AN ANALYSIS OF CURRENT VIRGINIA STATUTES RELATING TO DRIVING UNDER THE INFLUENCE OF DRUGS

by

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Conclusions and Recommendations

(1) It would appear that the current provision of Va. Code Ann. §18.1-54 prohibiting driving or operating a vehicle by one who is under the influence of drugs is somewhat imprecise in that the statute does not expressly state the extent to which one must be "under the influence" before the prohibition is applicable. Consequently, the statute would be clearer if the language of the Uniform Vehicle Code (UVC) was adopted, i.e. " . . . under the influence of any . . . drug to a degree which renders him incapable of safely driving a vehicle. . . ."

(2) The present statute would be somewhat more precise if the terms "drug" and "narcotic drug" were defined within the Code chapters relating to motor vehicle laws, or in the alternative, if it were expressly stated that the definitions of the 1970 Drug Control Act governed.

(3) It would appear that adoption of the UVC prohibition against driving by an "habitual user" of drugs (regardless of whether he is under the influence at the time of driving) would be premature. The scientific evidence available to support the UVC judgment is not only inconclusive, but present Virginia statutes regarding non-licensure of drug addicts would seem to make any prohibitions against "habitual users" somewhat duplicative.

(4) There is a valid debate over whether the fact that the drugs being used were prescribed by a physician should exonerate a motorist from a charge of driving under the influence of drugs. On the one hand, the fact that the drugs were prescribed by a physician is irrelevant as far as the amount of risk created by combining drugs with driving. On the other hand, there may be valid objection to the creation of a large class of violators who have had no advance notice that their driving is subject to drug impairment. Greater returns might be realized by requiring physicians to advise their patients of potential drug side effects inconsistent with safe driving.

(5) To date, there has been no enforcement of the prohibition against driving under the influence of drugs. This is perhaps partly due to the difficulties in detecting drug usage by a motorist and proving that the motorist is under the influence of drugs without the use of chemical tests. Furthermore, present chemical test methods are

inadequate for efficient detection of drug usage. Consequently, greater emphasis should be placed on identifying these problems of enforcement and on developing scientific methodology to aid in detection and conviction of offenders. Until such methodology is available, extension of the implied consent provisions to drugs would perhaps be premature.

Discussion:

An analysis of Virginia statutes relating to driving under the influence of drugs necessarily begins with the observation that driving is a relatively complicated psychomotor task involving a variety of mental and physical interactions. Given the enormous variety of pharmacological compounds and their corresponding side effects, many of which adversely affect driving performance (fatigue, nausea, dizziness, loss of attentiveness, confusion, poor muscle coordination, etc.) it would seem that some form of prohibition against the use of these compounds would be warranted in the name of highway safety. Indeed, all 50 states and the District of Columbia have some prohibition relating to driving under the influence of drugs. Once one moves past the level of generalities, however, the situation becomes increasingly complex.

The basic prohibition against driving under the influence of drugs is found in Va. Code Ann. §18.1-54, which provides:

> It shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, rum, whiskey, gin, wine, beer, ale, port, stout, or any other liquid beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature.

Corresponding, under §15.1-132, cities, towns, and counties are authorized to enact provisions substantially similar to §18.1-54.

Any person violating §18.1-54 is guilty of a misdemeanor, a first offense conviction of which carries a fine of not less than $200 nor more than $1,000, or a jail sentence of not less than one month nor more than six months, or both (§18.1-58). Additionally, under §§18.1-59, and 46.1-417(b), a first offense conviction under §18.1-54 entails a mandatory, self-executing license revocation of one year's duration. Second and subsequent convictions receive harsher sanctions.

The task of interpreting that portion of §18.1-54 relating to driving under the influence of drugs is not an easy one, for there have been no reported cases in Virginia that are directly on point, the only reference to that portion of the statute specifically relating to drugs being by way of dicta. In fact, Mr. Richard Spring of the Division of Motor Vehicles reports that that agency has no record of any convictions ever having been reported.

Cases construing that portion of the statute relating to alcohol are of some aid, however, For example, the prohibition is against driving or operating a vehicle while under the influence. While "driving" appears to be limited to putting the vehicle in actual motion, "to operate" a vehicle is not limited to merely moving the vehicle from place to place, but is rather broader in scope. See Gallagher v. Commonwealth, 205 Va. 666, 139 S.E. 2d (1964).

A problem of definition arises as to the meaning of the phrase "under the influence" as applied to drug usage. The definitional problem is partly resolved in the case of alcohol usage through the use of blood-alcohol presumptive levels (§18.1-57). However, since no comparable blood-drug level data are available, there is considerable ambiguity in the use of the term "under the influence of drugs." While it may be argued that the use of the term implies that the motorist is "under the influence" to such a degree that driving performance is impaired beyond an acceptable level of risk, the statute would be clearer if this were expressly stated. Md. Code Ann. 66½ §11-902(c) is illustrative of the better approach:

> It shall be unlawful for any person to drive or attempt to drive or to be in actual physical control of any vehicle within this State while he is under the influence of any narcotic drug or while under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle.

The Uniform Vehicle Code (UVC) also uses this language to clarify the meaning of the phrase "under the influence." Moreover, the clarification would seem to be warranted since the statutory emphasis is on driver risk creation through drug usage, rather than on usage alone without a corresponding impairment of driving skills.

The Virginia statute enumerates those substances (besides alcohol) which put one under the influence. The operative language is: ". . . under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature." At present, there are no definitions of these terms within the Code Chapter relating to motor vehicles. The 1970 Drug Control Act, §54-524.2, contains definitions of the words "drug" and "narcotic drug." §54-524.(b) (17) defines a drug as:

> . . . (a) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them; (b) articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in

> man or other animals; (c) articles, other than food, intended to affect the structure or any function of the body of man or other animals; and (d) articles intended for use as a component of any article specified in clause (a), (b) or (c); but does not include devices.

§54-524.2(b) (17) defines a "narcotic drug" as follows:

> . . . any of the following, whether produced directly by extraction from substances of vegetable origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis:
> (a) Opium, cocoa leaves, and opiates;
> (b) compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;
> (c) A substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (a) and (b), except that the words "narcotic drug" as used in this chapter shall not include decocainized coca leaves or extracts of coca leaves, which extracts do not contain cocaine or ecgomine.

Despite the caveat that the definitions apply ". . . as used in this chapter, unless the context indicates otherwise. . ." (§54-524.2(b)), it is plausible that the definitions also apply to the driving under the influence of drugs provision of the motor vehicle laws. Nevertheless, a more restricted definition would perhaps be desirable since §18.1-54 is concerned with drugs that impair driving performance and not just with any drug that may fall within the definitions contained in the Drug Control Act. The more restricted definition might be effectuated were the aforementioned language illustrated by the Md. Statute (and the UVC) adopted (". . . under the influence of any drug to a degree which renders him incapable of safely driving a vehicle.") A similar approach is that illustrated by General Statutes of North Carolina §20-19(b): "As used in this section, the term 'under the influence of an impairing drug' shall mean under the influence of any narcotic drug or under the influence of any other drug to such degree that a person's physical or mental faculties are appreciably impaired."

At this point, a comparison of Va. Code Ann. §18.1-54 with the UVC would be helpful. §11.902.1 provides:

> It is unlawful and punishable as provided in Section 11-902.2 for any person who is an habitual user of or under the influence of any narcotic drug or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle to drive a vehicle within this state. The fact that any person charged with a violation of this Section is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this section.

The language modifying the phrase "under the influence" has already been discussed. Two other significant differences from the Code of Virginia (COV) are the prohibitions against driving by an "habitual user" and the effect of whether the drug was prescribed by a physician on the legality of the motorist's conduct.

The UVC provision relating to driving by an habitual user appears to represent the judgment that driving by an "habitual user" is so inherently dangerous that a prohibition against his driving is per se justified, whether or not he is under the influence at the time of driving. According to the 1969 supplement to the UVC, some twenty-seven states prohibit operation of a vehicle by an habitual user of narcotic drugs. Indeed, there is precedent in the COV regarding non-licensure of drug addicts:

Under §46.1-429, the chief medical officer of any institution operated or licensed by the State Hospital Board is to notify the Commissioner (of DMV) of the pending release or transfer of any person who, in the opinion of the institution, is incompetent to safely operate a motor vehicle because of drug addiction. Under §46.1-427, the Commissioner, after receipt of the notice of incompetency to safely operate a vehicle, shall suspend the addict's license.

As to non-institutionalized drug addicts, §46.1-430 would appear to be applicable. Under this provision, the Commissioner may, after due hearing upon giving five day's written notice, suspend for not more than one year the license of one who is addicted to the use of drugs. Finally, §46.1-359 provides that the DMV "shall not issue an operator's or chauffeur's license to any person who it has been determined. is addicted to the use of any drug which may impair the ability of a person to operate a motor vehicle."

Despite the existence of these statutes, two questions remain as to the advisability of adopting the UVC provision relating to habitual users: (1) The first question is a minor one of definition, i.e., What is an "habitual user"? Certain foreign jurisdictions (exp. California) take the position that the terms "habitual user" and "drug addict" are not synonymous. Not only must a definition be formulated, but it would seem that there would have to be some prior determination

of the motorist's status as an "habitual user" before his driving would constitute an offense (since an habitual user under the UVC need not be under the influence of drugs at the time of driving in order for his conduct to constitute an offense). The question of notice to the individual that his driving per se constitutes a violation perhaps assumes constitutional dimensions since there is nothing about the act of driving itself (in the absence of drug impairment) that would put the motorist on alert that he was committing an offense, unless there had been a prior determination of his "habitual user" status. See Lambert v. California 355 U. S. 225 (1957), on the relation between notice and due process. (2) Related to the question of notice is the basic policy issue of the advisability of legislation declaring that driving by an habitual user is per se illegal even in the absence of drug impairment at the time of driving. While there are studies which correlate drug addiction (as opposed to being an habitual user of drugs) with higher accident rates, present Virginia statutes relating to habitual offenders and non-licensure of drug addicts would appear to already serve as a basis for action against this group. Even the studies relating to drug addiction are unclear as to the cause-effect relationship, i.e. whether the addicts are dangerous drivers due to drug usage or because of poor driving habits and accident-prone personalities without drugs. As regards the somewhat ambiguous group labeled "habitual users", there is an even greater dearth of scientific evidence available to make a sound judgment at this time. Mr. Marvin Wagner of the Office of Alcohol Countermeasures reports that although his office at present supports the UVC provision, this particular portion is nevertheless open to valid debate. It is submitted that the present COV provisions regarding non-licensure and revocation of the licenses of drug addicts already provide a sound base for action without adopting further ambiguous statutory language. Although the prohibition against driving by habitual users may prove to be justified given a more precise definition and additional evidence, the judgment embodied in the UVC may be premature at this time.

A final major difference between the UVC and the COV is the relevance of whether the drugs the motorist used were prescribed by a physician or "self-administered". The fact that the drugs were prescribed by a physician is immaterial under the UVC. The last sentence of UVC §11-902.1 provides: "The fact that any person charged with a violation of this section is or has been entitled to use such drug under the laws of this State shall not constitute a defense against any charge of violating this section." On the other hand, the language of Va. Code Ann. §18-54 reads: "while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature." Presumably, the term "self-administered" means the opposite of prescribed by a physician. The 1970 comparison of the COV with the UVC, conducted by the Michie Company, takes the position that the prohibition against driving under the influence of a narcotic drug applies only when the narcotic drug is self-administered. That interpretation is arguably incorrect. Generally, adjectives are taken to modify words which follow them in sequence, but not

those which precede them. Therefore, "self-administered" modifies the phrase "intoxicant or other drug of whatsoever nature," but not the term "narcotic drug." Consequently, one would conclude that a motorist driving under the influence of a narcotic drug is subject to arrest regardless of whether the narcotic drug was self-administered.

Regardless of the correct interpretation of the term "self-administered" and what words it modifies, the chief issue is again one of policy. The UVC provision has to recommend it the fact that whether or not the drug is prescribed by a physician is irrelevant as far as the amount of risk created by combining driving with drugs. In terms of "pure logic", the UVC provision is unassailable.

On the other hand, given the infrequency of warnings by physicians of possible drug side effects that would be inconsistent with safe driving, there may be valid objections to creating a wholesale class of violators who have had no advance notice that their driving behavior is subject to drug impairment. Although the COV provision is singular amongst state statutes in expressing the requirements that the drugs be "self-administered" (and one of a distinct minority in placing conditions on the drug usage), it is not altogether unwarranted. Generally speaking, making the knowledge of possible risks due to combining drugs with driving a matter of strict liability would have to be justified in terms of deterrence. Although deterrence is something that can seldom be proved or disproved, it would seem that since most people do drive even after having been warned of potentially dangerous side effects, (see account of Dr. John Buckman's speech to the Virginia Highway Safety Commission, Richmond Times Dispatch, November 27, 1969), the deterrent value of making the knowledge of risk a matter of strict liability is only slight.

Knowledge of the risk inherent in combining drugs with driving is, however, relevant to the issue of the defendant's culpability. In this sense, Md. Stat. Ann. 66½ §11-902(c) is illustrative of a somewhat compromise solution. The statute provides in part: "The fact that any person charged with a violation of this section is or has been entitled to use the drug under the laws of this State shall not constitute a defense against any charge of violating this section unless such person was unaware that the drug would render him incapable of safely driving a vehicle." In evaluating the compromise solution, however, one should be aware that requiring proof of the lack of risk awareness may well create an insurmountable prosecutorial burden (unless the lack of risk awareness were treated as an affirmative defense, in which case the defendant would have the burden of proving that he was unaware that taking the drug would impair his driving). While empirical evidence on this point is presently unavailable to the author, a very real problem is nevertheless apparent.

The best solution would appear to ensure that patients are given some sort of advance warning of possible side effects inconsistent with safe driving, such that ignorance of the potential danger could not be claimed. This would, of course, involve regulation of physicians as well as drivers, but such regulation would appear warranted in light of the seeming magnitude of the problem. (See W. Howard, "The Effects of Drugs on Driving Performance", where it is reported that as many as 10% to 20% of the people driving at any given time may be using medically prescribed drugs).

The final issues relate to detection, apprehension, and conviction of motorists driving under the influence of drugs, regardless of the form of the statute. Note that while the prohibition against driving under the influence of both drugs and alcohol is covered under §18.1-54, the implied consent provisions of §18.1-55.1 are restricted solely to chemical tests of the blood to determine the alcohol content thereof. Therefore, there is no "implied consent" to a blood test for purposes of determining possible drug impairment. As a consequence, the policeman is left solely to his own observations of the suspect's physical condition, plus any visible evidence of drug usage (pill bottles, etc.). Making a valid determination on such scant evidence would be difficult for a physician and nearly impossible for a layman in most situations. The difficulty here may partly account for the lack of enforcement.

Nor is there any indication that expanding the implied consent provisions to include drugs would substantially improve the enforcement picture. This is due to two factors:

(1) Testing blood samples for drugs is considerably more complex than testing for alcoholic influence. This can easily be seen from the fact that in testing for alcohol the basic substance tested for is ethanol, regardless of the form in which it was initially consumed. On the other hand, there is an almost infinite variety of drug compounds which the suspect may have used prior to driving. (In fact, alcohol is itself a form of drug.) Consequently, no one test is likely to be determinative unless the analyst knows which drug he is looking for before he begins testing.

(2) A second stumbling block to easy detection is the fact that most drugs are pharmacologically much more potent than an equivalent amount of alcohol. They metabolize more slowly in the blood stream, and one tends to get rather extended effects from small dosages. Consequently, it takes a considerably larger blood sample to detect the trace amounts of drug which may be present than in the case of alcohol. Yet, even these trace amounts can produce marked impairment. Thus it appears that drug detection techniques and knowl-

edge of the relationship between drugs and driving are in roughly the same position as was alcohol in relation to highway safety 30 to 40 years ago.

Given the difficulty of effective enforcement and the current lack of enforcement any talk about the form of the statute may constitute "much ado about nothing." Nevertheless, it is possible to make some observations at this point:

(1) It would seem that the statutory language would benefit in preciseness if the phrase "under the influence" were further clarified by adopting the language of the UVC, i.e. ". . . a degree which renders him incapable of safely driving a vehicle. . ." The statute might be further clarified by defining the terms "drug" and "narcotic drug" within the chapters relating to motor vehicle law, or at least stating that the definitions of the 1970 Drug Control Act are applicable. However, any gain here would be minor in comparison with the first suggestion, i.e. clarifying the term "under the influence."

(2) On the other hand, it seems that adopting the UVC provision relating to driving by an "habitual user" would be rather premature and perhaps duplicative in light of the present Virginia provisions regarding non-licensure of drug addicts.

(3) Some consideration should be given to deleting the "self-administered" language of §18.1-54 and substituting therefor the UVC provision making the fact that the drugs were prescribed by a physician irrelevant on the issue of guilt. No firm recommendation can be made at this point, however, and efforts might better be devoted toward ensuring that physicians warn their patients of potential drug side effects inconsistent with safe driving.

(4) Greater emphasis should be placed on identifying problems of enforcement of the statute and developing scientific methodology to solve these problems. Until such methodology is available, extension of the implied consent provisions to drugs would perhaps be premature.