

UPCOMING TRAININGS & CONFERENCES

A full list of NDAAs virtual learning sessions is available at [▶ ndaa.org/training-courses/](https://ndaa.org/training-courses/).

NDAAs Mastering Masking Digital Course/ On Demand Training (CLE Available)
▶ ndaa.org/training/mastering-masking-2/

NDAAs Human Trafficking and the Impact on Commercial Driver's Licenses/On Demand Training
▶ ndaa.org/training/human-trafficking-and-the-impact-on-commercial-drivers-licenses/

NDAAs Prosecuting DUI Cases Online Course/ On Demand Training (CLE Available)
▶ ndaa.org/training/prosecuting-dui-cases/

NDAAs Investigation and Prosecution of Drug-Impaired Driving Cases Online Course/On Demand Training (CLE Available)
▶ ndaa.org/training/on-demand-learning-investigation-and-prosecution-of-drug-impaired-driving-cases/

NDAAs Forensic Evidence Course
December 9-11, 2024, Savannah, GA

NDAAs Job Fair
February 1-2, 2025, Washington, DC

RESOURCES

Impaired Driving Resources
▶ ndaa.org/programs/ntlc/

CDL-Related Resources
▶ ndaa.org/programs/ntlc/commercial-drivers-license/

NDAAs STAFF

Executive Director Nelson O. Bunn, Jr.
Chief Operating Officer Christine Mica

Vice President, Education & Engagement
Lorena Vollrath-Bueno

THE NATIONAL TRAFFIC LAW CENTER

Director
Erin Inman erinman@ndaajustice.org

Senior Attorneys
M. Kimberly Brown mkbrown@ndaajustice.org
Bella Truong btruong@ndaajustice.org
Jim Camp jcamp@ndaajustice.org

Staff Attorneys
Stacy Graczyk sgraczyk@ndaajustice.org
Jill Bennett jbennett@ndaajustice.org

Coordinator, Education & Engagement
Hannah Dickmyer hdickmyer@ndaajustice.org

The National Traffic Law Center is a division of the National District Attorneys Association. This document was prepared under Cooperative Agreement Number 693JJ91950010 from the U.S. Department of Transportation National Highway Traffic Safety Administration. Points of view or opinions in this document are those of the authors and do not necessarily represent the official positions or policies of the Department of Transportation or the National District Attorneys Association.



People v. Bowden: How Michigan's DRE Program is Moving Ahead

By Kinga Canike and Eric Wanink, Michigan Traffic Safety Resource Prosecutors

Editor's note: In response to the persistence of drug-impaired driving occurrences and the complexities of prosecuting such cases, law enforcement established the Drug Evaluation and Classification (DEC) Program. For decades, the DEC Program has been a tool used to identify drugged drivers. This systematic and standardized process relies on a range of observable signs and symptoms recognized by the medical community as reliable indicators of drug influence. To become a Drug Recognition Expert (DRE), law enforcement officers undergo an intensive training program that includes classroom instruction, hands-on workshops, and rigorous examinations. DREs provide expert testimony in court regarding whether a driver is under the influence of drugs or other substances. Recently, the admissibility of this testimony has been challenged by defendants. In a two-part series, Between the Lines explores two significant challenges. Last month focused on the case of NJ v. Olenowski, while this month covers People v. Bowden, a notable case from Michigan.

For years, Michigan's Drug Recognition Expert (DRE) Program waited for the state's higher courts to address the scientific reliability of the program. When that decision finally came down in November 2022, the ruling did not meet the hopes of the program supporters. The Michigan Court of Appeals decision in *People v. Bowden*¹ greatly limited a DRE's ability to provide an expert opinion under Michigan Rule of Evidence (MRE) 702.² Despite this limitation, the *Bowden* decision should not stop prosecutors from moving forward with critical DRE testimony in drugged driving cases. It is important that prosecutors understand how a DRE can still help establish impairment in a drugged driving case through expert testimony that is consistent with the *Bowden* decision.

People v. Bowden

In December 2020, an Ottawa County deputy stopped defendant for driving with one working headlight. He smelled a strong odor of marijuana coming from the vehicle and observed the female driver to have bloodshot eyes. Defendant admitted to smoking marijuana 30 minutes earlier. Two deputies conducted a roadside investigation that included the standardized field sobriety tests (SFSTs) as well as the Lack of Convergence and Modified Romberg Balance Test.³ Following the roadside investigation, defendant was arrested for Operating While Intoxicated (OWI). She was transported to a local hospital for a blood draw where a DRE-trained deputy conducted the 12-step DRE evaluation.⁴ He opined that defendant was under the influence of cannabis and unsafe to operate a vehicle.⁵ Defendant was subsequently charged with OWI pursuant to MCL 257.625(1).

The trial prosecutor moved to qualify the DRE-trained deputy as an expert in the field of Drug Evaluation and Classification and be allowed to testify and provide his expert opinion as a DRE under MRE 702.⁶ At the *Daubert* hearing,⁷ the deputy provided extensive testimony, including about his considerable training and experience, as well as his 17 years as a road patrol officer interacting with impaired individuals, his SFST and ARIDE⁸ training, and his three-week-long DRE training. The deputy also testified about the history of the DEC Program; the seven drug categories in the DEC program; the 12-step DRE protocol and the reason for completing each step; that he followed the DRE protocol when evaluating defendant; and that the "... defendant was impaired by, or under the influence of, marijuana and unable to safely drive a motor vehicle at the time of the traffic stop."⁹ Additionally, the deputy testified about two studies supporting the Program; the court accepted these studies into evidence as well as a 2017 NHTSA report to Congress about

It is important that prosecutors understand how a DRE can still help establish impairment in a drugged driving case through expert testimony.

¹ *People v. Bowden*, 344 Mich. App. 171, 999 N.W.2d 80 (2022).

² Michigan Rules of Evidence, Rule 702, Testimony by Expert Witnesses.

³ The Lack of Convergence and Modified Romberg Balance tests are additional tests to use for drivers suspected of driving under the influence of drugs, including marijuana, and taught as part of the Advanced Roadside Impaired Driving Enforcement (ARIDE) training. [Advanced Roadside Impaired Driving Enforcement Participant Manual](#), Session 5, (2023), pages 4–8 and 9–12.

⁴ *Bowden* at 176-177.

⁵ Cannabis is one of the seven drug categories that make up the Drug Evaluation and Classification (DEC) Program. This category encompasses marijuana in all its forms and delta-9 tetrahydrocannabinol (THC) is the active psychoactive ingredient. [Saving Lives and Preventing Crashes, The Drug Evaluation and Classification \(DEC\) Program](#), National District Attorneys Association, National Traffic Law Center (2018), page 21.

⁶ *Bowden* at 177.

⁷ A *Daubert* hearing is a court hearing that evaluates the admissibility of expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Michigan is a *Daubert* state in that it uses the factors listed in *Daubert* when applying MRE 702 to new scientific evidence or expert witness testimony.

⁸ ARIDE stands for Advanced Roadside Impaired Driving Enforcement and is a two-day training focusing on detecting drug impairment in drivers. An officer must be proficient in administering SFSTs to successfully complete ARIDE training.

⁹ *Bowden* at 177.

marijuana-impaired driving.¹⁰ The studies, he testified, demonstrated DRE-trained officers correctly relied on their DRE training to determine whether a particular drug or drug class was present in a person’s blood and that the field validation study involved individuals who had been arrested for impaired driving offenses involving substances other than alcohol.¹¹

The prosecutor offered no other testimony or evidence, nor did the defendant. The district court ruled the deputy was qualified to testify as an expert under MRE 702. Defendant appealed the district court’s decision to the circuit court. In addition to the transcript from the lower court, the circuit court reviewed the two DRE studies admitted into evidence as well as published case law supporting the DEC program. The circuit court determined the district court did not abuse its discretion in qualifying the officer as an expert witness under MRE 702. Defendant then appealed to the Michigan Court of Appeals.

Majority Opinion

On November 10, 2022, in a published 2–1 decision, the Court of Appeals (COA) ruled a DRE-trained officer cannot testify under MRE 702 to the conclusion that defendant was operating while impaired by marijuana.¹² The COA held, “[t]here simply is no evidence in this record to support that the DRE protocol can reliably be used to detect the degree or level of intoxication caused by marijuana and determine whether that level of intoxication has made the person unable to safely drive a motor vehicle.”¹³

In rendering its decision, the COA cited to the very studies relied upon by the prosecutor at the *Daubert* hearing. The COA disagreed with the district court’s ruling that these two studies established the reliability of the DRE protocol under MRE 702. The COA held that, “[t]he studies on which the prosecution relied demonstrated the DRE protocol’s level of accuracy with respect to determining whether a particular type of substance was *present* in a person’s blood, but neither of the submitted reports purported to even address the question of how particular levels of marijuana impacted a person’s ability to drive or rendered a person ‘impaired.’”¹⁴

To further support its position, the COA also relied on NHTSA’s 2017 report to Congress about marijuana-impaired driving¹⁵ which stated that, even though research shows that marijuana has a potential to impair driving ability, “... there are no current evidence-based methods to detect marijuana-impaired driving as there are for alcohol-impaired driving.”¹⁶ The report emphasized the importance of states to collect more data to further studies of marijuana-based impaired driving. The COA relied on this single statement to affirm its position that there are, as of yet, no reliable studies to tie the DRE protocol to detecting driving impairment in marijuana-impaired drivers.

The report emphasized the importance of states to collect more data to further studies of marijuana-based impaired driving.

¹⁰ *Bowden* at 180–184. See also Bigelow, G.E., Bickel, W.E., Roache, J.D., Liebson, I.A., & Nowowieski, P. “Identifying Types of Drug Intoxication: A Laboratory Evaluation of a Subject-Examination Procedure,” May 1985, National Highway Traffic Safety Administration, Report No. DOT HS 806 753, U.S. Department of Transportation, Washington, D.C.; A Technical Report entitled “Field Evaluation of the Los Angeles Police Department Drug Detection Program,” December 1986, National Highway Traffic Safety Administration, Report No. DOT HS 807 012, U.S. Department of Transportation, Washington, D.C.; and Compton, R. (2017, July). Marijuana-Impaired Driving—A Report to Congress. (DOT HS 812 440). Washington, DC: National Highway Traffic Safety Administration.

¹¹ *Bowden* at 179–180.

¹² *Id.* at 175–176.

¹³ *Id.* at 190.

¹⁴ *Id.* at 189.

¹⁵ Compton, R. (2017, July). Marijuana-Impaired Driving—A Report to Congress. (DOT HS 812 440). Washington, DC: National Highway Traffic Safety Administration.

¹⁶ *Bowden* at 189–190.

In conclusion, the COA ruled the district court failed to meet its burden of reliability, and thus the admissibility, of the proposed DRE testimony under MRE 702. The COA held, "the determination under the DRE protocol that a person is 'impaired' and unable to safely drive a car appears to be ultimately based on the DRE officer's subjective judgment, and there is no evidence in this record that the ability of a person to make such a judgment based on the application of the DRE protocol has been tested to demonstrate the accuracy and validity of reaching such a conclusion on a person's level of impairment due to marijuana."¹⁷

The COA further stated, albeit in a footnote, "[w]e note that this conclusion does not preclude the prosecution from introducing [the DRE's] ... testimony as a lay witness to the extent that testimony is otherwise not inadmissible. Contrary to the apparent concern of our dissenting colleague, our holding is not a blanket prohibition on [DRE] ... testimony. We simply hold that [the deputy] ... cannot provide expert testimony under MRE 702 regarding his application of the DRE protocol and the opinion he formed of defendant's state of impairment due to marijuana."¹⁸ Even though the footnote refers to DRE testimony as being admissible as lay witness testimony pursuant to MRE 701, the *Bowden* opinion allows for a strong argument to be made in favor of DRE testimony being admitted as expert testimony under MRE 702 if it stays within the new parameters established by *Bowden*. It is recommended that a prosecutor seeking to introduce this type of evidence at trial make an offer of proof well ahead of trial and be ready to distinguish how he/she wishes to use the DRE's testimony from how it was used in *Bowden*.

NHTSA's 2017 report to Congress endorsed the use of DRE-trained officers in drugged driving investigations.

Dissenting Opinion

On the other hand, the dissenting opinion held there was no abuse of discretion by the lower courts in admitting the DRE testimony under MRE 702 because evidence established that the DRE-trained officer could reliably use the DRE protocol as an investigative tool to determine whether defendant was impaired by marijuana use and unable to safely drive a motor vehicle.¹⁹ The dissenting opinion ruled it was not necessary under the *Daubert* analysis for the DRE protocol to determine defendant's degree of impairment to an absolute certainty. Rather, a DRE officer's testimony is viewed along with other evidence, including toxicology results, as evidence that is helpful to a trier of fact in determining whether a suspect is intoxicated or impaired for purposes of MCL 257.625(1).²⁰

Additionally, the dissenting opinion held NHTSA's 2017 report to Congress endorsed the use of DRE-trained officers in drugged driving investigations, despite the lack of an impairment standard for marijuana. On that issue, the dissenting opinion stated, "The report does not assert anywhere that law enforcement should not use DRE-trained and certified officers as part of drug-impaired-driving case investigations. Rather, it endorses the DRE program as the highest level of training an officer can receive to 'identify the signs and symptoms of drug use that could be used to determine whether a suspected impaired driver was impaired by drugs and to rule out other possible cases such as neurological deficits, diseases, and illness.'²¹ The dissenting opinion held the arguments by defendant against the DRE Program went to the weight, not the admissibility, of the evidence and were areas about which the defense could cross examine.

¹⁷ *Id.* at 189.

¹⁸ *Id.* at 191-192, footnote 6.

¹⁹ *People v. Bowden*, 314 Mich. App. 171 (2022) (Redford J., dissenting opinion) at 192.

²⁰ *Id.* at 207.

²¹ *Id.* at 209.

People v. Bowden Post-COA

In September 2023, the Michigan Supreme Court denied application for leave to appeal the *Bowden* decision.²² The *Bowden* decision makes Michigan the only state in the country where a higher court has ruled against the admissibility and reliability of the DRE protocol. The overwhelming trend around the country has been in favor of admitting DRE expert testimony in drugged driving prosecutions. For example, the November 2023 decision in *State of New Jersey v. Olenowski* addressed this when it stated “we accept the *Bowden* court’s premise that DRE testimony does not, in and of itself, establish impairment. But we further hold that such testimony is sufficiently reliable to be admitted for a less ambitious purpose, and with critical safeguards.”²³

DRE Testimony Post-Bowden

Despite the setback for DRE testimony in Michigan, *Bowden* should not be read as a prohibition to this critical evidence in drugged driving cases. Prosecutors wishing to introduce DRE expert testimony at trial will need to distinguish how the DRE testimony they plan to introduce differs from what was presented in the *Bowden* case.

The *Bowden* opinion makes clear a DRE-trained officer can neither testify to the ultimate conclusion that a person was impaired by a particular drug category nor that a defendant’s driving ability was affected by a particular drug category and no longer able to safely operate a vehicle.²⁴ Such testimony has now been deemed inadmissible. However, the *Bowden* decision did not hold or state that a DRE-trained officer was prohibited from giving an *expert opinion* that a person was exhibiting certain signs and symptoms *consistent* with a particular drug category, that a particular drug category causes certain signs and symptoms, or the deleterious impact on the human body caused by a particular drug category, such as divided attention and other such psychophysical effects. This type of testimony would be in line with how other courts around the country treat DRE testimony, including the *Olenowski* decision.

Bowden should not be read as a prohibition to this critical evidence in drugged driving cases.

In addition, the *Bowden* decision also does not prohibit a DRE-trained officer from testifying about their training and experience, the DRE protocol, and their observations of a defendant, especially since these areas of testimony provide support for the DRE’s opinion. DREs are trained to make observations of physical and physiological signs and to determine what drug category is causing those signs and symptoms, which should be consistent with the signs and symptoms exhibited by the defendant at the time of the traffic stop and roadside investigation. At trial, a prosecutor can tie the DRE testimony to all the other evidence in the case establishing impairment (e.g., driving, statements/admissions, arresting officer’s observations and roadside investigation, and toxicology results). Ultimately, the conclusion on whether defendant was impaired or intoxicated for purposes of the OWI law is left for the jury to decide.

Conclusion

DRE officers play a critical role in helping hold drugged drivers accountable for their dangerous actions. Although it is still too early to tell what lasting impact the *Bowden* decision will have on DRE testimony in Michigan, the state’s DRE Program is moving forward with final arrangements being made for the upcoming December school and current DRE officers are undergoing courtroom testimony training consistent with *Bowden*. Drugged driving is not going away on our roads, and neither are DRE-trained officers.

²² *People v. Bowden*, 512 Mich. 958, 994 N.W.2d 776 (2023). On remand, the case resolved with a plea to a civil infraction.

²³ *New Jersey v. Olenowski*, 255 N.J. 529, 606-607, 304 A.3d 598 (2023).

²⁴ *Bowden* dealt with a marijuana-impaired driver and so the opinion refers to marijuana impairment. It is the belief of the authors that the ruling will be applied to all drug categories and not just those cases dealing with DRE testimony and marijuana impairment.

About the Authors

Kinga Canike is the director of the Traffic Safety Training Program (TSTP) and has been a Traffic Safety Resource Prosecutor with the Prosecuting Attorneys Association of Michigan (PAAM) since 2014. Since joining PAAM, she has trained thousands of officers and prosecutors in traffic safety. Kinga started her prosecution career with the Wayne County Prosecutor's Office in Detroit, Michigan, in 2004 and spent the next 10 years working as a trial prosecutor on the front lines. She handled hundreds of impaired driving cases and became one of the office's "go-to" resources on OWI issues. She worked closely with the Detroit Police Department to make sure its road officers were conducting thorough OWI investigations and complying with breath testing administrative rules. Kinga also spent several years in the General Trial Unit, where she cycled through various felony trial courtrooms and was responsible for handling all the felony cases in that courtroom. Kinga has undergone extensive drugged driving trainings including the Advanced Roadside Impaired Driving Enforcement and went through the Drug Recognition Expert School in 2016. She has a Bachelor of Arts Degree in Journalism from Michigan State University and a law degree from Wayne State University Law School in Detroit, Michigan.



In April 2024, Eric Wanink joined the TSTP team as the newest Traffic Safety Resource Prosecutor for PAAM. Eric spent 21 years with the Tuscola County Prosecutor's Office. Coming from a small office, he gained a variety of experience conducting jury trials concerning everything from routine OWI cases to complex Criminal Enterprise cases. Eric graduated from Alma College in 1998 and attended Thomas Cooley Law School, where he earned his Juris Doctorate in 2001. He began his career clerking for the Honorable Allen J. Nelson, where he served until 2003, when he accepted a position as an assistant prosecuting attorney with Tuscola County. He was promoted to Chief Assistant Prosecutor in 2009. Eric handled a variety of cases in Family Court, District Court, and Circuit Court. He specialized in fraud cases, drug cases, arson, assault, homicide, breaking and entering and drunk driving. He took over asset forfeiture in the office in 2007 and served as a member of the local narcotics team administrative board for several years. Eric has served on a variety of committees over the years, including the PAAM Drug Initiatives Committee and, recently, had been acting as a PAAM trainer, having conducted numerous asset forfeiture trainings and felony trial practice trainings. He has also presented for a number of years at the annual Drug Initiatives Conference, held every year in July.

