

MEDICAL MARIJUANA AND DUI

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**MEDICAL MARIJUANA ACT IS CODIFIED UNDER 35
PA.C.S.A. 10231.101-10231.2110**

EFFECTIVE MAY 17, 2016

**“NOTWITHSTANDING ANY PROVISION OF LAW TO
THE CONTRARY, USE OR POSSESSION OF MEDICAL
MARIJUANA AS SET FORTH IN [THE MMA] IS
LAWFUL WITHIN THIS COMMONWEALTH”**

35 P.S.10231.303

CASE CLOSED?

NO

THE MMA DOES NOT PREVENT...CRIMINAL PENALTIES FOR UNDERTAKING ANY TASK UNDER THE INFLUENCE OF MEDICAL MARIJUANA WHEN DOING SO WOULD CONSTITUTE NEGLIGENCE. 35 P.S. 10231.1309 (1)

THE GENERAL ASSEMBLY ALLOWS FOR THE USE OF MEDICAL MARIJUANA UNDER VERY SPECIFIC GUIDELINES WHICH, WHEN FOLLOWED, WILL NOT LEAD TO CRIMINAL PUNISHMENT. 35 P.S. 10231.2101

COMMONWEALTH V. JEZZI, 208 A.2d 1105 (Pa. Super. 2019)

COMMONWEALTH V. MURRAY, 2020 WL 7861244 (Pa. Super. Dec. 31, 2020) (unpublished memorandum)

COMMONWEALTH V. GRIMES, 980 MDA 2019 (Pa. Super. Jan. 31, 2020) (unpublished memorandum)

**COMMONWEALTH V. STONE, 2022 PA SUPER 65
(April 12, 2022) (en banc)**

**COMMONWELATH V. DABNEY, 2022 PA SUPER 82
(MAY 5, 2022)**

REGARDLESS OF WHETHER THERE ARE ACCEPTED MEDICAL USES FOR MARIJUANA IN THE UNITED STATES, ~~MARIJUANA REMAINS A SCHEDULE I~~ CONTROLLED SUBSTANCE (BECAUSE THE LEGISLATURE DECIDED SO; IT DOES NOT MATTER WHETHER IT DOES HAVE A CURRENTLY ACCEPTED MEDICAL USE AND NOT A HIGH POTENTIAL FOR ABUSE). MEDICAL MARIJUANA IS MARIJUANA. THE MMA DOES NOT DECLARE THAT MARIJUANA IS SAFE AND EFFECTIVE.

THE MMA DOES NOT TAKE PRECEDENCE OVER LAWS SPECIFIED IN THE DUI ACT.

COMMONWEALTH V. WADDELL, 61 A.3d 196 (Pa. Super. 2012)

COMMONWEALTH V. JEZZI

COMMONWEALTH V. STONE

COMMONWEALTH V. BARR, 266 A.3d 25 (PA. 2021)(DOES TAKE PRECEDENCE OVER CSA)

COMMONWEALTH V. DABNEY

DABNEY ARGUES THAT MM IS NOT A SCHEDULE I CONTROLLED SUBSTANCE AND THAT HE COULD NOT BE FOUND GUILTY OF 3802(d)(1)(i)(ANY AMOUNT OF SCHEDULE I CONTROLLED SUBSTANCE IN BLOOD) OR 3802 (d)(1)(iii)(ANY AMOUNT OF SCHEDULE I CONTROLLED SUBSTANCE METABOLITE IN BLOOD)

ISSUE: DID DABNEY'S VALID PRESCRIPTION FOR MM AND HIS LEGAL INGESTION OF SUCH, PRECLUDE HIS PROSECUTION UNDER THE DUI STATUTE?

NO

THE FACT THAT A PERSON CHARGED WITH DUI IS OR HAS BEEN LEGALLY ENTITLED TO USE...CONTROLLED SUBSTANCES IS NOT A DEFENSE TO A CHARGE OF DUI. 75 P.S. 3810

DABNEY WAS NOT PROSECUTED FOR USING MARIJUANA BUT RATHER FOR DRIVING AFTER SUCH USE

THIS ALSO APPLIES TO METABOLITES

THERE IS NO EXCEPTION FOR METBLITES IN THE STATUTE

IT IS NOT ABSURD OR UNREASONABLE TO CONCLUDE THAT IT IS ILLEGAL TO DRIVE WITH METABOLITES OF MM IN ONE'S BLOOD

LESSON: IF ONE HAS ANY AMOUNT OF MARIJUANA OR A MARIJUANA METABOLITE IN ONE'S BLOOD, THEY CAN BE PROSECUTED FOR A DUI

**ONE CAN ALSO DRIVE WITH SCHEDULE II OR III
CONTROLLED SUBSTANCES IN THEIR BLOOD AND
NOT MM 75 P.S. 3802 (d)(ii)!**

**THESE SCHEDULE II CS's INCLUDE: OPIUM,
MORPHINE, CODEINE, DILAUDID, METHADONE,
DEMEROL, HYDROCODONE AND FENTANYL**

EFFECTS OF FENTANYL CAN LAST UP TO 3 DAYS

EFFECTS OF MARIJUANA CAN LAST 3-10 HOURS

**FENTANYL STAYS IN BLOOD UP TO 12 HOURS;
METABOLITES STAY IN BLOOD UP TO 14 DAYS**

MARIJUANA STAYS IN BLOOD UP TO 2 DAYS

**MARIJUANA METABOLITES STAY IN BLOOD UP TO
30 DAYS ON AVERAGE**

IS THERE A MINIMUM THRESHOLD?

YES

THE MINIMUM THRESHOLD AMOUNT OF MARIJUANA AND IT'S METABOLITE THAT MUST BE PRESENT IN ORDER TO PROSECUTE FOR A DUI IS 1 NANOGRAM PER MILLILITER (1 NG/ML) OF DELTA CARBOXY THC.

PENNSYLVANIA BULLETIN, VOLUME 34 ISSUE 7

NOTE: THIS WAS REDUCED FROM 5NG/ML IN 2011

WHAT ABOUT EQUAL PROTECTION?

**HOW CAN WE BAR LEGALLY REGISTERED MM
USERS OR PATIENTS FROM DRIVING WHILE
ALLOWING SCHEDULE II AND III PATIENTS, TAKING
MORE POWERFUL AND ADDICTIVE DRUGS, TO
DRIVE?**

NO

**COMMONWEALTH V. ETCHISON, 916 A.2d 1169
(Pa. Super. 2007), AFFIRMED, 943 A.2d 262 (Pa.
2008) (GENERALLY NO)**

**COMMONWEALTH V. WAGER, 491 WDA 2021 (Pa.
Super. 4-5-22) (RAISED BUT COURT DID NOT
REACH, NON-PRECEDENTIAL)**

BUT SEE...

**THE CLASSIFICATION OF MEDICAL MARIJUANA AS
A SCHEDULE I CONTROLLED SUBSTANCE REMAINS
RATIONALLY RELATED TO PUBLIC PROTECTION.**

**THE COURTS REFUSE TO “USE THE POWER OF
JUDICIAL REVIEW TO UNDERCUT THE COLLECTIVE
LEGISLATIVE WISDOM (CONTRADICTION IN
TERMS?) ON PUBLIC HEALTH IN THIS REGARD”.**

COMMONWEALTH V. JEZZI

WHAT ABOUT SUBSTANTIVE DUE PROCESS?

JUST NOT FAIR!!!

NOT YET SPECIFICALLY DECIDED

**BUT SEE COMMONWEALTH V. SANDS, 887 A.2d
261 (Pa. Super. 2005)**

**“BECAUSE OF THE SEVERE CONSEQUENCES OF
DRUNKEN DRIVING IN TERMS OF ROADWAY
DEATHS, INJURIES AND PROPERTY DAMAGE, THE
GOVERNMENT HAS A COMPELLING INTEREST IN
DETECTING INTOXICATED DRIVERS AND
REMOVING THEM FROM THE ROADS BEFORE THEY
CAUSE INJURY”.**

REMEMBER AS WELL:

“THE TEMPORARY NATURE OF THE MMA SERVES AS AN ACKNOWLEDGEMENT OF THE GENERAL ASSEMBLY THAT MORE RESEARCH INTO THE MEDICAL VALUE OF MARIJUANA IS NECESSARY. THE MMA ESTABLISHED A MEDICAL MARIJUANA PROGRAM TO SERVE AS A STOPGAP MEASURE, PENDING FEDERAL APPROVAL OF AND ACCESS TO MEDICAL MARIJUANA THROUGH TRADITIONAL MEDICAL AND PHARMACEUTICAL AVENUES.”

35 P.S. 10231.102(4); COMMONWEALTH V. JEZZI, AT 1114

BUT COURTS HAVE OPENED THE DOOR...

DEFENDANT'S MARIJUANA IMPAIRMENT ALONE DOES NOT DEMONSTRATE A CONSCIOUS DISREGARD OF A SUBSTANTIAL RISK OF INJURY SUFFICIENT TO PROVE EWOC.

COMMONWEALTH V. VELA-GARRETT, 2021 PA. SUPER. 78 (APRIL 23, 2021) (AOPC CITE)

THE COURT MAY NOT PROHIBIT THE USE OF MM BY INDIVIDUALS ON SUPERVISION. ANY POLICY TO THAT EFFECT IS CONTRARY TO THE IMMUNITY ACCORDED BY THE MMA.

NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, USE OF MM AS SET FORTH IN THE ACT IS LAWFUL.

HAD THE GENERAL ASSEMBLY INTENDED BROADER LIMITATIONS, IT WOULD HAVE BEEN A STRAIGHTFORWARD MATTER TO SAY SUCH.

GASS V. LEBANON COUNTY, J-24-2020 (PA. 2020)

**THE MMA RECOGNIZES THE STATUS OF THE
INDIVIDUAL AS A PATIENT, ENTITLED TO
IMMUNITY FROM PUNISHMENT, OR THE DENIAL
OF ANY PRIVILEGE, SOLELY FOR LAWFUL USE.**

**A PATIENT SHALL NOT BE SUBJECT TO ARREST OR
PROSECUTION IN ANY MANNER SOLELY FOR
LAWFUL USE.**

35 P.S. 10231.2103(a)

GASS V. LEBANON COUNTY

**DOES THE MMA CREATE AN AFFIRMATIVE
DEFENSE?**

**CAN THE COMMONWEALTH BE REQUIRED TO
PROVE THAT THE MARIJUANA IS NON-MEDICAL?**

**DOES THE MMA OFFER AN AFFIRMATIVE DEFENSE
THAT THE COMMONWEALTH MAY DISPROVE
WITH EVIDENCE THAT THE SUBSTANCE OR
METABOLITE CAME FROM A SOURCE OTHER THAN
LAWFULLY PRESCRIBED MARIJUANA?**

NO

**COMMONWEALTH V. STONE, 2022 PA SUPER 65
(4-12-22) (AOPC CITE)**

COMMONWEALTH V. WAGNER

**MMA'S SILENCE REGARDING LAWFUL DRIVING
CANNOT BE INTERPRETED AS CREATING AN
AFFIRMATIVE DEFENSE**

**BECAUSE AN INDIVIDUAL'S LEGALLY PRESCRIBED
USE OF MM DOES NOT NEGATE ANY ELEMENT OF
A DUI OFFENSE, IT IS IMPERMISSIBLE TO CREATE
AN AFFIRMATIVE DEFENSE**

**BECAUSE THE INTENT OF THE MMA IS A
"TEMPORARY MEASURE", THIS MILITATES
AGAINST A CONCLUSION THAT ONE'S STATUS AS A
LAWFUL MM USER PROVIDES AN AFFIRMATIVE
DEFENSE**

WHAT ABOUT A DE MINIMUS ARGUMENT?

18 P.S. 312

CONDUCT OF DEFENDANT WAS:

WITHIN CUSTOMARY LICENSE

**DID NOT ACTUALLY CAUSE THE HARM OR EVIL
SOUGHT TO BE PREVENTED**

**CANNOT BE REASONABLY ENVISAGED BY THE
GENERAL ASSEMBLY**

WHAT ABOUT A DE MINIMUS ARGUMENT?

MAYBE.... NEVER ADDRESSED

COURTS HAVE OPENED THE DOOR

**ODOR OF MARIJUANA STANDING ALONE, NOT
SUFFICIENT FOR PC**

**COMMONWEALTH V. BARR, II, J-70-2-2021(Pa. 12-
29-21)**

**COMMONWEALTH V. GROOMS, PA. SUPER. 26 (2-
24-21) (AOPC CITE)**

**REQUEST FOR ID COUPLED WITH INVESTIGATORY
QUESTIONS (DO YOU HAVE A MM LICENSE)
DEMONSTRATED A SUBSTANTIAL ESCALATING
FACTOR RAISING THE LEVEL OF THE ENCOUNTER
TO AN INVESTIGATORY DETENTION**

**COMMONWEALTH V. ANDERSON, 2022 PA. SUPER.
95 (5-25-22)(AOPC CITE)**

HOW ABOUT 75 P.S. 3802(d)(2) (IMPAIRMENT)?

**AN INDIVIDUAL MAY NOT DRIVE, OPERATE OR BE
IN ACTUAL PHYSICAL CONTROL OF THE
MOVEMENT OF A MOTOR VEHICLE WHEN THE
INDIVIDUAL IS UNDER THE INFLUENCE OF A DRUG
TO A DEGREE WHICH IMPAIRS THE INDIVIDUAL'S
ABILITY TO SAFELY DRIVE, OPERATE OR BE IN
ACTUAL PHYSICAL CONTROL OF THE MOVEMENT
OF THE VEHICLE. 75 P.S. 3802 (d)(2)**

NOT SUFFICIENT EVIDENCE...

WHERE EVIDENCE OFFERED TO SUPPORT THE ELEMENTS IS IN CONTRADICTION OF THE PHYSICAL FACTS, IN CONTRAVENTION TO HUMAN EXPERIENCE AND THE LAWS OF NATURE, THEN THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW.

COMMONWEALTH V.; MCCLELLAND, 2019 PA. SUPER. 34 (2-11-19)(AOPC CITE)

CLUES OF IMPAIRMENT:

ERRATIC DRIVING (SWERVING, WEAVING, DRIVING TOO FAST OR SLOW, ACCIDENTS, TRAFFIC VIOLATIONS)

ODOR OF FRESH OR BURNT MARIJUANA

BLOODSHOT, GLASSY EYES

ADMISSIONS OF RECENT OR EVEN PAST USE

FINDING OF MARIJUANA AND/OR PARAPHERNALIA

LACK OF COORDINATION

CONFUSION

EUPHORIA

SFST (ALTHOUGH DESIGNED ONLY FOR ALCOHOL)

PERFORMANCE ON EYE EXAMS (ADMISSIBILITY QUESTIONS)

PULSE, BLOOD PRESSURE (ADMISSIBILITY QUESTIONS)

GREENISH TONGUE (NO SCIENTIFIC EVIDENCE TO SUPPORT)

OPINION OF DRUG RECOGNITION EXPERT BUT.....

LETHARGY

IMPAIRED PERCEPTION OF TIME

GENERAL CONFUSION

LACK OF REACTION TO STIMULI

CONSTRICTED PUPILS (ADMISSIBILITY QUESTIONS)

REMEMBER THIS:

**A LAY WITNESS MAY TESTIFY AS TO THEIR
OPINION THAT AN INDIVIDUAL WAS UNDER THE
INFLUENCE OF MARIJUANA BECAUSE
INTOXICATING EFFECTS ARE WIDELY KNOWN AND
COMMONLY UNDERSTOOD**

**SUCH OPINIONS ARE NOT BASED ON SCIENTIFIC,
TECHNICAL OR SPECIALIZED KNOWLEDGE**

**COMMONWEALTH V. DIPANFILO, 933 A.2d 1262
(Pa. Super. 2010)**

**COMMONWEALTH V. NEISWONGER, 488 A.2d 68
(Pa. Super. 1985)**

**ADMISSIBILITY OF HGN, VGN, LACK OF
CONVERGENCE TESTS**

**NO PENNSYLVANIA CASE HAS UPHELD THE
ADMISSIBILITY OF SAID TESTS AT TRIAL**

**NO SHOWING THAT GENERALLY ACCEPTED IN THE
SCIENTIFIC COMMUNITY**

**COMMONWEALTH V. WEAVER, 76 A.3d 562 (Pa.
Super. 2013)(ONLY PERMITTED FOR PC)**

**COMMONWEALTH V. MILLER, 532 A.2d 1186 (Pa.
Super. 1987)**

**COMMONWEALTH V. STRINGER, 635 A.2d 629 (Pa.
Super. 1996)**

**COMMONWELATH V. APOLLO, 603 A.2d
1023(Pa.Super.1992)(EXPERT TESTIMONY LARGELY
BASED ON OWN PERSONAL VIEWS AND
OBSERVATIONS)**

**IMPAIRED DRIVING EVIDENCE IS NOT RELEVANT
TO DRUG OR METABOLITE IN BLOOD
PROSECUTION.**

**COMMONWEALTH V. MAY, 2022 PA SUPER 25 (2-
15-22)(AOPC CITE)**

WHAT ABOUT DRUG RECOGNITION EXPERTS?

A DRUG RECOGNITION EXPERT/EVALUATOR IS A POLICE OFFICER TRAINED TO RECOGNIZE IMPAIRMENT IN DRIVERS UNDER THE INFLUENCE OF DRUGS OTHER THAN, OR IN/ ADDITION TO, ALCOHOL

STUDIES APPARENTLY DEMONSTRATE THAT A PROPERLY TRAINED DRE CAN SUCCESSFULLY IDENTIFY DRUG IMPAIRMENT AND ACCURATELY DETERMINE THE CATEGORY OF DRUGS CAUSING SUCH IMPAIRMENT

DREs UTILIZE A 12 STEP PROTOCOL TO DETERMINE WHETHER THE SUSPECT IS IMPAIRED BY DRUGS AND IF SO, WHAT DRUG

THE PROTOCOL WAS DEVELOPED IN 1979 BY THE LAPD IN CONJUNCTION WITH THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

THE 12 STEPS INCLUDE:

- (1) BREATH ALCOHOL**
- (2) INTERVIEW (BEHAVIOR, APPEARANCE)**
- (3) PRELIMINARY EXAM, PULSE**
- (4) EYE EXAM**
- (5) DIVIDED ATTENTION TESTS, SFST**
- (6) VITAL SIGNS, PULSE**
- (7) EXAMINING PUPIL SIZES UNDER LIGHTING CONDITIONS**
- (8) EXAM OF MUSCLE TONE**
- (9) LOOKING FOR INJECTION SIGHTS, PULSE**
- (10) CONSIDERATION OF SUSPECT'S STATEMENTS AND OBSERVATIONS**
- (11) ANALYSIS AND OPINION OF EVALUATOR**
- (12) TOXICOLOGY EXAM**

**WHILE UTILIZED IN MANY STATES, NOT
WIDESPREAD JUDICIAL ACCEPTANCE OR
ACCEPTANCE IN THE SCIENTIFIC COMMUNITY
NEVER ACCEPTED IN PENNSYLVANIA**

**SEE: OPINION IN DISPOSITION OF DEFENDANT'S
MOTION TO EXCLUDE COMMONWEALTH
WITNESS, J. GEISHAUSER, JUNE 3, 2020 BERKS
COUNTY LAW JOURNAL, VOL. 112, P. 256.**

**MARYLAND V. BRIGHTFUL, K-10-04-259 (MD,
MARCH 5, 2022)**

**BRAGAW V. STATE, 482 P.3d 1023 (ALASKA
APPEALS COURT, 2-26-21) (DRE IS SCIENTIFIC
EVIDENCE SUBJECT TO DAUBERT) ***

**THIS AREA OF THE LAW IS
FLUID AND EVOLVING
GUIDANCE MUST COME FROM
THE SUPREME COURT AND/OR
LEGISLATURE
OR FROM CREATIVE AND
ZEALOUS ADVOCACY
ITS UP TO YOU**