

Vermont Legislative Council

115 State Street • Montpelier, VT 05633-5301 • (802) 828-2231 • Fax: (802) 828-2424

MEMORANDUM

To: Erik FitzPatrick
From: Kirby Keeton
Date: March 28, 2013
Subject: Driving under the influence of drugs; per se standard

We discussed the per se standard as an approach for determining whether a person has driven under the influence of drugs. I reviewed House Bill 501 and some per se laws used in other states. Below is a summary of the per se standard.

The per se standard in other states

The per se standard makes any detectable level of a prohibited drug in a driver's blood a violation of the driving under the influence of drugs (DUID) law. DUID statutes in eighteen states use a variation of the per se standard. Federal laws for commercial vehicles also use a per se standard for DUID. Pennsylvania and Delaware are the two states with per se laws closest in proximity to Vermont. Below is a description of the DUID laws in those states.

Pennsylvania

Pennsylvania uses a hybrid approach involving a per se standard for some drugs and two subjective standards for other drugs. Pennsylvania's per se standard is as follows. Any amount of a substance or metabolite of a substance listed as schedule I, II, or III under the state's Controlled Substance, Drug, Device and Cosmetic Act is a violation if found in the individual's blood. Schedule I, II, and III drugs have a high or moderate potential for abuse. Additionally, there is an exception for medical prescriptions.

For other drugs, Pennsylvania uses the subjective standard, "under the influence of a drug . . . to a degree which impairs the individual's ability to safely drive . . ." Pennsylvania also uses a simple "under the influence" standard for solvents and noxious substances.

Delaware

Delaware uses both a per se standard and a subjective standard. A driver has violated the per se standard "when the person's blood contains . . . any amount of an illicit or recreational drug . . . substance or compound that is the result of unlawful use or consumption . . ." An "illicit or recreational drug" is defined as a schedule I controlled

substance, cocaine, amphetamine, methamphetamine, phencyclidine, a designer drug, or any other substance that releases vapors or fumes that may be used for “intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.” The term “unlawful use” excludes some medical prescriptions and some over-the-counter drugs but the burden is on the defendant to show that a use was lawful.

Delaware’s subjective standard is “under the influence of any drug.” Under the influence is defined as “less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.” “Drug” is defined as any scheduled controlled substance or any other substance that releases vapors or fumes that may be used for “intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.”

Effectiveness of Per Se Laws

Attached is part of a 2012 study on whether per se laws reduce instances of traffic fatalities. The study concluded that per se laws do not reduce traffic fatalities.

House Bill 501

H.501 uses a per se standard for 12 discrete drugs and a subjective standard for all other drugs. The definition of “drug” read together with the subjective standard may result in inadvertently criminalizing a wide range of activities done while driving. Further, the per se standard potentially makes Vermont’s medical marijuana users unable to drive at any time.

One definition of “drug” used by the bill is, “a substance, other than food, intended to affect the structure or any function of the body of humans or animals.” This definition of drug is broad enough to include nicotine, ibuprofen, or caffeine. The subjective standard used to supplement the per se standard is “when the person is under the influence of any other drug . . . to the slightest degree.” The broad definition of drug coupled with the low threshold for determining whether a person is “under the influence” means that activities like smoking a cigarette or taking over-the-counter medicine could potentially become criminal offenses if done while driving. The effect of H.501 would be that Vermont would have a broader definition of DUID than any other state that I reviewed.

Another policy consideration involves medical use of marijuana. THC is one of the drugs listed under the per se standard. Considering that THC can remain in a person’s blood for weeks after use, a medical marijuana user would never be allowed to drive a vehicle without risking criminal liability.