

Determining Impairment in the Field (DUI & DRUG IMPAIRMENT)

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September 2024



Learning Objectives



After this session you will be able to:

- 1) Discuss current issues arising in drug impaired driving cases.
- 2) Identify challenges presented in drug impaired driving cases.
- 3) Discuss the role and importance of drug recognition experts investigating drug impaired driving cases.

Hypothetical #1

- Tom is operating a vehicle at 8:30 p.m. on a 2-lane road, with his 5-year-old son as a passenger
- He is driving erratically, loses control of their vehicle and hits another vehicle causing significant property damage but fortunately no serious injuries
- Tom has an odor of alcohol on him, has a small baggie of marijuana in his pocket, along with a prescription slip for benzodiazepine

What's the best answer?

Assuming that Tom is under the influence, what substance is he under the influence of?

- a) alcohol
- b) marijuana
- c) cocaine
- d) benzodiazepine
- e) we don't know

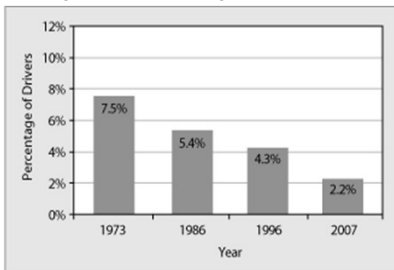
The Good News

- > American's roads are safer today as a result of the massive public awareness and enforcement campaigns that began in the early 1980's
- > The number of alcohol-related traffic fatalities has declined by one half since 1982



Decline in Alcohol-Impaired Driving

Estimated Percentage of Weekend Nighttime Drivers with BACs ≥ 0.08



Latest Survey (2013-2014): 1.5%

The Bad News: The Changing Face of the Impaired Driver

➤ Marijuana Use

- 2007 marijuana (THC) use: **8.6%**
- 2013/14 marijuana (THC) use: **12.6%**



➤ Overall Drug Use (all categories): **22.5%**

Source: *Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers*, NHTSA Research Note (DOT HS 812 118)(February 2015)

Fatality Analysis Reporting System (2016)

Of deceased drivers with known test results:

- **38%** tested positive for alcohol (any BAC)
- **43%** tested positive for drugs

Source: GHSA Drug Impaired Driving: A Guide for States (April 2017)

Fatality Analysis Reporting System (2016)

Of deceased drivers with known test results:

- **38%** tested positive for alcohol (any BAC)
- **43%** tested positive for drugs
 - **41% marijuana**
 - **51% of the drug-positive drivers were positive for two or more drugs**
 - **40.7% were positive for alcohol**

Source: GHSA Drug Impaired Driving: A Guide for States (April 2017)

Marijuana Use, Alcohol Use & Driving in Washington State (April 2018)

- **Poly-drug drivers** now the most common type of impaired drivers in fatal crashes
- Combining alcohol & THC inflates the level of one's impairment & crash risk (multiplying effect)

The Problem

- Legalized Medical Marijuana (37 States & D.C.)
- Legalized/Decriminalization of Marijuana (31 States & D.C.)
- Increased use and abuse of Rx
- Continued use of illegal & designer drugs
- Aging population



The Problem (cont'd)

- ↑ Public acceptance of use
- ↓ Public perception of harmfulness

Legalization of Marijuana A Snapshot

MARIJUANA HOSPITALIZATION INCREASES
SINCE LEGALIZATION

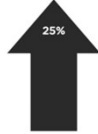


Colorado Department of Public Health and Environment, 2015-2017
Health Department of Health and Social Services, 2016



47% of Colorado drivers who tested positive for marijuana at a level of 5.0+ THC also had a BAC of 0.08 or higher.

(Colorado Division of Criminal Justice, 2016)



There was a 25% increase in Cannabis Use Disorder (CUD) among 12-17 year-olds in "legal" states.

(Cerdas et. al., 2019)

Traditional Enforcement

- DUI is the **ONLY** crime where the investigation stops after obtaining a minimum amount of evidence.
- Current protocols prevent drug testing once a suspect registers an illegal BAC.
- Hinders the ability to measure the true magnitude of the drug-impaired driving problem.
- Many DUI arrests are inaccurately attributed to alcohol alone.



Effects of Drugs on Driving: A Resource

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

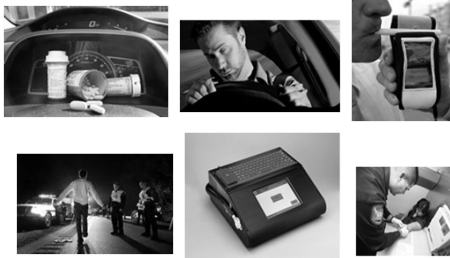
Drugs and Human
Performance Fact Sheets



NHTSA

<http://www.nhtsa.gov/people/injury/research/job185drugs/>
(NHTSA, April 2014)

Impaired Driving Laws



Impaired Driving Laws

- Per se laws/zero tolerance laws
 - Level of impairment need not be proven
- Non-per se laws
 - Driving while intoxicated
 - Driving while abilities impaired by consumption
 - alcohol and/or drug use
 - level of impairment must be proven

History of 0.08 Per Se

Pre-2000:

- 18 states + D.C.

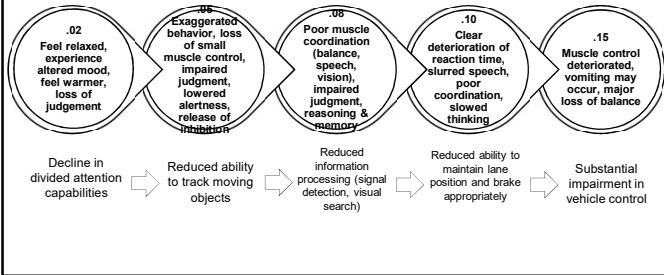
2000 - D.O.T. Appropriations Act:

- Mandated 0.08 standard by 2004
- Highway construction funds

Rationale:

- 0.08 = substantial impairment
- Crash risk substantially increased

Typical Effects on the Body→ Blood Alcohol Concentration



Prevalence of Drugged Driving *Per Se* Laws

One or more drugs

- Zero Tolerance (16)
- *Per se* limits (7)

Marijuana

- Zero Tolerance – THC + metabolites (9)
- Zero Tolerance – THC (3)
- *Per se* limits (5)



Please share
your thoughts



Why don't all States have a DUID "*per se*" law?

**Drug-Impaired *Per Se* Laws:
Alcohol Framework Doesn't Apply to Drugs**



Alcohol

- Alcohol in blood/breath = alcohol in brain = impairment = crash risk

Drugs

- Drugs in blood/urine ≠ drug in brain ≠ impairment ≠ crash risk

Science: Presence vs. Impairment

“The development of impairment standards for drugs similar to the .08 *per se* standard for alcohol has failed, not for want of trying and not for want of serious research. This is because **no standard relationship between blood levels of a drug or drug metabolites and impairment has been established.**”

DuPont, R.L., Voas, R.B., Walsh, J.M., et al. (2012). The need for drugged driving *per se* laws: a commentary, *Traffic Injury Prevention* 13(1), 31-42.

True or False?

The higher the level of THC in the body, the greater the impairment.

True

False

Per Se Limits for Cannabis

AAA Foundation for Traffic Safety (May 2016)

- > “There is no evidence . . . that any objective threshold exists that established impairment, based on THC concentrations”
- > “A quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported”



Driving Under the Influence Trials



Enforcement Challenges

- Many officers are not trained to identify the signs/symptoms of drug impairment.
- Delays in collecting a sample may allow drugs to metabolize; driver's concentration levels may not reflect levels at time of arrest.
- Warrant requirement for blood draws.
- Drug testing is expensive and time-consuming (lab backlogs).



Evidence of Impairment in Impaired Driving Cases

- Driving observations
- Post-stop observations from stop to release
 - Performance on SFSTs
 - Other "FSTs"
 - Coordination & other subjective signs
 - Presence and/or odor of drugs
- Admissions
- Officer's opinion
- ARIDE trained officer opinion
- DRE testimony
- Breath & blood testing
- Oral Fluid testing

DUID testing

Testing method	Location	Pros	Cons
Oral fluid/saliva	Roadside (screening)	<ul style="list-style-type: none"> - Identifies presence of recent use - Easy to administer - Inexpensive - Results in less than five minutes 	<ul style="list-style-type: none"> - Quality of kits varies - Not overly sensitive, especially for cannabis - Not specific; generally test for drug classes - Short window of detection
Blood	Laboratory (evidentiary)	<ul style="list-style-type: none"> - 'Gold standard' - Conclusive, sensitive, and specific 	<ul style="list-style-type: none"> - Short window of detection - Expensive (e.g., \$300 in CO) - Requires trained individual to conduct blood draw
Urine	Laboratory (evidentiary)	<ul style="list-style-type: none"> - Long window of detection - Conclusive, sensitive, and specific 	<ul style="list-style-type: none"> - Officers must observe suspects - Expensive
Oral fluid/saliva	Laboratory (evidentiary)	<ul style="list-style-type: none"> - Conclusive, sensitive, and specific 	<ul style="list-style-type: none"> - Short window of detection - Very expensive - Few qualified labs

Admissibility of Standardized Field Sobriety Tests



Admissibility of SFSTs - In General

- Generally admissible – e.g. *City of West Bend v. Wilkens*, 278 Wis.2d 643 (2005)
 - observational tools
 - not scientific tests
 - relevant & probative
- Generally not admissible as to level of intoxication
- No “pass” vs. “fail”



Admissibility of SFSTs – DUI Mj

Com. v. Gerhardt, 477 Mass. 775 (2017)

- SFSTs admissible in operating under the influence of marijuana case
- Lay witness may testify concerning observable behavior:
 - Bloodshot eyes
 - Lack of coordination/poor balance
 - Reaction times, slow speech, paranoia

See also *State v. Mueller*, 386 Wis.2d 351 (2019)

The Taking of Breath & Blood Specimens

An Overview

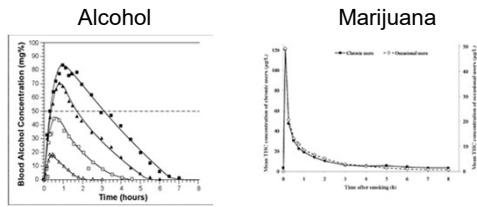
Breath Samples

- Constitutes a search & seizure
- Permissible
 - With consent
 - Incident to arrest

Blood Samples

- Constitutes a search & seizure
- Permissible
 - Pursuant to a search warrant
 - With exigent circumstances
 - With express consent
 - Incident to medical treatment

Dissipation of Alcohol & Marijuana



Food for Thought

Does/should the criminal justice system treat all impaired driving cases the same regardless of the impairing substance?

- Alcohol vs.
- Illicit drugs vs.
- Prescriptions vs.
- Marijuana



Missouri v. McNeely, 133 S.Ct. 1552 (2013) Exigent Circumstances

Issue Presented:

Whether the natural dissipation of alcohol in the bloodstream creates a *per se* exigency



Missouri v. McNeely

133 S.Ct. 1552 (2013)

- Non-consensual blood draw constitutes a search subject to 4th Amendment scrutiny
- Warrant or exception to warrant requirement required

HELD: dissipation of alcohol is not a *per se* exigency



Mitchell v. Wisconsin

139 S.Ct. 2525 (2019)



Mitchell v. Wisconsin

U.S. Supreme Court

Issue Presented:

- Whether implied consent statute provides exception to the 4th Amendment warrant requirement

State v. Mitchell, 2018 WI 84, 914 N.W.2d 151 (2018):

- “Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin’s roads and drinking to a point evidencing probable cause of intoxication.
- Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity ... to withdraw his consent.”

Mitchell v. Wisconsin

- BAC tests must be prompt because it is a biological certainty that alcohol dissipates from the bloodstream literally disappearing by the minute”
- “when the driver’s stupor or unconsciousness deprives officials of a reasonable opportunity to administer a breath test using evidence-grade equipment, a blood test will be essential for achieving the goals of BAC testing”



Mitchell v. Wisconsin

Plurality Opinion

HELD: exigent circumstances exist when natural dissipation is combined with other pressing police duties

- When person’s stupor requires trip to hospital, State may “almost always” order a warrantless blood test

Exigent Circumstances

Possible Examples

- Officer delayed by need to investigate crash
- Officer had to go to hospital to begin DWI investigation
- Suspect was being treated for injuries
- Alcohol/drug dissipation
- Time necessary to obtain warrant
- Unavailability of magistrate/judge

Hypothetical #2

- Single vehicle crash, minor injuries to driver; driver appears disoriented
- Odor of alcohol on breath; odor of marijuana from inside vehicle
- Burnt roach inside cup holder
- At police station – 0.03 BAC (breath)
- Refuses blood test
- Taken to hospital for warrantless blood draw



What Lies Ahead?



- Legalization/decriminalization of other drugs?
- Roadside drug testing
- Oral fluid drug testing
- New field sobriety tests
- Research on marijuana
- *Per se* drug-impaired driving laws

SMG
ENTERTAINMENT.TV

Resources

- NHTSA Traffic Safety <https://cdan.nhtsa.gov/>
- National Center for DWI Courts <https://www.dwicourts.org/>
- National Association of Drug Court Professionals <https://www.dwicourts.org/>
- National Institute on Alcohol Abuse and Alcoholism <https://pubs.niaaa.nih.gov/publications/arh291/41-48.htm>
- National Institute of Justice <https://nij.ojp.gov/>
- Hon. Scott Pearson
- APA Fellow Mark Stodola

THANK YOU!

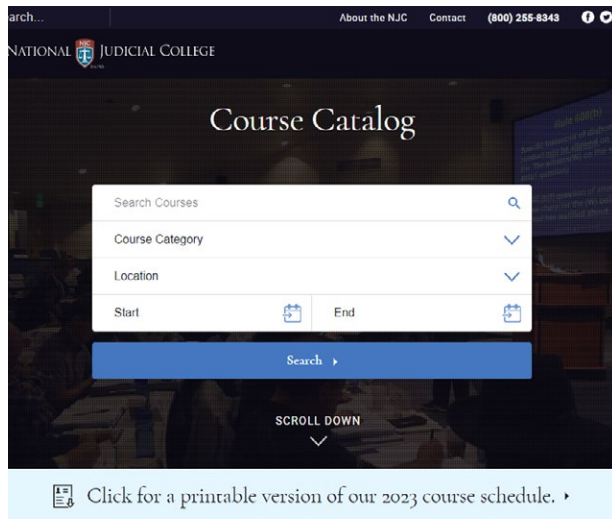
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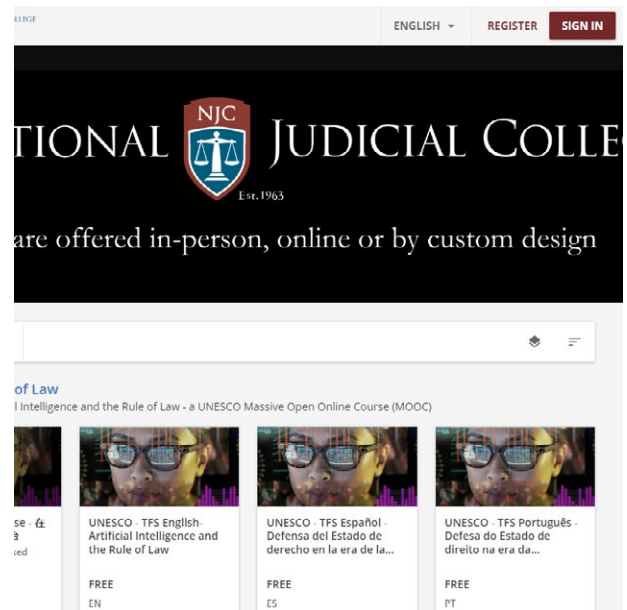
Additional Resources

For a full catalog of courses visit: judges.org/courses

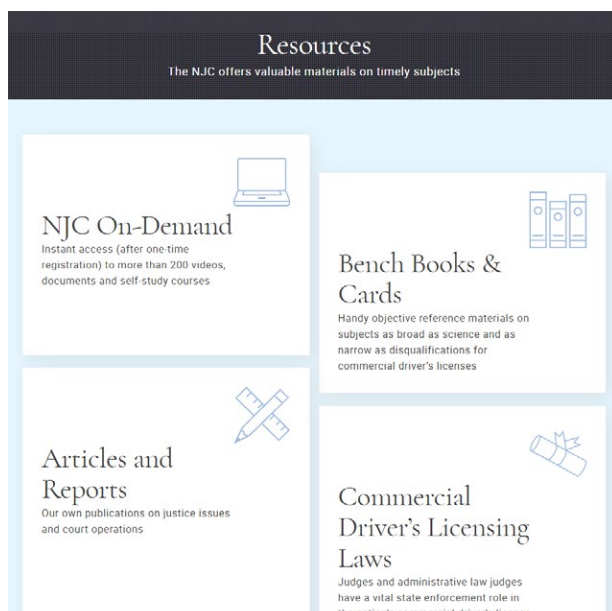


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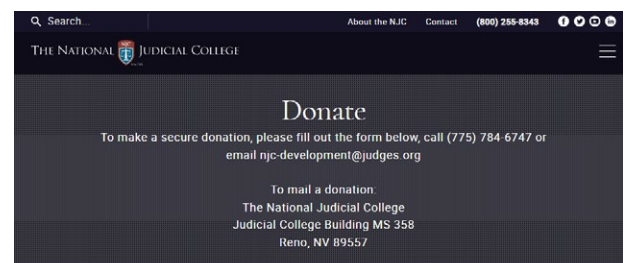
Online courses, recorded webinars, international courses are all available on NJC On-Demand: golearn.judges.org



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Judges who earn a **Certificate of Judicial Development: Adjudicating Impaired Driving** have higher levels of judicial expertise, skill, knowledge and professional growth.

Coursework for the **Certificate of Judicial Development: Adjudicating Impaired Driving** is comprised of completing three NJC products:

- One in-person course: *The Traffic Case: A Course for the Nonlawyer Judge or Impaired Driving Case Essentials*
- One impaired driving webinar (recorded or live)
- The self-study course *Search & Seizure in Impaired Driving Adjudication*

This program has been specifically designed for nonlawyer traffic court judges, magistrates and hearing officers who handle motor-vehicle-related cases. Criteria must be met during 2020-2025.

Please contact Bryan Walker at bryanwalker@judges.org for more information on how to get yours.

