The Medical Cannabis Act and Illinois DUI Law

By Larry A. Davis

On August 1, 2013, Governor Quinn signed the Compassionate Use of Medical Cannabis Pilot Program Act ("Medical Cannabis Act" or "Act") into law.[1] With its passage, Illinois becomes the twentieth state to decriminalize the medical use of cannabis, as well as its cultivation and distribution. Additionally, Washington state and Colorado have also legalized the recreational use of cannabis.

The Act legalizes medical cannabis for a "registered user" who may purchase the drug from a "dispensing organization" to treat symptoms associated with a user's "debilitating medical condition." Qualifying medical conditions are defined by statute and may be supplemented by Department of Public Health rule.[2] The Act also permits a "designated caregiver" to administer the drug.[3] Individuals and businesses licensed and registered under its provisions are granted civil and criminal immunity.[4] The pilot program is subject to repeal four years from its effective date of January 1, 2014.[5]

1. Pub. Act 98-0122 (eff. Jan. 1, 2014).
2. *Id.* § 10(h)(1)(2).
3. *Id.* § 10(i).
4. *Id.* § 25.
5. *Id.* § 220. Note that although the Act is effective January 1, 2014, pursuant to section 165(a), state agencies have 120 days to promulgate rules implementing it. Therefore, registered users under the Act will likely not be issued cards before May 1, 2014 and the new DUI provisions of the Act will not, as a practical matter, take effect prior to that date.

Larry A. Davis is a principal of The Davis Law Group, P.C. in Northfield where he concentrates his practice in DUI, criminal defense, and administrative hearings before the Secretary of State. He is a member and former chair of the ISBA Traffic Laws and Courts Section Council.

For the first time, people can legally drive in Illinois with cannabis in their systems, as long as they aren't impaired. But the Medical Cannabis Act makes important changes – and introduces inconsistencies – into DUI law that are likely to inspire litigation. Here's an overview.

While there was extensive debate over the socio-economic ramifications of legalizing medical cannabis in this state, there was relatively little discussion of the legislation's far-reaching impact on Illinois DUI law. Nevertheless, the anticipated increase in cannabis use raises public safety concerns, particularly in the law enforcement community.[6]

It has long been Illinois policy that any amount of cannabis in the blood or urine of a driver can be the basis for a DUI charge.[7] Challenges to the law have been rejected, most prominently by the Illinois Supreme Court in *People v. Fate*:

> The statute in question creates an absolute bar against driving a motor vehicle following the illegal ingestion of any cannabis or controlled substance. This is without regard to physical impairment. Given the vast number of contraband drugs, the difficulties in measuring the concentration of these drugs with precision from blood and urine samples and, finally, the variation in impairment from drug to drug and from person to person, we believe that the statute constitutes a reasonable exercise of the police power of the State in the interest of safe streets and highways.[8]

In the years since the *Fate* decision, some states have responded to studies indicating that a presumptive level of impairment can be determined for cannabis users, similar to the familiar .08 blood concentration for alcohol. In November 2012 the state of Washington, after much debate, adopted a per se limit of five nanograms per milliliter of blood (5 ng/ml) for THC, the psychoactive ingredient in cannabis.[9] Other states have adopted a 5 ng/ml limit while still others, such as Nevada and Ohio, have a 2 ng/ml limit.[10] But Illinois, like the majority of states, continues to maintain a zero tolerance stance.[11]

With the passage of the Medical Cannabis Act, however, Illinois will for the first time allow certain drivers to legally operate or be in physical control of a motor vehicle with cannabis in their systems, provided that they are not impaired. In this article we will look at the statutory changes in DUI law mandated by the new Act, the practical effect of these changes, and the issues and questions they raise.

Changes to DUI law

Before the Act, it was illegal for a person to drive or to be in physical control of a motor vehicle while under the influence of cannabis or while there was any amount of cannabis (or other controlled substances, intoxicating compounds, or methamphetamine) in his or her "blood, breath or urine resulting from (its) unlawful use or consumption."[12] That part of the law prohibiting "any amount of cannabis" is referred to here as the "trace law."

Under the Act, field sobriety tests are for the first time statutorily recognized as a valid form of testing, but only for a cannabis-DUI.

Under the Act, the trace law does not apply to a registered user in possession of a valid registry card unless the person is impaired by the use of cannabis.[13] The Act further provides that being legally entitled to use cannabis under the Act is not a defense to a DUI charge.[14]

Standardized field sobriety tests statutorily recognized for the first time. Standardized field sobriety tests ("SFSTs" or "field sobriety tests"), also known as physical performance tests, have long been used by law enforcement to establish probable cause for an alcohol-DUI arrest and ultimately to prove impairment, particularly for a driver who refuses chemical testing.[15] These tests were largely developed under the auspices of the National Highway Traffic Safety Administration (NHTSA) to determine alcohol impairment.[16] Their efficacy in demonstrating drug impairment has long been debated. Even in alcohol-DUI cases, Illinois statutes have never specifically recognized SFSTs, despite their widespread acceptance in case law.

Under the Act, SFSTs are for the first time statutorily recognized as a valid form of testing, but only in cases involving a cannabis-DUI:

> The General Assembly finds that (SFSTs) approved by (NHTSA) are divided attention tasks that are intended to determine if a person is under the influence of cannabis. The purpose of these tests is to determine the effect of the use of cannabis on a person's capacity to think and act with ordinary care and therefore operate a motor vehicle safely.[17]

This is curious, considering that their efficacy in determining drug impairment is far from clear.[18] While the Act does not bar such tests in alcohol-DUI cases, it continues the statutory policy of not

6. See Press Release, Illinois Sheriff's Association (May 8, 2013); Letter from Illinois Sheriff's Association and the International Association of Chiefs of Police to members of the Illinois Senate (May 10, 2013).
7. 625 ILCS 5/11-501(a)(6).
8. *People v. Fate*, 159 Ill. 2d 267, 271 (1994).
9. See RCW 46.20.502(b) (eff. Dec. 6, 2012) (prohibiting driving with a blood THC concentration of 5/ng/ml within 2 hours after driving).
10. See NRS § 484C.110(3); ORC § 45.11.19.
11. See, *e.g.*, ARS 28-1381 (Arizona); DCA-21, § 4177 (Delaware); IC 9-30-5-1 (Indiana); NCGS § 20-138.3 (North Carolina).
12. 625 ILCS 5/11-501(a)(4) and (a)(6).
13. *Id.* § 5/11-501(a)(6).
14. *Id.* § 5/11-501(b).
15. SFSTs include the walk and turn, one-leg stand, and horizontal gaze nystagmus tests. See Nat'l Highway Traffic Safety Admin., Standardized Field Sobriety Testing, http://www.nhtsa.gov/people/injury/alcohol/sfst/appendix_a.htm (last visited Jan. 24, 2014).
16. See V. Tharp et al., *Development and Field Test of Psychophysical Tests for DWI Arrest* (Mar. 1981), *available at* http://www.drugdetection.net/NHTSA docs/Burns Developement & Field Test of Psychophysical Tests for DWI Arrest.pdf.
17. 625 ILCS 5/11-501.2(a-5).
18. Divided attention tests are only one of a number of tests recognized in drug recognition evaluations. See, *e.g.*, The International Drug Evaluation & Classification Program, http://www.decp.org/experts/12steps.htm (last visited Feb. 4, 2014) (recommending a 12-step process). Also note that a specialized drug evaluation classification program ("DECP"), distinct from standardized field sobriety testing training, is approved and recommended by the NHTSA. See Student & Instructor Manuals, NHTSA DECP Certification Course (2011).

specifically recognizing them.[19]

The Act provides that the results of the tests are admissible in the criminal DUI and civil summary suspension proceedings; that the person may have his or her own chemical test administered; that full information concerning the SFSTs be made available to the person or the person's attorney; and that a registered cardholder may present evidence that he or she lacked the physical capacity to perform the SFSTs.[20]

"Expert" designation required? The legislative decision to designate SFSTs as a determinant of cannabis impairment raises important legal issues. Most prominent is that existing Illinois case law provides that in DUI drug cases, unlike alcohol cases, a law enforcement officer may not testify as to drug impairment unless he or she has been qualified as a drug recognition expert ("DRE"), which normally requires a certain minimum degree of training and experience.[21]

Since Illinois law does not require that an officer be qualified as an "expert" in administering SFSTs in alcohol impairment cases, can it be argued that the legislative recognition of SFSTs as a cannabis impairment determinant eliminates this requirement in medical cannabis cases? If so, does that raise due process concerns that scientific and empirical studies do not support such a "finding" by the legislature?[22] The lack of conclusive scientific studies supporting the legislature's "finding" could also arguably be an improper exercise of the state's police power.[23] (It is beyond the scope of this article to examine the science behind SFSTs testing and its validity.)

The "trace" DUI law doesn't apply to medical cannabis users – or does it? While the Medical Cannabis Act provides that the "trace" provision of the DUI law does not apply to a registered user who is not otherwise impaired, be aware of inconsistent provisions on this issue within the Act. Specifically, 625 ILCS 5/11-501(a)(6) provides, in part, that

> Subject to all other requirements and provisions under this Section, this paragraph (6) does not apply to the lawful consumption of cannabis by a qualifying patient licensed under the [Act] who is in possession of a valid registry card issued under that Act, unless the person is impaired by the use of cannabis.[24]

Furthermore, Section 25(a) of the Act provides that "[a] registered qualifying patient is not subject to arrest [or] prosecution…for the medical use of cannabis in accordance with this Act…."[25] While this language appears to provide blanket immunity from prosecution for DUI to the registered cannabis user who is not impaired, the Act also provides in section 30 that

> This Act does not permit any person to engage in, and does not prevent the imposition of any civil, criminal, or other penalties for engaging in, the following conduct: (5) Operating, navigating, or being in actual physical control of any motor vehicle, aircraft or motorboat while using or under the influence of cannabis in violation of sections 11-501 and 11-502.1 of the Illinois Vehicle Code….[26]

Because the "trace" DUI provisions are part of section 11-501 and section 30 of the Act, cited immediately above, does not provide immunity to those who *use* cannabis – or are under the influence – section 30 appears to be inconsistent with the immunity granted within sections 11-501(a)(6) and 25(a).

Anecdotally, this seems to be an issue of drafting and not intent. It appears that the Act's sponsor intended that if a registered user is not impaired, he or she is not subject to a DUI charge. However, by providing that the law does not protect those charged with DUI, the legislature – in passing section 30 – failed to note that the Illinois DUI statute includes the "trace" provision. To the extent that these sections conflict, they should be construed under the rule of lenity to immunize a registered user charged with violation of the "trace law."[27] (An effort is underway to change the trace law – see LawPulse at page 114.)

Summary suspension and revocation provisions

Pursuant to the Illinois summary suspension law, an officer with reasonable grounds to believe that someone is driving or in actual physical control of a motor vehicle on a public highway while under the influence of alcohol, other drug, or combination of both, may require the person to submit to chemical testing (breath, blood, or urine).[28] Submitting and failing or refusing testing may result in license suspension. Refusing testing if there has been an accident involving a serious injury or death may result in a summary revocation. Under the Act, a registered user whose blood or urine test demonstrates the presence of cannabis but who is not impaired is not subject to a license sanction.

Field sobriety testing and summary suspension. The Act also amends the law to provide that a registered user gives implied consent, if arrested for DUI or leaving the scene of a death or personal injury, to field sobriety testing approved by NHTSA.[29] That the driver possesses a registry card is not in itself enough for an officer to require testing. The officer must first have an independent "cannabis-related factual basis giving reasonable suspicion" that the person is driving under the influence of cannabis. This "basis of suspicion" must be listed on the reports as well as the officer's sworn statement. To initiate the suspension, the basis of suspicion must be served on the circuit court of venue and the driver and filed with the Secretary of State.[30]

Registered cannabis users who refuse or submit to and fail a field sobriety test may not get a monitored device driving permit.

Additionally, the Act adds two new sections to the list of issues upon which a driver may seek rescission of the suspension, which pertain only to registered users. Under the law, a person who is a registered user and who therefore has a legal right to use the drug is subject to suspension or revocation if he or she refuses to submit to SFSTs. Secondly, a registered user who submits to and fails SFSTs that demonstrate impairment from cannabis is subject to license suspension or revocation.

19. 625 ILCS 5/11-501.2(a-5).
20. *Id*.
21. See *People v. Briseno*, 343 Ill. App. 3d 953 (1st Dist. 2003); *People v. Foltz*, 403 Ill. App. 3d 419 (5th Dist. 2010); *People v. Jacquith,* 129 Ill. App. 3d 107 (1st Dist. 1984).
22. See *People v. Sides*, 199 Ill. App. 3d 203 (4th Dist. 1990).
23. See *North Carolina v. Basinger*, 30 N.C. App. 45 (1976) (noting that scientific studies demonstrate that in alcohol-related DUIs, a BAC .08 constitutes a danger to the public and regulation is therefore a proper exercise of the states' police power); *Pennsylvania v. Mikulan*, 504 Pa. 244 (1983) (same).
24. 625 ILCS 5/11-501(a)(6).
25. Pub. Act 98-0122, § 25(a).
26. *Id*. § 30(a)(5).
27. See *People v. Perry,* 224 Ill. 2d 312, 864 N.E.2d 196 (2007).
28. 625 ILCS 5/11-501.1.
29. *Id*. § 5/11-501.1(a-5).
30. *Id*.

This is a significant departure from existing Illinois law, which has never before sanctioned a driver for failing or refusing physical performance testing. This provision is, in large part, a recognition that chemical (blood or urine) testing is an inadequate way to determine whether a cannabis user is impaired.

SFTFs – before or after arrest? However, be aware of a tension in the summary suspension statute as amended by the Act. The law provides that SFSTs are only authorized after the person has been arrested. Later, in the same section, as noted above, it states that "[t]he officer must have an independent, cannabis-related factual basis giving reasonable suspicion that the person is driving under the influence for conducting [SFSTs]."[31]

The difference between the level of suspicion needed to detain and conduct further investigation and the higher standard required to establish probable cause to arrest is well established.[32] If part of the reason for physical performance testing is to give the officer probable cause to arrest for DUI but that testing is not authorized until after the arrest, the inconsistency in the statute is obvious.

It is not clear whether this was a drafting issue or intentional. In either event, this section, unless further amended, may be expected to produce a great amount of litigation over its interpretation and application. Also, the constitutional challenges to SFTSs available to DUI cases apply to summary suspension as well – i.e., that scientific evidence does not establish that SFSTs alone can show "impairment result[ing] from the consumption of cannabis."[33]

No MDDP for medical cannabis users

Prior to enactment of the new law, a statutory first offender charged with DUI and subject to a summary suspension for refusing or submitting to and failing chemical testing could apply for a monitoring device driving permit ("MDDP"). The MDDP grants the person driving privileges in return for using a breath alcohol ignition interlock device ("BAIID").[34] It is also available to those charged with driving while under the influence of drugs, including cannabis.

However, under the Act, registered users who refuse or submit to and fail SFSTs are now prohibited from obtaining an MDDP. Non-registered users who are suspended for DUI cannabis continue to be eligible for a MDDP.

Length of summary suspension

The Act provides that a registered user who submits to and fails SFSTs is subject to a six-month license suspension. A registered user who refuses testing is subject to a 12-month suspension. This is consistent with provisions for other alcohol and drug offenders.[35]

Illinois law also provides that repeat offenders, defined at 625 ILCS 5/11-500 as those who have had a prior DUI or summary suspension within five years, are subject to a suspension of one year if they fail testing and three years if they refuse. The provisions of the Act were not amended in the case of repeat offenders who are registered users and fail or refuse SFSTs. This conclusion is based on the fact that the repeat offender provisions of the statute continue only to apply to those who submit to a *chemical* test or refuse test(s) to determine the alcohol, drug, or intoxicating compound *concentration*.[36]

Commercial driver's licenses and the Act

The Act provides that a registered user who holds a commercial driver's license (CDL) and refuses or fails SFSTs may not operate a commercial motor vehicle (CMV) for 12 months. A driver's second offense – whether or not he or she committed the first while a registered user – results in a lifetime ban. Note that these periods of disqualification apply regardless of whether the person was operating a CMV or non-CMV.[37]

Illegal transportation or use of medical cannabis in a motor vehicle

The Act also prohibits a registered user from using medical cannabis within the passenger area of a motor vehicle while upon a highway. Additionally, any driver or passenger who is a registered user, cultivation center agent, dispensing organization agent, or caregiver is prohibited from possessing medical cannabis within the passenger area of any motor vehicle on a highway except in a sealed, tamper-evident medical cannabis container.[38]

A violation constitutes a Class A misdemeanor and subjects the offender to a revocation period for his or her medical cannabis card for two years from the termination of any sentence imposed by the court.[39]

Conclusion

At this early stage, it is impossible to say whether legalizing medical marijuana will increase the number of people driving under the influence of cannabis. It could certainly lead to more DUI arrests – because of more impaired drivers, more aggressive law enforcement, or a combination of both.

Whether the opponents or proponents of legalization are correct will be part of the reenactment debate in four years. In any event, registered medical cannabis users should understand that a valid registry card is not a license to drive while under the influence. ■

---

31. *Id.*
32. See *Terry v. Ohio*, 392 U.S. 1 (1968).
33. See 625 ILCS 5/6-206.1(a).
34. See *id.* § 5/6-206.1(a)(5).
35. 625 ILCS 5/6-208.1(a)(1) and (a)(2).
36. 625 ILCS 5/11-500; 625 ILCS 5/6-208.1(a)(3) and (a)(4).
37. 625 ILCS 5/6-514.
38. 625 ILCS 5/11-502.1.
39. *Id.* Note that the statute only provides for revocation upon the end of the imposed sentence and not upon conviction.