

Enforcing Amendment 3:

Law Enforcement Issues Arising From The New Recreational Marijuana Amendment



The narrow passage of Amendment 3 to the Missouri Constitution in November 2022 legalizes the broad use of recreational marijuana beginning in February 2023. While the amendment does provide some specific directions for police departments and prosecutors, those directives also give rise to new questions and concerns. This article will provide a brief overview of those directions and explore some of the issues likely to arise.

Recreational Marijuana

Under the new amendment, Missourians over 21 years of age have a constitutional right to possess and consume recreational marijuana. While medical marijuana laws remain in place, no medical certification or other form of permit is required for recreational marijuana. Specifically, an adult may possess up to three ounces of marijuana, approximately two and half times what the D-class felony limit of 35 grams

had been under §579.015.2, RSMo. The use of related paraphernalia (the amendment uses the term “marijuana accessories”), the right to cultivate marijuana at home with a permit, and the ability to sell marijuana at licensed recreational dispensaries are now all legal. All provisions relating to marijuana contained in Missouri state laws and local ordinances contrary to this amendment are unconstitutional and void, although possession of marijuana technically remains a federal offense. As of this writing, the General Assembly has not repealed the various state statutes criminalizing the use of marijuana and many cities continue to have similar, now void, anti-marijuana ordinances on their books.

Civil Penalties

The amendment does prohibit minors from possessing marijuana, bans smoking and cultivating in public, and prohibits possession of twice the legal

limit (which would be six ounces). It is not clear how, without an accompanying state statute or charge code, violations of these provisions will be processed for prosecution. Whatever process is used, each of these offenses is to be punished only by a “civil penalty” with a limited fine amount. For example, a third occasion of possession of twice the limit can be sanctioned with a “civil penalty” of up to a \$1,000.00 fine. The amendment does not define “civil penalty,” which has no applicable statutory definition. At this point, the only “civil penalties” would be in municipal court, where violations are considered civil in nature, not criminal in nature. State offenses are all criminal in nature, even misdemeanors and infractions. An early question for the courts will likely be whether an Amendment 3 “civil penalty” merely warrants a written citation or is an arrestable offense where a suspect could then be searched incidental to that arrest and ultimately jailed. Also unclear is when officers can make a felony

arrest for intent to distribute controlled substances under 579.020, RSMo., which has no quantity trigger, or how officers are to calculate the mass of marijuana in edibles.

Driving High

The biggest concern for law enforcement is likely to be drivers who operate motor vehicles under the influence of marijuana. The amendment expressly states that it does not authorize such driving but does not actually criminalize the conduct. This leaves to the state and municipalities the task of enacting enforcement provisions and policies related to driving high. For example, the amendment does not prohibit a city from passing an ordinance banning the use of marijuana by anyone in the passenger compartment of a motor vehicle, similar to open container laws. Regardless of what new laws are passed, law enforcement can rely upon the existing driving while intoxicated (DWI) statute, §577.010, RSMo., and 577.001(13), RSMo., that already encompasses drug use in the statutory definition of intoxication for purpose of DWI.

The most burdensome practical difficulty faced by law enforcement is the lack of a standardized quantity of THC agreed to cause impairment, akin to the blood alcohol content (BAC) used in drunken driving cases. While Missouri has embraced the 0.08 BAC limit encouraged by the federal government following extensive scientific research and field testing, there is yet no comparable figure for marijuana in the criminal context (the limit for a

federal drug-free workplace blood test is 50 nanograms per milliliter). Part of the reason for not having a limit is that unlike alcohol, typically metabolized at roughly one or two drinks per hour, marijuana is slowly metabolized over a period of days, such that a person can still have a readily detectable amount of THC in their system but genuinely considered not to be impaired. Furthermore, there is presently no rapid field test akin to breathalyzer devices for use with marijuana.

This means law enforcement agencies will need to rely on their veteran officers and deputies who have had Drug Recognition Expert (DRE) training to handle the suspected drugged driving

traffic stops involving poor driving. After performing careful field sobriety testing, they will invariably need to get a blood test of the driver's blood, either consensually or via a search warrant, to prove at trial that indeed it was marijuana that caused the intoxication. Unfortunately, those stops for expired plates or burned-out turn lights with rookie officers and no crime lab report will likely be the cases that are the most vigorously litigated. While normally the blood for crime laboratory drug testing is drawn by medical professionals at hospitals, agencies are exploring alternatives in which paramedics or even law enforcement personnel collect samples elsewhere.



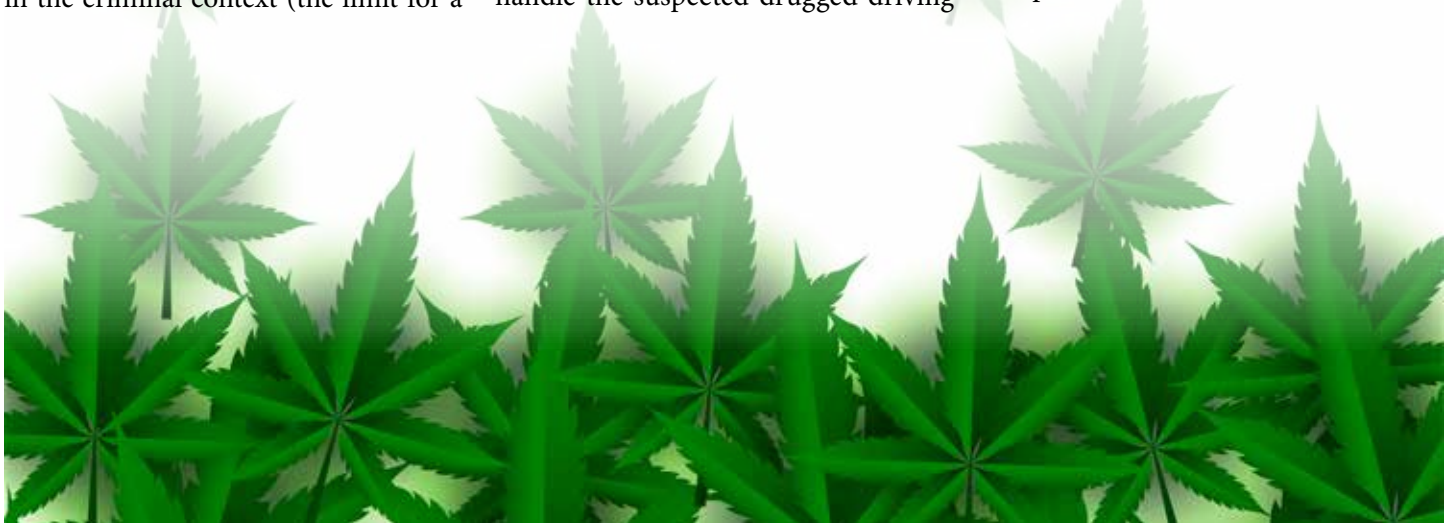
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Marijuana Search Warrants

Regarding search warrants, the amendment requires an officer to contact the Missouri Department of Health and Senior Services to ascertain if the suspect has a card prior to applying for a search warrant. As of this writing, there is no formal process or hotline for officers to make such a report. If the search warrant is targeted at marijuana, it cannot have a “no knock” execution provision, meaning the officers must announce themselves and wait before making entry. After any search for marijuana, whether pursuant to a search warrant or not, the officer is required to make a detailed report that includes the reasons for the search, whether marijuana was seized, whether any other contraband was seized, whether an arrest was made, and a “description of the tactics used by law enforcement to enter the property.” While the amendment is silent as to the consequences of failing to make such a report, defendants will surely argue that not doing so is grounds for suppressing the drugs from being admitted into



evidence at trial under the exclusionary rule. What is clear is that all agencies will be required by the amendment to collect these reports and provide them to the Missouri Attorney General’s Office on a yearly basis, not unlike the existing requirement to provide race statistics on traffic stops.

More broadly, the amendment provides that the mere presence of marijuana “without specific evidence that the marijuana is outside of what is lawful ... cannot be the basis of a search.” Thus, unless the suspect clearly is in plain-view possession of more than three ounces, an officer will need reasonable suspicion of another crime such as possession of stolen property or felon in possession of a firearm to

conduct a search. As an aside, it also means that all K-9 drug dogs trained to alert to marijuana will need to retire. More troubling, a pressing question for the courts will be whether this limitation on searches applies to a *Terry* frisk for weapons to protect officer safety.

In the coming months, the questions raised in this article and many others will doubtlessly be taken up by the courts and elected officials. It will be incumbent upon cities and their attorneys to remain focused on these legal developments, be it new legislation or judicial decisions, as they occur in order to properly enforce Amendment 3. 🍃

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