

IMPAIRED DRIVING SAFETY COMMISSION ACT

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House Bill 5024 (reported from committee as H-1)

Sponsor: Rep. Peter J. Lucido

Committee: Judiciary

Complete to 4-4-16

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: The bill creates the Impaired Driving Safety Commission Act to establish a commission charged with researching and recommending a threshold of THC bodily content that would constitute evidence for *per se* impaired driving.

FISCAL IMPACT: The bill will have indeterminate fiscal implications for the Department of State Police, as discussed in greater detail later in the analysis.

THE APPARENT PROBLEM:

The Michigan Vehicle Code prohibits a person from driving with any detectible amount of a Schedule 1 controlled substance in his or her body. The controlled substances listed in Schedule 1 include marihuana. At the same time, the Michigan Medical Marihuana Act (MMMA) protects a qualifying registered patient from prosecution for operating a vehicle with any amount of marihuana in his or her system, as long as the patient *is not under the influence of marihuana* and is otherwise in compliance with the act. The protections provided by the MMMA apply to the internal possession of marihuana as well as to the possession of usable marihuana, but restricts the amount of usable marihuana a patient may possess at any one time to no more than 2.5 ounces.

Where the Vehicle Code establishes 0.08 BAC as a *per se* limit to determine when a person is driving under the influence of alcohol, regardless of whether the driver actually shows any signs of impairment, the MMMA does not define "under the influence" as it relates to bodily content of marihuana. Therefore, it is up to a jury or a court (if a bench trial) to determine if the prosecution has shown that the patient (defendant) was indeed operating the vehicle while under the influence of marihuana.

Recently, the Michigan Supreme Court heard a case that involved a registered qualifying patient and whether the patient was protected under the MMMA when he committed a traffic offense while having a measurable amount of marihuana in his system. *People v Koon*, 494 MICH 1; 724 NW2d 724 (2013) In *Koon*, when the defendant was stopped for speeding, he presented a medical marihuana card. A blood test taken later showed that the defendant had THC, the physiologically active component of marihuana, in his system. The trial court concluded that the MMMA protected the defendant from prosecution under the Vehicle Code's zero tolerance level for a Schedule 1 drug. This was upheld on appeal to the Circuit Court, but overturned by the Michigan Court of Appeals (COA), which concluded that by violating the Vehicle Code's prohibition on any bodily amount of marihuana, the defendant was driving under the influence and therefore the protections of the MMMA did not apply. The Supreme Court agreed with the trial court and Circuit Court

and reversed the COA decision, noting that had the defendant been "shown to have been under the influence of marijuana, then the MMMA's protections will not apply, and the prosecution may seek to convict defendant under any statute of which he was in violation . . .", including a violation of the Vehicle Code's zero tolerance for a Schedule 1 substance.

The author of the *Koon* opinion went on to note that "the MMMA is an imperfect statute", that interpretation of the MMMA "has repeatedly required this Court's intervention", and that the *Koon* case "could have been easily resolved if the MMMA had provided a definition of 'under the influence.'" The author also suggested that to the extent the Legislature "wishes to clarify the specific circumstances under which a registered patient is per se 'under the influence' of marijuana, it might consider adopting a 'legal limit', like that applicable to alcohol, establishing when a registered patient is outside the MMMA's protection."

In response to *Koon*, some believe that a commission should be created and tasked with researching and recommending a *per se* level for THC impairment, as well as funding a University-based research program to determine the appropriate threshold for THC bodily content that would provide evidence for *per se* impaired driving.

THE CONTENT OF THE BILL:

House Bill 5024 creates a new act to establish a commission charged with researching and recommending a threshold of THC bodily content that would constitute evidence for *per se* impaired driving. The new act would take effect 90 days after enactment.

The new act would be known as the Impaired Driving Safety Commission Act, which would, among other things, do the following:

Create the Impaired Driving Safety Commission

- Appointed by the Governor, membership would comprise the director of the Department of State Police (or a designee), one M.D. or D.O., one forensic toxicologist, one medical marihuana patient, and two professors from two different Michigan public research universities.
- Appointees must have significant experience or involvement in studying marihuana, substance abuse, or impaired driving, as well as have good moral character. An appointee could not have been charged with a felony or misdemeanor involving a controlled substance, theft, dishonesty, or fraud.
- Members must be appointed within 90 days of the bill's effective date.
- Members would serve without compensation but would be reimbursed for actual and necessary expenses incurred in the performance of their official duties.
- Commission business must be conducted in accordance with the Open Meetings Act, and writings prepared, owned, used, in the possession of, or retained by the commission in the performance of an official function would be subject to the Freedom of Information Act.

- The commission would be abolished upon submission of a final report that would include a recommendation for an appropriate threshold of THC for a *per se* impaired driving violation.

Commission Duties

The Commission must do all of the following:

- Identify sources for grants to assist in defraying the cost of researching the effects of marihuana on driving.
- Fund a research program at a public research university to determine the appropriate threshold for a *per se* THC bodily content for impaired driving. (See ***Background Information.***)
- Collect and analyze information regarding marihuana-induced impaired driving and the THC bodily content impairment thresholds.
- Review and analyze research and state laws relating to the THC bodily content thresholds that provide evidence for *per se* impaired driving.
- File a final report with the Governor and Legislature no later than July 1, 2017. The report must include, but not be limited to, the results of the Commission's research program, recommendations for an appropriate threshold of the THC bodily content to provide evidence for *per se* impaired driving, and recommendations for further legislative action.

Impaired Driving Commission Safety Fund

The Fund would be created within the Department of Treasury but administered by the Department of State Police, contingent upon appropriation of money to the Fund. All money received by the Commission (including grants) would be state funds and appropriated by law. Money in the Fund could be expended only upon appropriation and only in a manner to carry out the act's purpose. Money remaining in the Fund at the close of the fiscal year must remain in the Fund and not lapse to the General Fund.

Repealer

The act would be repealed on the date the Commission's final report to the Governor, Senate Majority Leader, and Speaker of the House of Representatives is filed **or** two years after the act's effective date, whichever occurs first. (Note: The H-1 substitute as reported by committee requires the final report to be submitted no later than July 1, 2017, a date that, depending on when the bill takes effect, could be just a few months after enactment.)

BACKGROUND INFORMATION:

****** Operating a motor vehicle while intoxicated or impaired by the consumption of alcohol, illegal drugs, and some prescription medications, or any combination of these substances is against the law under provisions of the Michigan Vehicle Code, and a violator faces criminal penalties as well as license sanctions and fines. Alcohol has a *per se* threshold for drunk driving, meaning that a person is guilty of drunk driving if the person's bodily alcohol content (BAC) level is 0.08 or higher. A person is guilty of drugged driving if the person has any amount of a Schedule 1 controlled substance (illegal narcotics, hallucinogens, etc.), or cocaine. A person could also be guilty of drugged driving while using lawfully

prescribed prescription medications if the medication, or a combination of that medication with other medications or alcohol, affected (impaired) the person's ability to operate a vehicle in a safe manner.

** Marihuana currently is listed (both on the federal and state drug schedules) as a Schedule 1 drug. Unlike other Schedule 1 drugs, however, the component of marihuana responsible for most of the psychological effects, THC, may be detected in the saliva or blood, and in particular hair or urine, long after the ability to affect a person's driving ability has dissipated. According to a report issued by the Governors Highway Safety Association, for states had enacted laws establishing a *per se* threshold for impaired driving for THC as of August, 2015. [Hedlund, James (n.d.). Drug-impaired Driving: A Guide for What States Can Do. Retrieved from http://ghsa.org/html/files/pubs/GHSA_DruggedDrivingt2015_R5_LoResInteractive.pdf]

** For up-to-date information on marihuana and drugged driving from the National Institute on Substance Abuse (NIDA), part of the National Institutes of Health, go to: <https://www.drugabuse.gov/publications/research-reports/marijuana/letter-director>

** Research articles available from NIDA include the following:
National Institute on Drug Abuse. Research on THC blood levels sheds light on difficulties of testing for impaired driving Retrieved from <https://www.drugabuse.gov/news-events/news-releases/2016/01/research-thc-blood-levels-sheds-light-difficulties-testing-impaired-driving> on March 11, 2016

For a copy of the abstract, “Effect of Blood Collection Time on Measured Δ^9 -Tetrahydrocannabinol Concentrations: Implications for Driving Interpretation and Drug Policy” published in *Clinical Chemistry*, and co-authored by Drs. Marilyn Huestis and David Gorelick from NIDA, go to: <http://www.clinchem.org/content/62/2/367.abstract>

FISCAL INFORMATION:

This bill would have an indeterminate fiscal impact on the Department of State Police (MSP). This bill creates the Impaired Driving Safety Commission Fund (Fund), but does not appropriate any initial funding. The Impaired Driving Safety Commission (Commission), which would be created under the MSP, would be tasked with seeking out funding to conduct the research mandated in this bill, presumably from private and/or federal grants.

It is unknown how much funding a research project assessing the influence of THC on the ability to operate a vehicle safely would require. It is also unclear as to whether or not the MSP would be required to fund the research project if the Commission is unable to secure outside sources of funding. While the creation of the Fund is dependent upon appropriations to the Fund, the responsibilities of the Commission would not be. Presumably then if no outside funds were obtained by the Commission, the full cost of the project would have to be covered by existing MSP resources.

The members of the Commission would not be compensated for their services. However, the MSP would be responsible for any incidentals or administrative costs.

ARGUMENTS:

For:

The problem the bill seeks to address is whether a measurable bodily amount of marihuana is known to, or can be determined to, impair a person's ability to drive even if the person does not demonstrate impairment (for example, weaving across lanes); and it attempts to resolve an apparent conflict in interpretations of two distinct state statutes.

The Michigan Vehicle Code has a zero tolerance for operating a motor vehicle with even an infinitesimal amount of a Schedule 1 substance, which includes marihuana. On the other hand, the Michigan Medical Marihuana Act protects a qualifying registered patient from criminal prosecution under the Vehicle Code unless the person is shown to be under the influence of marihuana. A recent state Supreme Court case held that the MMMA supersedes the Vehicle Code, meaning that just because a patient's system contains detectable marihuana, the patient cannot be prosecuted for drugged driving just on that fact alone; the patient must show some form of impairment in order not to be protected by the MMMA.

The author of the Supreme Court decision identified the conundrum as stemming from a lack of a definition in the MMMA as to what constitutes being "under the influence" and suggested the Legislature establish when a registered patient is outside the protection of the MMMA. Unlike alcohol, however, there is no "generally agreed upon" level of THC in a person's bloodstream backed up by irrefutable scientific evidence that has been shown, in the same way as for alcohol, to affect a person's ability to safely operate a vehicle even when the person does not show any outward, physical signs of impairment.

House Bill 5024 addresses the issue by creating a commission, the members of which will have a background in studying marihuana, substance abuse, or impaired driving. Many studies have already been done regarding the effects on judgement and motor skills, and a few states have already adopted a *per se* level of THC impairment. The bill would require the commission members to review such studies and state laws and make a recommendation for an appropriate threshold of THC bodily content to provide evidence for *per se* impaired driving, as well as recommendations for further legislative action.

The bill would also require the commission to fund a research program at a public research university to determine the appropriate threshold of THC bodily content to provide evidence for *per se* impaired driving. Even if the project wasn't conclusive, it could add to the available science in this area and help make clearer which level of THC in the blood would be a fair representation of impairment.

Such an approach should mean that any recommended level of THC bodily content for *per se* impaired driving would be based on the scientific knowledge of the day and not be some arbitrary number picked from the air. It means the recommendations should reflect what

is likely to increase public safety yet preserve the protections of the MMMA for qualified patients who otherwise are complying with the act (meaning that absent being at or over a *per se* level for THC impaired driving, a patient would have to have demonstrated some level of impairment in order to be prosecuted for driving "under the influence" of marihuana.)

The bill in general could also increase the public's awareness and knowledge of how marihuana use can affect an individual driver's ability to operate a motor vehicle safely.

For:

The reason the bill is important is because marihuana is, as a Schedule 1 drug, illegal and yet is the drug most often found in the bloodstream of drivers involved in accidents, including fatal accidents (by some accounts, over 30 percent of drivers tested for drugs after an accident tested positive for marihuana). The effects on driving can include decreased car handling performance, increased reaction times, impaired time and distance estimation, as well as sleepiness and difficulties sustaining vigilance. (Drugs and Human Performance fact sheet on cannabis, National Highway and Traffic Safety Administration).

However, the role that marihuana plays regarding impairment is less clear. Current research studies have shown that marihuana impairs performance on driving simulator tasks and on open and closed driving courses for approximately up to three hours. But unlike alcohol, there is no universal consensus as to how the amount of THC measurable in a person's blood relates to the ability to safely (or not) operate a vehicle.

Ingestion vs. smoking, occasional use vs. chronic use, and other factors such as combining alcohol with marihuana can also influence the level of impairment and the timeframe of impairment between one person and another. Marihuana remains detectible longer in the blood of a chronic user. And smoking releases THC into the bloodstream quicker than eating a "medical edible" such as a brownie or candy; THC levels peak during smoking but peak about one to three hours after ingesting an edible, yet impairment can last for two to four hours after marihuana use by any means. Some studies demonstrated residual effects in specific behaviors, such as complex divided attention tasks, up to 24 hours. Mixing marihuana and alcohol appears to increase the safety risk factor over using marihuana alone. Complicating the issue is that unlike alcohol and other intoxicating substances, the time period during which THC can be detected in urine tests is well past the period of time of intoxication and impairment, and THC can be detected in the blood days after ingestion—long after the effects have dissipated. (NHTSA fact sheet) Thus, so far, trying to determine a *per se* THC level in blood as reliable as the 0.08 BAC for alcohol remains elusive.

Yet, for medical marihuana patients, who are protected from criminal or civil prosecution as long as they do not drive while "under the influence" of marihuana, having a defined threshold of THC *per se* impairment in the law could give more teeth to the protections under the MMMA and prevent unnecessary prosecutions from going forward—but only if the threshold was based in science. A level too low could unfairly capture patients who had recently used their medicine, but were no longer under its affects. Too high, and patients whose driving abilities are being affected, but who do not otherwise show signs of

impairments such as slurred speech or loss of coordination, would unduly be protected under the MMMA.

Against:

Implementation of the bill's requirements could be problematic for the following reasons:

- As written, the bill is unclear as to commission duties: are members to review completed studies and laws in other jurisdictions and make a recommendation based on the available science? Or, does the phrase "shall research and recommend a scientifically supported threshold of THC bodily content to provide evidence for *per se* impaired driving" mean that the commission is not only to fund a university-based research program, but also to be the ones actually conducting the research? The later interpretation would be problematic as the members would neither have the time nor the research experience to conduct such a project.
- The commission report must be filed by July 1, 2017, which then would trigger the abolishment of the commission and repeal of the new act. By time the bill could make its way through the legislative process and be signed into law, it is unlikely the bill's requirements could be completed.
- Even if the July 1, 2017 date were extended or deleted, the bill retains an outside deadline of two years from the bill's effective date for the report to be filed or the act to be repealed. According to staff at NIDA, this timeframe is not sufficient in which to appoint members, write grant applications, review and/or conduct research, write a report, etc. Further, it is not clear what would happen to any unspent money in the Fund if the act were repealed and the commission abolished prior to completion of the research program.
- The required public research university research program is likely to be very expensive and take many years to complete. By some estimates, unless the scope of the research was scaled back, the wording of the bill appears to call for a study the scope of which could cost up to \$10 million and take a decade to complete. A more modest, focused study, or just having the commission members research and review available studies and state laws and make a recommendation based on the available information, could be done within the bill's stated time periods and for approximately a million dollars, according to professionals familiar with university-based research grant projects.
- The bill does not specify that the research project be carried out at a public research university in Michigan. Perhaps state universities should be granted a preference.
- According to a recent guide for states on drug impaired driving issued by the Governors Highway Safety Association regarding *per se* laws, the "scientific evidence to establish such an impairment threshold for drugs simply does not exist, and may never exist." Even representatives from the Society of Forensic Toxicologists have been recorded as stating that a link between the *per se* thresholds

and impairment levels "cannot be supported scientifically" (six states to date have enacted *per se* laws for THC and/or other drugs). Thus, it is unlikely that the bill's requirement to fund a project able to provide the missing scientific evidence is feasible.

POSITIONS:

The Michigan Beer and Wine Wholesalers Association (MBWWA) indicated support for the bill. (3-1-16)

A representative of Criminalize Racketeering Against Patients testified in opposition to the bill. (2-9-16)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.