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“We change laws.”

Driving Under the Influence Laws and Medical Marijuana Patients: Zero Room for “Zero Tolerance”

MPP believes that the soundest approach to criminalizing driving under the influence of marijuana is the most common approach taken for prescription medications. In most states, a driver is guilty of driving under the influence of drugs (DUID) if the state proves, in light of all of the evidence, that the driver was actually impaired at the time of arrest.

Unfortunately, not all states have taken this sensible approach. A minority of states have “zero tolerance” laws for marijuana, meaning an individual will automatically be guilty of DUID if any THC and/or marijuana metabolites are found in his or her blood. Other states have “per se” laws, meaning drivers can be convicted solely for having a certain concentration of THC or metabolites in their blood. Metabolites can be detected weeks after impairment wears off, and THC can be detected days or even weeks after some regular consumers last used marijuana. To avoid criminalizing medical marijuana patients who drive long after marijuana’s effects have worn off, most medical marijuana states with zero tolerance laws have carved out an exception for patients.

DUID laws in medical marijuana states: A snapshot of the different approaches

Twenty-two states and the District of Columbia have effective medical marijuana laws on their books. Under 12 of the 20 states’ laws, an individual — whether or not he or she is a patient — is guilty of driving under the influence of marijuana if the state proves through a totality of the circumstances that the driver was impaired.¹ In other words, the mere presence of THC will not automatically lead to a conviction. Instead, the evidence as a whole, including blood tests, erratic driving, and roadside sobriety test results, must prove that the person was impaired. This is also how most laws treat other medications; the same standard applies to OxyContin and other drugs.

Five medical marijuana states — Arizona, Delaware, Illinois, Michigan, and Rhode Island — generally have “zero tolerance” laws criminalizing driving with any amount of THC or marijuana metabolites in a person’s system, even if the driver is not impaired. However, all of those states have an explicit or implicit exception for medical marijuana patients who are not impaired.²

Nevada, Montana, and Washington all have per se DUID laws with no exception for patients. In Nevada, a driver is guilty of DUID if the level of THC in his or her blood exceeds two nanograms per milliliter (ng/mL) of blood. In Montana and Washington, the per se limit is five ng/mL for patients.³ These laws can result in patients being convicted many hours, or perhaps days, after any intoxicating effects have worn off.⁴

¹ The 12 jurisdictions with those laws are: Alaska, California, Colorado, the District of Columbia, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, Oregon, and Vermont.

² In Delaware, a patient’s conviction cannot be based solely on metabolites or components of marijuana. In Rhode Island, a patient’s conviction cannot be based solely on metabolites. In Arizona, a patient’s conviction cannot be based solely on metabolites or components of marijuana in a concentration that is insufficient to cause impairment. In 2013, the Michigan Supreme Court ruled the state’s zero tolerance law did not apply to patients (*People v. Koon*). In Illinois, a conviction cannot be based solely on the presence of metabolites or components of marijuana when the individual is a medical marijuana patient.

³ The Colorado Legislature debated setting a five ng/mL per se limit, but decided against it due to a lack of scientific consensus and concerns that many marijuana users’ blood would exceed the limit even when they are not impaired.

⁴ After a 15-hour period of abstinence that included a full night’s sleep, *Westword*’s medical marijuana critic’s THC levels were still 13.5 ng/mL. According to his physician, Mr. Breathes was in “no way incapacitated” at the time. (William Breathes, “THC blood test: Pot critic William Breathes nearly 3 times over proposed limit when sober,” *Westword*, April 18, 2011.)

The final state — Colorado — has a law that may also result in medical marijuana patients being convicted of DUID when they are not impaired. Colorado has a permissible inference of impairment if a driver's blood THC concentration is five ng/mL or greater. This means that the jury or judge may infer that a driver drove under the influence of marijuana if that level of THC was in his or her system. However, the driver has a chance to rebut the evidence.

Prescription medications, over-the-counters, and driving while intoxicated

While many prescription and over-the-counter medications cause impairment, to the best of MPP's knowledge, no state has created a zero tolerance or per se DUID offense for simply testing positive for a prescription that was prescribed to the driver. Like THC and its metabolites, some prescriptions can stay in a person's system for days. To avoid criminalizing sober drivers who have used medications in the past, states instead criminalize driving while impaired by a medication by requiring the state to prove impairment by the totality of the circumstances. The state can present evidence relevant to impairment at the time of driving – which may include a blood test – but evidence of past use will not, on its own, result in a conviction.

The science behind detecting current marijuana intoxication

Most scientists researching the issue acknowledge the difficulty of pegging THC impairment to a number (in a way similar to drunk driving laws), and epidemiological evidence on the risk of accidents associated with marijuana is much less conclusive than data regarding alcohol. The most meaningful recent study measuring driver "culpability" (i.e., who is at fault) in 3,400 crashes over a 10-year period indicated that drivers with THC concentrations of less than five ng/mL in their blood have a crash risk no higher than that of drivers without any THC in their bodies.⁵ The crash risk begins to rise above the risk for sober drivers when a marijuana user's THC concentrations in whole blood reach five to 10 ng/mL.⁶

However, this does not mean all drivers will be impaired when they have that concentration of THC. Regular marijuana consumers' blood can contain detectable amounts of THC long after they last used marijuana, leading some experts to caution that heavy use results in "cannabis concentrations in sober phases that resemble concentrations found in occasional users after acute cannabis use."⁷ In one controlled study, six of 25 participants tested positive for THC a full seven days after abstinence, with the highest concentration detected being three ng/mL of whole blood.⁸

Pushes to enact a per se THC limit or a zero tolerance DUID law are a particular concern for medical marijuana patients who tend to use marijuana more frequently than the general population of marijuana users. These laws may make some patients have to give up legally driving — even when they are completely unimpaired — if they want to use the medicine that works best for them. In addition to being unfair to patients, research indicates per se DUID laws do not make the roads safer. Researchers found that, as implemented, these laws have "no discernible impact on traffic fatalities."⁹

⁵ O.H. Drummer, et al. "The involvement of drugs in drivers of motor vehicles killed in Australian road traffic crashes," *Accident Analysis and Prevention*, 2004, 36, pp. 239-48.

⁶ "When reporting THC levels in blood or adopting legal limits one must always specify the reference fluid ... five ng/mL of THC in whole blood corresponds to about 10 ng/mL in serum or plasma." (F. Grotenhermen, et al. "Testing for Impairment by Cannabis," DUID Report, 2004.)

⁷ S.W. Toennes et al. "Comparisson of cannabinoid pharmacokinetic properties in occasional and heavy users smoking a marijuana or placebo joint," *J. Anal. Toxicol*, 2008, 32, 470.

⁸ Erin L. Karschner, et al. "Do Δ^9 -Tetrahydrocannabinol Concentrations Indicate Recent Use in Chronic Cannabis Users?," *Addiction*, 2009, 104(12), pp. 2041-2048.

⁹ M. Anderson and D. Rees, "Per Se Drugged Driving Laws and Traffic Fatalities," IZA Discussion Paper 7048, 2012, p. 5.