



DRIVING UNDER THE INFLUENCE OF DRUGS

by Hillary Smith

The Colorado General Assembly has made many changes to its laws in response to the voter-approved legalization of medical and adult-use marijuana under state law. In 2013, the General Assembly passed House Bill 13-1325 to specifically address driving under the influence of marijuana. This *issue brief* provides a summary of state law related to driving under the influence of alcohol or drugs, an overview of law enforcement procedures regarding drivers suspected of driving while impaired, and an explanation of the changes made by HB 13-1325.

Express Consent Law

Colorado has an express consent law, which presumes that every driver has consented to take a blood, breath, saliva, and/or urine test when requested to do so by a law enforcement officer who has probable cause to suspect that the person is driving under the influence of or while impaired by alcohol or drugs. Such express consent is a condition of having a Colorado driver's license, but all drivers are subject to the law regardless of whether they have a Colorado driver's license. Refusal to take the test is both admissible in court and is a basis for the revocation of a driver's license.

In cases in which a driver is suspected of being under the influence of alcohol or drugs and of being responsible for certain serious crimes, such as criminally negligent homicide, vehicular homicide, or vehicular assault, an involuntary blood test may be required.

Law Enforcement Procedures

Law enforcement officers watch for drivers suspected of driving under the influence of alcohol or drugs during the course of their routine patrol and accident investigations, and also conduct sobriety checkpoints and impaired-driving enforcement periods for this purpose. In the course of stopping and questioning a driver, law enforcement officers look for signs that he or she is impaired, and use such signs to determine whether additional tests are needed.

Field sobriety, breath, and blood tests. If reasonable suspicion exists, a law enforcement officer may ask a driver to submit to a field sobriety test and a preliminary breath test. Field sobriety tests measure a driver's ability to perform certain tasks. Breath tests measure blood alcohol content (BAC), and cannot be used to test for drugs. Both field sobriety tests and the preliminary breath test are voluntary, and the results of the preliminary breath test are not admissible in court.

If a law enforcement officer has probable cause to believe that a driver is impaired by alcohol or drugs, he or she may ask the driver to take a formal breath or blood test, the results of which are admissible in court. Drivers over 21 years old may request a blood test rather than a breath test. However, the presence of drugs can only be tested with a blood test.

Breath tests can be administered by trained law enforcement officers, whereas blood tests

must be administered by authorized medical professionals in facilities certified by the Colorado Department of Public Health and Environment. Blood samples are sent to private labs for testing, and one sample will be preserved for the driver to retest during the course of his or her trial, if necessary.

Crimes Related to Driving Under the Influence

DUI and DWAI. In the Colorado Criminal Code, there are two primary driving offenses related to alcohol and drugs, both of which are misdemeanors: driving while ability impaired (DWAI) and driving while under the influence (DUI). A DWAI charge requires a person to be affected to the slightest degree, making him or her less able than usual to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle. A DUI charge requires a person to be substantially incapable of safely operating a vehicle.

The fact that a person is entitled to use one or more drugs under state law, including but not limited to marijuana, is not a valid defense against a charge of DUI or DWAI.

DUI per se. A third misdemeanor, DUI per se, can be charged if a person has a BAC of 0.08 or more at the time of driving or within two hours of driving. There is no equivalent per se charge for driving under the influence of drugs, although the General Assembly has considered bills to establish such a charge in recent years. During a trial for DUI per se, the defendant may present evidence that he or she consumed alcohol between the time of driving and testing. The defendant may also present evidence that there is a disparity between a BAC test and other facts.

Enhanced penalties for other vehicular crimes. The penalties for the felony offenses of vehicular homicide and vehicular assault increase if a person is found to have committed those crimes while under the influence of alcohol or drugs.

Permissible Inference

In any prosecution for DUI, DWAI, vehicular homicide, or vehicular assault, if a driver's BAC was 0.08 or greater at the time of the offense or within a reasonable time thereafter, this fact gives rise to the permissible inference that the defendant was under the influence of alcohol.

A permissible inference allows a judge to instruct a jury that if it finds that a defendant's BAC was 0.08 or greater at the time of the offense or within a reasonable time thereafter, then the jury *may* conclude that the defendant was driving under the influence of alcohol. A permissible inference does not *require* a jury to conclude that the defendant was driving under the influence when the BAC is 0.08 or greater. In addition, the jury may consider all of the evidence in the case to evaluate whether the prosecution has proved the offense beyond a reasonable doubt.

House Bill 13-1325

HB 13-1325, which was enacted in 2013, established that in any prosecution for DUI, DWAI, vehicular homicide, or vehicular assault, if a driver's blood contains five nanograms or more of delta 9-tetrahydrocannabinol (THC) per milliliter in whole blood at the time of the offense or within a reasonable time thereafter, this fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs. THC is the primary psychoactive component of marijuana.

In a trial for DUI or DWAI, a defendant's valid medical marijuana registry identification card may not be used as part of the prosecution's case in chief. In addition, in a traffic stop, the driver's possession of a valid medical marijuana registry identification card must not, in the absence of other contributing factors, constitute probable cause for a law enforcement officer to require the analysis of the driver's blood.

Finally, the bill repealed the law specifying that it is a misdemeanor for a habitual user of any controlled substance to drive a motor vehicle or low-power scooter.