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## **State Supreme Court ruling on drugged driving raises fairness questions**

### **Motorists found with trace amounts of illegal substances in systems face harsh penalties after fatal accidents**

By Christy Gutowski

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A recent Illinois Supreme Court ruling has given prosecutors a controversial new weapon in driving-under-the-influence cases — the ability to upgrade charges when small traces of drugs are found in motorists' systems after a crash, even if there's no evidence that they were impaired at the time.

Justices ruled in April that drivers found with even the slightest remnant of an illegal drug in their bodies should be found guilty of a felony if their bad driving caused a fatal crash.

Proof they were impaired isn't required, which means prosecutors no longer have to show the drug contributed to a crash, only that it was present in the offender's system, according to the decision. The ruling upheld a felony conviction against a pickup truck driver who had a trace of methamphetamine in his system when he killed two people in a crash.

Citing that decision, DuPage County prosecutors in May upgraded a misdemeanor charge to felony aggravated DUI involving drugs in a case in which a driver admitted taking "one or two" hits of marijuana the night before he is alleged to have plowed into a motorcyclist in a fatal collision last year in Addison. The motorist now could face three to 14 years in prison rather than up to 12 months in jail.

While safety advocates applaud the ruling, some defense lawyers and other critics say the justices have given prosecutors an unfair advantage in pressing such cases. The high court's decision, they say, misinterprets the Legislature's intent when it crafted the state's drunken-driving laws and could put lawful prescription drug users at peril.

The law applies to illicit drugs as well as to controlled substances used unlawfully, such as expired prescriptions. And drivers may be unaware how long a drug can be detected in their system, toxicology experts say. Painkillers can be traced up to three days after they are taken, said Jim O'Donnell, a Rush University Medical Center associate professor of pharmacology.

"God forbid you take your spouse's Vicoden because you happen to have a toothache. If you get into an accident, watch out," he said. "This puts Illinois, I'd say, at the bottom of the heap for law enforcement and the courts using responsible science."

The Tribune identified at least four prosecutions in Cook, DuPage and Kane counties in which the high court opinion has been applied. All involve alleged illegal drug use.

DuPage County State's Attorney Robert Berlin is handling one of the cases, the fatal Addison motorcycle crash.

Prosecutors, Berlin said, have always taken the position that they had to show impairment in a fatal crash involving drugs — which can be difficult because there's no set standard like the .08 blood alcohol level for drunken driving. So prosecutors often sought a lesser charge of reckless homicide or misdemeanor DUI involving drugs.

"Now we have the Illinois Supreme Court saying you just need to show the person's driving caused the accident," Berlin said.

The high court's ruling grew out of a fatal crash on Christmas Day 2004. Aaron Martin, 24, had just left a Peoria bar when his pickup missed a curve and hit a car head-on, killing a 50-year-old woman and her elderly mother.

A forensic scientist found "trace amounts" of methamphetamine in Martin's urine after multiple tests, but no alcohol.

A Peoria County jury convicted Martin of aggravated DUI involving drugs, and a judge sentenced him to six years in prison. But in August 2009, a state appeals court reversed the conviction, arguing prosecutors failed to show a causal relationship between the drugs and the driving infraction because the effects of the methamphetamine had likely worn off.

The Illinois Supreme Court overturned the appellate decision. The justices ruled that "no causal connection" is needed because Illinois long ago took a zero-tolerance stance on drugged driving, making it a misdemeanor when even the slightest measurable amount is detected.

The crime, the court ruled, is the bad driving, so proof of impairment isn't needed. The decision could also apply to nonfatal crashes involving a serious injury, experts say.

Since the opinion was issued, advocates for the Schaumburg-based Alliance Against Intoxicated Motorists have spread the word in courthouses. Meanwhile, criminal defense blogs are clogged with often barbed commentary questioning the opinion's fairness under such headlines as "Supreme Court blows it."

"What they're saying is just because you used drugs in the past, even though you could be safe on the road at the present time, we don't want you on our highways, and that's questionable," Wheaton defense attorney Donald Ramsell said. "It's the perfect storm of an overzealous prosecution and, frankly, bad facts making bad law."

Ramsell and other critics point to earlier cases in which prosecutors proved impairment through other measures, such as witness and expert testimony.

Such an approach was used in the case of Bloomingdale truck driver Richard Gancarz, 54, who is serving a 14-year prison term for aggravated DUI involving drugs for a fatal June 2000 crash. Schaumburg Eagle Scout Aric Wooley, 17, was killed the weekend of his high school graduation party. Gancarz refused alcohol and drug testing, but prosecutors proved he was high on marijuana through the testimony of toxicology experts, police and witnesses.

But the legal debate seems irrelevant to JoLynn Lash. She lost her husband, Robert, whom she called "the best man I could have ever dreamed of," and was left alone to raise their 5-year-old daughter. According to the police report, Michael Kainz, 21, said he had smoked pot since 13, and likely took "one or two" hits about 6:30 p.m. the night before the November crash. He tested positive for THC, the psychoactive ingredient in marijuana, prosecutors said.

Kainz said he never saw Lash, 46, the police report states. JoLynn Lash described her husband as a gentle giant, standing 6 feet 3 inches and weighing 290 pounds. She said he drove a large touring motorcycle that could be heard three blocks away.

"How could he not have seen my husband?" Lash asked. "As tough as this (court opinion) is, maybe it'll make people realize if you're going to drive negligent with drugs in your system, you're going to face tougher penalties. It should never be a misdemeanor when someone's life is lost."

The rules of the road are well established when it comes to drunken driving, but experts say determining when a motorist is impaired by drugs is uncharted territory.

The National Highway Traffic Safety Administration, based on random roadside checks, found that 16.3 percent of motorists at night were on various drugs, with pot being the most common. And researchers reported about 25 percent of motorists killed nationwide from 1998 to 2009 tested positive for drugs, compared with 37 percent for alcohol, according to the April 2011 Pacific Institute for Research and Evaluation (PIRE) study.

In another case, an Aurora woman is accused of texting about the time she rear-ended another car, pushing it into an oncoming group of motorcycle riders near Elburn. Two motorcyclists were killed in the May 2009 crash, and 12 were injured.

Tests showed Alia Bernard, 26, had pot in her system, but Kane County prosecutors during a court hearing in April said they believe the crash was due to careless driving, not impairment.

One day later, the Supreme Court's decision came down. Prosecutors promptly upgraded a misdemeanor DUI charge to a felony. Bernard now faces up to 28 years.

"Accidents happen, unfortunately, and if drugs or alcohol didn't cause you to be impaired, why is that a crime?" asked her attorney Bruce

Brandwein.

Wade Thomas, 44, and his wife, Denise, 45, were killed. The St. Charles couple married 14 months earlier and left behind eight children from previous marriages.

Vivian Thomas goes to every monthly court hearing to ensure justice for her only son, and regularly visits the crash site along Route 47 in Kane County to tend to a makeshift memorial.

"In a split second, this girl destroyed so many lives," she said. "It's easy for someone to say (of the court ruling) it's not fair or goes too far, but if you lose someone you love to something so senseless, you'll think differently."

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