
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 1273 **Hearing Date:** April 10, 2018
Author: Hill
Version: March 22, 2018
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Vehicles: Marijuana*

HISTORY

Source: Author

Prior Legislation: SB 65 (Hill) Chapter 232, Stats. 2017
Proposition 64, November 19, 2016
AB 266 (Bonta) Chapter 689, Stats. 2014

Support: California Peace Officers' Association; California Police Chiefs Association;
Peace Officers Research Association of California;

Opposition: American Civil Liberties Union; California Norml; California Public Defenders
Association

PURPOSE

The purpose of this bill is to create a zero tolerance law for marijuana for people under 21 years of age and to recast DUI provisions to make several classifications of drugs separate offenses.

Existing law prohibits drivers and passengers of motor vehicles from consuming any alcoholic beverage or possessing any open container of alcohol while on a highway. (Vehicle Code §§ 23221 and 23222)

Existing law allows police officers to request preliminary alcohol screening tests (breathalyzers) of drivers under 21 suspected of having a blood alcohol concentration (BAC) equal to or greater than 0.01%, or chemical lab screening of blood, breath, or urine if a screening device is not available. (Vehicle Code § 23136)

Existing law prohibits the operation of a vehicle while under the influence of any alcoholic beverage or to drive with a .08% or higher blood alcohol content or under the influence of any drug. (Vehicle Code § 23152; 23153)

This bill would keep these penalties for the above provisions but sets out seven types of drugs under which a person may be charged.

Existing law allows persons 21 or over to possess not more than 28.5 grams of marijuana and allows those individuals to smoke or ingest marijuana. (Health and Safety Code § 11362.1)

Existing law prohibits drivers and passengers of motor vehicles from possessing an open container or package of marijuana or marijuana products, treating violations as infractions punishable by up to a \$250 fine. (Health and Safety Code § 11362.3)

Existing law punishes possession of not more than one ounce of marijuana by those under 18 as an infraction, requiring four hours of drug education and up to 10 hours of community service for first-time offenders. (Health and Safety Code § 11357)

Existing law punishes possession of not more than one ounce of marijuana by 18 to 21 year-olds as an infraction with a \$100 fine. (Health and Safety Code § 11357)

This bill provides creates a zero tolerance for marijuana for people under 21 providing that a person under 21 years of ages is prohibited from driving with a detectable amount quantity of delta-9-tetrahydrocannabinol (THC).

This bill provides that the zero tolerance does not apply to a person under 21 who has in his or her possession a physician's recommendation of medical cannabis.

This bill provides that if a peace officer believes a person under 21 to be driving a Vehicle with marijuana in his or her system the officer shall request the person to take a chemical field test to determine the presence of THC.

COMMENTS

1. Need for this Bill

According to the author:

Zero-tolerance alcohol laws for drivers under age 21 in California and across the country have been successful. They've saved lives and reduced drinking and driving accidents by 20%. Now that recreational marijuana is legal, SB 1273 applies California's existing zero-tolerance alcohol driving law to marijuana since it's illegal for anyone under 21 to use cannabis. This bill will deter marijuana use prior to driving and save lives.

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Current law prevents individuals under age 21 from having any alcohol in their system while driving. If they blow .01 or above on a breathalyzer, their license is suspended by the DMV for one year. They receive an administrative suspension from the DMV instead of a criminal conviction and they are not sent to jail. There's

an appeal process through the DMV and they can also receive a restricted license for school, work or to take care of a family member. SB 1273 mirrors the existing statute for alcohol and applies to individuals under the age of 21 who test positive for delta-9-tetrahydrocannabinol as measured by an oral swab saliva test or other chemical field test. Oral swab saliva tests and other chemical field tests for marijuana detect use within a few hours and are currently used by a handful of law enforcement departments throughout California. The saliva tests are accurate (studies show over 98%) and have been used for over a decade by law enforcement agencies around the world. They will not detect someone exposed to second hand smoke unless they have been “hot-boxing” for an extended period of time (studies show over an hour).

SB 1273 exempts individuals under 21 if they have a medical marijuana prescription.

Proposition 64, which allowed for the retail sale of marijuana starting January 1, 2018, touted it’s “toughest-in-the-nation protections for children” in the ballot argument and “requiring purchasers to be 21”. Marijuana use is illegal for individuals under 21 and this bill ensures our youth are not driving after smoking or ingesting marijuana.

2. Zero Tolerance for Under 21 Years of Age

There is currently a zero tolerance for people under 21 years of age. The presence of alcohol in a person under 21 leads to the license suspension. This bill adds a zero tolerance for marijuana in a driver under 21 years of age making it illegal for a person under 21 to have a detectable quantity delta-9-tetrahydrocannabinol (THC) in his or her body. This bill exempts people under 21 who have a medical marijuana prescription. This section is nearly identical to a provision in SB 65 (Hill) last year that was amended out of that bill when it was heard in this Committee.

3. Detectable Quantity

This bill does not define detectable quantity. In SB 65 last year, a “detectable quantity” was defined as a blood plasma concentration of THC of five nanograms per milliliter or higher as indicated by a chemical test, or a positive indication on a binary chemical field test that has a detection threshold of not less than five nanograms per milliliter. At that time, the author’s office stated that the chemical field tests can detect as 5 nanograms per liter of THC and thus set the zero tolerance amount in this bill at that level. In response to SB 65, the Drug Policy Alliance and other opponents argue that these field tests are imprecise. Drug Policy Alliance states in part:

First, field chemical tests, including oral swab tests, fail to demonstrate whether a driver is impaired. A recent report by the AAA foundation for Traffic Safety noted that per se THC standard, including the zero tolerance standard for persons under 21 years of age proposed in this bill, are so unscientific that they both under and over punish drivers. Meaning that they fail to detect some people who are actually impaired and punish some drivers who are not. Thus, the chemical tests proposed in this bill will waste taxpayer dollars and result in administrative penalties that unnecessarily interfere with the lives of people who are driving safety.

Second, chemical testing, including oral fluid tests, like many other forensic disciplines is highly technical and imperfect. There are a host of problems with drug testing techniques and analyses, including: the substantial risk of false positive results, false negative results, specimen contamination; and chain of custody, storage and retesting issues. These problems are made worse when chemical tests are performed in the field.

Are the roadside chemical tests ready for a zero tolerance law?

4. Impairment v. use

As noted above, a “detectable amount” of delta-9-tetrahydrocannabinol (THC) does not necessarily signify impairment. It may not even show recent use. Should a licensing sanction be used for a person who is not impaired? If impairment is evident then a person can and should be charged with a DUI. If there is no impairment then it is not a driver safety issue but instead an drug enforcement issue.

5. Timeliness

Proposition 64 just passed in 2016 and even before that happened there were already people studying marijuana and its impact on driving.

The University of California, San Diego houses the Center for Medicinal Cannabis Research. AB 266 (Bonta), Chapter 689, Statutes of 2015, required the Bureau of Medical Cannabis Regulation to contract with the California Marijuana Research Program, known as the Center for Medicinal Cannabis Research, to develop a study that identifies the impact that cannabis has on motor skills. The Center for Medicinal Cannabis Research is currently engaged in that clinical study. The title of the study is “A Randomized, Controlled Trial of Cannabis in Healthy

Volunteers Evaluating Simulated Driving, Field Performance Tests and Cannabinoid Levels.” As part of the study, volunteers will inhale smoked cannabis with either 0% (placebo), 6.7%, or 12.6% Δ 9-THC at the beginning of the day, and then complete driving simulations, iPad-based performance assessments, and bodily fluid draws (e.g., blood, saliva, breath) before the cannabis smoking and hourly over the subsequent 7 hours after cannabis smoking.

(<http://www.cmcrc.ucsd.edu/index.php/2015-11-20-20-52-15/active-studies/62-ab266>) The purpose of the study is to determine (1) the relationship of the dose of Δ 9-THC on driving performance and (2) the duration of driving impairment in terms of hours from initial use, (3) if saliva or expired air can serve as a useful substitute for blood sampling of Δ 9-THC in judicial hearings and (4) if testing using an iPad can serve as a useful adjunct to the standardized field sobriety test in identifying acute impairment from cannabis. (Id.) Proposition 64 provides the University of California San Diego Center for Medicinal Cannabis Research will continue to receive \$2,000,000 annually for research on understanding the efficacy and adverse effects of marijuana.

In addition, Proposition 64 provides a couple of funding streams for CHP to address driving under the influence, including driving under the influence of marijuana. The source of the revenue streams is the money that will be generated by taxing marijuana (The Marijuana Tax Fund). One revenue stream is a fixed amount of \$3,000,000 a year for four years starting in fiscal year 2018-2019. That money is for CHP “to establish and adopt protocols to determine whether a driver is operating a vehicle while impaired, including impairment by the use of marijuana or marijuana products, and to establish and adopt protocols setting forth best practices to assist law

enforcement agencies.” (Health and Saf. Code § 34019, subd. (c).) The language of Proposition 64 allows CHP to use those funds to hire personnel to establish the protocols for driving under the influence. In addition, the department may make grants to public and private research institutions for the purpose of developing technology for determining when a driver is operating a vehicle while impaired, including impairment by the use of marijuana or marijuana products. (Health and Saf. Code § 34019, subd. (c).) Proposition 64 provides a second funding stream to CHP from the Marijuana Tax Fund. The money generated by taxing marijuana will go to a variety of entities to ensure effective implementation of the Proposition 64 and to address policy concerns surrounding the use of marijuana. After the mandatory disbursements from the Marijuana Tax Fund are made each year, the remaining money will be disbursed to specified entities on a percentage basis.

Should we await the results of these studies and CHP recommendations before we set a zero tolerance level for marijuana in people under 21 years of age?

6. Charging with the type of drug

Existing law makes it illegal to drive under the influence of alcohol or drugs. This bill would allow a peace officer to charge a person as being under the influence of one of specified drugs without changing the current penalties for DUI or DUI with injury. The listed drugs are:

- Cannabis or any cannabis
- Any depressant including, but not limited to, diazepam or methaqualone,
- Any dissociative anesthetic including, but not limited to, phencyclidine (PCP) or ketamine, to drive a vehicle
- Any hallucinogen including, but not limited to, lysergic acid diethylamide (LSD) or psilocybin.
- Any inhalant including, but not limited to, toluene, or any combination of hydrocarbons having toxic qualities similar to toluene.
- Any narcotic analgesic including, but not limited to, heroin, oxycodone, and codeine.
- Any stimulant, including, but not limited to, cocaine, methamphetamine, and amphetamine.

This should give the Department of Motor Vehicles and others who do research on DUI's in California more information about what type of drugs are resulting in a DUI. It is not clear however that all law enforcement officers will have the training to make the determination of what type of drugs are causing a person to be intoxicated.

7. Argument in Support

The California Police Chiefs Association supports this bill stating:

The California Police Chiefs Association is pleased to support SB 1273, which would prohibit an individual under the age of 21 from driving under the influence of delta-9-tetrahydrocannabinol (THC). Similar to driving under the influence of alcohol, this bill would make a person under 21 years of age who has any detectible amount of THC in his or her body subject to the same license suspension as if he or she was found with blood alcohol concentration of 0.01% or more.

In the State of Washington, the AAA Foundation for Traffic Safety reported a 9% increase between 2013 and 2014 in the number of fatal car accidents whose drivers had recently used marijuana. In Colorado, according to the Smart Approaches to Marijuana (SAM) organization, the total number of drivers who were found to be intoxicated with marijuana and involved in a fatal traffic accident increased 88% from 2013-2015. Marijuana-related traffic deaths increased 66% “between the four-year averages before and after legalization,” according to the National Highway Traffic Safety Administration (NHTSA, 2017).

Beyond the concerns regarding driving while intoxicated, we are equally concerned with increased cannabis consumption by minors. Unfortunately, there are very little – if any – substantive sanctions in law to address youth use. By setting this standard, we will be sending a clear message that this product is dangerous on the developing mind.

8. Argument in Opposition

The ACLU opposes this bill stating:

We are concerned that roadside chemical tests are not sufficiently reliable to serve as the basis for these serious sanctions, particularly in the absence of additional confirming evidence, and that these sanctions will disproportionately burden low-income people and people of color.

First, drug testing, like many other forensic disciplines, is highly technical and imperfect.¹ There are a host of problems with drug testing techniques and analyses, including the substantial risk of false positive test results, specimen contamination, and other issues.² Studies have found that false positive THC tests results have been associated with the passive ingestion (i.e. second-hand) of marijuana smoke.³ While it is illegal for a person under 21 to personally consume marijuana, we should not punish young drivers who are inadvertently exposed to marijuana through second hand smoke.

Second, the costs of administrative action taken by a law enforcement officer on the side of the road are significant. Any person whose license is suspended under Vehicle Code section 13388 (the section amended by SB 1273) who requests a review of the suspension decision must pay a \$125 fee. (CVC 14105.5, 14907.) If the suspension decision is upheld, the person must pay \$100, in addition to any other fees required for the reissuance or return of a driver’s license. (Vehicle Code

¹ See generally National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009).

² Laxmaiah Manchikanti et al., *Protocol for Accuracy of Point of Care (POC) or In-Office Urine Drug Testing (Immunoassay) in Chronic Pain Patients: A Prospective Analysis of Immunoassay and Liquid Chromatography Tandem Mass Spectrometry*, 13 Pain Physician E1 (2010); Sharon Levy et al., *Drug Testing of Adolescents in Ambulatory Medicine: Physician Practices and Knowledge*, 160 Archives Pediatric Adolescent Medicine (2006); National Academy Of Sciences (2009), *supra*.

³ See, e.g., S. Niedbala et al., *Passive cannabis smoke exposure and oral fluid testing*, 28 Journal of Analytical Toxicology (2004).

§13392.) These fees are on top of all of the costs associated with loss of one's driver's license, which may include loss of employment or difficulty finding employment. Data shows that a valid driver's license is a more accurate predictor of sustained employment than a General Educational Development (GED) diploma.⁴ The administrative penalties and corresponding fees levied on drivers are too onerous for many individuals to pay, as are the collateral costs of losing one's license. This is particularly true for low-income families who will be unequally harmed by the loss of driving privileges and may have no other way to get to and from school or work. Moreover, as highlighted in a recent editorial by the New York Times, license suspensions drive up the cost of auto insurance, further burdening low-income individuals.⁵

Finally, we are concerned that the new administrative penalties contemplated by this legislation would likely be applied unequally to black and Latino drivers. The uneven enforcement of California's traffic laws on black and Latino drivers is well established.⁶ Even though there are no documented differences in the driving behaviors of black, Latino, and white drivers, SB 1273 may be used to perpetuate inequality in traffic enforcement, with the concomitant high costs of incarceration, fines and fees.

-- END --

⁴ Lawyers' Committee for Civil Rights of the Bay Area et al., *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California* (2015), available at <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf>.

⁵ "Drivers Licenses Caught in the War on Drugs," New York Times (January 3, 2017), <https://www.nytimes.com/2017/01/03/opinion/drivers-licenses-caught-in-the-war-on-drugs.html?ref=opinion>

⁶ See, e.g., Jeremy B. White, *Report: California traffic stops, arrests hit minorities harder*, Sacramento Bee (April 10, 2016).