Hello Judges

By Judge Rod Ring, (Ret.)

This is my first Sound Judgement newsletter and I want say **Goodbye!** and **Thank You!** to Retired Judge Carol Hubbard and Hello! to all of you. I also want to introduce you or refresh your memory about the Judicial Outreach Liaison/Statewide Judicial Education Project and what you can expect for the rest of the year.

Judge Hubbard has been the driving force of this program since 2013. I’m sure some of you don’t remember a time that Judge Hubbard was not the JOL/Statewide Judicial Educator. The program has been successful because of her research and writing skills along with her dedication to judicial education. She has put together a nationwide network of judicial educators to bring quality programs to Oklahoma judges. Her *Sound Judgement* Newsletters provided the good, up to date, concise information Judges need and can use every day. Her professionalism and enthusiasm will be missed but I wish her the best of luck in her latest retirement.

The JOL/SJEP program is funded by the National Highway Traffic Safety Administration by a grant through the Oklahoma Highway Safety Office. The OHSO and the Oklahoma Bar Association will cooperate in providing the education services to the Judges of Oklahoma. The programs will focus on

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Resources for judges, court administrators, court clerks, and other court staff on issues related to traffic adjudication.

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**Ways to Say, “Goodbye” . . .**

By Judge Carol Hubbard

Goodbyes can be long and take forever, or they can be short, sweet and to the point.

They can be understood – such as Auf Wiedersehen, Adios, Sayonara – or not – such as Viszontlatasra, Proshchay, Tam Biet.

It’s been a great ride! You are the best, and I’m leaving you in good hands. So, look for me on the highway with something like this in tow to ensure that the road ahead is filled with more great adventures.

**Goodbye, Carol**
By Mary A. Celeste  
Reprinted with permission

One of the major consequences of legalizing marijuana is that it can affect drivers on the roadways. Courts across the country are facing issues such as the applicability of the long established standard field sobriety test for alcohol-driving impairment to determine marijuana-driving impairment; the characteristics indicative of marijuana-driving impairment; and the blood nanogram concentration levels that establish marijuana-driving impairment. The Massachusetts Supreme Court was the first state Supreme Court out of the box to address these issues.

On January 6, 2017, the Massachusetts Supreme Court heard oral arguments in the case of Commonwealth v. Gerhardt1, which required the court to consider several novel questions:

1. What physical characteristics (e.g., bloodshot eyes, dilated pupils, lack of coordination, slow balance or reaction times, garbled or slow speech) permit an inference of impaired driving by reason of marijuana use?
2. Is there a scientifically established correlation between performances on field sobriety tests and marijuana-impaired driving?
3. Is there a level of intoxication that is generally accepted as establishing impairment as to driving?
4. Has any jurisdiction, foreign or domestic, recognized such a level of intoxication?

As far as marijuana-driving cases go, the facts of the Gerhardt case were not unusual. The defendant (Gerhardt) was stopped for driving without working tail lights. Once stopped, an officer saw smoke inside the vehicle and detected the odor of marijuana. The defendant stated that he had smoked around three hours before the stop, although another passenger said it had only been 20 minutes. Gerhardt pulled two marijuana cigarettes (“roaches”) from an ashtray and handed them to the officer. In a subsequent search, officers found two more roaches.

As more and more marijuana-driving cases come forward, the plain view doctrine will play a large role. The plain-view doctrine has been expanded to include plain feel, plain smell, and plain hearing.

As far as marijuana-driving cases go, the facts of the Gerhardt case were not unusual. The defendant (Gerhardt) was stopped for driving without working tail lights. Once stopped, an officer saw smoke inside the vehicle and detected the odor of marijuana. The defendant stated that he had smoked around three hours before the stop, although another passenger said it had only been 20 minutes. Gerhardt pulled two marijuana cigarettes (“roaches”) from an ashtray and handed them to the officer. In a subsequent search, officers found two more roaches.

As more and more marijuana-driving cases come forward, the plain view doctrine will play a large role. The plain-view doctrine has been expanded to include plain feel, plain smell, and plain hearing. The U.S. Supreme Court agrees that the smell of marijuana may provide probable cause to obtain a search warrant. Further, some state courts hold that detection of the odor of marijuana or marijuana smoke provides probable cause for a warrantless search. Oddly enough, searches based upon marijuana smell have decreased in the states of Colorado and Washington, which were two of the first states to legalize recreational marijuana.

All of the facts related to the Gerhardt stop established probable cause to request that he perform a standard field sobriety test and Gerhardt consented. He failed several tests:

Rather than standing heel to toe, with his right foot in front and his left toes touching his heel, as he had been shown, Gerhardt moved his feet so that they were side by side; he also did not turn around as instructed . . . Gerhardt[t] did not remain upright on one foot, instead putting his foot down multiple times.

See Impact on Page 3
times, and swayed.\textsuperscript{8} It should be noted that counting backwards and reciting the alphabet, although frequently used by law enforcement in suspected driving-impairment stops, is not part of National High-way Traffic Safety Administration sanctioned alcohol field sobriety tests.

For purposes of alcohol impairment, a standard field sobriety test consists of the horizontal gaze nystagmus, the one-leg stand, and the walk-and-turn.\textsuperscript{9} For purposes of detecting drug impairment, sometimes the Romberg or modified Romberg test is added:

[T]he officer will ask you to stand with your feet together, head tilted slightly back and eyes closed. You will be asked to estimate when 30 seconds has passed, and say “stop” when you think it’s been that long. While you are balancing, the officer will look for six clues: amount and direction of swaying, eyelid/body tremors, estimate of when 30 seconds has passed, muscle tone, sounds or statements made during the test, ability to follow directions.\textsuperscript{10}

Some research says that standard field sobriety tests are effective in identifying marijuana-driving impairment\textsuperscript{11}, some research says that they are only moderately successful\textsuperscript{12}, while other research says that only the walk-and-turn or the one-leg stand tests are effective.\textsuperscript{13} One study stated that the finger-to-nose test was the best test to accurately predict cannabis impairment.\textsuperscript{14} Many agree, however, that the horizontal gaze nystagmus test is not effective.\textsuperscript{15}

Indicators of marijuana-driving impairment include eyelid tremors, increased pulse, elevated systolic blood pressure, dilated pupil size, lane weaving, driving on the wrong side of the road, drifting, following too close, driving a large distance from the vehicle ahead, not responding to questions, reddened eyes, slow pupil reaction, nervousness, laughing, and unusual facial expressions.\textsuperscript{16} Some believe that one side effect includes “green tongue,” although the appellate courts in both Utah and Washington are skeptical.\textsuperscript{17}

Studies and reports from 2004 through 2012 designated THC blood concentration levels from 2 to as high as 30 THC ng/ml as establishing marijuana-driving impairment.\textsuperscript{18} The more recent studies and reports, however, do not support the designation of a blood nanogram concentration level as the sole indicator of marijuana-driving impairment. The July 2017 National Highway Traffic Safety Administration Marijuana-Impaired Driving Report to Congress stated that there is a “poor correlation of THC concentrations in the blood with impairment” and that “setting per se levels is not meaningful.”\textsuperscript{19} In 2016 the AAA Traffic Safety Administration also stated that “it is difficult to establish a relationship between a person’s THC blood or plasma concentration and performance impairing effects. Concentrations of parent drug and metabolite are very dependent on pattern of use as well as dose. . . . It is inadvisable to try and predict effects based on blood THC concentration alone.”\textsuperscript{20} Also in 2016, the AAA Traffic Safety Research Foundation conducted a study and concluded that “quantitative thresholds for per se laws for THC following cannabis use cannot be scientifically supported.”\textsuperscript{21}

There are pending federal studies related to marijuana and driving. The National Institute on Drug Abuse is using a $1.4 million grant to conduct a five-year study to determine how marijuana impacts critical brain functions for driving.\textsuperscript{22} The National Highway Traffic Safety Administration is conducting a second research project to take initial steps towards developing a battery of tests to identify drivers who have recently used marijuana.\textsuperscript{23} The State of Colorado granted the University of Colorado $1.68 million to look at the impacts of marijuana use on driving.\textsuperscript{24}

In mid-2017, the Massachusetts court in Gerhardt v. Commonwealth, No. 10-8697

The court went even further and concluded that:

The fact that the [standard field sobriety tests] cannot be treated as scientific “tests” of impairment means that evidence of performance on [standard field sobriety tests], alone, is not sufficient to support a finding that a defendant’s ability to drive safely was impaired due to the consumption of marijuana, and the jury must be so instructed.\textsuperscript{27}

What other factors should be considered in determining driving impairment? Perhaps toxicology reports indicating THC blood nanogram concentration levels; the degree of bad driving; physical evidence, such as marijuana paraphernalia or cigarettes in plain view; inculpatory statements, such as “I just smoked some marijuana”; an odor of marijuana; observations by law enforcement of characteristics like bloodshot eyes; and others as identified by the Gerhardt Court. Toxicology reports offering THC blood concentration levels are themselves under scrutiny. As noted above in the National Highway Traffic Safety Administration’s report to Congress, setting per se levels is not meaningful,\textsuperscript{28} and last year’s AAA Traffic Safety Research Foundation study concluded that “quantitative threshold for per se laws for THC following cannabis use cannot be scientifically supported.”\textsuperscript{29} If the toxicological findings also become an issue, then Massachusetts may only be left with the drug recognition expert observations as identified and supported by the ruling: bad driving, physical evidence, odor, and inculpatory statements.

This may cause the “road” to conviction in marijuana-driving cases to narrow in Massachusetts and perhaps in other Daubert states. Massachusetts, federal courts, and over half of the state courts in the U.S. use the Daubert standard for the admissibility of scientific evidence.\textsuperscript{30} Does this mean that other courts will adopt the Massachusetts analysis on the admissibility of standard field sobriety tests in marijuana-driving cases even though the
2. Gerhardt, 477 Mass. at 774–78; Martha Bebinger, Mass. High Court Tackles Driving Under the Influence of Marijuana, ALL THINGS CONSIDERED (Jan. 6, 2017), http://www.npr.org/2017/01/06/504070271/marijuana-legalization-driving-


4. See, e.g., United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973) (recognizing a “plain view” exception, the Court held there was no search where officers overheard conversation in adjoining hotel room); United States v. Pierre, 958 F.2d 1304 (5th Cir.1992) (holding that an officer smelling marijuana in defendant’s car was not an unreasonable search under the Fourth Amendment).


6. See, e.g., State v. Sarto, 195 N.J. Super. 565, 574, 481 A.2d 281 (App. Div. 1984) (reversing the order of suppression because the “strong odor of unburned marijuana gave police probable cause to search the trunk for evidence of contraband”); Waugh v. State, 20 Md. App., 682, 681, 318 A.2d 204 (Md. Ct. Spec. App. 1974) (stating that “[t]rained investigators are entitled to rely upon the sense of smell to establish probable cause, just as surely as they are entertained to rely upon the senses of hearing, touch, or taste”), revid on other grounds, 275 Md. 22, 338 A.2d 268 (1975); see also Andrea Ben-Yosef, Annotation, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana—State Cases, 114 A.L.R. 5th 173 (2003); 68 AM. JUR. 2D Searches and Seizures § 72 (1993); Odor of Narcotics as Providing Probable Cause for Warrantless Search, 5 A. L.R. 4th 681 (1981). In Virginia, the Commonwealth’s appeals court has recognized plain-smell probable cause but has never clearly adopted the doctrine. See Commonwealth v. Jones, No. 0857-97–3, 1997 WL 557005, at *1 (Va. Ct. App. Sept. 9, 1997) (finding probable cause based on odor along, but not clearly excluding other factors from the holding); Lewis v. Commonwealth, No. 1483-96-1, 1997 WL 260581, at *1–2 (Va. Ct. App. May 20, 1997) (suggesting, but not expressly stating, that the odor of marijuana alone gave officer probable cause to search the vehicle). The situation in Georgia is substantially similar to that in Virginia. Compare Brewer v. State, 199 S.E.2d 109, 112 (Ga. Ct. App. 1973) (stating that odor of marijuana is not in itself sufficient evidence to establish probable cause), overruled by State v. Folk, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999), and Albert v. State, 511 S.E.2d 244, 248 (Ga. Ct. App. 1999) (recognizing that the issue of plain smell was still unresolved in Georgia, and holding that odor of marijuana was not sufficient to establish probable cause to search the warrantless search of a vehicle.”). Although Folk appeared to settle the issue of plain smell in Georgia, it remains to be seen whether the Georgia Supreme Court will ratify that decision if it continues to follow the setting the stage for how courts will treat driving under the influence of marijuana in particular, and driving under the influence of drugs in general, is an escalating problem for the roadways and the courts. State trial and supreme courts will have to make important decisions about how to address the science establishing impairment, the role of the drug recognition expert, and the applicability of standard field sobriety tests in drugged-driving cases. Will the Massachusetts findings regarding marijuana and driving under a Daubert analysis influence how courts will treat driving under the influence of other drugs as well? Slowly the answers will come.

Footnotes

2. Gerhardt, 477 Mass. at 774–78; Martha Bebinger, Mass. High Court Tackles Driving Under the Influence of Marijuana, ALL THINGS CONSIDERED (Jan. 6, 2017), http://www.npr.org/2017/01/06/504070271/marijuana-legalization-driving-


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Judge Mary A. Celeste (retired) served as a judge of the Denver County Court from 2000 to 2015 and was the presiding judge from 2008 to 2010. She was president of the American Judges Association in 2010–2011. Celeste is the immediate past chair of theABA National Conference for Court Judges and a former liaison for judicial outreach for NHTSA.
OBA/OHSO Fall 2018
Statewide Judicial Education Program

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GET TO KNOW OUR OUT-OF-STATE PRESENTERS

HONORABLE TARA A. OSBORN
Judge Osborn is the former Chief Trial Judge of the U.S. Army. In that position, she presided over felony criminal trials, to include capital cases, oversaw judicial operations at military installations worldwide, and led all active duty and reserve judges of the Army Trial Judiciary. She retired from the military in 2017 as a colonel, having served over 29 years on active duty, with extensive experience as a prosecutor, litigation attorney, and military judge. Before her appointment to the bench in 2007, she completed a U.S. Army War College fellowship as Special Counsel to the Assistant Attorney General, Civil Division, at the U.S. Department of Justice in Washington, DC. A combat veteran of the Persian Gulf War with service in Iraq, her military decorations include the Legion of Merit and the Bronze Star. She also received the U.S. Department of State Superior Honor Award. She holds degrees from the University of South Carolina (B.A. and J.D.) and the University of Virginia (M.P.A.), and earned a Master of Laws degree from the U.S. Army Judge Advocate General’s School, and a Professional Certificate of Judicial Development from the National Judicial College. She is the current Chair of the American Bar Association’s National Conference of Specialized Court Judges, the 2018 George S. Prugh Distinguished Lecturer in Military Legal History at the U.S. Army Judge Advocate General’s School, and is also active in the National Association of Women Judges. Judge Osborn joined the faculty of the National Judicial College in 2018.

HONORABLE WILLIAM G. KELLY
Judge William G. Kelly has served as judge of the 62-B District Court in Kentwood, Michigan since 1979. He is a graduate of the University of Detroit and the University of Detroit School of Law. He has been a faculty member of the Michigan Judicial Institute since 1985. He teaches criminal pretrial issues at the New Judges Seminar. Judge Kelly has taught several other courses for the Michigan Judicial Institute and for various organizations. He is very active in judicial associations in Michigan and nationally and has served as Chair of the National Conference of the Special Court Judges of the ABA, Chair of the Traffic Court Program of the ABA Judicial Division, President of the Michigan District Judges Association, and as Chair of the Judicial Conference of the State Bar of Michigan. He also served as a member of the Board of Directors of the National Center for State Courts. In addition, he edited the Judicial Division Record of the Judicial Division of the ABA for four years. Judge Kelly is an alumnus of The National Judicial College and joined its faculty in 2001. He served on The National Judicial College Faculty Council representing Special Courts.
The Traffic Resource Center for Judges is a cooperative effort between the U.S. Department of Transportation/National Highway Traffic Safety Administration and the National Center for State Courts (NCSC) to establish a resource for judges, court administrators, court clerks, and other court staff on issues related to traffic adjudication. It is an integrated clearinghouse of information as well as a training and technical assistance resource to improve court decision-making and processing of impaired driving, drugged driving, distracted driving, commercial driving, and other cases that affect traffic safety.

A key service of the Resource Center is to respond in a timely manner to requests for information and assistance from the court community, the media. In addition to merely responding to requests, staff anticipates topics of interest to the court community and proactively prepares information “modules” on current and relevant topics for posting on the website. In practice, this requires staff to keep current with traffic issues affecting courts, such as impairment caused by the new designer drugs, to organize and sort relevant information from diverse sources into user-friendly modules, and to disseminate information in practitioner publications, newsletters, court association meetings, and the website [website link].

The Traffic Resource Center, and its associated website, is a useful reference to judges new to the bench or recently assigned to traffic cases, who may need quick access to accurate and timely information. Experienced judges and court staff will also find the website a useful resource for reference materials on specialized traffic issues, evidence-based practices, frequently asked questions and basic legal references and statutory requirements.

The Traffic Resource Center maintains a liaison relationship with many organizations serving courts and will provide them with materials, speakers, and panel members as requested. Therefore, it is also a repository of training materials, including PowerPoint slides delivered at association meetings, video clips of presentations, and other media designed specifically for the website, but that also serve as reusable training resources for the court community.

For more information, please contact: Greg Hurley at 757.259.1819 or Deborah Saunders at 757.259.1827.

Check the link below for information on online courses that may be of interest to Judges and others such as Drug Court Staff. Many of the courses are FREE of charge and self paced. [Online course link]

**FREE Training!**

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**The Science and Admissibility of Drug Evaluation and Classification Evidence in Drug-Impaired Driving Cases**

**July 31, 2018, 3:30 p.m. CST**

This program will address the basics of drug recognition expert testimony in the trial of a drug-impaired driving case, how courts around the country have addressed its admissibility, and the applicability of Frye and Daubedrt to drug recognition evidence.

Judge Neil Edward Axel and Mr. Robert Duckworth are panelists and Judge Laura Weiser is the moderator.

To learn more about and register for the program, visit [Program registration link]