



Legal Update

September 2017

The SJC holds that a police officer may administer “roadside assessments” during a motor vehicle stop for OUI marijuana and can testify to what the driver did during the administration of these assessments. However, the officer who is not qualified as an expert witness CANNOT testify that the driver was under the influence of marijuana or that the consumption of the marijuana impacted the driver’s ability to safely operate a motor vehicle.

Commonwealth v. Thomas Gerhardt, SJC-11967 (2017)

The SJC answered the following questions in its decision:

1. Whether police officers may testify to the administration and results of standard field sobriety tests in prosecutions for operating under the influence of marijuana as they do in operating under the influence of alcohol prosecutions?

No. Police officers may not testify to the administration and results of FSTs as they do in operating under the influence of alcohol prosecutions. Police officers may testify to the administration of "**roadside assessments**" in the manner set forth in this opinion.

2. Are the effects of marijuana consumption sufficiently within the common knowledge and experience of a lay person, such that a non-expert witness may offer opinion evidence whether a person is 'high' on marijuana?

No. A lay witness may not offer an opinion that another person is "high" on marijuana.

3. May a police officer, who has not been qualified as an expert witness, testify to the effects of marijuana on a person such as bloodshot eyes, lack of coordination and/or balance, reaction times, slow speech, paranoia, or relaxed responses?

Yes. A police officer may testify to the observed physical characteristics of the driver such as blood shot eyes, drowsiness, and lack of coordination. **The officer is not permitted to offer an opinion that these characteristics mean that the driver is under the influence of marijuana.**

4. May a juror rely on their own experience and common sense about the effects of marijuana as they may do in an operating under the influence of alcohol prosecution?"

Yes. Jurors are permitted to utilize their common sense in assessing trial evidence.

In February 2013, a state trooper, **who was not a drug recognition expert ("DRE")**, observed an SUV driving on a highway without its rear lights on, and stopped it. The defendant, Thomas Gerhardt, was driving the vehicle with two passengers. The trooper noted that the SUV was full of smoke and smelled like burnt marijuana. The trooper observed cigar tobacco on the floor as well as a cigar slicer attached to the key ring in the ignition. When asked, the defendant provided the trooper with his license, but was unable to produce his registration. The defendant told the trooper that he had a couple of roaches, which he gave to the trooper. He also reported that he had smoked about one gram of marijuana three hours ago, and he agreed to perform field sobriety tests. According to the trooper, the defendant responded appropriately to the HGN test and he was able to complete the alphabet and counting backwards tests. However, the defendant was not able to follow directions when performing the walk and turn test and the one legged stand test.

The trooper formed the opinion that the defendant was under the influence of marijuana and issued a complaint against the defendant for Operating under the Influence of Drugs in violation of G.L. c. 90, § 24.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

Before trial, the defendant filed a motion to exclude the results of the field sobriety tests and the motion judge reported the case to the SJC.

1st Issue: Are Field Sobriety Test results admissible in a prosecution for OUI/marijuana?

The unsettled state of scientific research suggests that FST evidence should be neither treated as a definitive test of impairment nor excluded entirely from consideration by the fact finder. *Commonwealth v Thomas*, 476 Mass. 451 (2017).

The SJC held that field sobriety tests are admissible at trial to show the driver's "balance, coordination, ability to retain and follow directions and ability to perform tasks requiring divided attention, and the presence or absence of other skills necessary for the safe operation of a motor vehicle." A police officer testifying to a defendant's performance on these FSTs therefore need not be qualified as an expert. However, because of the "mixed results" as to whether these tests are scientifically reliable in measuring a driver's impairment by marijuana, the SJC has limited what police can testify to during an OUI marijuana trial.

A police officer may only testify as to what the driver did during the performance of the road assessments, but may not say that the driver "passed" or "failed" based on the driver's performance of the roadside assessments. "A police officer makes numerous relevant observations in the course of an encounter with a possibly impaired driver. An officer may testify to his or her observations of any erratic driving or moving violations that led to the initial stop; the driver's appearance and demeanor; the odor of fresh or burnt marijuana; and the driver's behavior upon exiting the vehicle. Some FSTs also may provide information that is relevant to the question of a defendant's impairment, and a police officer may testify, as a lay witness, to his or her observations of the defendant's performance."

A police officer may not suggest on direct examination that an individual's performance on a FST established that the individual was under the influence of marijuana. In *Gerhardt*, the trooper testified at the motion hearing that Gerhardt was impaired because of his performance on the walk and turn test and one legged stand test. The trooper's testimony would not be admissible at trial.

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2nd Issue: Can a police officer, without being qualified as an expert, testify to the effects of marijuana consumption and offer an opinion as to whether the driver was impaired by marijuana?

The SJC held that a police officer not qualified as an expert cannot testify that a person is impaired due to marijuana because the effects of marijuana may “vary greatly from one individual to another, and those effects are as yet not commonly known.” A police officer or anyone may testify to an opinion that someone was intoxicated by alcohol because the opinion is not based on scientific or specialized knowledge, but lies within the realm of common experience. However, there is no such general knowledge related to the effects of marijuana because they vary greatly among individuals.

A lay witness may testify concerning a defendant’s appearance, behavior, and demeanor, but may not offer an opinion as to the defendant’s sobriety or intoxication. If the prosecutor elicits from the police officer his or her special training or expertise in ascertaining whether a person is intoxicated, the prosecutor risks transforming the police officer from a lay witness into an expert witness and the admissibility of any opinion proffered on this issue may then be a subject to the different standard applied to expert witnesses. *Commonwealth v. Canty*, 466 Mass. 535 (2013).

The SJC added that the jury must be instructed that field sobriety tests do not directly test marijuana impairment, and that evidence of field sobriety tests alone are not enough to prove marijuana impairment. Additionally, the SJC recognized that it since it is “common knowledge” that marijuana can impair driving skills including coordination, concentration, and the ability to multi-task, jurors can use their common sense in assessing trial evidence.

Commentary: As in *Canty*, the SJC here imposed limitations as to what the officer can testify to during an OUI/marijuana trial. Pursuant to *Canty*, a police officer can only testify that the driver is impaired, but not that a driver is impaired to operate a motor vehicle. *Gerhardt* does not prevent officers from using roadside assessments when stopping a vehicle on suspicion of OUI/marijuana, nor does it prevent police from arresting drivers for OUI marijuana. The bottom line is that *Gerhardt* restricts officers to testify or describe in court only how a driver behaved during the roadside assessments, not that the driver was intoxicated by marijuana.

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