

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

1 The Circle, Suite 2  
GEORGETOWN, DE 19947

January 22, 2013

Edward C. Gill, Esquire  
Law Office of Edwards C. Gill, P.A.  
16 N. Bedford Street  
P.O. Box 824  
Georgetown, DE 19947-0824

Casey L. Ewart, Esquire  
Department of Justice  
114 East Market Street  
Georgetown, DE 19947

***RE: State of Delaware v. Robert Levan***  
***Def. ID No: 1204016933***

Date Submitted: October 4, 2012

Dear Counsel:

This is my decision on Robert Levan's Motion to Declare 21 *Del.C.* § 4177(a)(6) unconstitutional. Levan was arrested and charged with Disregarding a Police Officer's Signal, Reckless Endangering in the First Degree (2 counts), Reckless Endangering in the Second Degree (2 counts), Resisting Arrest, Driving While Under the Influence of Drugs, Criminal Mischief, and numerous other traffic related offenses. These charges arose out of an incident that occurred on April 23, 2012. It got started when a Delaware State Police Officer attempted to stop Levan for driving with a suspended or revoked license. Levan pulled his car over to the side of the road and stopped briefly. He then pulled his car back out on to the road and fled. The police gave chase. Levan eventually abandoned his car and fled on foot into a wooded area. He finally surrendered after the police used K-9 dogs track him down. After Levan was arrested, he told the police that he had

been smoking marijuana and fled because he did not want to be arrested for a DUI. After Levan's arrest, and within 4 hours of him driving a motor vehicle, the police obtained a blood sample from him. The blood sample revealed the presence of both active and inactive metabolites of marijuana. 21 *Del.C.* § 4177(a)(6) states that "[n]o person shall drive a vehicle when the person's blood contains, within 4 hours of driving, any amount of an illicit or recreational drug that is the result of the unlawful use or consumption of such illicit or recreational drug or any amount of a substance or compound that is the result of the unlawful use or consumption of an illicit or recreational drug prior to or during driving." This code section criminalizes the act of driving with any amount of an illicit or recreational drug in the blood system, regardless of impairment. It is known as the *per se* drug DUI statute.

Levan filed a motion seeking to dismiss the DUI charge against him as unconstitutional on August 23, 2012. Levan argues that 21 *Del.C.* § 4177(a)(6) is unconstitutional because it is overbroad and vague. Levan argues that the statute is overbroad because it does not require the State to prove that a defendant was under the influence of marijuana while driving. Levan argues the statute is vague because an ordinary person is not able to reasonably discern how long traces of marijuana, whether ingested legally or not, may remain in one's blood system. These arguments have previously been considered and rejected in Delaware<sup>1</sup> and other jurisdictions throughout the country.<sup>2</sup>

---

<sup>1</sup> *State of Delaware v. James R. Bowers*, Cr. A. No. 1101009631 (Del. Com. Pl. June 27, 2011)(Welch, J.).

<sup>2</sup> *People of the State of Illinois v. Vincent S. Fate*, 636 N.E. 2d 549 (Ill. 1994); *Bennett v. State of Indiana*, 801 N.E. 2d 170 (Ind. Ct. App. 2003); *State v. Phillips*, 873 P.2d 706 (Ariz. Ct. App. 1994).

## Overbroad

\_\_\_\_\_The privilege to operate a motor vehicle is not a fundamental right.<sup>3</sup> If a statute does not implicate an individual's fundamental rights, then it is subject to rational basis scrutiny.<sup>4</sup> A statute subject to rational basis scrutiny is constitutionally sound if there is a rational relationship between the conduct proscribed by the statute and a legitimate state interest.<sup>5</sup> Traffic safety is undoubtedly a legitimate state interest. A person driving under the influence of drugs is certainly a risk to the safety of other drivers on the road. The problem is that with drugs, unlike alcohol, no acceptable level of drug use can be scientifically quantified so as to distinguish between users who can drive impaired and those who are presumably impaired.<sup>6</sup> The solution to this problem has been to prohibit a person from driving with any level of drugs in their blood. Prohibiting drivers from driving with any level of drugs in their blood has been held to be rationally related to a state's interest in promoting traffic safety in Delaware<sup>7</sup> and other jurisdictions.<sup>8</sup> Levan did not any cite any authority reaching a different conclusion.

---

<sup>3</sup> *S.S. v. State*, 514 A.2d 1142, 1144 (Del. Super. 1986).

<sup>4</sup> *State of Delaware v. James R. Bowers*, Cr. A. No. 1101009631 (Del. Com. Pl. June 27, 2011)(Welch, J.) citing *Heller v. Doe*, 509 U.S. 312, 319 (1993).

<sup>5</sup> *Id.* at 320.

<sup>6</sup> *People of the State of Illinois v. Vincent S. Fate*, 636 N.E. 2d 549 (Ill. 1994).

<sup>7</sup> *State of Delaware v. James R. Bowers*, Cr. A. No. 1101009631 (Del. Com. Pl. June 27, 2011)(Welch, J.)

<sup>8</sup> *People of the State of Illinois v. Vincent S. Fate*, 636 N.E. 2d 549 (Ill. 1994); *Bennett v. State of Indiana*, 801 N.E. 2d 170 (Ind. Ct. App. 2003); *State v. Phillips*, 873 P. 2d 706 (Ariz. Ct. App. 1994).

### Vagueness

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by statute, or if it encourages arbitrary or erratic enforcement. §4177(a)(6) does not suffer from vagueness. Its elements are clear and understandable. First, an individual must unlawfully use or consume an illicit or recreational drug before or while operating a motor vehicle. Second, an active ingredient or metabolite must be present in the individual's blood within four hours of driving. Finally, the active ingredient or metabolite must be the result of the unlawful use or consumption of an illicit or recreational drug prior to or while driving. §4177(a)(6) adequately informs the public of the prohibited conduct and is not unconstitutionally vague.<sup>9</sup> As to Levan's specific argument that he does not know when he can legally drive after smoking marijuana, the easy answer to that is to not smoke marijuana in the first place.

### Conclusion

21 *Del. C.* §4177(a)(6) is neither constitutionally overbroad or vague. Levan's motion to declare 21 *Del. C.* §4177(a)(6) unconstitutional is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

/s/ E. Scott Bradley  
E. Scott Bradley

ESB/sal  
cc: Prothonotary

---

<sup>9</sup> *State of Delaware v. James R. Bowers*, Cr. A. No. 1101009631, (Del. Com. Pl., June 27, 2011) (Welch, J.) Moreover, this analysis is similar to the analysis and conclusion the Court reached in *Disabatino v. State*, 808 A.2d 1216 (2002) for §4177(a)(5), the *per se* alcohol DUI statute.