

What the Michigan Regulation and Taxation of Marihuana Act (“MRTMA”) Means for Prosecutors/Law Enforcement in OWI Cases

Prosecutors and law enforcement handling impaired driving cases should be familiar with the Michigan Supreme Court ruling of *People v. Koon*, 494 Mich 1; 832 NW2d 724 (2013).

In *People v. Koon*, the Court ruled that, “The immunity from prosecution provided under the MMMA to a registered patient who drives with indications of marihuana in his or her system but is not otherwise under the influence of marihuana inescapably conflicts with MCL 257.625(8), which prohibits a person from driving with any amount of marihuana in her or system. Under the MMMA, all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marihuana. Consequently, MCL 257.625(8) does not apply to the medical use of marihuana.”

On November 6, 2018, Michigan voters chose to become a recreational marihuana state by adopting the Michigan Regulation and Taxation of Marihuana Act (“MRTMA”).

Like the Michigan Medical Marihuana Act (“MMMA”), the MRTMA contains the following language which will take effect in mid-December 2018:

Section 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;

Section 4. 1. 5. All other laws inconsistent with this act do not apply to conduct that is permitted by this act.

In light of the language in the MRTMA, it is important for law enforcement to know what to look for when someone is under the influence of ONLY marihuana. Listed below is what officers should be looking for during a roadside investigation to establish probable cause of impairment due to marijuana.

GENERAL INDICATORS

Bloodshot, watery eyes

Relaxed inhibitions

Body tremors

Eyelid tremors

Impaired perception time/distance

Increased appetite

Possible paranoia

Possible panic attacks

Divided attention impairment

Odor of marihuana (not always)

Debris in mouth and/or on tongue

Standardized Field Sobriety Test (SFST) Indicators: Impairment will usually be evident on the Walk and Turn (WAT) and/or One-Leg Stand (OLS). Horizontal Gaze Nystagmus (HGN): Will not usually cause any HGN, but person might have difficulty holding head still due to divided attention issues. Vertical Gaze Nystagmus (VGN) will not be present.

Walk and Turn: There are eight clues on this test that were studied and validated for the .08 percent breath alcohol concentration (BAC). However, they are extremely useful for disclosing drug impairment as well. The eight clues are easy to remember through the following acronym:

“BS SO WHAT”: In the following order, subjects sometimes lose their **B**alance during instructions. Sometimes they **S**tart walking too soon. Sometimes they **S**top while walking. Sometimes they step **O**ffline. Sometimes they take the **W**rong number of steps. Sometimes they miss touching **H**eel to toe by more than half an inch. Sometimes they raise their **A**rms more than six inches from their sides for balance. Sometimes they **T**urn improperly. In addition, general, non-studied indicators of impairment frequently manifest themselves as well including but not limited to the following: failing to count each step out loud, failing to watch feet while walking, and body tremors.

One-Leg Stand: This test contains four studied, validated clues for alcohol, but may also be very useful in establishing impairment due to marihuana. An easy way to remember the clues is with the following acronym:

“DASH”: Sometimes subjects put their foot **D**own while balancing. Sometimes they raise their **A**rms over six inches from their body for balance. Sometimes they **S**way while balancing. Sometimes they **H**op. General indicators of impairment frequently occur as well with the OLS including but not limited: not looking at the raised foot while balancing, jumbled count or no count, body tremors, and an unusually fast or slow count.

As with the WAT, officers need to make sure they are always in “substantial compliance” with the standards set forth by the National Highway Traffic Safety Administration (NHTSA) when administering the SFSTs. A test that falls short of being administered in “substantial compliance” may not be admitted at trial as evidence of impairment.

Please take the time to review your SFSTs and be as sharp as you can on them. If you commit these tests to your memory banks, they will be there when you really need them. Also, officers are encouraged to incorporate the Modified Romberg Balance Test and the Lack of Convergence (LOC) test into all their OWI investigations. Both tests are very useful for helping establish probable cause to arrest in OWI case.

Lastly, in a marihuana-intoxicated driving case, it is imperative that blood results come back with THC in the subject's blood. *People v. Feezel*, 486 Mich 184; 783 NW2d 67 (2010).

For more information on these cases, statutes and PAAM training programs, contact your Traffic Safety Resource Prosecutors, Kenneth Stecker and Kinga Canike, at (517) 334-6060 or email at steckerk@michigan.gov and canikek@michigan.gov. Please consult your local prosecutor before adopting practices suggested by reports in this article. The court decisions in this article 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 changes.