
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11967

COMMONWEALTH

v.

THOMAS GERHARDT

BRIEF OF THE NATIONAL COLLEGE FOR DUI DEFENSE AS AMICI
CURIAE IN SUPPORT OF DEFENDANT-THOMAS GERHARDT



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II. STATEMENT OF THE ISSUES

Pursuant to the Honorable Andrew D'Angelo's request for amicus briefs made on January 16, 2015.

1. Whether police officers may testify to the administration and results of standard field sobriety tests in prosecutions for operating under the influence of marijuana, as they do in prosecutions for operating under the influence of alcohol.

2. Whether the effects of marijuana impairment are within the common knowledge and experience of laypersons, such that a non-expert witness may testify to his or her opinion that a person is "high" on marijuana.

III. INTEREST OF THE AMICUS CURIAE

Amicus curiae the National College for DUI Defense, Inc. (NCDD) is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its extensive educational programs, its website, and its email list, NCDD trains lawyers to more effectively represent persons accused of drunk driving.

Counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation of this brief.

IV. ARGUMENT

The effects of marijuana have not been properly studied or applied to the operation of a vehicle. The field sobriety tests were designed and tested to help police officers detect clues of alcohol impairment. These tests were not designed to detect impairment by marijuana or any other type of drug. In the more recent years courts and law enforcement across the United States and in other countries have begun to understand that the effects of drug impairment are nuanced and require different tests and expert testimony to assess and understand drug intoxication. A lay juror requires testimony from an expert to understand the results of the field sobriety tests in a marijuana driving prosecution because the effects of the drug are not common knowledge.

1. POLICE OFFICERS CANNOT COMPETENTLY TESTIFY TO THE ADMINISTRATION AND RESULTS OF STANDARD FIELD SOBRIETY TESTS IN PROSECUTIONS FOR OPERATING UNDER THE INFLUENCE OF MARIJUANA, AS THE TESTS ARE NOT ADEQUATELY RESPONSIVE TO THE DETECTION OF MARIJUANA IMPAIRMENT.

Police officers cannot competently testify to how the results or administration of the standard field

sobriety tests relate to marijuana impairment. The standard field sobriety tests were created with the sole purpose of assessing alcohol intoxication. The field sobriety behavioral test battery is related to alcohol concentration level. A.5-8.¹ The tests in their inception were not designed to detect impairment from any other substance. Marijuana impairment and alcohol impairment present with different symptoms. In fact, studies have shown that marijuana influenced variations in driving behavior are often the opposite of those effects exhibited by subjects under the influence of alcohol. A. 16.

Tests used to detect a certain range of symptoms exhibited by someone under the influence of alcohol are not reliable or effective in detecting the very different symptoms exhibited by someone who has consumed marijuana.

For these reasons the field sobriety tests should not be used to assess marijuana impairment and police officers should not be permitted to testify to the administration of or the results of the FSTs in the prosecution of operating under the influence of

¹Appendix citation format: Appendix to this brief, A.

A) THE STANDARD FIELD SOBRIETY TESTS WERE DESIGNED AND TESTED TO DETECT ALCOHOL IMPAIRMENT.

Early in the twentieth century states began to understand and address the risks associated with drivers who were alcohol impaired. A. 20. In response to the danger observed by drivers who had consumed alcohol laws prohibiting driving under the influence or while impaired were created. A. 21. To enforce these laws and to assist law enforcement in determining whether a driver was in fact under the influence of alcohol roadside tests were developed.

In the mid 1970s, under contract from the Department of Transportation, the National Highway Traffic Safety Administration (NHTSA) set out to determine which tests best able to detect drivers who are under the influence of alcohol. A. 61. The tests deemed most responsive to alcohol intoxication detection included the walk-and-turn, the one-leg stand, and the horizontal gaze nystagmus. A. 61. The goal of the tests was to correlate a blood alcohol content of .10% with specified results on the three tests. A. 62.

The tests were based on the presumption that at a certain blood alcohol level people begin to exhibit

certain universal symptoms. The tests examine symptoms of alcohol intoxication including impairment in the divided attention skills necessary for safe driving, as well as evidence of central nervous system depression. A. 65-69.

Marijuana is not a central nervous system depressant. In fact the National Highway Traffic Safety Administration has acknowledged that marijuana's spectrum of behavioral effects is unique, preventing classification of the drug as a stimulant, sedative, tranquilizer, or hallucinogen. A. 73. The pharmacological effects of marijuana vary with dose, route of administration, experience of user, vulnerability to psychoactive effects, and setting of use. A. 75. At recreational doses, effects include relaxation, euphoria, relaxed inhibitions, sense of well-being, disorientation, altered time and space perception, lack of concentration, impaired learning and memory, alterations in thought formation and expression, drowsiness, sedation, mood changes such as panic reactions. A. 75, 76. When compared alcohol and marijuana have very different effects and are not in the same class of drugs.

B) THE STANDARD FIELD SOBRIETY TESTS DO NOT ACCURATELY ASSESS MARIJUANA INTOXICATION.

The standardized field sobriety tests designed for the detection of alcohol impairment cannot be said to be reliable or accurate in assessing marijuana intoxication. In fact, a United States Department of Transportation report titled "Marijuana and Actual Driving Performance" found that the effects of marijuana differ qualitatively from many other drugs, especially alcohol. A. 88. When testing the effectiveness of the field sobriety tests in detecting marijuana intoxication researchers they found that:

THC(the active ingredient in marijuana)is not a profoundly impairing drug...An important practical objective of this study was to determine whether degrees of driving impairment can be actually predicted from either measured concentration of THC in plasma or performance measured in potential roadside sobriety tests of tracking ability or hand and posture stability. The results, like many reported before, indicated that none of these measures accurately predicts changes in actual performance under the influence of THC. A. 86.

Alcohol significantly impairs critical thinking, divided attention and stop signal performance.

However, in a 2012 study, reported in the Journal of Analytical Toxicology, researchers found that heavy marijuana users reported physiological changes but no

identifiable changes in critical tracking or divided attention tasks. A. 99-106.

The effects of marijuana have not been adequately explored or tested in connection to operating a motor vehicle.

Furthermore, the SFSTs were never designed to record or adjudge impairment for the purposes of driving, but rather they were created as an attempt to measure specific BAC levels. Dr. Marcelline Burns, who was integral in the development of the FSTs and has testified extensively on their validity, has acknowledged that the tests are only useful in predicting blood alcohol concentrations of below and above .08 and .04. A. 110., A. 143.

In 2012, a study by forensic toxicologists and neuroscientists was performed to test the ability of the field sobriety tests to detect marijuana intoxication. A. 150. The results published in the Journal Psychopharmacology, showed that only 30 percent of people under the influence of THC tested failed the field sobriety tests. A. 155. The researchers concluded that the field sobriety tests' ability to identify a driver under the influence of marijuana depended heavily on whether the driver was a

frequent user of marijuana and was more accustomed to the effects. A. 155,156.

This is not to say that no roadside test could predict marijuana impairment. Recently there has been a growing interest in developing modified field sobriety tests that can detect the symptoms of marijuana consumption. A. 158. In Australia, efforts have been made to adapt elements of the roadside FSTs to make them more sensitive to drivers who may be under the influence of marijuana. A. 159-164. Scientific evaluations of these tests have shown that subjects' performance on the modified FSTs may in fact be positively associated with dose related levels of marijuana impairment. A. 163.

Modified tests are being developed as researches are becoming more aware that the FSTs do not accurately predict marijuana impairment. In light of the modern scientific research showing that these tests are not reliable in detecting marijuana impairment, police officers should not be allowed to testify to the results or administration of these tests in the prosecution of marijuana impaired drivers as they would in alcohol impaired prosecution.

2. OFFICERS WHO DO NOT HAVE DRUG RECOGNITION TRAINING CANNOT ACCURATELY TESTIFY TO THE EFFECTS OF MARIJUANA IMPAIRMENT BECAUSE THE EFFECTS OF MARIJUANA IMPAIRMENT ARE NOT COMMON KNOWLEDGE.

The courts have long held that the effects of alcohol impairment are within the common knowledge of the lay witness. As early as 1939, the court held that "under the influence of liquor" is recognized in common speech, in ordinary experience, and in judicial decisions. Cutter v. Cooper, 234 Mass. 307, 317, 318 (1920). Commonwealth v. Lyseth, 250 Mass. 555 (1925). The prevalence of alcohol use has led to a common understanding that the lay observer can recognize the signs of alcohol impairment. The same cannot be said for marijuana intoxication. The evidence suggests that the effects of smoking marijuana are unpredictable. There are no means of determining how much someone has smoked or even how much causes intoxication. Commonwealth v. Leis, 355 Mass. 189. (1969).

A) THE EFFECTS OF MARIJUANA ARE NOT COMMON KNOWLEDGE.

The effects of drugs are not as well understood. In a 2007 report from the National Highway Traffic Safety Administration, panel members acknowledged that the effects of drugs vary greatly from alcohol and

officers are not properly trained to detect the effects of drugs. Given the wealth of evidence on the subject, officers have become well versed in documenting evidence of alcohol use such as bloodshot eyes, odor of alcohol on the breath, slurred speech, difficulties in extracting the driver's license, and problems with balance. A. 169. However, signs of drug effects in drivers such as fast or confused speech, excessive sweating, abnormal pupil size, muscle tics or tremors, or drug odors, all of which can be important clues to drug impairment, may be overlooked by officers without appropriate training. A. 169.

The report recognized that the effects of alcohol intoxication are well known and that officers are well trained to detect them. However, the report recognized that the same cannot be said for drug intoxication.

A. 174. The amount of research carried out is significantly more limited, and in the case of recreational drug use, researchers cannot ethically administer the doses of drugs typically taken by regular users. Other confounding factors include the common practice of combined drug or drug and alcohol use, where the interactions are not well known or understood. Additionally many drugs, particularly

stimulants and narcotics, have markedly different effects in the acute phase from the later or withdrawal phases, even though the concentrations may be similar. A. 174.

The report recommended that drug recognition experts (DREs) be adopted by all law enforcement agencies. The drug recognition program was created in Los Angeles in the 1970s as officers noticed many of the individuals they arrested for DUI-alcohol registered very low or zero alcohol concentration readings. The officers suspected drugs impaired the individuals, but they lacked the necessary skills and training to support their suspicions. A. 190.

The DRE training program encompasses over one hundred hours of intensive classroom instruction and formal training. A. 190-193. This intensive program was deemed necessary by NHTSA for officers to competently testify to drug impairment. This is because the effects of drugs including marijuana are not common knowledge. The average police officer does not understand the effects of marijuana and how they may affect the field sobriety tests.

B) EXPERT TESTIMONY ON THE EFFECTS OF MARIJUANA IS NECESSARY BECAUSE MARIJUANA IMPAIRMENT IS NOT WITHIN THE COMMON EXPERIENCE OR KNOWLEDGE OF THE LAY JUROR.

This court has held that an opinion regarding a defendant's sobriety is a lay opinion, not an expert opinion. Commonwealth v. Canty, 466 Mass. 535, 541 (2013). Police officers may testify to a defendant's apparent intoxication without laying any foundation for expertise because, unlike opinions based on scientific methods, the foundation for testimony regarding sobriety falls within the common experience and knowledge of jurors. Commonwealth v. Sands, 424 Mass. 184, 187 (1997). The prevalence of alcohol use has led to a common understanding that the lay observer can recognize the signs of alcohol intoxication. The same cannot be said for marijuana intoxication. For this reason expert testimony should be required. An officer should not be allowed to offer opinion testimony that a person is "high" on marijuana.

The effects of marijuana and their impact on roadside tests are not well understood by the lay juror. This court has held that where a witness's opinion is based upon scientific, technical, or other

specialized knowledge expert testimony is required and the testimony must overcome a threshold inquiry to the reliability of the knowledge. Mass. G. Evid. § 702 (2015).

In the 2007 report by the National Highway Traffic Safety Administration previously noted in this brief, a panel of experts acknowledged that the average law enforcement officer is not adequately trained in the detection of drug impairment. A. 168-9. Likewise courts have begun to limit officers' ability to testify on drug impairment without specific drug training.

In a 2007 Illinois case, People v. Workman 726 N.E.2d 759, 760 (2000), the court held that an officer must be qualified by the court as an expert prior to testifying about whether or not someone is under the influence of drugs. In Workman, the officer testified that he observed the defendant stop in the median, sway and stumble as he walked and that he was unable to complete the field sobriety tests. Id. at 760. The officer placed the defendant under arrest for operating under the influence of alcohol and a breath test at the station resulted in a .01. While searching the defendant's possession the officer retrieved eight

Lorazepam pills (anxiety medication). Id. at 761. The officer testified that at that point he suspected that the defendant was under the influence of drugs. Id. The officer did not present the court with any evidence that he had the relevant training and experience to determine that someone was under the influence of drugs. Id. at 762

The court contrasted the ability of officers to testify about alcohol intoxication with their inability to testify to drug intoxication and reasoned that it is well established that even a layperson is competent to testify regarding intoxication from alcohol, because such observations are within the competence of all adults of normal experience. Id. However, the opinion of an officer regarding whether a person is under the influence of drugs may only be considered if the officer is qualified by the court as an expert. Id.

In a case specific to marijuana, the Supreme Court of Montana held that the officers' opinions that the defendant was impaired due to marijuana consumption were expert opinions that required adequate foundation. State v. Larson, 243 P.3d 1130 (2010). In Larson, the officers testified that they

observed the defendant operating in an erratic manner, that his speech was slow and slurred and that he had a delayed reaction time. Id. at 1139. A portable breath test on scene registered a result under the legal limit. Id. At trial the officers testified that they believed that the defendant was impaired by marijuana. Id. at 1140. The court concluded that the testimony was inadmissible opinion testimony. Id. The court reasoned that there may come a time where the average lay person will be able to opine as to the effects of marijuana impairment on motor vehicle operation but for now it requires expert testimony with proper foundation. Id. at 1141.

A Vermont case had similar findings. In State v. Rifkin, the defendant was charged with operating under the influence of marijuana. 438 A.2d 1122(1981). In rendering its decision the court discussed the fact that drugs, other than alcohol, can produce a confusing array of symptoms, which cannot be sorted out without specialized training. Id. at 1124. The court held that the layman is unable to rationally relate observed symptoms to the influence of a particular drug and its effects on driving. Therefore, only a qualified expert may testify to whether a

defendant is under the influence of drugs and to whether the drug rendered him incapable of driving safely. Id.

Any testimony given by officers without expert training is likely to confuse or mislead jurors. For these reasons, the court should require expert testimony on this issue of whether a person is under the influence of marijuana.

CONCLUSION

The prevention of drugged driving is of the utmost importance. Given the number of operating under the influence cases it is highly desirable to have available a simple, inexpensive, and reliable test that can be administered by police officers on the road. However, expedient as it may be for courts to take judicial notice of scientific or technical matters to resolve the crush of driving under the influence cases, this cannot be done in the face of legitimate challenges to the reliability and accuracy of the tests. United States v. Horn, 85 F. Supp. 2d 530, 549 (D. Md. 2002).² The FSTs have been well tested

² The Horn case addressed unreliability of the Horizontal Gaze Nystagmus Test to detect alcohol impairment. The test was deemed inadmissible in many states including Massachusetts because the scientific data could not show

and validated to detect alcohol impairment. However, their application to marijuana impairment is strenuous at best. This is largely due to the fact that the effects of marijuana are not well understood by law enforcement officers. Researches are currently experimenting with modified FSTs to detect marijuana impairment. Until those tests are implemented, expert testimony should be required prior to the admission of field sobriety tests into evidence at trial for charges of operating under the influence of marijuana.

AMICUS CURIAE
NATIONAL COLLEGE DUI DEFENSE

Respectfully submitted,

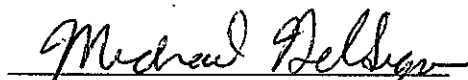
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that the nystagmus was directly related to alcohol intoxication.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to, Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (reference to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of the brief); Mass. R. App. P. 18 (appendix to the brief); and Mass. R. App. P. (forms of briefs appendices and other papers).



MICHAEL A. DELSIGNORE

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2016 I forwarded two copies of the foregoing brief to be delivered via first-class U.S. mail, postage prepaid, to counsel for the Commonwealth Assistant District Attorney Jane Sullivan and Assistant District Attorney Michelle King, Office of the District Attorney, 225

Main Street, Room G-301, Worcester, MA 01608 and to
counsel for the defendant, Maura Jennie Tansley,
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01608.

A handwritten signature in cursive script, reading "Michael A. DelSignore". The signature is written in black ink and is positioned above a horizontal line.

MICHAEL A. DELSIGNORE