

As Legal Marijuana Spreads, States Struggle With Drugged Driving

BY SARAH BREITENBACH

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Washington State Patrol Sgt. Mark Crandall half-jokingly said he can tell a driver is under the influence of marijuana during a traffic stop when the motorist becomes overly familiar and is calling him “dude.”

The truth in the joke, Crandall said, is that attitude and speech patterns can be effective markers for drugged driving. And, according to legalization advocates and some in law enforcement, they can be more reliable than blood tests that measure THC, the psychoactive compound in marijuana.

When it comes time to go to court, the testimony of an officer trained as a drug recognition expert is often more valuable than a THC test because of disparities in how the drug affects driving ability, Crandall said.

“Here’s the really bad driving that I saw, here’s the magnified impairment that I saw on the side of the road,” he said. “It’s telling a good story and making sure that it’s backed up with facts, and evidence, and proof, and the ability of the officer to articulate it well.”

As more states make medical and recreational marijuana use legal, they increasingly grapple with what constitutes DUID — driving under the influence of drugs — and how to detect and prosecute it. They’re finding it more difficult than identifying and convicting drunk drivers.

While marijuana is the substance, other than alcohol, most frequently found in drivers involved in car accidents, the rate at which it causes crashes is unclear.

At least 17 states, including Wash-

ington, have “per se” laws, which make it illegal to have certain levels of THC in one’s body while operating a vehicle, according to the National Conference of State Legislatures. Under those laws, no additional evidence is required to prove that a driver is impaired.

Of those states, Colorado, Montana, Nevada, Ohio, Pennsylvania and Washington allow for some amount of THC to be found in a driver’s blood, ranging from 1 to 5 nanograms per milliliter (ng/ml). Other states leave no wiggle room and consider any amount of THC to be impairing and grounds for being charged with DUID.

In Colorado, where recreational marijuana became legal in 2012, drivers are assumed to be under the influence of marijuana if they have THC levels of 5 ng/ml or higher, but the law also lets defendants produce evidence that they were not impaired.

Alaska, Colorado, the District of Columbia, Oregon and Washington allow adult recreational use of marijuana, and 18 other states permit its use for medical purposes. More states are expected to permit recreational marijuana use as legalization efforts move to the ballot in Ohio this fall and Nevada in 2016.

State lawmakers, conditioned by the universal system of rating blood alcohol content to determine intoxication, have long wanted similar measurements to gauge a driver’s impairment under the influence of THC. But that has proven elusive.

Unlike alcohol consumption, which creates impairments that are measurable by blood alcohol content, the consumption of marijuana creates physical effects that vary

from person to person and THC levels can depend on how cannabis is ingested and whether the person is a long-term marijuana user, said Rebecca Hartman, a researcher with the National Institute on Drug Abuse.

THC levels peak quickly as marijuana users inhale smoke, and then decrease rapidly in the first 30 minutes to an hour after smoking. Even though the THC levels are decreasing, users can still be impaired, Hartman said.

How the human body processes marijuana varies so much from person to person that even on different days a user might metabolize the drug at different rates, she said.

“We’ve shown that cannabis increases lane weaving and some studies have shown one of the big things that cannabis is known to impair is driver attention,” Hartman said.

A June study on drugged driving conducted by Hartman and others suggested that people driving with THC levels of 13.1 ng/ml had a tendency to weave within lanes, similar to those who had a 0.08 blood alcohol content, the point at which drivers can be prosecuted in all states.

George Bianchi, a criminal defense attorney in Seattle, said the rule in his state (5 ng/ml) is not appropriate because studies of driver impairment vary so much. He said he thinks Hartman’s study opens the door to using 13 ng/ml as a national standard for marijuana impairment.

“I think you should try to quantify it somehow,” he said. “And this recent study seems to do that.”

Some states see creating DUID laws as part of the marijuana legali-

zation process, said Morgan Fox, a spokesman for the Marijuana Policy Project.

Several states considered adding or modifying per se DUID limits in 2015. Legislation that would elevate the Illinois per se standard from zero tolerance to 5 ng/ml, as amended (down from 15 ng/ml) by Republican Gov. Bruce Rauner, is awaiting final approval by the General Assembly. And a bill that would create a per se standard in New Jersey is before that state’s legislature. Alabama, Maine and New Mexico also reviewed bills adding per se DUID limits ranging from 2 ng/ml to 5 ng/ml, though none passed.

“Considering most states already have them in place, and they are already being enforced, we don’t see the need to add them,” Fox said. “But we’re not going to scuttle a bill that would legalize (marijuana) because of per se (laws).”

Because of the variation in users’ impairment levels, critics of blood testing like Paul Armentano, deputy director for the National Organization for the Reform of Marijuana Laws, say the tests are an inappropriate measure of how well a person was driving at the time of a traffic stop or crash.

“Where is the need to go in this (direction) with cannabis when there is a consensus among experts in the field that the presence of THC in the blood in a single sample is not an accurate predictor of recent use, nor is it a predictor of performance?” Armentano said.

He cited a February 2015 drug and alcohol crash risk study from the Department of Transportation that points out contradictions between previous studies about the relationship between marijuana use and

motor vehicle crashes. The analysis, which looked at marijuana and other drugs, found that, when adjusted for age, gender and alcohol use, there was no significant increase in crash risk associated with the use of THC.

Legalization advocates said they worry that per se standards will lead to DUID convictions of people who were not impaired by marijuana when they were pulled over for traffic violations, but might test positive for THC because they are frequent recreational users or use marijuana as medicine.

“These laws could lead to significant unintended consequences and the most significant of those is that the law prosecutes and convicts individuals of violating traffic safety laws for simply having engaged in behavior in the privacy of their own home that at no point rose to a legitimate traffic safety threat,” Armentano said. In 2014, the Arizona Supreme Court overturned a lower court ruling that allowed for the prosecution of drivers under the per se law, even if there was no evidence of impairment. The previous year, the Michigan Supreme Court ruled that police must prove driver impairment to pursue DUID charges.

States began adopting THC-specific standards in the early 1990s after highly publicized accidents, Armentano said. He contends that the laws are largely unnecessary given established protocols for determining if a driver is under the influence of a drug.

“The officer is collecting evidence from the minute he flashes his lights,” he said. “Based on evidence observed at the scene, he or she is going to start making some judgment about whether (the driver) might be under the influence.”

Freeman

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“First may simply be to determine if the (Freeman) situation meets their thoughts of whether an emergency truly exists,” he told the *Press & Dakotan*. “From there, they can act on whether or not to approve a co-op and what stipulations they might consider as part of this situation.”

The SDHSAA board expects to hear from both sides of the issue, Krogstrand said.

“Essentially, the plan at 10 a.m. will be for our board of directors to hear testimony on the situation from the member schools and their representatives,” he said. “The information that we most recently posted online shows that there are some schools that are planning on heading this way to testify both on behalf and against the proposal.”

RAISING CONCERNS

Gayville-Volin secondary principal Tom Rice raised objections in his letter sent last week to SDHSAA executive director Wayne Carney, Krogstrand and 14 area school officials. In particular, Rice opposed allowing a program to add the Freeman players without making the accompanying move to a higher classification for playoff purposes.

Rice spoke of his concerns about the SDHSAA board’s recent decision to allow Highmore-Harold, which suffered from low player numbers, to enter a football co-op with Miller shortly before the current season. He alluded to the impact that decision may have on Freeman’s request.

“With the Board of Directors decision concerning the Highmore-Harold football situation, I believe a dangerous precedent has been set. You have heard this before, ‘But why have rules if we don’t follow them?’” Rice wrote.

“I also know that situations arise that we can’t always see coming, I support giving every young man the opportunity to play the game of football. I do not, however, support doing this at the expense of other athletes in the state.”

Rice then directly addressed a proposed arrangement between Freeman and Canistota. At the time of Rice’s letter, Canistota had given its approval for accepting Freeman players. Menno and Marion school board later passed resolutions of approval Monday night.

“It has come to my attention that Freeman and Canistota are considering a co-op due to Freeman’s inability or unwillingness to have a team. I am in favor of this as are other schools in Class 9A,” Rice wrote.

“The ADM (average daily membership, or enrollment used to classify schools) puts this co-op at 58. While the number escapes me at this time, I believe the 58 boys would classify them for the 11B ranks,” he said.

“I want to be very clear that I have great respect for both Canistota and Freeman. We have competed against them in other sports and would look forward to the opportunity in football as well,” he said.

“I admire Canistota’s willingness to take in the Freeman program, but that would also create an unfair advantage for all other schools in Class 9A, including Gayville-Volin. At the bare minimum, Canistota should play their regular schedule and, if they qualify for the playoffs (which I believe they will), they should move to 9AA.”

Rice used the example of Gayville-Volin’s adjustments to its football program through the years.

“I was reminded today that when Wakonda broke away from (the co-op with) Gayville-Volin, the once-proud tradition of football almost died. The school made tough decisions and played only a JV schedule for a few years,” he said.

“Only recently has the team made strides of being competitive and qualified for playoffs last year. We hope to build upon last year’s successes this year!”

Rice said he knows his comments will offend a number of schools, including Canistota, which would need to move its powerful football program up to Class 9AA, and the other Class 9AA schools affected by such a move.

“Who wants to have their island blown up?” Rice asked. “We all want what is best for our school districts. To me, I know this (reclassification) is the best course of action.”

Krogstrand told the *Press & Dakotan* that the Highmore-Harold approval shouldn’t be taken as an automatic green light for the Freeman request.

“I think the precedent set by the Highmore-Harold situation shows that the board is willing to consider the application, but not necessarily an automatic approval, especially given specific demands or terms from the member schools that may conflict with (SDHSAA) board members’ opinions on the matter,” he said.

“Certainly, the testimony from other member schools will weigh strongly on any decisions to be made. Perhaps the mitigating factor will become the 9A vs. 9AA issue.”

As of early Wednesday afternoon, the SDHSAA office had received paperwork from Canistota and Freeman but not from Menno-Marion, Krogstrand said.

OFFERING THEIR HELP

The three schools looking to add Freeman players told the *Press & Dakotan* they are looking to help Freeman without harming their own programs.

“Marion will not send any cooperative paperwork until there is a judgment by the SDHSAA,” said David Colberg, the Marion superintendent and athletic director.

“We were surprised that Freeman didn’t choose to

join Menno/Marion, but we wanted to leave the door open for the future. Our head football coach, Todd Obele, will be representing our program at the Pierre meeting.”

The Menno school district had not been asked to send any paperwork to Pierre, and the Menno board didn’t do so, said Chris Christensen, the superintendent and athletic director.

“Our board just wanted to be sure that Freeman knows that they are invited to join our football co-op this year provided that we stay in the same classification and are eligible for the playoffs for the next two years. This is similar to Canistota’s request,” he said.

“I guess we were a bit surprised that Freeman decided to go with Canistota, since during the summer we agreed to have Freeman join our junior high program. We do hope that Freeman will consider us for a future cooperative.”

“We do not intend to have anyone in Pierre for their meeting since the request is for Freeman to join Canistota,” Christensen added.

Canistota superintendent Larry Nebelsick said he sees the proposal as a way to help Freeman.

“Freeman has struggled in football the last couple of years in trying to maintain a program,” he said. “This is not only giving the Free-

man players a place to play this year and next, but (it) also helps us move towards keeping the relationship beyond that time as we all have seen participation numbers go down. It is in no way designed to create a powerhouse team at the last minute.”

Canistota is requesting that it remain in Class 9A, rather than be forced to move up, should it add the Freeman players, Nebelsick said.

“The request to remain 9A is directed at fairness to the boys we have at Canistota, especially our seniors, who have worked hard getting ready for this season,” he said. “It wouldn’t be fair to them to change classes as the season starts, and Freeman understands that. Hopefully, the SDHSAA board feels the same way.”

LOOKING TO THE FUTURE

At Tuesday’s special meeting, Freeman board members and patrons brought up a number of items for consideration. The audience included football players who, with the exception of one remark, sat silent.

The group wondered whether to state a preference between Canistota and Menno-Marion. If so, the discussion took into account which of the two programs would provide a better fit for Freeman and more likely receive SDHSAA approval.

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