Judging Drugged Driving

Across the country, judges are hearing an increased number of drug-impaired driving cases.

Recently, three judges associated with the National Highway Traffic Safety Administration (NHTSA) partnership with the ABA Judicial Division talked with NCSC about the latest issues in adjudicating impaired-driving cases involving substances other than alcohol: Hon. Earl Penrod, a senior judge from Indiana and currently an ABA Judicial Fellow in cooperation with NHTSA; Hon. Phyllis McMillen, Oakland County Circuit Court, Michigan, Region 7 judicial outreach liaison for NHTSA; and Hon. Chaney Taylor, Jr., Independence County District Court, Arkansas, Region 7 judicial outreach liaison for NHTSA. What follows is a summary of that discussion.

Alcohol-Impaired vs. Drug-Impaired Driving
Courts across the country are struggling with the issues surrounding toxicology for substances other than alcohol. At issue are methods for identifying impaired drivers on the road, the assessment and documentation of their impairment, the availability of appropriate chemical tests, and the interpretation of test results.

Most law enforcement officers, physicians, attorneys, forensic toxicologists, traffic-safety professionals, and judges are comfortable with how our nation arrests and prosecutes alcohol-impaired drivers. All 50 states have per se alcohol-level laws. An officer’s testimony concerning observations of standardized field sobriety tests (FSTs) can be sufficient to prove a prima facie case for alcohol-impaired driving. The results of secondary chemical testing can also prove such a case.

However, the application of these alcohol-testing procedures to drug-impaired driving has not been well validated. Many judges are uncomfortable with admitting these test results as evidence of drug-impaired driving. There are so many classes of drugs: from central-nervous-system depressants, like opiate pain medication, to marijuana, to hypnotic sedatives or hallucinogens. Each of these chemicals interacts differently with a person’s ability to drive an automobile. For drug-impaired driving, the simple model for making a prima facie case is insufficient, and judges can no longer rely on this simple formula:

officer’s observation of known indications of impairment of alcohol + standardized tests + breathalyzer results = successfully proven blood alcohol level.

Alcohol-Impaired vs. Drug-Impaired Driving

About the Series
These special reports are part of the National Center for State Courts’ “Trends in the State Courts” series and serve as informative and timely updates for state court leaders. Any opinions expressed herein are those of the authors, not necessarily of the National Center for State Courts.
For the first time in United States history, driving under the influence of drugs has surpassed driving under the influence of alcohol. There is no simple formula for successfully proving drug-impaired driving. There is no scientific research to show that the presence of a drug in one’s system is well correlated to impairment in driving.

For a law enforcement officer, the indicators of intoxication from drugs are different than those for alcohol impairment; therefore, the proof from the prosecutor is substantially different. It’s difficult for an officer to determine which drug classification is suspected. Then the officer must decide which roadside tests or tools to use to measure drug impairment. Judges are hearing very interesting testimony when it comes to drugged driving impairment. Often, there is expert testimony from officers who have been trained in drug FSTs. The credibility of these experts is often litigated. Some states have per se laws where any presence of a drug is enough to violate the law. But, in many states, impairment must be separately proven, and determining what drug was consumed and how it impaired the user’s driving ability is challenging for the prosecution and interesting for the judge.

What Is a DRE?
A DRE is a drug recognition expert who is specifically trained to recognize certain symptoms or indications of impairment. There are other certifications, like ARIDE (Advanced Roadside Impaired Driving Enforcement), which require less training. Drug recognition is complicated, and many officers are receiving the 40 hours of training needed to become DREs. The training requires them to understand the different drug classes and teaches them to identify the indicators of intoxication (e.g., dilation or constriction of the pupils or the way a person performs some of the FSTs). After an intense observation period, DREs are taught to reach a conclusion about which drug class might be impairing a person’s driving. The testimony of a DRE, their personal observations on the indicators of impairment, is important for judges. The prosecution must present the DRE’s testimony, combined with a toxicology report and the research behind DRE or ARIDE programs, so that judges can understand the validity of the DRE’s observations and conclusions.

For the first time in United States history, driving under the influence of drugs has surpassed driving under the influence of alcohol, according to the report Drug Impaired Driving: A Guide for States (2017 edition) from the Governors Highway Safety Association. However, our standard FSTs were created to detect alcohol-impaired driving but not drug-impaired driving. In September 2017, the Massachusetts Supreme Court was the first state supreme court to address some of these important issues. In Commonwealth v. Gerhardt, 477 Mass. 775 (2017), the court noted that the scientific community has not reached a consensus on the reliability of FSTs to assess drugged driving impairment. The court concluded that although police officers may testify about their observations related to FSTs, they may not suggest “that an individual’s performance on an FST established that the individual was under the influence of marijuana.” More judges across the nation are making important decisions about the applicability of FSTs, the science behind drug-impaired driving, and the role of drug recognition experts.
Is there a scientifically established correlation between performances on field sobriety tests and marijuana-impaired driving?
No. There is no scientific consensus on the correlation between a defendant’s performance on any field sobriety tests and marijuana use or impairment. But FST evidence is still admissible and relevant. Police officers do not need to testify as experts (with Daubert requirements), but they also cannot testify that the defendant “passed” or “failed” any FST, as that gives the impression the results of the test establish conclusively whether or not the defendant was under the influence of marijuana.

Can police officers testify, without being qualified as an expert, that in their opinion the defendant was intoxicated by marijuana?
No. While the effects of alcohol are well known, no such general knowledge exists as to the physical or mental effects of marijuana consumption. The effects of marijuana consumption on individuals vary too much.

What physical characteristics (e.g., bloodshot eyes, dilated pupils, lack of coordination, slow balance or reaction times, garbled or slow speech) permit an inference of impaired driving by reason of marijuana use?
None of those characteristics permit an inference of impairment. But a police officer may testify to them and allow jurors to use their common sense in assessing that evidence.

See also, Judge Mary A. Celeste (ret.), “The Impact of the Gerhardt Decision on Marijuana Driving Cases,” Court Review 53 (2017): 170-73, for a complete summary of the case and its impact.
Please visit NCSC’s *home.trafficresourcecenter.org* for useful resources to help educate judges on drug-impaired driving and other important issues.

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