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## Driving Stoned: Pending Marijuana Legalization Prompts Questions About Testing Protocol, Expert Witnesses

Louis DeAngelis, a criminal defense lawyer in Hackensack, thinks increased availability of marijuana will translate to more people being charged with impaired driving.

By Charles Toutant | September 24, 2021



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Retail sales of recreational marijuana are expected to start in New Jersey as early 2022, and defense lawyers expect to see more arrests for driving under the influence of that drug.

And with the state Supreme Court about to consider a challenge to the Drug Recognition Expert protocol for testing drug impairment in drivers, defense lawyers hope officials throw out that controversial technique.

A special master, former Appellate Division Judge Joseph Lisa, began conducting a hearing Monday in *State v. Olenowski*, which concerns a challenge to the admissibility of DRE evaluations at trial.

Lisa is expected to conduct hearings over several weeks to determine whether the DRE protocol meets the standard for scientific reliability expressed in *Frye v. United States*, a 1923 U.S. Supreme Court ruling. Lisa will present his findings to the Supreme Court, which will have the final say on whether DRE test results should be admissible in impaired driving trials.

DRE is a 12-step procedure in which a specially trained police officer performs an examination of an individual and renders a judgment as to whether that person is under the influence of drugs. The protocol includes a pulse reading, eye examinations, psychological tests, examination for muscle tone and a search for injection marks on the body.

Laws setting the blood alcohol content at 0.08 help police combat drunken driving, but a universal standard for driving while impaired by drugs has been elusive. Some states, including Colorado and Washington, have adopted a standard of five nanograms of tetrahydrocannabinol, or THC, per milliliter of blood as a standard for impaired driving, but that standard has been widely criticized as a one-size-fits-all solution. Some say THC rates varies widely in users and the five-nanogram index is not a valid measurement of impairment.

Instead of adopting the five-nanogram standard, New Jersey has opted to rely on specially trained police officers to spot cannabis-impaired drivers.

Meanwhile, lawyers think the increased availability of cannabis will lead to more impaired driving arrests. In part, that's because cannabis is not available for retail sales in New York, Pennsylvania or Delaware, so residents of those states will drive to New Jersey to obtain some, lawyers said.

"I think there'll be a small rise," said Evan Levow, a lawyer in Cherry Hill who represents people charged with drunken driving and drug-impaired driving. "Drugged driving is becoming more of a thing than it was, more prevalent than it used to be. I think people will be just as responsible or irresponsible with marijuana as with alcohol or other drugs."

Toms River defense lawyer Stephen McGuckin said he has a family and he worries about his children's safety on the road once marijuana becomes available for retail sale. He anticipates more stoned-driving arrests as well as cases involving issues like underage use of cannabis.

"I do believe we are going to see an uptick in driving under the influence of marijuana," McGuckin said.

Louis DeAngelis, a criminal defense lawyer in Hackensack, thinks increased availability of marijuana will translate to more people being charged with impaired driving.

"I'm sure you're going to see a higher incidence of people driving under the influence. In my thoughts, the more readily available it is to the public, the higher the incidence of people being charged," DeAngelis said.

DeAngelis said he is “not a fan” of the DRE protocol. “Way too often, the end conclusion is unreliable because of the way the test is administered and the methods employed by the examiner. And too much contradictory evidence is often present,” he said.

If the DRE protocol is upheld, defense lawyers will rely on testimony from DRE experts, who will pick apart the way the test was administered, DeAngelis said.

Many defense lawyers are hopeful that the Supreme Court will strike down the DRE protocol entirely, but it’s unclear what that would mean. DeAngelis thinks the court could order the attorney general to come up with steps to address its shortcomings.

But in the meantime, defendants can be prosecuted based on an arresting officer’s testimony about what they observe, DeAngelis says. That’s based on a 2006 Supreme Court ruling, *State v. Bealor*, which upheld a motorist’s conviction for driving while impaired where an officer testified that the defendant engaged in erratic driving, had slurred speech and bloodshot eyes and smelled of burnt marijuana.

McGuckin agrees with other critics of the DRE protocol, which he calls “subjective” and “a pretty arbitrary method for determining if people are under the influence. I would prefer a more scientific method but I don’t know if that’s possible,” he said.

Levow said that if the DRE protocol is struck down by the Supreme Court and driving while impaired prosecutions revert to visual observations by officers, “I think that’s a good thing—either you’re impaired or you’re not. It’s like the original definition of pornography by [Supreme Court] Justice [Potter] Stewart—I know it when I see it, and that’s fair for everybody.”

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