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# Editor's Comment: Know as You Go - By Sarah Roland

[1]Features
[2]Sarah Roland
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There are a few unrelated things worth mentioning this month:

**Marijuana**

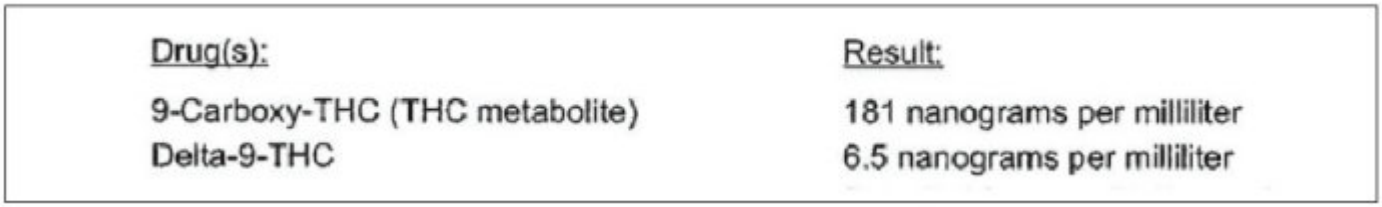
Is it legal or not? When do you think it will be? Those are the questions many of our clients are asking us these days about marijuana. Texas isn?t the only state grappling with new hemp laws. Ohio is dealing with a nearly identical issue. The issue in Ohio, like in Texas, is that the only way to determine the difference between marijuana (illegal) and hemp (legal) is the THC level. A THC level of .3% or less is hemp and is legal, whereas a THC level over .3% is marijuana and is thus illegal. The current issue resulting in many district attorney offices declining such cases is the present inability of most of the crime labs to quantify the level of THC in a given substance. The reagent kits used by many police departments used on substances believed to contain THC only test for the presence of THC, and not the level of THC. As such, they too are incapable of quantification. This issue is sure to be short-lived, though. Labs will quickly catch up and become able to quantify THC in substances. However, whether the cost of performing such quantification makes the prosecution of small amounts of marijuana economically feasible or not might be a lingering question.

As marijuana intoxication prosecutions becomes more prevalent, there are some general points practitioners need to know to successfully defend these cases.

- The 2017 *Marijuana-Impaired Driving: A Report to Congress* by NHTSA is a publication that we should all have and read. It?s only about 40 pages. Save, print and keep it with your trial folder. It?s available for download at [3]www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impai....
- Be aware that in 2018, NHTSA launched the ?If you feel different, you drive different? campaign to counter marijuana impaired driving. This is akin to NHTSA?s ?drink, drive, go to jail? campaign to counter alcohol impaired driving.
- Unlike alcohol, which has a predictable and known rate of elimination, marijuana does not. Marijuana has a precipitous drop off from when a person stops smoking. Thus, the window of time a person has a peak concentration of THC in his blood?and is under the psychoactive effect of marijuana?is s relatively short; however, a person will test positive for THC and metabolites of THC for a prolonged time after use.
- Unlike alcohol where there is a per se limit for intoxication, there is not for any drug.
- If someone is high, you will generally know it when you watch the video through their behavior.

- You will get a lab report that looks something like the following:

[4]



| Drug(s): | Result: |
|---|---|
| 9-Carboxy-THC (THC metabolite) | 181 nanograms per milliliter |
| Delta-9-THC | 6.5 nanograms per milliliter |

- Do not be alarmed by these two readings. An important distinction exists between the two readings. The body breaks down THC into several metabolites. Metabolites of THC stay in the body for longer periods of time than does THC. One such metabolite is 9-Carboxy-THC, the non-psychoactive component in marijuana. It can be detected for more than 7 days and up to around 30 days. A positive or even high reading of 9-Carboxy-THC should not be alarming. If a person has smoked marijuana in the last week to 30 days, expect an elevated reading. Meaning, an expert cannot tell by this reading whether the person was presently under the influence. The main psychoactive component of marijuana is Delta-9-THC. And, Delta-9-THC concentrations do not necessarily indicate recent use. If a person smokes marijuana regularly (daily for example), a Delta-9-THC level such as the above could be residual. There is a wealth of literature on this point, much of which comes from NHTSA?s own *Marijuana-Impaired Driving: A Report to Congress.* If the accused doesn?t admit to recent smoking and there is otherwise no real evidence of very recent smoking other than the lab report (for example, an odor of fresh marijuana as opposed to burnt odor), then we should be in good shape to defend these cases.
- Always reach out to the state?s expert. Talk to the expert. There is no reason not to do this. I have found the DPS toxicologists to be easy to contact and responsive to my questions. You will gain a wealth of information if you have a conversation with the toxicologist before trial. Remember, this is not the time for cross-examination; this is the time for information gathering. Nothing is on the record here?just get information. Know what the expert is going to say ahead of time and ask the expert how the opinion was formed. There will necessarily be too many unknowns for an expert to say with any degree of scientific certainty that the person was presently high. For instance, type of ingestion, frequency of use, type of THC, potency of marijuana, etc. All of these factors matter. Remember, true experts are advocates for the science, not the side.
- If the State attempts to offer any drug recognition testimony, be sure to have a gatekeeping hearing under Rule 702.
- Of course, as Phil Baker points out in his article, not every county is declining to file marijuana cases. The Second Court of Appeals? recent opinion in *Dowdy v. State*, No. 02-18-00112-CR (Tex. App.?Fort Worth 7/30/19) (not designated for publication) is worth a read for anyone handling possession cases (whether they be for marijuana or something else).

**Penal Code 42.07(a)(7)**

Section 42.07 is the harassment statute. Subsection (a)(7) provides:

> (a) A person commits an offense, if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . .
>
> > (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Everyone please be aware of *Ex Parte Barton*, ___ SW3d ___ (Tex. App.?Fort Worth, No. 02-17-00188-CR; 08/08/19), where the Second Court of Appeals held section 42.07(a)(7) is unconstitutionally vague and overbroad on its face. In three points, Barton argues that the version of penal code section 42.07(a)(7) under which he was charged is unconstitutionally overbroad and vague, and that the charging instrument fails to give him notice of the offense. *See* Act of June 15, 2001, 77th Leg., R.S., ch. 1222, 2001 Tex. Gen. Laws 2795 (amended 2013) (current version at Tex. Penal Code Ann. §?42.07(a)(7)). The Court of Appeals agreed and reversed.

**Seminars**

Finally, since the last publication, I?ve had the great privilege to have presented at the State Bar Advanced Criminal Law Course and the Center for American and International Law?s Annual Trial Skills and Trial Law Program. Our members should know I always say something positive about the *Voice*. I spoke about investigatory detentions, State?s experts, and the jury charge. These were, and always are, outstanding seminars. There?s just nothing like a TCDLA seminar, though! I fully recognize my inherent bias, but there is just something intangible yet incredibly valuable about a TCDLA seminar as a defense lawyer. If you haven?t been to a TCDLA seminar lately, you have a chance to go this September in Austin (voir dire seminar). And if you can?t make it in September, come to Dallas in December for a seminar dedicated to defending those accused of sexual assault. And, any time any of us are fortunate enough to get the opportunity to speak about a legal issue, whether it be on the local or state level, we should take it. It makes us better lawyers.



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