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Police face obstacles in enforcing laws against driving while stoned

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Officers said they could smell burnt marijuana as soon as they walked up to the pickup truck, where they would later find a small bag of marijuana in the console. The driver, a teenager who had been seen recording video on his phone moments before crashing into a parked Braintree police cruiser, told police he smoked it regularly.

But months after the 2014 crash, prosecutors told a judge they weren't prepared to pursue an impaired driving charge against the teenager, who instead pleaded guilty to a lesser charge of negligent driving. He was sentenced to two years of probation.

Court records don't indicate why prosecutors didn't push the impaired driving charge, but the case illustrates how difficult it is in Massachusetts for prosecutors to go after drivers who get behind the wheel while high on marijuana. The problems are many: There is no equivalent of the alcohol breath test for drugs. Current blood tests can detect marijuana use but cannot determine impairment, leaving police to rely on circumstantial evidence, like the presence of drugs in a vehicle, and the observations of one of a limited number of officers in the state trained to recognize the effects of drug impairment.

And with marijuana about to become legally available for adult recreational use, some law enforcement officials say the limited tools they have for detecting and proving drug impairment among drivers will be increasingly put to the test. The law, which begins to go into effect Thursday, doesn't make it any more legal to drive stoned, but police fear the new law will lead people to view marijuana as a more benign drug.

"We're concerned that (the new law) may lead to people believing that it's OK to drive after using marijuana, and that's certainly not the case," said Sgt. Steven Dearth of the Hingham Police Department.

Police in Massachusetts are not alone. With the increasingly rapid success of campaigns to legalize marijuana in the U.S. - voters in eight states have approved recreational use as of last

month, and 20 other states allow medical use - state officials across the country are scrambling to update laws and give law enforcement more tools to detect marijuana impairment and prosecute cases.

Help on the way

Private investors have also jumped at the demand for better technology, with one company in California promising to deliver a breath-testing device within months and a professor in Boston working on a cellphone app that he says will be able to measure impairment by assessing a user's performance on a series of challenges.

But the science behind marijuana presents a major challenge for law enforcement. Alcohol is widely understood to cause dangerous levels of impairment when blood levels reach 0.08 percent, but the active component in marijuana, called tetrahydrocannabinol, or THC, remains detectable in the body long after its side effects - delayed reactions, distractibility, confusion - have worn off. The drug also acts very differently on different people, meaning that someone who uses marijuana regularly could have a high level of THC in their system without feeling any effect, while an infrequent user with the same level could be practically incoherent.

Science uncertain

Because of these challenges, the AAA Foundation for Traffic Safety concluded in a May report that there is no threshold level for THC that could reliably prove impairment. Despite those kinds of findings, Colorado and Washington have adopted a threshold of 5 nanograms of THC per milliliter of whole blood to indicate marijuana impairment, though the states give the measurement different weight in court and juries in some cases have rejected it.

Massachusetts has no such threshold, though some lawmakers have suggested it should. In March, members of the Special Senate Committee on Marijuana recommended that if voters were to approve the recreational marijuana law, the state's secretary of public safety should "develop methods and procedures for determining driver impairment due to marijuana," including a legal threshold for THC levels in the blood.

"Right now our laws really aren't ready," said Plymouth County District Attorney Timothy Cruz, who's called on the Legislature to delay the implementation of the recreational marijuana law.

Felix Browne, a spokesman for Secretary Daniel Bennett, would not comment Friday on whether a legal limit for THC levels among drivers was being developed. The spokesman said the secretary would be working with lawmakers to change statutes "as needed to enhance public safety in light of this law." The agency also released a public service announcement Friday equating driving under the influence of marijuana with drunken driving.

Proving the case

Without reliable tests for marijuana impairment, police in Massachusetts must often rely on observation. Only a hundred or so officers in the state are trained to recognize and measure the physical symptoms associated with the use of specific drugs. But while the state's Drug Evaluation and Classification program has been around since 1995, defense attorneys say judges

continue to look at the officers' observations differently, allowing them as evidence in some cases and denying them in others.

"Every district court is kind of doing their own thing," said James Milligan, a Norwell criminal defense attorney. "Everyone has different opinions on this, obviously, and they're applying their different assessments to it."

All this makes securing a conviction for driving while high "very challenging," according to Marshfield Police Chief Phillip Tavares, even when compared to drunken driving cases, more than half of which are acquitted if they go to trial.

"Operating under the influence of alcohol is much easier to prove than for drugs, and we still lose a lot of those, so we're very concerned," Tavares said.

Tavares said prosecutors have other options in marijuana impairment cases, like pursuing a charge of negligent driving or, in Marshfield's case, violating a town bylaw banning public marijuana use, but those don't carry the same penalties as an impaired driving charge, particularly for subsequent offenses.

Despite concern among law enforcement officials, there remains wide disagreement among experts about how significantly marijuana use affects a person's ability to drive safely and whether legalization in other states has led to more crashes and traffic fatalities. Police in both Colorado and Washington have reported that more drivers have tested positive for THC after crashes since legalization, but it's not known how many of those drivers were actually impaired or whether their marijuana use led to the crash.

Conflicting studies

Studies on impaired driving have come up with different answers. While a 2011 meta study found a higher risk of crashes associated with marijuana use, a report released last year by the National Highway Traffic Safety administration found that most of that risk is associated with the kind of people who tend to use marijuana - like young men - rather than the marijuana use itself. And a policy paper released by the Cato Institute in September found no significant change in crash fatalities after legalization in Colorado, Washington, Oregon and Alaska, though Washington saw a spike in deaths in late 2015, more than a year after legalization.

And while police in Massachusetts wait to see how legalization will affect the roads and whether new technological and legal tools become available to combat drugged driving, some experts say police are already trained to recognize drug use in the way that really matters. After all, an officer needs no more than probable cause to make an arrest.

"That's going to get the person off the road, and that's what I care about," said David Rossman, director of criminal law clinical programs at Boston University. "I'm less interested in the conviction part."