

# LAW WEEK

## COLORADO

# The Fallacies of Colorado's DUI-D Laws

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It took several attempts, but Colorado's legislature finally passed the DUI THC bill in 2013, which allows a jury to infer that an individual was legally under the influence of marijuana if a blood test reveals 5 nanograms or more of THC per milliliter present in that person's blood stream. The DUI law now states, "If at such a time the driver's blood contained 5 nanograms or more of delta-9 tetrahydrocannabinol per milliliter in whole blood, as shown by an analysis of the defendant's blood, such facts give rise to a permissible inference that the defendant was under the influence of one or more drugs." This permissive inference in DUI-D cases makes a significant difference for individuals at trial on drugged driving charges.

Prior to this permissive inference, the police and prosecutors still used blood tests to determine how much THC was in a person's blood. If the proper foundation was laid, the blood test results were admitted in trial, and the attorneys on both sides would then have a chance to convince a jury what that blood test really signified. Now, a jury could legally decide that an individual was under the influence of marijuana based on the results of a single blood test alone, without testimony or other evidence as to the significance of the test.

To the non-criminal attorney, this may seem like no big deal — after all we have had alcohol limits and inferences forever. In an alcohol-related DUI case, a blood or breath test result from .051-.079 infers a person is impaired (DWAI) and a test result of .08 or more infers that a person is under the influence (DUI). Colorado also has an excessive-alcohol content charge, making a separate DUI crime if a person was driving with a breath or blood alcohol content (BAC) of .08 or more. We criminal attorneys refer to this as DUI per se.

The problems with the 5 nanogram permissive inference for DUI concerning marijuana result from the lack of scientific research confirming what levels in a person's system can make them under the influence or impaired. Despite this, and the following research, findings and warnings from the federal government agencies that set the standards for DUI prosecutions across the country, Colorado law now allows jurors to be instructed that they can presume DUI with a blood test revealing 5 nanograms or more of delta-9-THC, the active impairing metabolite created in the body from marijuana ingestion.

The use of marijuana causes intoxication, which includes drowsiness, cognitive dysfunction, short-term memory issues, variations in time assessment, perceptual changes and

poor motor coordination. The pharmacological effect of delta-9-THC, which is the active metabolite in cannabis, varies based on factors such as dose, route of administration and tolerance. Marijuana use causes changes in mood, perception and motivation, but the effect sought after in recreational use is the "high." Effects vary with dose but typically last approximately two hours. During the "high," the user's cognitive functions, perception, reaction time, learning and memory are impaired. In addition, a person's coordination and ability to multitask, which are critical to safely operating a motor vehicle, may be impaired for hours.

While the dangerous effect of marijuana cannot be denied when it comes to operating a motor vehicle, the National Highway Traffic Safety Administration and the U.S. Department of Transportation explicitly advise against trying to establish a limit for THC at this time. For example, the NHTSA fact-sheet, "Drugs and Human Performance" available at the NHTSA.gov website, acknowledges: "It is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects," and goes on to state "[i]t is inadvisable to try and predict effects based on blood THC concentrations alone..."

Similarly, the US Department of Transportation's "Drug Evaluation and Classification Training" student manual (January 2011 edition) states: "Toxicology has some important limitations. One limitation is that, with the exception of alcohol, toxicology cannot produce 'per se' proof of drug impairment. That is, the chemist can't analyze the blood or urine and come up with a number that 'proves' the person was or wasn't impaired."

Part of the problem with equating a THC blood test result to impairment is that the effects of marijuana are short-lived, but its traceability is not. The NHTSA website states, "Effects from smoking cannabis products are felt within minutes and reach their peak in 10-30 minutes." Another U.S. Department of Transportation report, "State of Knowledge of Drug-Impaired Driving" recognizes, "experimental research on the effects of cannabis have produced mixed results, indicating that any effects ... dissipate quickly after one hour."

More recent federal government research confirms that the studies are not in place to set limits or inferences for marijuana and impaired

driving. In November 2014 the Department of Transportation released, "Understanding the Limitations of Drug Test Information, Reporting, and Testing Practices in Fatal Crashes." The research paper starts by discussing the distinction between evaluating data and the "mere presence" in a person's system opposed to the person being impaired by a drug in his or her system, and then concludes:

The presence of some drugs in the body can be detected long after any impairment. For example, traces of cannabinoids (marijuana) can be detected in blood samples weeks after use. Thus, knowing that a driver tested positive for cannabinoids does not necessarily indicate that the person was impaired by the drug at the time of the crash.

The report goes on to state:

In addition, while the impairing effects of alcohol are well understood, there is limited research and data on the crash risk of specific drugs, impairment, and how drugs affect driving related skills. Current knowledge about the effects of drugs is insufficient to make judgments about connections between drug use, driving performance, and crash risk.

In February 2015, the Department of Transportation released another research paper titled "Drug and Alcohol Crash Risk," seeking to establish a connection between marijuana use and motor vehicle crashes. Surprising to some, the paper stated, "Some studies suggest that marijuana use has minimal or no effect on the likelihood of crash involvement, while others estimate a small increase in the risk of crash involvement." The paper went on to reveal the data from NHTSA's "Crash Risk" study, which is the first large scale study in the U.S. to include drugs other than alcohol, collecting data from more than 3,000 crash-involved drivers, and over 6,000 control drivers (not involved in crashes) over the course of 20 months.

Similar to the previously mentioned government studies and research papers, NHTSA states, "[c]aution should be exercised in assuming that drug presence implies driver impairment. Drug tests do not necessarily indicate current impairment. Also, in some cases, drug presence can be detected for a period of days or weeks after ingestion."

Comparing THC to alcohol, NHTSA concluded that a driver is twice as likely to cause an accident with a BAC of .05 (note a person would be presumed not impaired to the slightest degree under Colorado with a BAC under .051); four-times more likely with a BAC of .08; six times more likely with a BAC of .10; and 12 times more likely with a BAC of .15.

The study concluded that THC would cause a driver to be 1.25 times more likely to cause an accident, and after adjusting the data for factors such as age and gender, concluded that there was no significant increase in crash risks with the presence of THC.

This NHTSA study commented on the challenges in determining how drugs affect driving, such as detectable blood levels and peak levels may persist beyond the impairing effects; a person's sensitivity and tolerance; an individual differences in absorption, distribution, action, and metabolism; and accumulation from repeated administration (chronic users).

Once again, the conclusions of this study are that "drug presence does not necessarily imply impairment. For many drug substances, drug presence can be detected after impairment that might affect driving has passed. For example, traces of marijuana use can be detected in blood samples several weeks after heavy chronic users stop ingestion," and "[w]hereas the impairment effects for various concentration levels of alcohol in the blood or breath are well understood, there is little evidence available to link concentrations of other drugs to driver performance."

The NHTSA report finally states: "At the current time, specific drug concentration levels can not be reliably equated with a specific degree of driver impairment."

If NHTSA and the Department of Transportation advise against setting drug limits for impaired driving, why does Colorado have a 5 nanogram inference of guilt? In addition, a prosecutor can legally move forward on a DUI case with a blood result far below 5 nanograms on the theory of the lesser-included Driving While Ability Impaired (DWAI) charge in a DUI case, which allows the jury to convict if they conclude that a person "was impaired to the slightest degree" as opposed to being "substantially incapable of safely operating the vehicle," which is the level of culpability for DUI.

While the courts and legislature may disagree, the THC inference essentially causes the burden to be shifted to the defense to raise the fallacies of this THC inference due to this permissive inference that appears in a jury instruction informing the fact finders that they can infer a person was under the influence (not just impaired) when a blood test reveals 5 nanograms or more of THC in a DUI case.

For once, concerning a DUI issue, criminal defense attorneys can say that the USDOT and NHTSA are on our side. •

— Jay Tiftickjian is a criminal defense attorney who specializes in DUI and drug crime defense. For more information about the pharmacology of marijuana, check out *Medicolegal Aspects of Marijuana: Colorado Edition*, available through Lawyers and Judges Publishing Company.



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