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Traffic Laws & Courts

The newsletter of the Illinois State Bar Association's Section on Traffic Laws & Courts

The other DUI: Part II

By Liam Dixon

In the last newsletter, I wrote an article regarding the serious flaws of the Illinois Marijuana DUI Statute. On April 22, 2014 the State of Arizona ruled their law, similar to Illinois statute, was unconstitutional for many of the same reasons.

The Arizona statute made it unlawful to be in actual physical control of a vehicle if there was "any drug or its metabolite in the person's body." A driver, Hrach Shilgevorkyan, was stopped and submitted to a blood test. (1. The case is *State v. Harris,* for the Honorable Myra Harris, the commissioner of the Superior Court) The State was able to detect Carboxy-THC in the defendant's blood. It should be noted here that Illinois allows a urine test, which can only detect an inert metabolite to satisfy the State's burden. The blood test did not reveal either THC, or "its metabolite Hydroxy-THC, but only Carboxy-THC.

At the hearing the State's expert testified marijuana has many metabolites, and Hydroxy-THC and Carboxy-THC are two of the metabolites, although Hydroxy-THC does not exist in the blood system very long and the State, therefore, does not test for it. The expert also testified the Carboxy-THC is inactive and does not cause impairment and can remain in the system for up to 30 days.

The State did not proceed on the DUI count where they would have had to have proved impairment but, instead, proceeded on the "per se" count. The Lower court found the word metabolite ambiguous as it could be read as either plural or singular. The court further reasoned that that the legislature could not have intended to include all possible byproducts, particularly those that could not impair the driver. The appellate court reversed the lower court's decision. The Supreme Court of Arizona agreed to review the case de novo.

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Ex parte judgments in petty traffic cases

By Jeremy Richey

If a defendant with a petty traffic ticket fails to show up for court, the court system will address the ticket in the defendant's absence. The *ex parte* judgment is a common way for a petty traffic ticket to be resolved when a defendant fails to show up in court. This article discusses what these judgments are and how the practitioner may set them aside.

What is an *ex parte* proceeding?

A type of *ex parte* proceeding is one where a party is missing for a court hearing.[1] In the context of a traffic ticket, an *ex parte* hearing occurs when a person with a traffic citation "does not appear on the date set for appearance, or any date to which the case may be continued."[2] The failure of the motorist to appear in court results in the trial court entering judgment on the traffic offense against the motorist.[3] The Illinois Supreme Court Rule that applies to *ex parte* judgments for traffic citations is Rule 556. This rule contains five paragraphs. Each paragraph addresses the various bail and appearance situations that may accompany citations. Paragraph (a) addresses promises to comply and drivers' licenses as bail, paragraph (b) addresses citations that don't require an ap-

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The Court started its inquiry into the term metabolite and found there is more than one possible meaning for the phrase "its metabolite" and would interpret "the statute as a whole, and consider the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." In looking at the statute in that light the Court found the State's interpretation that metabolite included ANY byproduct lead to "absurd results." The court noted that a result was absurd if it was so irrational, unnatural, or inconvenient that it could not have been, or supposed to have been within the intention of persons with ordinary intelligence or discretion. The absurd result is one that would create criminal liability regardless of how long the metabolite was in the driver's system.

In Arizona there was not an exception for medical marijuana users, which is different from Illinois, but both would criminalize conduct that was legal. A marijuana user in another state, notably Colorado and Washington, could still be prosecuted for, what would otherwise be legal conduct. Arizona's court did express concern for the possibility of prosecuting medical marijuana users without any indication of impairment.

The Arizona court also noted that the State's interpretation would allow the prosecution of an individual who drives after ingesting a legal substance that shares a non-impairing metabolite with a proscribed substance. They cite the example of serotonin, a legal substance, and the proscribed drug bufotenine that share the common metabolite, 5-hydroxindoleactic acid (5-HIAA). Such results were absurd and made the State's argument untenable.

In looking at the legislative history they found the legislative purpose of the statute was to prevent impaired driving. Also, by placing it in the DUI statute the court found it was the intent of the legislature to punish impaired driving not driving with a metabolite in one's system. The statute did not further the purpose of the statute.

The court also described the alcohol "per se" statute and held there is "no generally applicable concentration that can be identified as an indicator of impairment for illegal drugs, noting previous cases holding that a drug's potency cannot be accurately predicted.

The Arizona court held that the statute, as written in Arizona, applied to only to a metabolite that is capable of causing impairment. Drivers cannot be convicted based merely on the presence of a non-impairing metabolite that may reflect the prior usage of marijuana.

The Court's reasoning is sound based on the medical evidence. The Illinois statute suffers from the exact same defects as those discussed by the Arizona high court. The same result is dictated by the science. The flood of laws in both the legalization of marijuana, and medical marijuana across the country, risk many more law abiding citizens being prosecuted and punished for a legal fiction. ■

Ex parte judgments in petty traffic cases

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pearance in court and the motorist provides cash bail or a bond certificate, paragraph (c) addresses citations where court appearances are required, paragraph (d) addresses individual bonds, and paragraph (e) addresses notices to appear. Each paragraph authorizes *ex parte* proceedings.

What traffic tickets are not eligible for *ex parte* judgments?

Illinois Supreme Court Rule 556 repeats throughout the rule that *ex parte* judgments only apply to fine-only offenses. If the citation is for a misdemeanor offense, then an *ex parte* judgment is not available.

How much money should the *ex parte* judgment be for?

Each paragraph of Rule 556 states that the *ex parte* judgment should be the same as cash bail. Illinois Supreme Court Rule 526 establishes cash bail in the amount of $120 for most minor traffic offenses and $140 for speeding 21-25 miles per hour over the posted limit.

How do I remove an *ex parte* judgment from my client's record?

You may wish to move to set aside or vacate[4] an *ex parte* judgment in order to lift a conviction off of a client's driving abstract. To do this, you will need to file a motion to set aside (or vacate) the *ex parte* judgment entered by the Court. If you need a form, check with the circuit clerk's office in your county to see if it has a standard form you can use as a template. You can also find forms online. If your clerk does not have a form online, you will be able to find one on the website of another clerk. ■

Jeremy Richey is the state's attorney for Moultrie County. Prior to taking office on December 1, 2012, he was in private practice in Charleston, Coles County, Illinois.

1. *Black's Law Dictionary* 1398 (10th ed. 2014).
2. Ill. Sup. Ct. R. 556.
3. *Id.*
4. 735 ILCS 5/2-1301; 735 ILCS 5/2-1401.

New amendments to the DUI provisions of the Compassionate Use of Medical Cannabis Pilot Program Act

By Larry A. Davis

The Compassionate Use of Medical Cannabis Pilot Program Act ("Act") became effective January 1, 2014; however, due to the time required to promulgate required rules for its implementation, to date, no registered user cards have been issued by the Illinois Department of Public Health.[1] As a result, to date, there have been no DUI Cannabis arrests that have been subject to its provisions.

As I pointed out in an article appearing in the Illinois Bar Journal ("IBJ") in March 2014, there were numerous issues surrounding the DUI provisions contained in the Act.[2] The Act has now been amended to address a significant problem with its provisions but continues to maintain others.[3]

As was explained in the IBJ article a fundamental problem with the previous version of the Act is that it required that the officer "arrest" the person before field sobriety testing could be conducted but also required that "the officer have an independent, cannabis related factual basis giving suspicion that the person (was) driving under the influence of cannabis" in order to conduct testing. I suggested that these provisions were inconsistent in that a suspicion was a long way from the probable cause associated with an "arrest" to require and obligate one to submit to testing as required by the law.[4]

The amended language has now eliminated the requirement of an arrest and only requires a reasonable suspicion is order to require field sobriety testing.[5]

The Act continues to recognize that cannabis impairment cannot be quantified by a chemical test providing for a prohibited per se level. As a result, it continues to rely on standardized field sobriety tests as a determinant of impairment. As I have opined before this is subject to challenge as an unconstitutional exercise of the State's police powers in that such a conclusion is without a recognized scientific basis. Additionally, the legislature appears to be attempting to qualify any officer trained in field sobriety testing (for alcohol) without regard to the particularized experience and training in drug recognition as currently required under Illinois case law to prosecute DUI drug cases.

Furthermore, the amended Act continues to provide that the obligation to submit to field sobriety tests only applies to the registered cannabis user and that a summary suspension will only result in the case of a registered user who fails or refuses such testing.[6]

The Act also continues to provide that the length of suspension is six months for submitting to and failing testing and 12 months for refusal (regardless whether the person is a first or second offender for summary suspension purposes); prohibits the issuance of a MDDP for registered cannabis users (but allows issuance of a MDDP for non-registered users); provides that a commercial driver's license holder who is a registered user and is subject to a statutory summary suspension under the Act's provisions is subject to a 12-month disqualification for a first suspension and lifetime loss for a second violation (regardless of whether the person was operating a CMV or non-CMV at the time of the offense); and continues to prohibit the use of medical cannabis within a vehicle or from possessing it in a vehicle unless in a tamper-evident medical cannabis container.[7]

Immunity for registered users from DUI prosecution under 625 ILCS 5/11-501(a)(6) remains part of the Act.[8] This continues to raise what I and other attorneys believe is an equal protection issue. In *People v. Fate*, the Court held that the statute creates an absolute bar against driving a motor vehicle following the illegal ingestion of any cannabis without regard to physical impairment.[9] Its reasoning was grounded in the finding that because there was no adequate scientific basis to determine at what level impairment occurs, it was a reasonable exercise of the state's police power to prohibit any driving with the substance in one's system in the interest of "safe streets and highways.[10]

In light of the Court's reasoning in *Fate,* how does immunizing from prosecution those drivers who *legally* use the substance without impairment constitute any less of a risk to the public than those who use it *il-*

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New amendments to the DUI provisions of the Compassionate Use of Medical Cannabis Pilot Program Act

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legally and are not impaired? If the statute seeks to protect the public from that class of drivers with any amount of cannabis in their system, how is the possession of a registered cannabis user card justification for classifying and treating this group differently? It would seem that such a distinction would have a difficult time surviving even a rational basis test. What does having a medical need to use cannabis have to do with according such individuals the right to drive with the substance in their system? No more than allowing individuals who are impaired by a prescription drug taken to alleviate a medical condition—which Illinois, of course, prohibits.[11]

Furthermore, if the legislature is now saying that cannabis impairment can be determined by standardized field sobriety tests (a dubious proposition as stated above), is the reasoning of *Fate* upholding an absolute bar because impairment cannot be quantified—no longer valid and therefore an unreasonable exercise of the state's police powers and therefore a violation of due process?

In my opinion, despite that amendment the Act continues to raise significant constitutional due process and equal protection issues as well as practical enforcement problems that will be litigated for years to come. ■

1. Pub. Act 98-122 (eff. 1/1/14).
2. See L. Davis, "*The Medical Cannabis Act and Illinois DUI Law*," vol. 102, no. 3, page 128 (March 2014).
3. Pub. Act 98-1172 (eff. 1/12/15).
4. *Supra*. See L. Davis, "*The Medical Cannabis Act and Illinois DUI Law*" at page 131.
5. 625 ILCS 5/11-501.9(a).
6. 625/11-501.9(a).
7. See P.A. 98-1172.
8. See 625 ILCS 5/11-501(a)(6).
9. *People v. Fate*, 159 Ill.2d 267 (1994).
10. Supra. 159 Ill.2d. at 271.
11. 625 ILCS 5/11-501(b).