

With medical marijuana imminent in Ohio, some attorneys say driving limit for drug is too low

By Patrick Cooley

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Now that medical marijuana will soon be available in Ohio, defense attorneys are raising the alarm about the state's legal driving limit for the drug, which they contend is too low and will result in patients being charged with driving under the influence even after the intoxicating effects of the drug have worn off.

The state approved the first medical marijuana dispensary this month.

Under state law, anyone with at least 35 nanograms of marijuana metabolites per milliliter in their urine or 50 nanograms per milliliter in their blood is barred from driving. However, doctors say metabolites remain in a user's system at those levels for days, whereas the effects of the drug usually wear off after a few hours.

Little research has been conducted on how a body breaks down marijuana, making it hard to say how long metabolites linger, said Krissy Reinstatler, a clinical pharmacist for the University of Cincinnati Medical Center. But metabolites are known to remain for several days, she said.

"If you're a chronic user, it stays in your (blood and urine) for a long time," said Alfred Staubus, a professor at Ohio State University's College of Pharmacy.

That means medical marijuana patients could always be above the limit, Columbus criminal defense attorney Blaise Katter said.

"Every single medical marijuana patient (who drives) is going to be a criminal," Katter said.

A police officer could have probable cause to ask for a blood or urine test if the driver they've pulled over admits to using medicinal pot, Katter said. Police also seek blood and urine tests when drivers are involved in crashes that result in injury or death, potentially resulting in serious charges for medical marijuana patients, whether or not they are intoxicated, he added.

Carol O'Brien, Delaware County prosecutor and president of the Ohio Prosecuting Attorney's Association, pointed out that Ohioans using certain prescription medications are already banned from driving.

“You have to get a warrant to get a blood draw,” she added. “(A police officer) has to have probable cause, so they better be able to articulate the reason for the arrest or it’s going to get denied by the judge.”

The issue has come up in court cases.

Police said former Ohio State quarterback Troy Smith failed sobriety tests after a stop at a DUI checkpoint on Riverside Drive on Oct. 20 and police acquired a warrant for a urine test. But his attorney, Brad Koffel, said video of the arrest showed that Smith was clearly not impaired. A urine test found marijuana metabolites, but Koffel argued they weren’t high enough to show that Smith was intoxicated.

Smith eventually pleaded guilty to a lesser charge of having physical control of a vehicle while intoxicated.

Ohio standards seemed more reasonable when marijuana was completely prohibited, attorneys say.

“In a world where marijuana is illegal for all purposes, any presence of the drug at any level is itself a crime,” said Douglas Berman, a criminal law professor for the Moritz College of Law at the Ohio State University. “So most states have set driving levels low.”

That was the idea when the Ohio General Assembly set the legal driving limit for marijuana in 2005.

In an October 2004 letter to legislators, a drugged driving committee composed of doctors and law enforcement officials acknowledged that marijuana metabolites can stay in a user’s system for days, and that no clear level of impairment exists for marijuana. But the committee felt that a zero-tolerance approach sent a clear message that driving under the influence of drugs is unacceptable.

Then-Ohio Senate majority whip Steve Austria argued in a February 2005 letter to the General Assembly that the lack of a legal limit made it more difficult to prosecute drivers who used marijuana and then got behind the wheel.

Studies have generally found that drivers are more likely to cause a crash after recent marijuana use.

Experts don’t see an ideal alternative to Ohio’s current system.

“There is no perfect answer because marijuana functions so much differently than alcohol,” Berman said.

The vast majority of drivers are too impaired to drive once they reach Ohio’s legal driving limit for alcohol, he said, but marijuana impacts all users differently, making a uniform limit hard to determine.

Katter suggested measuring THC instead of metabolites. THC is the active ingredient in marijuana and is detectable only for a few hours.

It's still an imperfect measure, Katter said, but it's better than the state's current system.

Defense attorneys interviewed for this article said they want Ohio legislators to address the state's limits, although it's unclear if they will.

Rep. Nathan Manning, R-North Ridgeville, said there might be an appetite to revisit the state's impaired driving laws in 2019, but cautioned that the issue is complicated.

"We need to make sure it's fair," said Manning, who has worked as both a prosecutor and a defense attorney. "We don't want to punish people who are innocent, but we can't be dismissive of the fact that you can't be impaired (while driving)."

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