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# DRIVING WHILE IMPAIRED BY DRUGS NOW IN LINE WITH DRIVING WHILE INTOXICATED

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## INTRODUCTION:

As of December 2021, the crime of Driving While Ability Impaired by Drugs (DWAID) under VTL 1192 (4) has been revised to define "impaired" in the same way as "intoxicated" (rather than "impaired" as was previously the case) under People v Cruz, 48 NY 2d 419 (1979).

In Cruz, the Court of Appeals held that a person is INTOXICATED when, as the result of the voluntary consumption of alcohol, he/she is INCAPABLE of employing the physical and mental capabilities that he/she is expected to possess to operate a motor vehicle as a reasonable and prudent driver. (id at 428).

In contrast, a person is IMPAIRED when his his/her ability to operate a motor vehicle as a reasonable and prudent deriver is adversely affected to ANY EXTENT. The difference between the two conditions, then, is one of DEGREE and a motorist crosses the line from IMPAIRED to INTOXICATED when his abilities to drive (e.g., perception, motor control, reaction time) have been impaired to a SUBSTANTIAL EXTENT. (People v Ardila, 35 NY2d 846 [1995]).

## DRIVING WHILE ABILITY IMPAIRED BY DRUGS -vs- DRIVING WHILE IMPAIRED (BY ALCOHOL):

As stated in VTL 1192-1, a person is guilty of DWAI when he/she operates a motor vehicle (i.e., drives or manipulates the machinery to put it in motion) on a public highway (which includes a private road accessible from a public highway, a parking lot with four or more parking spaces) while his/her ability to do so is IMPAIRED by the consumption of alcohol. (See: People v People v Alamo, 34 NY2d 453 [1974], People v Williams, 6 NY2d 657 [1987]).

The bar for alcohol impairment is quite low, requiring only that the evidence (e.g., manner of operation, defendant's physical appearance/coordination) establishes that the motorist's ability drive in a reasonable and prudent manner was affected to ANY DEGREE, however slight. (People v Cruz, supra).

It is important to note that DWAI is a VIOLATION (not a crime) and carries a mandatory minimum fine of $300.00 up to a maximum of $500.00 along with a suspension of the driver's license days for 90 days (which may be stayed pending enrollment in the Drinking Driver program). There is also the potential for 15 days in jail.

By contrast, DWAID (VTL 1192-4), like DWI (1192-3) is a CRIME punishable by a fine of $500.00 to $1000.00, license revocation for six months, three years of probation and up to one year in jail. Even though VTL 1192-4 speaks of IMPAIRMENT by drugs (including marijuana), up until just recently, the

definition of impairment was the SAME as for the non-criminal violation of DWAI. That is, under the former law, “a person’s ability to operate a motor vehicle is impaired by the use of a drug when his/her use of a drug has actually impaired TO ANY EXTENT, the physical and mental abilities that he/she is expected to possess in order to operate a vehicle as a reasonable and prudent driver.” (People v Caden, 189 AD3d 84 [3d Dep’t 2020]), citing People v Cruz supra at 427).

This definitional anomaly was rectified in Caden, a vehicular manslaughter case in which the Third Department abandoned the lower threshold in favor of one that defines impairment in terms of the higher degree of impairment required to sustain a conviction for Driving While Intoxicated.

NEW DEFINITION OF IMPAIRMENT IN DWAID CASES:

So now, the CJI on DWAID states, in pertinent part, that “A PERSON’S ABILITY TO OPERATE A MOTOR VEHICLE IS IMPAIRED BY THE USE OF A DRUG WHEN HIS/HER USE OF A DRUG HAS RENDERED HIM/HER INCAPABLE OF EMPLOYING THE PHYSICAL AND MENTAL ABILITIES WHICH HE/SHE IS EXPECTED TO POSSESS IN ORDER TO OPERATE A VEHICLE AS A REASONABBLE AND PRUDENT DRIVER.

As with DWI, the People must now meet the Cruz standard for intoxication when trying to establish the defendant’s impairment by the use of drugs. In other words, the evidence must show that the defendant was impaired to such an extent that he/she could not employ the requisite abilities to drive in a reasonable and prudent manner.

CASE FACTS:

In Caden, the defendant/driver and three friends had smoked some “Dutchies” (hollowed out cigars replaced with marijuana) while driving one of the passengers to work in Horseheads NY. After dropping one off, the defendant and the other two drove to a nearby mall parking lot where they smoked some more marijuana.

The passengers described the defendant’s driving at different points as “fast,” “reckless” and a “little quick” on some turns. As the defendant approached a particular intersection, he made a left turn in front of an on-coming motorcycle (which one of the passengers and two other drivers travelling behind the defendant had seen) which struck the defendant’s front bumper, killing both the driver and his passenger.

The defendant told police that he did not see the oncoming motorcycle. Though the police observed a baggie of marijuana on the street near the defendant’s vehicle, they did not detect an odor of marijuana coming from him. He was later described as exhibiting blood shot and watery eyes, a noticeable fluttering under the eyelids and a right leg tremor while performing some field sobriety tests at the police station. A subsequent blood test (within three hours of the accident) revealed 2.2 ng/ml of Delta-9 THC and 33 ng/ml of Delta-9 Carboxy THC in the defendant’s system. (The motorcyclist’s blood was found to contain 0.73 ng/ml of THC).

Forensic toxicologists called by the People testified that the Carboxy THC was a relatively high concentration (although, unlike alcohol, it was not susceptible to reverse extrapolation) and that marijuana adversely affects a person’s perception and reaction time. In their estimation, the defendant’s psychomotor performance would have been impaired at the time of the accident.

A forensic pathologist called by the defense testified that there were too many unknown variables to draw a conclusion with respect to the defendant’s level of impairment at the time of the collision.

Information from the Event Data Recorder in the defendant's vehicle indicated that he was travelling in a straight line five seconds before impact and then increased the steering input by 55 percent one second before the collision, thereby depriving the motorcyclist of enough time (at least one and ½ seconds) to react and avoid running into the vehicle.

In the People's view, the defendant failed to yield the right of way to the oncoming motorcycle because he was impaired by the use of marijuana which adversely affected his driving ability and caused the death of two people.

THE AD REJECTS THE OLD DEFINITION OF IMPARMENT BY USE OF DRUGS:

The court noted that the statutory scheme of the Vehicular Manslaughter statutes (PL 125.12 [2d degree] and 125.13 [1st degree]) imposes the same sanctions on one who causes death while INTOXICATED as on someone who causes death as the result of being IMPAIRED by use of a drug. Such a distinction, in the court's view, can only be deemed consistent if the SAME STANDARD is applied to each misdemeanor offense (VTL 1192-3 and 1192-4) incorporated within the Vehicular Manslaughter statute.

Consequently, the degree of impairment necessary to convict a person of Vehicular Manslaughter based on a death caused while the defendant was under the influence of a drug, including marijuana (PHL 3306) is the SAME DEGREE OF IMPAIRMENT as would be necessary to sustain a conviction of DWI, i.e., that the defendant was INCAPABLE of employing the mental and physical capabilities required of a reasonable and prudent driver. (Citing People v Cruz, supra at 428). As such, the court abandoned the less stringent definition of impairment. (People v Rossi, 163 AD2d 660 [1990]).

AD AFFIRMS CONVICTION UNDER THE STRICTER STANDARD:

The trial court, after a bench trial, convicted the defendant of Vehicular Manslaughter 1st degree (based on two victims killed in the same incident), granted him Youthful Offender (YO) status, and sentenced him to an indeterminate prison term of one-to-three years.

The AD affirmed the conviction, finding the evidence was legally sufficient to support the conviction and, while a different verdict would not have been unreasonable, the guilty verdict was not against the weight of the evidence.

In particular, the court found that there was sufficient proof of both IMPAIRMENT AND CAUSATION, i.e., that the defendant's impairment from smoking marijuana shortly before the crash and manner of operation (as described by his passengers), his failure to see the oncoming motorcycle (unlike the drivers behind him) on a straight roadway in broad daylight, and his sharp turn across the cyclist's path constituted a sufficiently direct cause of the ensuing deaths. (People v Ballenger, 106 AD3d 1375, 1377 [3d Dep't 2013]). As the court saw it, it was foreseeable that the victims could die as a result of the defendant's conduct. (Citing People v Li 34 NY3d 357. 369 [2019]).

FINAL THOUGHT:

While the trial court in Carden found the defendant guilty by the former definition of impairment, the AD affirmed the conviction by the more rigorous standard even though the evidence as to manner of operation and of the defendant's physical appearance was arguably "garden variety." Beyond being described as driving fast at earlier points in time, the evidence showed that the defendant was not weaving, and the data recorder showed that he slowed down as he approached the intersection.

There was also conflicting testimony with respect to the distance from the motorcycle when the defendant initiated the left turn. Further, the defendant was not described as having slurred speech or a staggered gait at the scene.

While the change in the law to bring the definition of impairment by use of drugs in line with the definition of intoxication makes logical sense, there is always the chance that factfinders will interpret the evidence in the light most favorable to the prosecution in cases of vehicular fatality. That is why defense counsel cannot underestimate the importance of the decision whether to proceed to trial with or without a jury.

Thank you to Jim Maloney for the heads-up on the change in the definition of impairment. TF