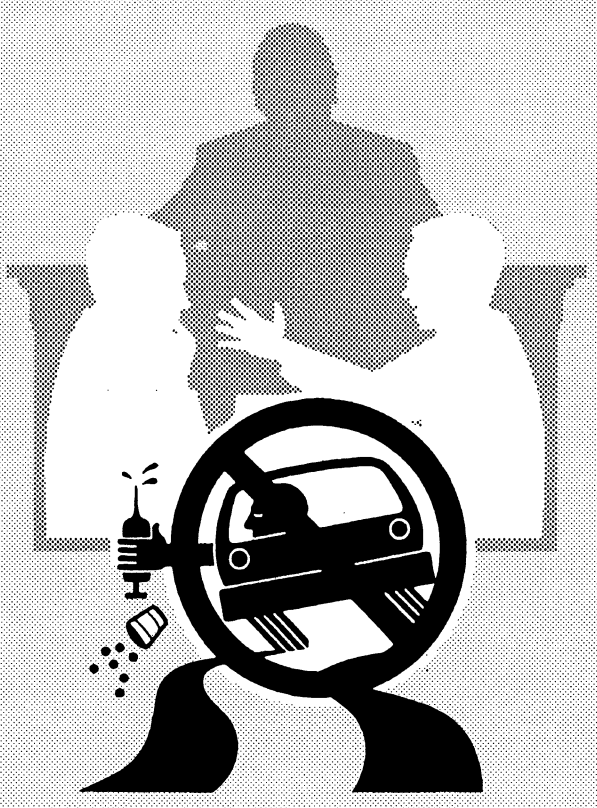
FINAL REPORT

LEGISLATIVE APPROACHES TO INCREASING VIRGINIA'S CONVICTION RATE FOR DRUG-RELATED DUI



ROBYNE R. LAU
Graduate Legal Assistant

JONATHAN C. BLACK
Graduate Legal Assistant

JACK D. JERNIGAN
Senior Research Scientist

Virginia Department of Transportation
VDOT
Research Council

VIRGINIA TRANSPORTATION RESEARCH COUNCIL

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Legislative Approaches to Increasing Virginia's Conviction Rate for Drug-Related DUI

Author(s)

Robyne R. Lau, Jonathan C. Black, & Jack D. Jernigan

Performing Organization Name and Address:

Virginia Transportation Research Council
Box 3817, University Station
Charlottesville, Virginia 22903-0817

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Virginia Department of Transportation
1401 E. Broad Street
Richmond, Virginia 23219

University of Virginia
Charlottesville
Virginia 22903

Department of Motor Vehicles
P.O. Box 27412
Richmond, Virginia 23269

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Abstract

Beginning on April 1, 1988, a revision of Virginia's law concerning drug-related driving under the influence (DUI) enabled police officers to require a person suspected of driving under the influence of drugs to submit a blood sample to be tested for drug content. However, some judges have been reluctant to pass down a DUI conviction in the absence of an established presumptive or per se concentration of a drug in the blood that indicates impairment. In fact, because of the complex chemical nature of most drugs and their varying effects on individuals, establishing a scientific link between a particular concentration of drugs in the blood and impairment is not possible, at least at this time. This study investigated if there were ways to amend Virginia's laws to facilitate drug-related DUI convictions in the event of a finding of drugs in a suspect's blood.

The researchers formulated three options for legislative amendments: two for criminalizing internal possession of drugs regardless of whether a person is driving, thus opening the way for a plea bargain to a reduced charge of drug-related DUI, and one for criminalizing the operation of a motor vehicle with a nonprescribed drug in the blood. An internal possession offense does not seem to be a feasible option for Virginia at this time. However, the researchers recommend that serious, but cautious, consideration be given to proposing that Virginia's current DUI offense be revised to remove the requirement of showing impairment and permit a positive blood test for a nonprescribed drug to be sufficient evidence for conviction.

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Senior Research Scientist

(The opinions, findings, and conclusions expressed in this report are those of the authors and not necessarily those of the sponsoring agencies.)

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A. R. WOODROOF, ESQ., Manakin-Sabot, Virginia

ABSTRACT

Beginning on April 1, 1988, a revision of Virginia's law concerning drug-related driving under the influence (DUI) enabled police officers to require a person suspected of driving under the influence of drugs to submit a blood sample to be tested for drug content. However, some judges have been reluctant to pass down a DUI conviction in the absence of an established presumptive or per se concentration of a drug in the blood that indicates impairment. In fact, because of the complex chemical nature of most drugs and their varying effects on individuals, establishing a scientific link between a particular concentration of a drug in the blood and impairment is not possible, at least at this time. This study investigated if there were ways to amend Virginia's laws to facilitate drug-related DUI convictions in the event of a finding of drugs in a suspect's blood.

The researchers formulated three options for legislative amendments: two for criminalizing internal possession of drugs regardless of whether a person is driving, thus opening the way for a plea bargain to a lesser charge of drug-related DUI, and one for criminalizing the operation of a motor vehicle with a nonprescribed drug in the blood. An internal possession offense does not seem to be a feasible option for Virginia at this time. However, the researchers recommend that serious, but cautious, consideration be given to proposing that Virginia's current DUI offense be revised to remove the requirement of showing impairment and permit a positive blood test for a nonprescribed drug to be sufficient evidence for conviction.

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INTRODUCTION

In 1988, Virginia implemented a significant revision of its statute concerning drug-related driving under the influence (DUI). Although the previous language of the law made it illegal for a person to drive while impaired by alcohol and/or other drugs, the law provided for a blood or breath test to ascertain the concentration of only alcohol in a suspect's system, not of other drugs. That is, under the law (called the implied consent statute), a person in possession of a Virginia driver's license or who operates a motor vehicle on Virginia's public roads agrees to provide a blood or breath sample if required to do so by a police officer who suspects the person of driving while impaired by alcohol. In 1987, the General Assembly amended the statute to allow collection of a blood sample from persons suspected of drug-related DUI beginning on April 1, 1988.

In the autumn of 1987, the Department of Motor Vehicles (DMV) and the Virginia State Police (VSP) created the Task Force to Combat the Impaired Driver to prepare for the implementation of the revised statute. As a supplement to the general provisions of the statute, the task force decided to establish a pilot Drug Recognition Technician (DRT) Program, which was originally developed by the Los Angeles Police Department (LAPD) as an intensive training program to enhance a police officer's ability to detect impairment and classify the physiological symptoms consistent with seven broad categories of drugs.

In tracking the ultimate resolution of cases associated with the blood samples submitted for analysis in 1988 and 1989 to the Division of Forensic Science (DFS), the official state laboratory, it became apparent that some judges were reluctant to convict a drug-related DUI suspect, even in the case of a finding of drugs by the DFS, because there are no blood drug concentrations that parallel the 0.10% blood alcohol concentration (BAC) that indicates per se impairment by alcohol.

PURPOSE AND SCOPE

The task force requested that the Virginia Transportation Research Council (VTRC) investigate whether Virginia's laws could be changed to facilitate drug-related DUI convictions in the event of a finding of drugs by the DFS. Because Virginia's DRT program is modeled after a similar program in the LAPD that is associated with a high conviction rate, the researchers considered the possibility of modeling Virginia law after California law. California has a statute that makes it illegal for a person to be under the influence of an illegal drug, which is, in effect, an internal possession charge that carries a mandatory 90-day jail sentence. This penalty is much harsher than the penalty for the first drug-related DUI conviction, so a plea bargain is often struck to drop the internal possession charge if the defendant will plead guilty to drug-related DUI—hence, the high conviction rate for drug-related DUI in California. However, the researchers were unsure whether a blood sample acquired under Virginia's implied consent statute could be used as evidence in another type of criminal offense, i.e., internal possession. Thus, the researchers asked the question: Could the results of a blood analysis obtained for a drug-related DUI case be used as evidence in the non–driving-related charge of being under the influence (or internal possession) of drugs, thus opening the way for a plea bargain? Second, because the use of illicit drugs is by definition illegal, the researchers also asked the question: Can Virginia's law be changed to allow a conviction for drug-related DUI merely on the basis of a driver having a nonprescribed drug in his or her system? The findings were used to develop three legislative options for Virginia.

METHOD

To collect the information necessary to answer the two research questions and develop legislative options, reviews of relevant Virginia court cases and legislation were conducted. The case law of other states was also considered. Although Virginia courts are not bound by the decisions of the courts of other states, it was felt that the case law of other states might serve as a useful model for Virginia.

RESULTS

Question 1

Could the results of a blood analysis obtained for a drug-related DUI case be used as evidence in the non–driving-related charge of being under the influence (or internal possession) of drugs, thus opening the way for a plea bargain?

Examinations of statutory amendments and Virginia Supreme Court rulings regarding permissible uses of the blood test results obtained under the implied con-

sent statute indicate the possible use of blood test results in any criminal or civil proceeding. Deciding on the issue of whether blood test results could be used as evidence in a criminal prosecution for involuntary manslaughter, the *Wade* court limited the admissibility of blood test results to criminal prosecutions under the DUI statute that was tied to the implied consent statute. *Wade v. Commonwealth*, 202 Va. 117, 122, 116 S.E.2d 99, 103 (1960). The *Wade* court based its decision on the principle that "penal statutes are to be construed strictly against the State and in favor of the liberty of a person." *Id.* at 122, 116 S.E.2d at 103.

Although *Wade* once circumscribed the use of blood test results, the legislature amended the statute on which *Wade* rested. At the time of *Wade*, the relevant statute provided for a voluntary blood test and stated that blood test results were "admissible in any court or proceeding." Va. Code Ann. §§ 18-75.1–18-75.2 (1950). Four years after *Wade*, a statutory amendment provided for the admissibility of blood test results "in any court, in any criminal proceeding." 1964 Va. Acts C. 240. In 1975, another amendment further broadened the admissibility of blood test results by providing for the admission of such evidence "in any court, in any criminal or civil proceeding." 1975 Va. Acts C. 14. Thus, legislative action following *Wade* has consistently expanded the admissibility of the blood test results obtained under the implied consent statute.

Research revealed only one post-*Wade* ruling that reflected the change in the scope of admissibility for the blood test results created by the legislative amendment. In that case, the admissibility of the blood test results for a non-DUI charge was at issue for different reasons than in *Wade*. *Essex v. Commonwealth*, 228 Va. 273, 322 S.E.2d 216 (1984). In *Essex*, the Commonwealth prosecuted the defendant for DUI and for second-degree murder. *Id.* at 278, 322 S.E.2d at 218. The defendant challenged the admissibility of the blood test results not on the grounds that the statute limited admissibility to DUI prosecutions, but rather on the grounds that the blood test results were not probative. *Id.* at 285, 322 S.E.2d at 223. Because the court determined that the blood test results report "the degree of [the defendant's] intoxication," which tends to show "the relative dangerousness of his conduct," it held that the trial court's admission of the blood test results was proper in the homicide prosecution. Thus, although the *Essex* court specifically addressed neither *Wade* nor the ensuing statutory amendments, its ruling was in accord with the broader scope of the statutory amendments.

It cannot be said with certainty whether the blood test results obtained under the implied consent statute may be used in prosecutions for internal possession. Although a plain language reading of the two statutory amendments indicates that the legislature intended the admissibility of the blood test results in virtually any court proceeding, a plain language reading of the version of the statute on which the *Wade* court relied also indicates that the blood test results should have been admitted in that case. In *Wade*, admissibility under the statute extended to "any court or proceeding," and admissibility under the amended statute presently extends to "any court, in any criminal or civil proceeding." Va. Code Ann. § 18-75.2 (1950) and Va. Code Ann. § 18.2-268(L) (1989). The extension of admissibility in *Essex* beyond that allowed in *Wade* may serve as some indication that the Virginia

Supreme Court may be willing to adhere to a plain language reading of the scope of admissibility of blood test results under the implied consent statute. However, in *Essex*, the murder charge was directly related to the defendant's operation of a motor vehicle while under the influence of alcohol.

In summary, although *Wade*, a case decided more than 30 years ago, indicated that the Virginia Supreme Court would rule strictly and against the Commonwealth in interpreting the scope of admissibility of blood test results under the implied consent statute, two statutory amendments and the more recent *Essex* ruling indicate an expanded scope of admissibility. Whether that scope is broad enough to encompass a non–driving-related charge for internal possession of drugs is not clear.

Question 2

Can Virginia's law be changed to allow a conviction for drug-related DUI merely on the basis of a driver having a nonprescribed drug in his or her system?

Under the California Health & Safety Code § 11550 (West 1990), it is an offense to "use, or be under the influence of any controlled substance . . . except when administered by or under the direction of a person licensed by the state to dispense controlled 'substances.'" The significant part of the offense is not impairment, but the illegal use of a substance. *Culberson*, 140 Cal. App. 2d Supp. at 961, 295 P.2d at 599. Thus, since "under the influence . . . refers to the presence of [illegal drugs] in any detectable manner" (*People v. Mendoza*, 76 Cal. App. 3d Supp. 5, 9, 143 Cal. 404, 406 [1977]), a positive chemical test can provide the sole evidentiary basis for conviction under the statute. In *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), the Supreme Court stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising" of casino gambling. *Id.* at 346. Hence, since California has criminalized the presence of a nonprescribed drug in a person's system and this law has not been overturned in California or federal courts, then the lesser step of criminalizing driving with a nonprescribed substance in the blood would likely be upheld in the federal courts, although the position of Virginia courts is unknown.

The offense of addicted driving likewise supports criminalizing the operation of a motor vehicle with a nonprescribed substance in the blood. Under California case law, proof of withdrawal is a sufficient basis to convict for addicted driving (*Duncan*, 255 Cal. App. 2d at 78, 62 Cal. Rptr. at 825) since withdrawal symptoms pose the primary threat to roadway safety. *O'Neill*, 62 Cal.2d at 756, 44 Cal. Rptr. at 325. Proof of actual withdrawal while driving is not required for conviction. *Id.* at 754, 44 Cal. Rptr. at 324. Thus, the California law confronts the potential threat to roadway safety created by addicted driving, not just individual circumstances in which withdrawal symptoms actually impaired driving.

Although Virginia defines DUI in terms of impairment of the driver's ability to operate a motor vehicle (Va. Stats. Ann. §18.2-266 [1988]), California's addicted

driving statute suggests that actual impairment need not be a requirement for a drug-related DUI conviction. Just as California guards against the possibility of impairment from withdrawal, Virginia may be able to protect the public from the threat of impairment caused by drug use. Whenever a nonprescribed substance is present in a driver's blood, the potential for impaired driving exists, just as it does with addicted drivers subject to withdrawal symptoms. Virginia may be able to guard against this threat, even though it is not manifested in actual impairment. The law assumes, without further proof, that when a person is under the influence of intoxicants "that it is dangerous to the public, as well as to the driver, to operate a motor vehicle." *McMurry*, 184 So. 42, 43 (Ala. 1938).

Indeed, proof of actual impairment is not required by statutes that do not define *under the influence* in terms of "impairment." In construing Alabama Code § 1397 (Michie's Code 1928), which made it illegal "to drive any vehicle upon a public highway while under the influence of liquors or narcotics," the *McMurry* court held that the state need not "prove that the intoxication had reached a stage where it would or did interfere with the operation of the motor vehicle." *Id.* at 42. Driving under the influence of intoxicants is presumed to be dangerous. *Id.* at 42, 43. Before the Virginia law required impairment for conviction under § 18.2-266, the Virginia Supreme Court held that conviction for driving "while under the influence of intoxicants" did not require the Commonwealth to prove that the driver was under the influence of intoxicants to such an extent that his or her ability to drive "safely is materially impaired." *Owens v. Commonwealth*, 136 S.E. 765 (Va. 1927).

Thus, absent a statutory requirement of proof of impairment, it is possible that Virginia might obtain a conviction for drug-related DUI without a showing of impaired driving. Although it may be argued that proving the charge mandates evidence of some effect on the operator's nervous system, California case law establishes that a positive blood test sufficiently demonstrates that a person was under the influence of narcotics. See *Mendoza*, 76 Cal. App. 3d Supp. at 9, 143 Cal. Rptr. at 406. Therefore, it follows that a blood test showing the presence of a controlled substance in the driver's system may be able to provide the sole evidentiary basis for a conviction of drug-related DUI, without further proof of impairment.

Legislative Options

Based on the analysis of the two questions investigated in this study, the researchers formulated three legislative options for consideration in Virginia. The first two options would criminalize internal possession of drugs, and the third would criminalize the operation of a motor vehicle with a nonprescribed drug in the blood.

Options 1 and 2: Criminalizing Internal Possession

- *Option 1: Internal Possession with Penalties Corresponding to Virginia's Drug Possession Laws*

This option models a statute criminalizing internal possession of a controlled substance after Virginia's possession statutes and could be placed in Title 18.2, Chapter 7, Article 1. The language in the prohibition portion was taken from California, Michigan, and Delaware law. The penalty portion of the statute corresponds to Virginia's possession penalties contained in Title 18.2, Chapter 7, Article 1.

18.2-XXX. Use of controlled substances; penalty.

It is unlawful for any person knowingly or intentionally to use or be under the influence of any controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner acting in the course of his professional practice. It shall be the burden of the defense to show that it comes within the exception.

Violation of this section with respect to a controlled substance classified in Schedules I or II of the Drug Control Act is punishable as a Class 5 felony.

Violation of this section with respect to a controlled substance classified in Schedule III of the Drug Control Act is punishable as a Class 1 misdemeanor.

Violation of this section with respect to a controlled substance classified in Schedule IV of the Drug Control Act is punishable as a Class 2 misdemeanor.

Violation of this section with respect to a controlled substance classified in Schedule V of the Drug Control Act is punishable as a Class 3 misdemeanor.

Violation of this section with respect to a controlled substance classified in Schedule VI shall be punishable as a Class 4 misdemeanor.

If Virginia chooses to criminalize internal possession of a controlled substance, provisions should be included for internal possession of marijuana. The following provision is modeled after Virginia's possession statute. The criminalization of internal possession of marijuana is separated from the criminalization of internal possession of a controlled substance because Virginia's possession penalties are separated in that manner. The penalty provision in the following model matches the penalty provision in Virginia's marijuana possession statute.

18.2-YYY. Use of marijuana; penalty.

It is unlawful for any person knowingly or intentionally to use or be under the influence of marijuana unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice.

Any person who violates this section is guilty of a misdemeanor and shall be confined in jail not more than 30 days and fined not more than

$500, either or both; any person, upon a second or subsequent conviction of a violation of this section, is guilty of a Class 1 misdemeanor.

- *Option 2: Internal Possession with a 90-day Mandatory Jail Term*

The following penalty alternative is a modified version of California's penalty for being under the influence.

18.2-XXX. Use of controlled substances; penalty.

Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term in jail of not less than 90 days nor more than 1 year. The court may place a person convicted hereunder on probation for a period not to exceed 5 years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in jail for at least 90 days, notwithstanding section 18.2-251. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in jail.

Like option 1, option 2 would require a separate section to address the internal possession of marijuana:

18.2-YYY. Use of marijuana; penalty.

Any person who violates this section is guilty of a misdemeanor and shall be confined in jail not less than 90 days nor more than 12 months. The court may place a person convicted hereunder on probation for a period not to exceed 5 years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in jail not less than 90 days, notwithstanding section 18.2-251. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in jail.

- *Provisions Common to Options 1 and 2*

The use of internal possession to punish drug-related DUI may require that Virginia clearly allow the use of blood samples acquired under the provisions of the implied consent statute in internal possession proceedings. Following is a modification of Virginia's implied consent statute. The amended statute constitutes one of two feasible alternatives regarding the seizure of blood for evidence in internal possession prosecutions. Either making the amendments suggested below or having no amendments and no search statute at all appears to be the better choice. If no amendment is made to the implied consent statute, and if no separate search provision is drafted, it is possible that the Virginia Supreme Court may interpret the implied consent statute broadly enough to allow the use of blood samples acquired under the provisions of the statute in internal possession prosecutions. The sample provision follows:

§ 18.2-268. Use of chemical test to determine alcohol or drug content of blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence; suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions . . .

L. When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the Division, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Director of the Division or his designated representative, be admissible in any court, *in any criminal proceeding under Title 18.2* or *in any civil proceeding,* as evidence of the facts therein stated and of the results of such analysis . . .

O. In any trial for a violation of section 18.2-266 or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood or breath test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. If the results of such a blood test indicate the presence of a drug or drugs other than alcohol, *in a section 18.2-266 proceeding,* the test results shall be admissible only if other competent evidence has been presented to relate the presence of a drug or drugs to the impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely. The failure of an accused to permit a sample of his blood or breath to be taken for a chemical test to determine the alcohol or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal.

Option 3: Driving with a Nonprescribed Drug in the Blood

Under this formulation, the offense of drug-related DUI is defined simply as driving with a controlled substance, cannabinoid, or any other self-administered intoxicant or drug of whatsoever nature in the blood. Under Virginia law, the definition of *controlled substances* includes prescribed substances as well as traditionally illicit substances. By using this language, the provision covers illicit, prescribed, and over-the-counter substances. Cannabinoids include marijuana and marijuana-derived substances. Further, this alternative makes a positive chemical test for a nonprescribed controlled substance a sufficient basis for conviction under the statute.

§ 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc. It shall be unlawful for any person to drive or operate any motor ve-

hicle, engine or train (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of § 18.2-268, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any *controlled substance or cannabinoids,* ~~narcotic drug~~ or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs or (iv) while such person is under the combined influence of alcohol and any drug or drugs. *For the purposes of this section, a positive blood concentration of non-prescribed, controlled substances or cannabinoids as indicated by a chemical test administered in accordance with the provisions of § 18.2-268 constitutes prima facie evidence that a driver is under the influence of controlled substances.*

An alteration is recommended in Va. Stat. Ann. § 18.2-268(O) (Supp. 1988) if option 3 is to be effective or enacted. The following language should be struck from the current statute:

> O. If the results of such a blood test indicate the presence of a drug or drugs other than alcohol, the test results shall be admissible only if other competent evidence has been presented to relate the presence of drug or drugs to the impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely.

This section may suggest that presumptive or per se levels for controlled substances are necessary to relate the concentration of drugs in the blood to the impairment of driving skills. Such an interpretation is best avoided by deleting the language entirely.

DISCUSSION

One reason for considering options 1 and 2 would be to provide a way to encourage a guilty plea in drug-related DUI cases. Plea bargaining to a plea of guilty in a drug-related DUI case should be facilitated if the internal possession penalty is harsher than the DUI penalty. Although it is also conceivable that, even if the internal possession penalty were less severe than the DUI penalty, a Commonwealth's Attorney's offer to drop an internal possession charge might be sufficient motivation for an accused to plead guilty to drug-related DUI, such a scenario is unlikely.

The following are the penalties that would result for internal possession of drugs if option 1 was implemented:

Schedule	Class	Penalty
I & II	Felony 5	1–10 yrs; up to $2,500
III	Misdem. 1	Up to 12 mos; up to $2,500
IV	Misdem. 2	Up to 6 mos; up to $1,000
V	Misdem. 3	Up to $500
VI	Misdem. 4	Up to $250
Marijuana	N/A	Up to 30 d; up to $500

Va. Ann. Code § 54.1-3445 et seq. (1950).

Drugs are placed in each schedule depending on factors such as medically accepted usage, potential for abuse, and potential for either physical or psychological addiction. Those drugs carrying the harshest possession penalties (i.e., Schedule I drugs) have no accepted medical use and are highly addictive. Hallucinogens, such as LSD, appear in Schedule I. Schedule II drugs, which include opiates, are those with restricted use and are also highly addictive. Schedule III drugs include barbiturates and narcotics, which have medically accepted uses but that are highly psychologically addictive and moderately physically addictive. Drugs in Schedules IV, V, and VI are considered less addictive, with Schedule VI drugs being all prescription drugs not listed in the other schedules. The scheme appears to be based on the relative danger to the individual that could result from use of the drugs—the more dangerous the drug, the greater the penalty.

Several comparisons are noteworthy. Because drug-related DUI is punishable as a class 1 misdemeanor, the penalty is the same as that for possession of a Schedule III drug, less severe than that for possession of a Schedule I or II drug, and more severe than that for possession of a Schedule IV, V, or VI drug or marijuana. Thus, option 1 would likely encourage a plea of guilty to drug-related DUI only in cases in which a defendant had used a Schedule I, II, or III drug.

On the other hand, option 2, which would impose a 90-day mandatory jail term for internal possession, is harsher than the Virginia possession penalties for controlled substances in Schedules V and VI and for marijuana. Although option 2 would likely be extremely effective for plea bargaining purposes, it would also create an inconsistency in Virginia law. Thus, under this formulation, penalties could be far worse if an individual had a controlled substance in his or her blood than if he or she had the same substance in his or her possession.

A further complication to consider under options 1 and 2 concerning internal possession stems from the fact that an internal possession statute would target drug users in general and not impaired drivers only. Thus, police officers and prosecutors could choose to arrest and convict drug users under the harsher penalties of internal possession.

Under option 3, which would criminalize the operation of a motor vehicle with a nonprescribed drug in the blood, drug-related DUI would be redefined in terms of a positive finding of a drug by the DFS. Thus, the focus of the statute would be shifted from impaired driving to a positive blood test, thereby avoiding the

presently unanswerable question of what blood concentration of each illicit substance results in impaired driving.

Indeed, a conviction for drug-related DUI based on a positive blood test is not strict liability, but liability for recklessness. Under strict liability, if the specified event occurs, then the party is held liable. In the application of strict liability to the DUI context, if a driver operates an automobile in an impaired fashion, for example by weaving, the driver could be convicted of DUI without a blood test or further proof. However, a positive blood test strongly implies a reckless basis for impaired driving. Moreover, an interpretation of the present statute by some Virginia judges that would require presumptive or per se levels for controlled substances places an impossible burden on the Commonwealth. The strategy proposed in option 3 may resolve some difficulties in obtaining a drug-related DUI conviction by removing the impediment to effective law enforcement created by the lack of presumptive or per se levels while corroborating that there is a reckless ground for a driver's impaired operation of a motor vehicle.

RECOMMENDATIONS

One purpose of considering an internal possession offense in Virginia would be to encourage a plea of guilty for a drug-related DUI offense in which a sample of the suspect's blood tested positive for drugs. However, it appears that such a structure would not be feasible at this time in Virginia for two reasons:

1. For an internal possession charge to be most effective, the Commonwealth would need a sample of the suspect's bodily fluids that could be tested for drugs. Even though the defendant is required under the implied consent statute to submit a blood sample to be tested for drug content, there is some question as to whether blood acquired under the implied consent statute could be used as evidence in an internal possession trial. Even if Virginia were to amend the current language of its implied consent law, there is no case law that would specifically allow the use of the blood in a non–driving-related charge.
2. In Virginia, possession of most types of illicit drugs carries a less severe penalty than for drug-related DUI. Hence, if the possession penalty scheme were followed for internal possession, most plea bargains would be for the less severe internal possession charge than for the more severe drug-related DUI charge. Conversely, if the internal possession penalties were made harsher than the drug-related DUI penalties in order to encourage a DUI guilty plea, the internal possession penalties would have to be made inconsistent with existing laws governing illicit drug possession.

Thus, the researchers recommend that options 1 and 2 be rejected at this time.

Option 3, which would remove the language of "impairment" from Virginia law, seems to be the most feasible option considered in this investigation. There is

some scientific support for the argument that drugs in any quantity will place an individual under the influence, even if not to the degree of impairment. Further, it appears that option 3 would provide the best strategy for changing the law, and there is some California case law that suggests that Virginia courts might uphold the change (although Virginia courts are not bound by California case law). The choice of option 3 would also result in a significant alteration in the burden of proof for drug-related DUI cases.

It is quite possible that the Virginia General Assembly would not pass such substantial changes to the law if a bill were to come before them on this matter. Hence, legislative acceptance of option 3 is far from certain. However, the researchers recommend that Virginia seriously consider this option, but only in light of the likely opposition it will receive in the General Assembly and the opposition it could receive in the Virginia courts.