A Look Around the Country at the Admissibility of Evidence in Drugged Driving Cases

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Categories : Crimes and Elements, Motor Vehicles

Tagged as : Ciborowski, drug-impaired driving, drugged driving, DWI, field sobriety tests, FSTs, Gause, Gerhardt, Kavanaugh, McCord, Packer

Date : December 12, 2017

Last week I wrote about studies examining the prevalence of driving with drugs in one's system. Research has shown that an increasing number of drivers have detectable drugs in their symptoms. What we don't yet know is how many of those drivers are impaired by drugs and whether the incidence of drug-impaired driving is increasing.

We do know, of course, that drug-impaired driving is dangerous. Policy-makers in North Carolina and elsewhere have attempted to combat the problem by enacting zero-drug-tolerance laws and provisions that prohibit driving with a threshold of a drug or its metabolites in one's body. And law enforcement officers across the country have created detection protocols that are geared specifically toward the drug-impaired driver rather than a driver impaired by alcohol.

Notwithstanding these measures, drug-impaired driving continues to be prosecuted in North Carolina and other states under statutory schemes and law enforcement protocol that were primarily written and developed to deter, detect and punish alcohol-impaired driving.

Courts across the country are increasingly being required to consider how those schemes and that protocol apply to drug-impaired driving prosecutions. This post will summarize recent court rulings on the admissibility in drugged driving prosecutions of (1) evidence regarding a defendant's performance on field sobriety tests, (2) testimony about the effects of certain drugs, and (3) lay opinion testimony about the person's impairment. It will also review recent opinions regarding the quantum of proof necessary to establish drug-impaired driving. It will conclude with a case that demonstrates why drugged driving is a matter of serious concern.

Field Sobriety Tests. In *Commonwealth v. Gerhardt*, 81 N.E.3d 751 (Mass. 2017), a case in which the defendant was alleged to have been driving while impaired by marijuana, the Supreme Court of Massachusetts significantly limited the scope of permissible testimony from an officer about the defendant's performance on field sobriety tests. The *Gerhardt* court determined that these limitations were required because standardized field sobriety tests—the walk and turn, one-leg stand, and horizontal gaze nystagmus tests—were developed to detect alcohol impairment. Unsatisfactory performance on these tests, the court noted, has been strongly correlated with a blood alcohol concentration of at least 0.08.

By contrast, the court said there is "no scientific agreement on whether, and, if so, to what extent, these types of tests are indicative of marijuana intoxication." *Id.* at 766. The court explained that the research on the efficacy of field sobriety tests to measure marijuana content "has produced highly disparate results." *Id.*

> "Some studies have shown no correlation between inadequate performance on FSTs and the consumption of marijuana; other studies have shown some correlation with certain FSTs, but not with others; and yet other studies have shown a correlation with all of the most frequently used FSTs. In addition, other research indicates that less frequently used FSTs in the context of alcohol consumption may be better measures of marijuana intoxication."

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Id.

Based on this lack of scientific consensus, the *Gerhardt* court held that a law enforcement officer could not testify that a person's performance on one or more field sobriety tests established that the person was under the influence of marijuana. Nor could an officer testify that a person passed or failed any test. Such testimony would, the court said, improperly imply that field sobriety tests are definitive tests of marijuana use or impairment.

The *Gerhardt* court held that an officer *may* testify about his or her observations of the defendant during certain field sobriety tests, which the officer should refer to as "roadside assessments" rather than tests to avoid suggesting "that they function as scientific validation of a defendant's sobriety or intoxication." Id. at 760. The court said that observations regarding a driver's balance, coordination, mental acuity and other skills required to safely operate a motor vehicle are relevant facts to which an officer may testify.

In *People v. Kavanaugh*, 72 N.E.3d 394 (Ill. App. 2016), the Appellate Court of Illinois held that the trial court in the petitioner's license suspension hearing properly refused to consider an officer's testimony that the defendant's left eye demonstrated a lack of convergence in a roadside test. The officer testified that based on his experience, a lack of convergence in a person's eyes when a stimulus is placed close to the person's face indicates that the person has THC (tetrahydrocannibol, the primary psychoactive substance in marijuana) in his or her system. The officer acknowledged, however, that some people's eyes simply lack convergence. The appellate court held that the State failed to adequately demonstrate a scientific basis for the convergence test. Instead, the officer simply described the test and said he had learned to perform it at a training course. This was an insufficient foundation.

The effects of certain drugs. The *Gerhardt* court held that a police officer may testify to the physical characteristics that he observes of a driver suspected of drug-impaired driving such as bloodshot eyes, drowsiness, and lack of coordination. An officer may not, however, offer an opinion that these characteristics mean that the driver is under the influence of marijuana. 81 N.E.3d at 762.

In *People v. Ciborowski*, 55 N.E.3d 259 (Ill. App. 2016), the Appellate Court of Illinois held that the trial court did not abuse its discretion by permitting a law enforcement officer trained as a drug recognition expert to testify about the effects of the prescription drugs detected in the defendant's urine. The court of appeals noted that the trial court did not allow the officer to testify as to whether the defendant, whom he did not personally examine, was impaired by the substances he identified. On cross-examination, the officer admitted that the two drugs, citalopram and quetiapine, can have different effects on different people. He further testified that, just because an individual has a particular drug in their system, it does not necessarily mean that the person is under the influence of that drug. The appellate court deemed the officer's testimony to be relevant to the issue of whether the arresting officer had probable cause to arrest defendant.

The Ciborowski court also favorably recited testimony from the arresting officer that the court said supported his determination that the defendant had driven while impaired. The officer had been trained in the police academy in drug detection. In his work in the gang unit he had seen hundreds of people under the influence of drugs ranging "from illegal drugs 'such as cocaine and crack [where] you get erratic, irrational behavior' to 'the other end of the spectrum such as anti-depressants and sleeping aids, [where] you get people that are tired and sleepy.'" 55 N.E.3d at 277. The officer further testified that Ambien, one of the drugs the defendant said he had taken, was a sleeping drug, and that the defendant's inability to keep his eyes open and his sleepy state were consistent with the effects of Ambien.

Lay opinion testimony regarding impairment. As mentioned in the previous section, the *Gerhardt* court held that neither a police officer nor any other lay witness could offer an opinion as to whether a driver was impaired by marijuana as the "effects of marijuana may vary greatly from one individual to another, and those effects are as yet not commonly known." *Id.* at 754. The court cautioned the State that "a prosecutor who elicits from a police officer his or her special training or expertise in ascertaining whether a person is intoxicated risks transforming the police officer from

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a lay witness to an expert witness on this issue, and the admissibility of any opinion proffered on this issue may then be subject to the different standard applied to expert witnesses." *Id.* at 762 n.22 (2017) (internal citations omitted).

The Superior Court of Pennsylvania in *Commonwealth v. Gause*, 164 A.3d 532 (PA Super. 2017) held that an officer who was not qualified as an expert could not testify that eyelid and body tremors were indicative of the driver's impairment by marijuana. The *Gause* court acknowledged that expert testimony is not required to prove impairment in a drug-impaired driving case when there is other independent evidence of impairment. *Gause* was not, however, such a case. Gause was stopped for a taillight violation. Once the officer activated her lights, he properly signaled and pulled to the curb. He provided his license, registration, and proof of insurance without fumbling. There was no evidence that an odor of marijuana emanated from his person or from his vehicle, no testimony that his eyes were bloodshot, and no physical evidence of recent marijuana usage. Furthermore, Gause did not admit that he had recently smoked marijuana, and there was no eyewitness testimony to establish that he had done so. Thus, expert testimony was required to connect the body and eyelid tremors the officer observed to marijuana impairment.

The *Gause* court differientiated eyelid tremors from physical symptoms like staggering, stumbling, glassy or bloodshot eyes, and slurred speech, which are ordinary indications that a person has ingested a controlled substance. Eyelid tremors, in contrast, are something only a person with specialized training would associate with ingestion of a controlled substance. Moreover, as the law enforcement officer in *Gause* admitted on cross examination, there are many causes of eye tremors other than the ingestion of marijuana.

Sufficiency of the evidence. The *Gerhardt* court held that since FSTs cannot be treated as scientific tests of marijuana impairment, poor performance on FSTs alone is not sufficient to support a finding that a person was impaired by marijuana. The court said that the jury must be so instructed and drafted a model jury instruction for this purpose.

The court in *Kavanaugh* held that the following facts were sufficient to provide probable cause to believe the defendant was driving while impaired by cannabis: The defendant said she failed to check her blind spot before changing lanes, causing another vehicle to go into the ditch. A law enforcement officer smelled a strong odor of burnt cannabis in the defendant's car and located a pipe, grinder, and cannabis under her front passenger seat. Based on this evidence, the court concluded that a reasonably cautious person would have believed that the defendant was driving under the influence of cannabis.

Likewise in *Ciborowski*, the appellate court found that the facts known to the officer provided probable cause to believe the defendant was driving while impaired by a drug. The defendant was in a crash. There was no indication that he was impaired by alcohol. He admitted to taking prescribed medication. He had slurred speech. He was mush-mouthed. He was sleepy. He changed his story of what happened in the accident and gave different explanations of where he was going. When the officer asked for his insurance card, the defendant provided his AARP card. The defendant was unkempt, appeared confused, had dilated pupils and had a hard time keeping his eyes open. He also performed poorly on field sobriety tests.

The Supreme Court of Alaska in *McCord v. State*, 390 P.3d 1184 (Alaska 2017), determined that the State's evidence of impaired driving was sufficient to survive the defendant's motion for judgment of acquittal. The defendant argued that the State failed to introduce any evidence that the concentration of clonazepam, a controlled substance found in her blood, was capable of impairing her capacity to drive safely. The court disagreed. A forensic toxicologist testified that clonazepam affected central nervous system in ways similar to alcohol. She further stated that the defendant's levels were in the therapeutic range, and that therapeutic levels of clonazepam are sufficient to cause impairment. Finally, she testified that the symptoms the law enforcement officers observed were consistent with side effects from benzodiazepines such as clonazepam. Thus, the court concluded, the State's evidence was sufficient to survive the defendant's motion.

Why the concern? If the risks of drug-impaired driving are not self-evident, the facts in *Commonwealth v. Packer*, 168

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A.3d 161 (Penn. 2017), illustrate them clearly. There, the Pennsylvania Supreme Court found that the evidence regarding the defendant's inhaling of difluoroethane (DFE) provided the malice necessary to support charges of murder and aggravated assault. The State's evidence showed that the defendant, who had a history of losing consciousness immediately after huffing DFE, inhaled the substance before and during driving. She became "zombified" and unresponsive, drove into oncoming traffic, and crashed head-on into the car driven by a man who braked extensively and steered away in an attempt to avoid the collision. The man died within minutes of the crash. The airbag module recovered from the defendant's car indicated that the defendant did not brake before the crash and took no evasive measures to avoid the victim's car.

Despite this level of impairment, no one who spoke with the defendant at the scene could tell she was impaired. She asked several questions of responders that aroused suspicion—Am I going to jail? Will the police be able to detect duster in my blood?—and she consented to a request by law enforcement officers for a blood draw at the hospital. Testing of her blood revealed DFE.

At trial, an expert toxicologist testified that the level of DFE in the defendant's system was on the low side of the detectable range. The toxicologist testified that DFE has a half-life of 23 minutes, and that peak effects and peak concentrations are reached within minutes after inhaling the substance.Those effects frequently are resolved by the time emergency responders arrive.

In holding that the defendant acted with malice, the court stated that there is a significant difference between deciding to drive while intoxicated and deciding to drive with knowledge that there is a strong likelihood of becoming unconscious. The latter, said the court, is akin to the decision to play Russian roulette:

> "[I]n both instances, the defendant is 'virtually guaranteeing some manner of accident' will occur through the 'intentional doing of an uncalled–for act in callous disregard of its likely harmful effects on others.'"

Id. at 172.

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