

To: New Jersey Law Revision Commission
From: Arshiya Fyazi, Counsel
Re: “Under the Influence” – N.J.S. 39:4-50 and Cannabis
Date: April 05, 2021

MEMORANDUM

Executive Summary

The term “under the influence” is not defined in New Jersey’s Driving While Intoxicated (DWI) statute, N.J.S. 39:4-50. In *State v. Siervo*,¹ the Appellate Division affirmed the trial court’s denial of the defendant’s application to vacate his previous DWI conviction, but it noted that the DWI statute did not define the term “under the influence of intoxicating liquor.”²

Staff brought this issue to the Commission’s attention for consideration of whether the modification of N.J.S. 39:4-50(a), as it pertains to the term “under the influence”, would assist in the application of the term and potentially reduce the need for additional litigation.

In light of the authorized use of medicinal marijuana, and anticipated changes to the law permitting the recreational use of marijuana, the Commission authorized Staff to expand the scope of the project to determine the impact of legalization of marijuana on the “under the influence standard.”³ The following pages outline developments in this area of law.

Background

In 2009, the Defendant in *State v. Siervo*, pled guilty to DWI and the refusal to take a breathalyzer test (“refusal”).⁴ Seven years later, Defendant applied to the municipal court to vacate his guilty pleas.⁵ The municipal court denied his application and the Law Division determined that his request for post-conviction relief was time-barred.⁶

The Appellate Division observed that although the case was properly disposed of on procedural grounds, the Defendant’s challenge to the adequacy of his plea could have been avoided if the municipal court judge had further inquired about Defendant’s physical or mental state on the evening he was operating the vehicle and arrested for DWI.⁷ The Appellate Division noted that the DWI statute in question did not contain a definition of the phrase “under the influence.”⁸ The

¹ *State v. Siervo*, 2018 WL 266734 (N.J. Super. Ct. App. Div. Jan. 3, 2018).

² *Id.* at *2 - *3; see Memorandum from Joseph Pistrutto, a former Legislative Fellow on Under the Influence to the New Jersey Law Rev. Comm’n (Oct. 8, 2018) (on file with the Comm’n).

³ See NEW JERSEY LAW REVISION COMMISSION (2018) ‘Under the Influence’. *Minutes of NJLRC meeting 18 Oct. 2018*, Newark, New Jersey.

⁴ *Siervo*, at *1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at *5.

⁸ *Id.* at *4.

Court stated that the New Jersey Supreme Court has generally understood this phrase to refer to a deterioration of a person's physical or mental condition.⁹

“Under the Influence” and Marijuana

On February 22, 2021, three bills were signed into law that make adult use of marijuana legal in New Jersey.¹⁰ The legalization of marijuana raised questions regarding the impact of legalization on New Jersey's DWI statute, N.J.S. 39:4-50.

Currently, fifteen states and the District of Columbia have fully legalized marijuana.¹¹ These states are: Alaska, Arizona, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Montana, New Jersey, Nevada, Oregon, South Dakota Vermont, and Washington.¹² The states differ, however, with regard to how they define and determine when a person is “under the influence.”¹³ Of the fifteen states that have legalized recreational use of marijuana, only Colorado and Montana define the term “under the influence” of alcohol or drugs.¹⁴ Vermont provides a definition for “under the influence of a drug.”¹⁵

In Colorado, there are three categories of impaired driving: driving under the influence (DUI), driving while ability impaired (DWAI), and DUI per se.¹⁶ A person is considered to be driving under the influence if the driver's ability is substantially impaired or if the driver's blood alcohol content (BAC) is .08% or higher.¹⁷ DWAI refers to circumstances in which the driver's ability is “affected to the slightest degree” by either alcohol, drugs, or both.¹⁸ In this category, a law enforcement officer can base an arrest on observed impairment regardless of the level of

⁹ *Id.*

¹⁰ Governor Murphy Signs Historic Adult-Use Cannabis Reform Bills into Law (2021) <https://www.nj.gov/governor/news/news/562021/20210222a.shtml> (last visited Mar. 25, 2021). A21, 219th Leg., 1st Sess. (codified as P.L.2021, c.16) (Legalized personal use cannabis for certain adults, subject to State regulation; decriminalizes small amount of marijuana and hashish possession and removed marijuana as Schedule I drug.); A1897 219th Leg., 1st Sess. (codified as P.L. 2021, c.19) (Provides for certain criminal and civil justice reforms, particularly addressing legal consequences associated with certain marijuana and hashish offenses as well as raising awareness for available expungement relief); A5342, 219th Leg., 1st Sess., (codified as P.L.2021, c.25) (Concerns certain regulated substances, with particular emphasis on underage possession or consumption of various forms of cannabis, including legal consequences for such activities.)

¹¹ “Fully legalized” means that both medicinal marijuana and recreational use have been decriminalized.

¹² Map of Marijuana Legality by State (2021); <https://disa.com/map-of-marijuana-legality-by-state>. (last visited Mar. 02, 2021); *See also* All the States That Legalized Marijuana (2020); <https://www.addictioncenter.com/news/2020/11/states-legalized-marijuana/> (last visited Mar. 05, 2021).

¹³ There is a national consensus and recognition of impairment for drunk driving to be .08g/ml blood alcohol content, however, there is no national standard for drugged driving. *See* <https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx> (last visited Mar. 16, 2021).

¹⁴ COLO. REV. STAT. ANN. §42-4-1301(West 2021); MONT. CODE ANN. § 61-8-401 (West 2021).

¹⁵ VT. STAT. ANN. TIT. 23, § 1201 (West 2021).

¹⁶ COLO. REV. STAT. ANN. §42-4-1301(West 2021).

¹⁷ *Id.*

¹⁸ *Id.* *See* <https://www.codot.gov/safety/impaired-driving/druggeddriving/faqs> (last visited Mar. 16, 2021).

Tetrahydrocannabinol (THC)¹⁹ in the driver’s system or their BAC.²⁰ Finally, DUI per se means that the driver is deemed to be under the influence if the THC level in the driver’s blood is 5ng/ml or higher or the BAC level is .08% or higher, even if the driver was not impaired.²¹ Unlike per se laws, reasonable inference law allows the charged driver to assert an affirmative defense to demonstrate that they were not impaired, regardless of having tested at or above the set legal limit for alcohol or drugs.²²

Montana defines under the influence to mean that, due to consumption of alcohol, drugs, or both, a person’s ability to operate a vehicle has been diminished.²³ In addition to Montana, Illinois, Nevada, Ohio, Pennsylvania, and Washington have established per se limits for THC.²⁴ Per se laws deem a driver to be impaired if they are shown to have reached or surpassed the legal limit of THC or alcohol.²⁵

Vermont defines “under the influence of a drug” in its DUI statute.²⁶ The statute provides that if “a person’s ability to operate a vehicle safely is diminished or impaired in the slightest degree”, that person may be charged.²⁷ Alcohol- impaired driving is illegal if the BAC level is 0.08 or higher.²⁸

The remaining twelve states that have fully legalized marijuana do not define the term “under the influence”.²⁹ Though these statutes do not explicitly define the term, or expressly indicate the various signs generally associated with impairment, the general consensus is that operating a motor vehicle while physically or mentally impaired by the use of alcohol or drugs, or any combination thereof, will be deemed “under the influence.”³⁰

Testing for Marijuana Impairment

THC, the psychoactive chemical in marijuana, can stay in the body for several days or even

¹⁹ *Id.* THC is a psychoactive component found in in marijuana. *See* <https://www.medicalnewstoday.com/articles/324315.php> (last visited Mar. 16, 2021).

²⁰ *Id.* *See also* <https://www.codot.gov/safety/impaired-driving> (last visited Mar. 16, 2021).

²¹ COLO. REV. STAT. ANN. §42-4-1301 (West 2021). *See* <https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx> (last visited Mar. 16, 2021).

²² *Id.*

²³ MONT. CODE ANN. § 61-8-401 (3)(a) (West 2021).

²⁴ <https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx> (last visited Mar.16, 2021).

²⁵ *Id.*

²⁶ VT. STAT. ANN. TIT. 23, § 1201 (West 2021).

²⁷ *Id.*

²⁸ *Id.*

²⁹ ALASKA STAT. ANN. § 28.35.030 (West 2021); ARIZ. STAT. ANN. § 28-138; CAL. VEH.. CODE § 23152 (West 2021); 625 ILL. COMP. STAT. ANN. 5/11-501; D.C. CODE ANN. § 50-2206.11 (West 2021); ME. REV. STAT. TIT. 29-A, § 2411; MASS. GEN. LAWS ANN. CH. 90, § 24 (West 2021); MICH. COMP. LAWS ANN. § 257.625 (West 2021); NEV. REV. STAT. ANN. § 484C.110 (West 2021); OR. REV. STAT. ANN. § 813.010 (West 2021); S.D. CODIFIED LAWS § 32-23-1; WASH. REV. CODE ANN. § 46.61.502 (West 2021).

³⁰ *Id.*

weeks, long after any impairment has ceased.³¹ The length of time that THC remains in the body varies from person to person depending on multiple factors.³² Some of the factors include: how much body fat a person has; how often they consume the drug; how much they smoke; and the sensitivity of the drug test they were given.³³

Unlike alcohol, marijuana cannot be readily quantified by blood, urine, or breath tests.³⁴ Additionally, due to the limitation of drug-testing technology, testing for drug impairment on the roadside is problematic.³⁵ A portable technology, similar to a Breathalyzer, capable of measuring THC levels in drivers was recently developed by Hound Labs and SannTek.³⁶ The goal is to create a marijuana breathalyzer that will allow law enforcement officer to detect THC levels accurately and objectively in drivers.³⁷

These breathalyzers can apparently distinguish between marijuana consumed two weeks ago and marijuana consumed within three hours of driving, which is deemed the peak impairment window.³⁸ This distinction is critical because it will give law enforcement officers verifiable evidence of recent use, and marijuana users assurance that they will not be held accountable for legally smoking marijuana days or weeks before being stopped.³⁹

These marijuana breathalyzers are not, however, currently available. The device developed by Hound Labs was projected to be available in the Spring of 2021. This unit is expected to cost five thousand dollars, and additional twenty dollars for each testing cartridge.⁴⁰ In contrast, Sann Tek's breathalyzer is still under development and the company has not released information on its

³¹ See How long can you detect marijuana in the body? (2019); <https://www.medicalnewstoday.com/articles/324315.php> (last visited Mar. 16, 2021). See also https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812118-roadside_survey_2014.pdf (last visited Mar. 16, 2021).

³² *Id.*

³³ *Id.*

³⁴ Driving while high: Legal weed could jam courts with DUI cases, ensnare the innocent, N.J. lawyer warns (2019); <https://www.inquirer.com/news/new-jersey/marijuana-weed-driving-high-dui-nj-law-20190201.html> (last visited Mar. 16, 2021).

³⁵ <https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx> (last visited Mar. 16, 2021).

³⁶ Driving while stoned? Marijuana breathalyzers expected to hit the street in 2020 (2019) <https://www.fresnobee.com/news/local/crime/article234714067.html> (last visited Mar. 17, 2021). See also <https://www.sannteklabs.com/> and <https://houndlabs.com/>

³⁷ *Id.*

³⁸ *Id.* See also Testing Drivers for Marijuana Impairment (2019); <https://www.policemag.com/505866/testing-drivers-for-marijuana-impairment> (last visited Mar. 17, 2021).

³⁹ https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812118-roadside_survey_2014.pdf (last visited Mar. 16, 2021). See also New York Has the Opportunity to Get Marijuana Legalization Right (2021); <https://empirereportnewyork.com/new-york-has-the-opportunity-to-get-marijuana-legalization-right/> (last visited Mar. 17, 2021).

⁴⁰ Avetta and Hound Labs Partner to Bring the World's First On-Site Test for Recent Marijuana Use to Supply Chain Industry (2021); <https://www.businesswire.com/news/home/20210113005309/en/Avetta-and-Hound-Labs-Partner-to-Bring-the-World%E2%80%99s-First-On-Site-Test-for-Recent-Marijuana-Use-to-the-Supply-Chain-Industry> (last visited Mar. 25/2021). See also New Breathalyzer Could Help Identify Pot-Related DUIs (2019); <https://www.govtech.com/public-safety/New-Breathalyzer-Could-Help-Identify-Pot-Related-DUIs.html> (last visited Mar. 27, 2021).

current status.⁴¹

Until marijuana breathalyzers are scientifically verified and widely accepted by law enforcement agencies, Standardized Field Sobriety Tests (SFST) will continue to be utilized to identify impairment in drivers suspected of being under the influence of drugs.⁴² SFSTs may be administered by police officers trained as Drug Recognition Experts (DRE).⁴³ These officers are trained to recognize impairment and are well-versed in a variety of different drugs and their effects on the human body.⁴⁴

To this time, New Jersey has the second-largest number of DREs in the country.⁴⁵ Questions have been raised regarding the accuracy of DRE's abilities when it comes to recognizing a driver who is under the influence of drugs.⁴⁶ Criminal defense lawyers argue that the DRE methodology lacks objectivity and gives too much discretion to police officers.⁴⁷

In *State v. Olenowski*,⁴⁸ the defendant appealed two separate DWI convictions that occurred in 2015.⁴⁹ He contended that he had been convicted both times of driving under the influence based on a DRE's testimony, despite having BAC below the legal limit.⁵⁰ He argued that DRE methodology was flawed and not generally acceptable in the scientific community as required by *Frye v. United States*, and that the testimony provided by the DREs should not be admissible as *de facto* evidence of driving under the influence.⁵¹ The New Jersey Supreme Court heard the oral arguments in the case on October 8th, 2019 and has yet to render a decision.⁵²

⁴¹ Marijuana Breathalyzer Coming 2020. (2019); <https://thelumberjack.org/2019/09/17/marijuana-breathalyzer-coming-2020/> (last visited Mar. 25, 2021).

⁴² The Holy Grail for Law Enforcement: Accurate Roadside Testing for Driving While Stoned (2019); <https://www.cannabissciencetech.com/view/holy-grail-law-enforcement-accurate-roadside-testing-driving-while-stoned> (last visited Mar. 25, 2021).

⁴³ Testing Drivers for Marijuana Impairment (2019); <https://www.policemag.com/505866/testing-drivers-for-marijuana-impairment> (last visited Mar. 17, 2021).

⁴⁴<https://www.theiacp.org/drug-recognition-experts-dres> (last visited Mar. 17, 2021).

⁴⁵<https://whyy.org/articles/n-j-wants-more-cops-trained-to-spot-stoned-drivers-critics-question-science-behind-methods/> (last visited Mar. 22, 2021).

⁴⁶ *Id.*

⁴⁷ Stoned-Driving Enforcement Seen as New Civil Liability Concern for Police (2020) <https://www.law.com/njlawjournal/2020/05/15/stoned-driving-enforcement-seen-as-new-civil-liability-concern-for-police/> (last visited Mar. 22, 2021).

⁴⁸ *State v. Olenowski*, A-4666-16T1, 2018 WL 6174766 (N.J. Super. Ct. App. Div. Nov. 27, 2018). (The trial court upheld the convictions holding that DRE evidence is generally accepted and relied upon in the scientific community. The Appellate Division affirmed the decision of the trial court). The New Jersey Supreme Court heard the oral arguments in the case on Oct. 8, 2019).

⁴⁹ *Id.* at *1

⁵⁰ *Id.*

⁵¹ *Id.* Citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Similar concerns were raised by the New Jersey State Bar Association, in its amicus brief to the New Jersey Supreme Court. NJSBA have asked the court to find DRE protocols as not generally accepted in the scientific community).

⁵² A month after hearing the oral arguments, the New Jersey Supreme Court remanded the matter to a Special Master to review whether or not the evaluation submitted by the DRE's are generally accepted within the scientific community under *Frye* standard.

Pending Legislation

In the 2020-2021 legislative session, there are eight pending bills that seek to amend N.J.S. 39:4-50.⁵³ Of those eight bills, one, Assembly Bill 763, seeks to clarify the term “under the influence”; prohibiting driving under the influence of any substance or combination of substances that may impair a person’s ability to operate a motor vehicle.⁵⁴

Conclusion

The legalization of marijuana is very new in New Jersey. New developments and technologies are still emerging, the New Jersey Supreme Court has a case pending on the issue of DREs, and the Legislature continues to actively work on many aspects of this area of the law.

Staff seeks guidance from the Commission regarding whether to continue working in this area, or to conclude its work in light of ongoing legislative activity.

⁵³ A2124 and S2170, 219th Leg., 1st Sess. (N.J. 2020) (Establishes Office of Alcohol and Drug Use Disorders Policy to oversee, direct, and coordinate resources, funding and data tracking concerning treatment of substance use disorders); A763, 219th Leg., 1st Sess. (N.J. 2020) (Amends and extends penalties for driving under the influence to include any substance or combinations of substances that impairs driving ability; deems driver’s consent to non-invasive drug tests by a DRE agent; defines a certified drug recognition expert); A437, 219th Leg., 1st Sess. (N.J. 2020) (Requires installation of ignition interlock device if sentence for DWI is stayed pending appeal); S2381, 219th Leg., 1st Sess. (N.J. 2020) (The bill to be known as “Michelle Sous’ Law” will require blood sample to be obtained from driver involved in motor vehicle accident resulting in death to determine if the driver has drugs in his or her system.); A2751, 219th Leg., 1st Sess. (N.J. 2020) (Requires breath or blood test in motor vehicle accidents involving pedestrians); S2079, 219th Leg., 1st Sess. (N.J. 2020) (The bill consolidates and updates State’s substance use disorder treatment laws and establishes an independent Office of Coordinated Substance Use Control Policy and Planning); A3896, 219th Leg., 1st Sess. (N.J. 2020) (Amends the definition of “narcotic, hallucinogenic or habit-producing drug” by eliminating the reference to “pentachlorophenol”).

⁵⁴ Currently the statute prohibits driving under the influence of narcotics, hallucinogens, and habit producing drugs.