant was charged with operating while intoxicated (OWI), MCL 257.625(1). The prosecution did not submit jury instructions before trial, and the defense counsel only submitted instructions for OWI. At trial, after both parties presented proofs but before closing arguments, defense counsel objected to the prosecution's proposal to include the elements of OWVI. The trial court overruled defendant's objections and gave instructions for both OWI and OWVI. The jury found defendant guilty of only OWVI. Defendant then filed a motion for a directed verdict of acquittal after jury trial, judgment notwithstanding the verdict, or new trial, which the trial court denied.

On appeal, defendant argued that the trial court erred by instructing the jurors regarding OWVI because it is not a necessarily included lesser offense of OWI. The Court of Appeals disagreed.

The Court held that the trial court did not err by holding that OWVI was a necessarily included lesser offense of OWI.

The Court noted "More recently, in Oxendine v Secretary of State, 237 Mich App 346, 354-355; 602 NW2d 847 (1999), this Court reiterated that "[OWVI] and the 'under the influence' version of [OWI] are in a hierarchical relationship, because any person who drives while so affected by consumption of alcohol or a controlled substance as to be substantially and materially affected and thus commit [OWI] would plainly always also be so affected that the person's driving ability would be 'visibly impaired' and thus constitute [OWVI]."

Next, the defendant argued the trial court erred by instructing the jury regarding

OWVI because he was not given notice of the charge. The Court disagreed.

The Court ruled "This claim lacks merit. "[A] defendant is on notice when charged that he or she may be found guilty of a necessarily included lesser offense of the offense charged." Martin, 271 Mich App at 288. "Hence, it is not error to instruct the jury on such necessarily included lesser offenses."

Affirmed.

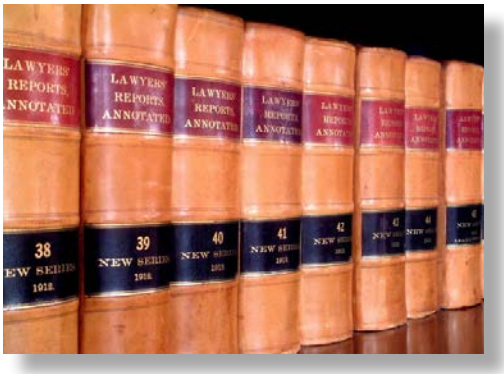
People v. Shah, case no. 330752, decided April 20, 2017.

During the early morning hours on January 5, 2014, Officer Daniel Lobbezoo was working road patrol in East Grand Rapids. He passed defendant's vehicle traveling in the opposite direction. In his rearview mirror,

Officer Lobbezoo believed that he saw that one of defendant's taillights was completely out. Officer Lobbezoo turned around to follow defendant. After catching up to defendant, Officer Lobbezoo saw that his initial perception was incorrect but continued following defendant because one of defendant's taillights was significantly dimmer than the other.

Officer Lobbezoo pulled defendant over, and when he approached the vehicle, he smelled alcohol and saw that defendant's eyes were glassy and bloodshot. Officer Lobbezoo had defendant perform several field sobriety tests and determined that defendant was intoxicated. He then arrested defendant for OWI. Defendant was transported to the Kent County Jail and took two DataMaster DMT tests. The first test showed that defendant's alcohol level was 0.14 grams per 210 liters of breath, and his second test showed that his alcohol level was 0.13 grams per 210 liters of breath.

Before trial, defendant filed a motion to suppress all evidence obtained as a result



of the traffic stop on the basis that Officer Lobbezoo lacked reasonable suspicion. At the hearing on defendant's motion, the officer testified that he was uncertain whether both of defendant's taillights were visible from 500 feet but that the defective taillight created a safety concern. Visiting Judge David Jordan denied defendant's motion to suppress.

At the close of the prosecution's case at trial, defendant renewed his motion to suppress and moved for a directed verdict in front of the presiding judge, the Honorable Steven Servaas. Judge Servaas took defendant's motion under advisement. The jury later returned a guilty verdict. Judge Servaas then granted defendant's motion and set aside the jury verdict, finding that Officer Lobbezoo lacked reasonable suspicion to stop defendant's vehicle. The prosecution appealed to the circuit court, which vacated Judge Servaas's ruling and reinstated the jury's verdict.

The Court reassessed a motorist's obligations under MCL 257.686 and MCL 257.683 when reaching its decision.

First, section 686, subsection (1) states in relevant part, "A motor vehicle…shall

"A vehicle must have a taillight, that taillight is considered 'lighted' when it is red and plainly visible from at least 500 feet, and that taillight must be lighted every time that a headlight or auxiliary lamp is lighted."

be equipped with at least 1 rear lamp mounted on the rear, which, when lighted as required by this act, shall emit a red light plainly visible from a distance of 500 feet to the rear." MCL 257.686(1) Under subsection (2), in relevant part, "A tail lamp or tail lamps, together with any separate lamp for illuminating the rear registration plate, shall be wired so as to be lighted whenever the head lamps or auxiliary driving lamps are lighted." MCL 257.686(2)

The Court held that when these two sections are read together they create a coherent whole: "A vehicle must have a taillight, that taillight is considered 'lighted' when it is red and plainly visible from at least 500 feet, and that taillight must be lighted every time that a headlight or auxiliary lamp is lighted."

However, the Court found that the record did not support defendant's dim taillight falling into this category where it would violate section 686. Officer Lobbezoo testified that he could not tell whether the taillight was visible from 500 feet which was also confirmed by the dash-cam video.

Rather the Michigan Court of Appeals relied on MCL 257.683(1) to find the legal justification for Officer Lobbezoo's traffic stop. Subsection 683(1) prohibits a person from operating "a vehicle…that is in such an unsafe condition as to endanger a person." The Court stated "This provision is separate from the provisions requiring that vehicles be kept in certain condition and adjustment, meaning that a vehicle could satisfy all of the condition and adjustment requirements of the Vehicle Code and yet, if the vehicle is operated in a manner that creates an unsafe condition that endangers a person, that vehicle would still violate subsection 683(1) of the Vehicle Code."

The Court held that the unsafe condition created by defendant's one dim taillight is that when one taillight is significantly brighter than the other, other motorists may think that the person is braking in front of them all the time. The Court also took into account that there were icy wintery conditions at the time of this traffic stop and that defendant was driving in a congested area in dark conditions.

Affirmed.

***City of East Grand Rapids v. Vanderhart*,** case no. 329259, decided April 11, 2017.

While on routine patrol, the trooper stopped defendant's vehicle after observing the front passenger tire cross the right fog line. The trooper exited her car, explained the reason for the stop, and obtained defendant's license and registration. After a brief conversation, the trooper determined that defendant was lost, and then questioned her on whether she had anything in the car that she shouldn't have.

Defendant denied having anything other than her six-year-old daughter. The trooper ran defendant's license through the in-car computer. The computer revealed that defendant had been convicted of a drug offense 11 years earlier. The trooper found this information significant, as (in her words) "somebody with a prior drug crime might have more drugs with them."

The trooper returned to defendant's car and asked her again about having anything in the car that she shouldn't have. Defendant questioned the trooper about needing a search warrant to search her car to which the trooper responded that she wouldn't need a search warrant if defendant gave her consent. Defendant later testified that the trooper told her

"she could get a dog," which defendant interpreted as "they were going to search my car regardless of consent."

At this point, defendant revealed that she had a valid medical marijuana card, and that her medical marijuana was on the back seat. The trooper told her that was okay since she had a valid card. Defendant than gave the trooper consent to search her vehicle. The trooper found a pill bottle containing methadone that did not belong to defendant.

Defendant moved to suppress the methadone, contending that her consent to the search was involuntary. The trial court agreed, but ruled that the inevitable discovery doctrine justified the search. The court rested its ruling on defendant's admission that her medical marijuana was on the back seat rather than in the trunk. A jury convicted defendant of unlawful possession of less than 25 grams of a controlled substance (methadone), pursuant to MCL 333.7403(2)(a)(*v*).

Defendant argued that her brief incursion over the fog line did not supply reasonable suspicion for the traffic stop. The Court of Appeals stated that this was a close question, but in the end did not answer it since it found that the trial court had incorrectly relied on the inevitable discovery doctrine to uphold the search.

The Court relied on *Rodriguez v. United States,* __ US __; 135 S Ct 1609, 1616; 191 L Ed 2d 492 (2015) when it ruled that the trooper unconstitutionally prolonged defendant's traffic stop to "ferret out" evidence of criminal wrongdoing.

The Court stated the following, "The 'mission' of the traffic stop was to ticket Kocevar for her fog line infraction. The traffic-control portion of the 'mission' was complete when Wicker returned to Kocevar's car after running Kocevar's information through the computer. That was the point at which Wicker was authorized either to ticket Kocevar or to send her on her way with a warning. Instead, Wicker pivoted from traffic enforcer to drug detective. In so doing, Wicker violated Kocevar's Fourth Amendment right to be free from unreasonable seizure."

The Court rejected the trial court's reliance on the inevitable discovery doctrine because defendant's statement regarding her medical marijuana being on the back seat was revealed during what it referred to as an unconstitutionally protracted seizure.

The Court of Appeals held, "But for the questioning that persisted far beyond the time needed to ticket or warn Kocevar about her driving, Wicker would never have learned about the medical marijuana or threatened the dog sniff that led to Kocevar's involuntary consent."

Reversed.

People v. Kocevar, case no. 329150, decided March 16, 2017.

New Laws

Official State Personal Identification for a Concealed Pistol License Effective, August 7, 2017

Public Act 31 of 2017, effective August 7, 2017, would amend Public Act 222 of 1972, which provides for the issuance of an official State personal identification card, to authorize the Secretary of State (SOS) to forward to the Michigan Department of State Police (MSP) a digitized photograph for a concealed pistol license (CPL).

The Act requires an individual's official State personal ID card to contain certain information, including his or her digital photographic image. The SOS must use an individual's digital photographic image only for programs the SOS administers, as authorized by law, and only as follows: a) by a Federal, State, or local governmental agency for a law enforcement purpose; b) by the SOS for a use specifically authorized by law; c) for the SOS to forward to the MSP the images of individuals required to be registered under the Sex Offenders Registration Act; or d) as necessary to comply with a law of the State or the United States.

Under the Act, an individual's digital photographic image also could be used for the SOS to forward to the MSP a digitized photograph taken of the applicant for use as provided in Section 5c of the handgun licensure Act. (Section 5c requires the SOS to make a digitized photograph taken of the applicant for a driver license or personal ID card available to the MSP for use under that Act.)

Public Act 32 of 2017, effective August 7, 2017, would amend the Michigan Vehicle Code to authorize the SOS to forward to the MSP a digitized photograph for a CPL.

Under the Code, an applicant for an operator's or chauffeur's license may have his or her image and signature captured or reproduced when the application is made. An image or signature captured for an application must appear on the applicant's license. A person's digital photographic image and signature must be used for the same purposes as a digital photographic image for an official State personal ID card. Under the bill, a person's digital photographic image and signature also would have to be used by the SOS for forwarding to the MSP as provided in Section 5c of the handgun licensure Act.

Consult Your Prosecutor Before Adopting Practices Suggested by Reports in this Article.

The statutes and court decisions in this publication are reported to help you keep up with trends in the law. Discuss your practices that relate to these statutes and cases with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practices in reliance on a reported court decision or legislative change.

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