



Testimony Before the Ohio House Judiciary Committee
In Support of Senate Bill 55
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Chairman Thomas, Vice Chairman Swearingin, Ranking Member Synenberg and members of the House Judiciary Committee, on behalf of the Ohio Association of Criminal Defense Lawyers, I am privileged to have an opportunity to testify in support of Senate Bill 55.

My name is Bryan Hawkins. I serve on the board of the Ohio Association of Criminal Defense Lawyers and am a member of both the National College for DUI Defense and the DUI Defense Lawyers Association. I've spent the entirety of my 15-year legal career as a defense attorney. For the last 8 years, I have worked for a defense firm here in Columbus focusing on OVI and serious traffic offenses throughout the Central Ohio region. I have presented at numerous seminars for the OACDL as well as the Ohio State and Columbus Bar Associations on topics related to OVI defense in general and marijuana impaired driving specifically.

I'd like to preface my comments by saying that nobody wants somebody operating a vehicle on Ohio's roadways while impaired, whether by alcohol or drugs. On the flip side of that coin, though, we need to ensure that our laws are written in a way that avoids punishing innocent people who are in no way impaired.

Unfortunately, Ohio's OVI statute, as it currently exists with regard to marijuana, does just that. Under our current law, someone who has not consumed marijuana for several weeks could nonetheless be convicted of OVI solely due to the presence of a completely inert metabolite found in their blood or urine. Current Ohio law treats this no differently than someone testing over the legal limit for alcohol even though the person is in no way impaired by marijuana. While this has been an issue for many years, the legalization of medical marijuana in 2016 and recreational marijuana in 2023 have made finding a solution much more urgent. Senate Bill 55 is an important and long overdue step toward bringing Ohio's law in line with existing science and eliminating this inherent unfairness.

Per Se Impairment

Ohio's OVI statute creates an offense known as OVI "per se." The statute sets a limit for the quantity of a substance in someone's blood, breath, urine or oral fluid. If a driver has an amount higher than that limit, the law deems them to be guilty of OVI, even if their ability to drive is not impaired. Most people are probably familiar with this through the legal limit of .08 for alcohol.

There are actually multiple current legal limits for marijuana. For simplicity's sake, the ones we are concerned with here are 2 nanograms (ng) of Delta-9 Tetrahydrocannabinol (THC) and 50 ng of a marijuana metabolite per milliliter of a person's blood.

Delta-9 THC is the primary psychoactive ingredient in marijuana and causes impairment. Once marijuana is ingested, the body begins to break the Delta-9 THC down into what we call metabolites. The first stage converts the Delta-9 THC into Hydroxy-THC which has a minor psychoactive ability and only has a slight effect on the human body. This is quickly broken down into Carboxy-THC, which is unanimously understood by scientific experts to be completely inactive with no impairing effect on the human body at all. Carboxy THC can linger in a person's body for days, weeks or even months after use.

Reasonably, we should be most concerned with Delta-9 THC as that is what would cause somebody to be unsafe on the road. However, because current Ohio law has created a per se limit for marijuana metabolites, anyone with over 36 ng of the completely inert Carboxy THC in their urine is deemed to be impaired. This would be like charging somebody with an OVI because an officer saw them pull into their driveway and then noticed a bunch of empty beer cans in their recycling. At best, it's evidence that they consumed marijuana at some undefined point in the past. Virtually every per se marijuana case I have handled in my career has been based on my client being over the limit for Carboxy THC.

This combination of testing for an inactive waste product rather than the active, impairing component of marijuana and then deeming someone to be guilty of OVI has led, and will continue to lead, to countless people being charged and convicted for Operating a Vehicle Impaired even though they were absolutely not impaired while they were driving.

Senate Bill 55's Solutions

Senate Bill 55 has been carefully drafted to alleviate this issue while retaining the State's ability to prosecute defendants with active THC in their blood. It also leaves undisturbed law enforcement's ability to conduct roadside investigations for determining whether a person should be arrested for marijuana-based OVI.

Officers develop probable cause to arrest a suspected impaired driver through their observations during the traffic stop, application of their training, and administration of roadside field sobriety tests. Senate Bill 55 does nothing to alter or impede officers' conduct during these investigations. Instead, it addresses the issues with per se limits and someone's ability to defend themselves once the case is in court.

This bill continues to prohibit operating a vehicle with a prohibited concentration of THC in a person's blood, setting the new limit at 5 ng/ml. At the same time, it eliminates per se offenses based on THC metabolites, as well as per se offenses for THC in urine and oral fluid.

However, the bill would not eliminate the role of urine and oral fluid testing entirely. Instead, it creates a new evidentiary standard where the trier of fact may infer that a person is under the influence of marijuana, without the need for expert testimony, if they test at any of the following levels:

- At least 25 ng/ml of THC in urine; or
- More than 2 ng/ml but less than 5 ng/ml of THC in blood; or
- At least 5 ng/ml of THC in oral fluid

Once this inference is established, either party could support or rebut it with any evidence or testimony that complies with the Rules of Evidence. This would allow the jury to consider not only the results of the chemical test but all other relevant and admissible evidence when determining whether a driver was actually impaired by THC.

Conclusion

OVI's are an incredibly complex area of law that requires balancing public safety interests, defendants' due process rights, and scientific standards of what constitutes impairment. It is clear that allowing drivers to be convicted of impaired driving solely based on the level of an inactive metabolite of marijuana in their body is patently unfair. This bill's proposed solutions acknowledges that fact by maintaining per se limits for THC and eliminates the per se limit for metabolites while allowing defendants the ability to rebut the inference of their impairment at lower levels of positive test for Delta-9 THC. This compromise position preserves law enforcement's ability to keep impaired drivers off the road, promotes the State's ability to prosecute drivers who are truly impaired by THC, and protects the due process rights of the accused.