

Driving Legally in the World of Recreational Marijuana

The Standard Remains Hazy

By Michael J. Nichols and Aaron R. Martinez

At a Glance

Now that marijuana has become legal recreationally in Michigan, the prosecutor's burden of proving the elements of operating with the presence of drugs has changed. Rather than relying on the mere presence of marijuana to prove their case, the emerging consensus is that prosecutors must make a showing beyond a reasonable doubt that marijuana consumption substantially lessened the ability to operate a motor vehicle.



Section 4 of the Michigan Regulation and Taxation of Marihuana Act (MRTMA)¹ says that a person may not operate a motor vehicle if they are “under the influence” of tetrahydrocannabinol (THC), the psychoactive compound of the marijuana plant.² While that language may seem clear enough, is anything ever that simple?

The citizen-initiated MRTMA states:

Sec. 4. 1. This act does not authorize:

- (a) operating, navigating, or *being in physical control* of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of marihuana; (Emphasis added.)

Contrast that language with subsection 8 of MCL 257.625:

- (8) 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 has in his or her body any amount of a controlled substance listed in schedule 1* under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214. (Emphasis added.)

It is important to note that the MRTMA *did not* reclassify THC from its current status as a Schedule I controlled substance, and therein lies the conflict. However, the MRTMA also states:

Sec. 5. 1. Notwithstanding any other law or provision of *this act*, and except as otherwise provided in section 4 of this act, the following acts by a person 21 years of age or older are not unlawful, are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection, and are not grounds to deny any other right or privilege:

- (a) except as permitted by subdivision (b), possessing, using or consuming, *internally possessing*, purchasing, transporting, or processing 2.5 ounces or less of marihuana, except that not more than 15 grams of marihuana may be in the form of marihuana concentrate; (Emphasis added.)

Does this mean that the standard for a prosecutor to prove in an operating under the influence of drugs (OUID) case—in which the theory is that the person was under the influence of legal marijuana—is now “under the influence”? The answer to this question could be a game changer for many reasons.

Most prosecutors generally believe that creating a per se standard by having a level set by law, which allows them to argue guilt more simply as they would in a drunk driving by alcohol case (the .08 standard),³ is the ultimate advantage before a jury at trial. Internal possession is a theory that has been discussed by Michigan courts in *People v Koon* and *People v Antkoviak* (within the context of minors possessing alcohol by virtue of consuming it).⁴ The March 2019 report published by the Michigan Impaired Driving Safety Commission included a recommendation that the state should not adopt a per se limit for THC intoxication given the varying impact marijuana has on individual users.⁵

The Michigan Supreme Court in *Koon* declared that the language in the Michigan Medical Marihuana Act (MMA),⁶ which is virtually identical to Section 4 of MRTMA, was superior to the “zero tolerance”/“any amount” language in the drunk-driving statute.⁷ The Court did not go through a detailed analysis of intention or impact, but that approach would



be appropriate if a judge's philosophy aims to strictly construe the plain meaning of the legislation. It is safe to infer from this decision that, when faced with a question of whether the MRTMA's "under the influence" standard trumps the "any amount" standard in the operating while intoxicated (OWI) statute, the appellate courts will be hamstrung to declare that the MRTMA standard is the threshold of conduct required for a conviction of OWI by THC—or even a combination, especially if the alcohol level is below the .08 threshold.

The question then becomes how one proves "under the influence." This is where the old phrase, "I am from the government and I am here to help" is fitting, except it needs a modifier: "I am from the government and I am here to help prosecutors." The National Highway Transportation Safety Administration (NHTSA) has spent millions of tax dollars on research to develop tools for law enforcement to prosecute drunk drivers.⁸ From this research, we have been given the roadside gymnastics known as the Standardized Field Sobriety Test. A 2015 NHTSA study,⁹ which received a fair amount of media attention,¹⁰ could not draw a correlation between any level of THC in human blood and impaired driving. This finding was again repeated in the NHTSA's formal report to Congress in 2017.¹¹

Thanks to the scores of public-service announcements, most citizens have a cursory understanding of the Standardized Field Sobriety Test: (1) the horizontal gaze nystagmus, or eye test; (2) the walk and turn; and (3) the one-leg stand.¹² Assessing or otherwise disputing the validity of these exercises and the original NHTSA research is beyond the scope of this article. In a trial in which a citizen is accused of driving under the influence of marijuana, the point to be made is this: the Standardized Field Sobriety Test has never been validated for correlating the identification of "clues" exhibited by the subject during the test-taking phase and impairment by THC—let alone a substantial and material effect of the drug on the person.¹³ The Michigan Impaired Driving Safety Commission report noted previously also affirmed that the current Standardized Field Sobriety Test protocols are not validated to identify impairment by THC, and their use by officers for that purpose should be discouraged.¹⁴

It is worth noting that the test under the law is not impairment. The test is *under the influence*. The Supreme Court held in *Koon* that the MMMA did not define "under the influence," but the Court referenced the definition in *People v Lambert*¹⁵ as "a substantial and material effect on the person's mental and physical condition."¹⁶

Any article on THC and driving would be remiss if it bypassed the drug recognition examination (DRE) protocol.¹⁷ Some lawyers and judges have heard this acronym described as "drug recognition expert." The original protocol, developed in the late 1970s in California, was for drug recognition

examination. At some point along the way, a clever member of the law enforcement community declared that "expert" was a more appropriate handle for this protocol. The DRE officer is trained to identify whether a person has taken one or more of seven categories of controlled substances and whether the person is "impaired." The officer is not trained to identify whether a person is *under the influence* per the protocol of the validation studies.

If an officer is going to tender to the factfinder an opinion about someone being under the influence or even impaired by a particular category of controlled substances, then the strictures of Michigan Rules of Evidence 702 and 703 certainly apply. The test for qualifications, for example, is whether the witness has "specialized knowledge" that the ordinary layperson does not have, regardless of the designation of expert.¹⁸ It is worth mentioning that the Michigan State Police does not allow defense attorneys access to the same training as prosecutors and DRE candidates; defense attorneys cannot take the Standardized Field Sobriety Test course offered by the

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Michigan State Police, the Advanced Roadside Impaired Driving Evaluation course, or the simple six-hour course on how to run the Datamaster breath-test device.¹⁹ Critics will argue that defense lawyers can find this training elsewhere, but private courses are expensive and out of reach for many startup firms and solo practitioners. In a time when our legal community is actively seeking ways to make the system more just, especially for indigent defendants, this inequity provides a glaring example of ways in which the deck is stacked against the defense before the matter begins to play out.²⁰

Defense attorneys in the many national organizations to which our firm's attorneys belong believe it is just as effective to allow the DRE officer to be qualified as an expert to test his or her opinion against the preeminent source: the NHTSA validation research. Cross-examination of a DRE officer often includes pointing out what the research does and doesn't say, and what the officer did or didn't do in the particular case. Even so, in the day and age of body-worn cameras that capture the physical and mental condition of subjects pretty well, juries are going to be told what to think about what they see and hear when a DRE is involved.

How can defense attorneys begin to make progress on these issues when we are fighting for improved quality of the indigent defense system at a time when legalization of controlled substances generates even more revenue for the government through taxation? The authors respectfully offer three suggestions:

- (1) Make all training that is offered to prosecutors available to defense attorneys, including the initial Standardized Field Sobriety Test student course, the DRE course, and any successor courses forming the basis of expertise to be used against a defendant.
- (2) Conduct additional research on the impact of controlled substances, whether alcohol, marijuana, or other drugs, and educate high school students on these issues backed by science explaining how these psychoactive substances affect people physiologically, especially when behind the wheel.
- (3) Conduct neutral research to continue to develop societal knowledge and eradicate the stereotypes and stigmas associated with controlled substances from THC to Ambien. Determine whether there is any cause and effect on traffic accidents and what role, if any, a drug or drug combination plays in diminishing driving skills.

Let us hold ourselves to the same standard we urge for our juries: maintain open and eager minds on the emerging issues of our times. If we place ourselves in a position to use facts to draw conclusions, especially regarding scientific facts, we will have a better opportunity to make effective, fair, and enlightened public policy and reap the benefits to our justice system. ■



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ENDNOTES

1. MCL 333.27951 *et seq.*
2. Michigan law has consistently used the “marihuana” spelling since the Federal Marihuana Tax Act of 1937. The authors use the generally accepted spelling “marijuana” throughout the article.
3. MCL 257.625(1)(b).
4. *People v Koon*, 494 Mich 1; 832 NW2d 724 (2013) and *People v Antkoviak*, 242 Mich App 424; 619 NW2d 18 (2000).
5. *Report from the Impaired Driving Safety Commission*, Impaired Driving Safety Comm, State of Michigan (March 2019), available at <https://www.michigan.gov/documents/msp/Impaired_Driving_Report_650288_7.pdf> [<https://perma.cc/7VEC-H2EY>]. All websites cited in this article were accessed February 7, 2020.
6. MCL 333.26421 *et seq.*
7. *Koon*, 494 Mich at 4.
8. *Department of Transportation (DOT) Appropriations: FY2019*, Congressional Research Service (2018) <<http://crsreports.congress.gov/product/pdf/R/R45321/2>> [<https://perma.cc/NWN5-AY7E>]. According to page 5 of this report, the 2018 NHTSA budget included \$338 million for “operations and research,” including impaired driving research.
9. Lacey et al, *Drug and Alcohol Crash Risk: A Case-Control Study*, Nat’l Hwy Traffic Safety Admin, US Dep’t of Transportation (December 2016), available at <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812355_drugalcoholcrashrisk.pdf> [<https://perma.cc/Q6YL-LY3T>].
10. Shepardson, *Study: Marijuana not raise crash risk*, The Detroit News (February 7, 2015) <www.detroitnews.com/story/news/nation/2015/02/06/us-evidence-marijuana-leads-higher-crash-risk/23004549/> [<https://perma.cc/FXX6-G42L>].
11. Compton, *Marijuana-Impaired Driving—A Report to Congress*, Nat’l Hwy Traffic Safety Admin, US Dep’t of Transportation (July 2017), available at <<https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>> [<https://perma.cc/5J2N-QZCT>].
12. *DWI Detection and Standardized Field Sobriety Testing (SFST) Refresher: Instructor Guide*, NHTSA/TSI/IACP (October 2015), pp 33–35, available at <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_ig_refresher_manual.pdf> [<https://perma.cc/YE7W-3TRK>].
13. *Report from the Impaired Driving Safety Commission*, p 11.
14. *Id.*
15. *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975).
16. *Koon*, 494 Mich at 4–5.
17. *Drug Recognition Experts (DREs)*, IACP <www.theiacp.org/drug-recognition-experts-dres>.
18. MRE 702.
19. Author Nichols has previously attempted to sign up for the training sessions, classes, and webinars but has been denied enrollment because of his role as a defense attorney. The most recent denial occurred on January 23, 2020.
20. Our team often operates as a dueling counterpoint for lawyers, judges, and prosecutors around the state alongside Traffic Safety Training Prosecutor Ken Stecker with the Prosecuting Attorneys’ Association of Michigan (PAAM). PAAM appears to have significant influence on the approaches taken by local county prosecutors’ offices on OWI cases, some of which have already vowed to abide by the MRTMA’s “under the influence” standard on OUID marijuana cases. Before print, Mr. Stecker provided a comment to the authors in which he anticipated that the conflicts which arise from the MRTMA will likely need to be resolved with litigation.