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Protecting Medical Marijuana Users From DUI Prosecution


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Law360, New York (May 12, 2016, 12:39 PM ET) -- Legalizing the medical marijuana industry in Pennsylvania[1] is a complicated endeavor, and gaps, overlooked consequences and the like are to be expected. Here's one: it may be a crime to drive with any medical marijuana, or any metabolite of it, in your blood.

A preexisting Motor Vehicle Code provision addresses "Driving under influence of alcohol or controlled substance." That is where the familiar 0.08 percent alcohol concentration in the blood comes from.

That same provision makes it illegal to drive when there is "in the individual's blood any amount of a Schedule I controlled substance." As is well known, marijuana is (at least currently) a Schedule I controlled substance pursuant to the U.S. Controlled Substances Act (CSA). As such, there is no requirement under that provision that the marijuana impaired the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle. The same is true of any metabolite of marijuana.

This provision stems from the time before the enactment of the Medical Marijuana Act. It applies to all Schedule I drugs, a class that then and now includes heroin, LSD and marijuana. Schedule I drugs are those with high potential for abuse; no currently accepted medical use in the U.S.; and a lack of accepted safety for use under medical supervision. Medical marijuana should not still be in that category — the whole premise of the Medical Marijuana Act is that marijuana has medical use — but that is where it remains.

There are certainly levels of medical marijuana that impair driving ability. A posting by the California NORML, references that a review of scientific studies on driving under the influence of cannabis concluded that THC levels above 3.5 - 5 nanogram/milliliter in blood (or 7 - 10 ng/ml in serum) indicate likely impairment. At the same time, trace amounts almost certainly do not. Where the line resides is apparently not a matter of consensus.

Will patients lawfully using medical marijuana essentially lose their ability to lawfully drive a vehicle? Not if Pennsylvania follows the lead of the Arizona Supreme Court, which addressed the issue in 2015 (Dobson v. McClennen). There, the Arizona Supreme Court ruled that while legal authorization to use medical marijuana under that state's medical marijuana law was not a "get out of jail free" card, a person's status as a legal medical marijuana user could be used as an affirmative defense to such a charge. Important to that conclusion was that the Arizona statute "immunizes" people from prosecution for legal medical marijuana use. The defendant would have to prove by a preponderance of the

evidence that the metabolite level in his/her bloodstream was at the time of driving at a level that did not cause impairment.

Does this solve the problem? Maybe. Pennsylvania's law, like Arizona's, declares that "[no person lawfully using or involved with medical marijuana] shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, ... solely for lawful use of medical marijuana ..." (Section 2103) This provision would seem to protect lawful medical marijuana users from DUI prosecution, at least to the extent that the prosecution was "solely" due to lawful medical marijuana use, that is, where the person was not also impaired. Like the Arizona court, Pennsylvania may reconcile the two conflicting legal provisions by drawing the line at "impairment."

Is that reasonable? It certainly makes sense from a public policy point of view. It is clearly against public policy to permit anyone from driving while impaired, regardless of the reason for impairment. However, generally speaking the level of concentration of the drug in a human's system sufficient to cause impairment is not clearly established. So presumably, until the legislature clarifies, a legal medical marijuana user defending a DUI would have to present an expert witness at trial to show that he/she was not "impaired." Also, the defendant would have to know that the defense existed — something that the defendants in the Arizona case, unfortunately, were not aware of (because it was created in their appeal).Their conviction was affirmed!

While the courts may have to resolve this issue, it would be better to obtain a legislative fix; a simple solution would be to treat medical marijuana usage the same as prescribed CSA Schedule II and III drugs, whose presence in blood is legal if prescribed and if it does not impair driving. Fourth, it is unlikely, and probably illegal, for police to pull over a driver just to check marijuana levels; something, in this context erratic driving, will likely be the catalyst.

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[1] The authors thank Gabe Chorno, a lawyer in York, Pennsylvania, who has been a leading advocate of medical marijuana legalization in Pennsylvania, for suggesting this issue for analysis.