



DUI/DRUG OFFENSE ENFORCEMENT CHALLENGES

Report of Act 158 of 2016

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Report to the Joint Legislative Justice Oversight Committee

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Saliva testing is functionally identical to breath testing in that it only requires the insertion of a small plastic swab to collect the sample, and, the breath test requires the driver to insert a small plastic tube into his mouth to provide the sample.

The U.S. Supreme Court determined recently that the use of an oral swab by law enforcement was a “negligible intrusion.” *Maryland v. King*, 569 U.S. --- (2013). Saliva testing was again discussed in *Birchfield v. North Dakota*, which concluded that saliva testing is “no more intrusive” than breath testing. 136 S.Ct. 2160, 2177. This finding is in accord with *McGuigan* as discussed above.

The Vermont Supreme Court has also considered oral swabs and determined that, even though they remove saliva, rather than air, from the mouth, **oral tests are equivalent to breath tests**. See *In re Nontestimonial Identification Order Directed To R.H.*, 171 Vt. 227, 233-34 (2000)

Furthermore, the Court stated, “**We do not believe that taking a saliva sample by swabbing a pad on the inside of the mouth involves the same intrusiveness as drawing blood by piercing the skin with a needle.**” Emphasis added.

Given the legal precedents set to this point, the Vermont Supreme Court would likely conclude that our Constitution permits a request for a sample of saliva, particularly when that request is supported by facts sufficient to permit an officer to suspect that a driver may be impaired by drugs.

Conclusions and Recommendations

Oral fluid testing is a scientifically reliable means of determining the presence of drugs in impaired drivers. It is effective and reliable both as a roadside screening test and as an evidentiary test. It is less invasive than blood testing, and results can be obtained more quickly. It is the position of this committee to recommend that the Legislature wholeheartedly endorse its use in Vermont.

Furthermore, we would ask that the Institution Committees of the House and Senate continue to monitor the renovation of the VFL in order to ensure its timely opening and certification. The VFL will significantly reduce the costs of prosecution of drugged driving cases, once operational.

Defense Counsel’s Perspective

In an effort to provide a balanced report, Attorney Bradley D. Myerson of Manchester Center, Vermont, has provided an alternate position to the majority report. It has not been altered or edited.

LIMITATIONS OF SALIVA TESTING

1. According to the Center For Forensic Science Research and Education *Vermont Oral Fluid Drug Testing Study 2015*, at 3: "A limitation of saliva testing is that drug concentrations 'cannot be related to a specific degree of impairment in the driver, nor can they be used to predict

blood drug concentrations". Also, the National Safety Council's Alcohol Drugs and Impairment Division compiled recommendations for scope and threshold for laboratory based drug screening and confirmation in saliva testing cases. "The recommendations do not however address criteria for field based testing devices". Id.

2. "There is currently no Federally approved list of devices for use in law enforcement saliva drug testing as there is for alcohol testing devices". Id. at 4.

3. The oral fluid drug testing study is not authoritative because of all the persons in the study who tested positive for drugs, "only 9 subjects provided blood samples so no statistical comparisons were possible of performance of field saliva testing against the current practice of blood testing". Id. at 7.

4. The comparisons in the report between field saliva test results and blood tests is for informational purposes only "as the number was too small for meaningful analysis of the sensitivity, accuracy, or positive predictive value".

5. Two field saliva testing drug devices were evaluated in the study, the Drager Drug Test 5000 and the Alere DD52 Mobile Test System. Regarding the Alere DDS 2, field testing produced an invalid result in 24% of the total cases. "Given the low number of subjects and the low frequency of positives in the cohort, the specificity and sensitivity and accuracy cannot be calculated with any statistical significance...". Id. at 15.

THE LACK OF PROOF THAT DRIVERS IMPAIRED BY DRUGS, ARE A THREAT TO PUBLIC SAFETY SUFFICIENT TO JUSTIFY SALIVA TESTING

1. According to data provided by the Vermont Court Administrator, between 2014 and July 1, 2016, 359 motorists were arrested for driving under the influence of drugs, or drugs and alcohol, with 356 being convicted. Of these, there were 229 arrests for 1st Offense DUI/Drugs, without regard to identity of substance, with 278 convictions (the discrepancy is because of cumulative cases from previous years resulting in convictions).

2. Roadside saliva testing is being proposed as a clear cut way to determine if someone is under the influence of drugs, similar to preliminary roadside breath testing in DUI cases. However, there is ample research showing that there is little to no correlation between the level of THC in a person's blood and actual impairment. Moreover, since roadside breath test results are not scientifically reliable under Vermont Law to be introduced as part of a DUI prosecution to establish guilt beyond a reasonable doubt, *excepting in Civil License Suspension cases or as a basis to establish probable cause in a preliminary hearing*, how can the results of roadside saliva testing be deemed sufficiently accurate and reliable under Rule 702 to be introduced into evidence? The manner in which the human body ingests controlled substances, including marijuana, is vastly different than that of alcohol.

3. A saliva sample showing some level of THC means nothing except that the driver had smoked marijuana at some previous time, or even was in a room with pot smokers, i.e. "contact high". It is widely accepted in the scientific community that THC remains in a person's system long after marijuana is smoked. What if the driver is a medical marijuana user and happens to be stopped because of a defective equipment violation? Medical marijuana patients may always have a certain amount of nanograms in their blood at almost all times, yet have no impairment.

4. Marijuana remains in the body for up to 30 days and perhaps longer but the mind altering affects of THC only remain for a few hours, and peak within 10 to 30 minutes of ingestion.

5. From the National Highway Traffic Safety Administration Drug and Human Performance Fact Sheets for Cannabis/Marijuana (D9-THC)
(www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm):

It is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects.

It is inadvisable to try and predict effects based on blood THC concentrations alone... it is possible for a person to be affected by marijuana use with concentrations of THC in their blood below the limit of detection of the method. Id. at 2.

6. *Test case: Australia*

- In west Australia, roadside saliva testing (using the Draeger Drug Test) was introduced in legislation in 2006.
- It has recently come to light from police that these machines have "quite a few issues" including: failing to return adequate readings, machines not working sufficiently (the indicators fails even though there is plenty of saliva), and failing to pick up on positive readings despite admission from driver they had smoked in the last 24 hours.⁴
- Saliva testing was recently criticized by a NSW judge who acquitted a man who was charged with drug-driving nine days after he had smoked.⁵
- In that case, roadside saliva test detected presence of THC in his blood, although clearly he was not impaired since he had smoke nine days earlier.⁶

7. What if the saliva sample shows elevated levels of a drug prescribed for a driver but who is stopped for an equipment violation or a minor traffic infraction, i.e. failure to activate a turn signal within 100 feet of an intersection, doesn't show signs of alcohol impairment, but nevertheless makes the officer feel "suspicious" because of for example, bloodshot, watery eyes (from fatigue, smoking, allergies) or dry mouth (nervousness) or hesitant speech (nervousness), which could be seen as symptoms of drug ingestion?

8. The devices used would have to be extremely accurate and reliable to show and "any amount" standard, and there is no scientific standard evident for the "any amount" threshold that a DUI/Drug violation would be based on.

⁴ <https://au.news.yahoo.com/a/31046715/police-drug-test-accuracy-in-doubt/>

⁵ <http://www.smh.com.au/nsw/roadside-drug-driving-tests-mysterious-and-uncertain-magistrate-says-20160202-gmjus2.html>

⁶ <http://www.abc.net.au/news/2016-02-02/man-caught-drug-driving-days-after-smoking-cannabis-acquitted/7133628>

PERSONAL PRIVACY CONCERNS GENERATED BY ROADSIDE SALIVA TESTING

1. In State v. Medina 2014 VT 69, 197 Vt. 63 (2014) the Vermont Supreme Court held that warrantless, suspicionless DNA collection (by swabbing of the lining of the mouth) of persons arraigned for a felony, after a determination of probable cause, was an unconstitutional search and seizure under the Fourth Amendment and Chapter 1, Article 11 of the Vermont Constitution. While the proposed Saliva Testing Statute has safeguards against retention of DNA from roadside saliva testing, and while Medina found swabbing of the mouth to be unconstitutional under Federal and State law, the privacy interests addressed in Medina regarding a person's saliva should apply with equal force to trigger the same protections against warrantless roadside saliva testing under Chapter 1, Article 11.
2. In Medina, the mouth swab DNA test was authorized by 20 V.S.A. § 1933(a)(2). However, the "donor" had to first be arraigned for a felony, *after* a determination of probable cause, for their DNA to be collected by mouth swab. Conversely, a roadside saliva test does not involve a sampling of tissue, an entry in to the mouth, or retention of DNA from the collected sample for later submission to the Vermont DNA Databank. Nevertheless, the privacy interests a person has in his saliva, and in his bodily fluids generally, is so substantial that warrantless roadside saliva testing may violate Chapter 1, Article 11 of the Vermont Constitution. The Vermont Supreme Court has "consistently held that Article 11 provides greater protections than its Federal analog, the Fourth Amendment...". State v. Cunningham 2008 VT 43 ¶ 16, 183 Vt. 401 (2008).
3. First, the order to produce saliva for testing is a search under Chapter 1, Article 11. When an officer asks a driver to perform field dexterity tests in order to determine whether the individual should be processed for DUI, a seizure occurs, State v. Gray 150 VT 184, 190-91 (1988). Certainly a saliva test should be treated no differently. A request to provide a *preliminary breath test*, as part of the DUI roadside processing, is also a search, State v. Therrien 2011 VT 120 ¶ 1, 191 Vt. 24, 27 (2011).

"Because of the strong interest in public safety *and the minimal intrusion of the test*, administering a PBT is reasonable under both the Fourth Amendment and Article 11 of the Vermont Constitution, if an officer *can point to specific, articulable facts indicating that an individual has been driving under the influence of alcohol.*" State v. Therrien, supra at 28 ¶ 7 (citation omitted) (emphasis added).

4. It is also accepted that a person does not have a privacy interest in their breath, because it is expelled by the body as part of the normal respiratory process. However, since saliva is a bodily fluid not normally shared with the public at large, and because an individuals have a privacy interest in their bodily fluids, the standards for preliminary breath testing are too low for justifying a warrantless seizure of saliva for roadside breath testing. While it can be argued that there is "a strong law enforcement interest in attempting to keep a suspected drunk (or drugged) driver off the roads", the "level of intrusion" should be greater for saliva testing than roadside breath testing, or roadside dexterity exercises. State v. Therrien, supra.
5. Under Article 11, warrantless searches and seizures are presumed unconstitutional, a determination where the Court will not defer to the Legislature. State v. Medina, supra, 197 Vt. at 70, ¶ 13. Certainly a motorist has an expectation of privacy in his saliva. "Defendants, like the rest of us, have an expectation of privacy in their oral cavity and in the information contained in their DNA", Id. ¶ 13. This means the State must justify what exceptional circumstances "in which special needs, *beyond the normal need for law enforcement*, made the warrant and probable cause requirement impractical". Id. at 73, ¶ 14 (quotation omitted) (emphasis added). If a "special need" is found, a Court must determine a "balancing" of the competing public and private interests at stake. Id. (citation omitted).
6. In Birchfield v. North Dakota 579 U.S. _ 2016 (6/23/16), the United States Supreme Court held that under the Fourth Amendment, police must obtain a warrant before seeking an evidentiary blood sample from a DUI arrestee. In reaching this

conclusion, the Court noted the difference between breath testing and blood testing, the latter being obviously more intrusive. *Id.* slip. op. at 22-23. The Supreme Court engaged in a similar balancing analysis regarding the degree to which blood testing intruded upon individual privacy and the degree which blood testing was needed to promote "legitimate governmental interests", *Id.* at 20 (citation omitted).

7. The proposed Vermont saliva testing bill prohibited the collection and use of DNA in test samples by police. However, saliva does contain DNA, and as Birchfield noted, "although the DNA obtained (through a Buccal Swab)", "could be lawfully used only for identification purposes... *the process put in to the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained*" slip. op. at 21-22 (emphasis added). Under Article 11, the State must prove that it has a "special need" for roadside saliva testing to justify a warrantless search and whether such a search interferes with individual rights. State v. Medina, supra, at 73-74, ¶ 15.
8. An example of a "special needs" exception to the warrant requirement of Article 11 is the DUI Roadblock, allowing the police to "apprehend intoxicated drivers who may have otherwise posed a serious threat to society". State v. Record 150 Vt. 84, 90 (1988). As pointed out elsewhere herein, it is unclear driving under the influence of drugs is as dangerous and as widespread as driving under the influence of alcohol. Moreover, the level of intrusion triggered by a car being stopped at a roadblock - even if the roadblock is set up and administered with appropriate written guidelines - is hardly as great an intrusion "upon an individual's legitimate and reasonable expectation of privacy", as ordering a person suspected of driving under the influence of drugs to provide a saliva sample. See State v. Record, supra at 87 (noting "the extent of the interference with an individual's personal liberty" must also be examined).
9. Given the privacy interest a citizen has in his saliva, and the interference with personal liberty by having to disgorge a sample of bodily fluid on the side of the road, the constitutional balance favors the privacy interest inherent in one's saliva. See, State v. Medina, supra at 88, ¶ 47 ("our special needs test requires that (1) the statute fulfills a special need, *beyond the normal needs of law enforcement*, and that (2) the balance

between public interest and private interest at stake weighs in favor of allowing the search and seizure (citation omitted) (emphasis added).

10. In Medina, the Court held that the State's interest in obtaining DNA sampling from persons charged with but not convicted of a felony, for identification purposes, favors the privacy rights of the Defendant under Article 11, so that the statute providing for DNA sampling of persons charged with a felony, violated Chapter 1, Article 11. Id. at 95, ¶ 63.
11. The Vermont Supreme Court has expansively interpreted the privacy interests inherent in Article 11. If the Legislature were to pass a saliva testing bill, it would be immediately challenged on constitutional grounds, and might well be deemed unconstitutional, following the rationale set forth in Birchfield and Medina, particularly concerning saliva as a bodily fluid. Of course, an officer can administer the same field exercises to a motorist believed to be driving under the influence of drugs as if alcohol was involved, question the suspect about drug use and rely upon sight, sound, and smell to arrive at a probable cause to arrest, *without* a roadside saliva test. The availability of this evidence reinforces that the State cannot prove a warrantless seizure of saliva for roadside testing even given the State's interest in fighting drugged driving. In comparison to a DUI roadblock being constitutional under Chapter 1, Article 11 based upon the need to combat drunk driving, no such showing has been made that driving under the influence of drugs in Vermont rises to that same level to justify the State's interest in saliva testing of suspected drivers.
12. It should also be noted that until the 1970's saliva testing was available as an option for *evidentiary testing*, for a motorist who *had been arrested*, upon probable cause, for driving under the influence. Thus it could be suggested that in an age of expanded privacy interests, roadside saliva testing of drivers *suspected* of driving under the influence of drugs *should not* be used as a basis for probable cause to arrest.
13. There are substantial logistical impediments to the practicality and use of roadside saliva testing such as :

- What if the suspect is unable to produce an adequate sample? Will he be deemed to refuse, with the refusal being admissible in the same manner a refusal to prove a PBT may be used against the motorist;
- Will the motorist be instructed that he is not required to provide a sample, and that police cannot force him to do so, see State v. Therrien, supra;
- What will the admissibility standards be for roadside saliva tests?
Roadside breath test results are not scientifically reliable under Vermont Law to be introduced in a DUI criminal prosecution. Use of roadside saliva tests may be admissible in other States but will be subjected to pre trial litigation here under Vermont Rule of Evidence 702. If preliminary breath test results are not admissible, then how could the more complex scientific processes involved in roadside saliva testing be admissible as an element in determining probable cause?

DRIVING UNDER THE INFLUENCE OF DRUGS IS NOT SO WIDESPREAD IN VERMONT TO JUSTIFY ROADSIDE SALIVA TESTING

1. According to data provided by the Vermont Judiciary, between FY2014 and FY2016 there were 383 DUI Drug Offense charges filed, of which 233 or 61% resulted in convictions and 143 were dismissed (see attached charts). There were 3 charges filed during this same time for Driving Under the Influence of Drugs, Fatality Resulting.
2. According to National Highway Traffic Safety Administration (NHTSA) *Analysis of Fatal Crash Data, Vermont: 2009 -2013*⁷ during this timeframe there was an average of 69 motor vehicle related deaths annually. Traffic fatalities fell 6.76% during this period, or nearly twice the rate of decrease of the national average. See also, "Traffic Safety In Vermont Fatalities are Down, Driving Deaths Are Down", attached as "Appendix 1"

⁷ [http://ghsp.vermont.gov/sites/ghsp/files/documents/Vermont%202009-2013%20NHTSA%20Summary%20of%20Motor%20Vehicle%20Crash%20%26%20Fatality%20Data%20\(FARS\).pdf](http://ghsp.vermont.gov/sites/ghsp/files/documents/Vermont%202009-2013%20NHTSA%20Summary%20of%20Motor%20Vehicle%20Crash%20%26%20Fatality%20Data%20(FARS).pdf)

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2013**

3. Based on the statistics provided, there is simply an insufficient public safety hazard to satisfy the "special needs" test under Article 11 to justify the use of saliva for roadside testing.

4. According to a NHTSA February 2015 research report titled *Drug And Alcohol Crash Risk*, attached as "Appendix 2":

- The role of marijuana "in contributing to the occurrence of crashes remain less clear. Many studies, using a variety of methods have attempted to estimate the risk of driving after use of marijuana (citations omitted). The methods have included experimental studies, observational studies, and epidemiological studies. While useful in identifying how marijuana affects the performance of driving tasks, *experimental and observational studies do not lend themselves to predicting real world crash risk*, Id. at 1;
- A 2010 study conducted in 9 European Union countries found that the risk of crash involvement for drivers testing positive for THC *was similar to drivers with BAC levels of between .01 to .04% while drivers having a BAC of between .08 and .12% were 5 to 30 times more likely to crash than sober drivers.* Id. at 2;
- Caution should be exercised in assuming that drug presence implies driver impairment. *Drug tests do not necessarily indicate current impairment.* Also, in some cases, drug presence can be detected for a period of days or weeks after ingestion, Id. at 4.

5. This 2015 Study did find a statistically significant increase in unadjusted crash risk for drivers testing positive for illegal drugs, and THC specifically. However,

"Analyses incorporating adjustments for age, gender, ethnicity, and alcohol concentration level did not show a significant increase in the levels of crash risk associated with the presence of drugs". Id. at 8.

6. The Study adds that age, gender, ethnicity and alcohol use were highly correlated with drug use and accounted for much of the increased risk associated with the use of illegal drugs and with THC.

7. In summary, NHTSA's research, as contained in the 2015 Report confirms that there is simply insufficient data to establish that drivers who use marijuana, or even other drugs, and then drive, are at a significantly higher risk to crash than drivers who use alcohol.

8. This lack of data would undermine the "special needs" argument advanced by the State when attempting to justify a warrantless search by testing a DUI drug suspect's saliva, under Chapter 1, Article 11 of the Vermont Constitution, see State v. Medina 2014 VT 69, 197 Vt. 63 (2014) discussed infra.

**TRAFFIC SAFETY IN VERMONT:
FATALITIES ARE DOWN; IMPAIRED DRIVING DEATHS ARE DOWN**

2009-2013

- From 2009 through 2013, there were 346 motor vehicle related deaths in Vermont, on average about 69 deaths annually. *NHTSA Analysis of Fatal Crash Data, Vermont: 2009-2013.*¹
- Traffic fatalities were down 6.76% from 2009 to 2013. Compared to data Nationwide, where fatalities were only down 3.44% during that same time period.

Major Contributors to Fatalities in Vermont, behavior related:

1. Unrestrained Occupant Deaths: 38% of total
2. Speed-Related Deaths: 35%
3. Alcohol Impaired Driving Deaths: 29%
4. Older Driver Involved Deaths: 26%
5. Young Driver Involved Deaths: 20%

Overall, the largest declines were in three behavioral categories:

1. Unrestrained Occupant Deaths: - 25%
2. Impaired Driving Deaths: - 25%
3. Speed Related Deaths: - 18%

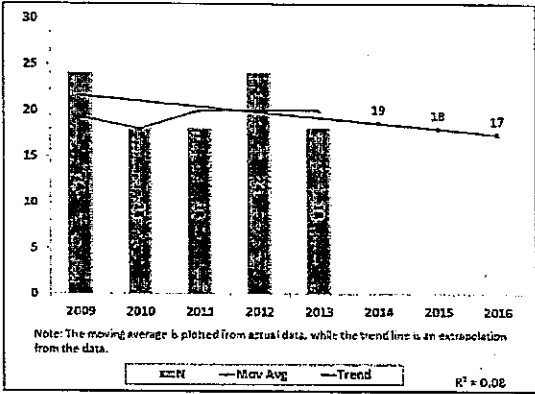


Figure 3. Vermont Alcohol-Impaired Driving Fatalities

2013 - 2016

- Vermont decriminalized small amounts of marijuana in 2013.
- Highway fatalities continue to decrease:²

| Year | Fatalities |
|-------------------|------------|
| 2015 | 57 |
| 2014 | 44 |
| 2013 ¹ | 70 |
| 2012 | 77 |
| 2011 | 55 |

¹NHTSA Analysis of Fatal Crash Data, Vermont: 2009-2013, <http://ghsp.vermont.gov/sites/ghsp/files/documents/Vermont%202009-2013%20NHTSA%20Summary%20of%20Motor%20Vehicle%20Crash%20%26%20Fatality%20Data%20%28FARS%29.pdf>

² State of Vermont, Vermont Highway Safety Alliance. <http://highwaysafety.vermont.gov/data>, viewed on 3/29/16.