

## **Coming soon: Roadside drug testing**

### **Lawyers raise concerns about pilot program**

By: [Lee Dryden](#) August 8, 2016

Michigan State Police are moving toward launching a roadside drug testing pilot program later this year, but the effort is already raising questions from attorneys.

In June, Gov. Rick Snyder signed Senate Bill 207 to allow officers with specialized training to require motorists suspected of driving drugged to take a saliva test and make a warrantless arrest based on the test's outcome. The measure, sponsored by Sen. Rick Jones, R-Grand Ledge, is now Public Act 242.

The governor also approved Senate Bill 434, sponsored by Sen. Tom Casperson, R-Escanaba, to allow state police to establish a one-year pilot program for the saliva tests in five counties. The effort, to be launched under Public Act 243, could be rolled out statewide if successful. The new laws take effect Sept. 22.

Participating counties are expected to be selected this summer with the initiative to begin later in the year, said Shanon Banner, manager of the Michigan State Police public affairs section.

"The five counties will be determined based on a number of criteria including: the number of impaired driving crashes, the number of impaired drivers arrested and the number of Drug Recognition Experts (DREs) trained in the county," she said.

The year-long program will "establish policies in the area of roadside drug analysis, as well as make a determination of the accuracy and reliability of the tests," Banner said.

Criminal defense lawyer Neil Rockind of Rockind Law opposes the plan, saying the state is "hustling and hurrying it into production and use."

"The roadside saliva test process is not reliable nor is it scientifically validated," he said. "Like a pharmaceutical drug rushed to market, it is dangerous."

Attorney Steven M. Gursten of Michigan Auto Law said, "To the extent that roadside drug testing of drivers who are suspected of driving while drug-impaired helps to reduce and/or bring an end to drug-impaired driving, then I'm all for it."

Gursten, who handles serious auto accident injury and wrongful death cases, expressed concern that the program is not broad enough as it appears to target impairment stemming from controlled substances such as cocaine or marijuana — not alcohol or prescription drugs.

### **Tragedy prompts legislation**

The initiative is deemed the Barbara J. and Thomas J. Swift Law after a couple killed in 2013 by a truck driver who used a controlled substance.

Their son, Brian Swift, told lawmakers the bill is aimed at “stopping people who get behind the wheel of a vehicle and choose to put others’ lives at risk.”

“We want to make sure other families do not have to live with the nightmare we live with,” he testified at a House Judiciary Committee meeting early this year.

Jones, a former Eaton County sheriff who chairs the Senate Judiciary Committee, touted the hand-held device to check for drugs — much like a breathalyzer test for alcohol — as another tool for officers.

The senator added that such testing could protect motorists who are stopped by police while having medical issues, such as a diabetic attack.

While constitutional concerns were expressed at the committee level in Lansing, Jones said those who refuse to take the test would be issued a civil infraction, as is the case for declining to take a preliminary breath test for alcohol.

Within 90 days of the pilot program conclusion, the state police must submit a report to the Legislature’s judicial and criminal justice committees.

The report must include data such as the number of traffic stops resulting in an arrest for operating under the influence of a controlled substance and the total and type of convictions under the pilot program.

As in drunken-driving cases, blood test results would be used for prosecution in drug cases with roadside tests.

However, there are exceptions that would allow saliva test results to be used in court.

The saliva test results are admissible “to assist the court or hearing officer in determining a challenge to the validity of an arrest.”

The results also would be admissible to rebut testimony that saliva test results did not match blood or urine test results.

### **Lawyers weigh in**

If lawmakers are “truly concerned” about drug-impaired driving dangers, Gursten said, “then they should allow the saliva-testing to be used to root out all drug-impaired driving — regardless whether the impairment originates with cocaine, marijuana, prescription drugs or, even, alcohol.

“To the person who’s killed or injured by a drug-impaired driver, it’s no consolation — and the grief and loss are no less great — if the at-fault driver was impaired due to prescription drugs rather than illegal ones like cocaine or marijuana,” he said.

Rockind said “science is being abused” in this effort as processes need years of refinement to ensure accuracy.

“They cannot be hurried for the sake of efficiency or availability and, most assuredly, when science is hurried, the results are dangerous,” he said. “The criminal justice system should insist on proven, reliable and validated methods when adopting science to people’s lives, but that means accepting that it takes years for a scientific method to be validated — and even then it will have errors and uncertainties.

“However, that is incompatible with law enforcement’s need for ‘fast and perfect’ scientific results. The roadside saliva test process is not reliable nor is it scientifically validated.”

As for the claim that roadside testing could clear those suffering from a medical issue behind the wheel, Rockind said that doesn’t make sense, referring to it as “rubbish.”

“Law enforcement is so reactive these days and wants to have a solution for every social ill, misfortune or misdeed but the legal system is incapable of reacting similarly,” he said. “If you’re going to force a nonsense test on us as some reaction to crime, at least have enough respect for us to not make up a nonsensical explanation like that, e.g., ‘It’s for your own good.’”

Gursten said if roadside saliva testing “succeeds in clearing a driver from suspicion of and/or arrest for drug-impaired driving, then that is an important added benefit of the testing.”

But he doubts it would get to that point for someone having a medical issue behind the wheel as the new law only allows police officers certified as “drug recognition experts” to require someone to submit to a roadside saliva test.

“Given that a ‘certified drug recognition expert’ is ‘a law enforcement officer trained to recognize impairment in a driver under the influence of a controlled substance rather than, or in addition to, alcohol,’ I believe a properly certified police officer will be able to discern the difference between a substance-impaired driver and a driver suffering under the disability of a medical condition,” Gursten said.

Gursten pointed out that under current law, police are allowed to conduct roadside drug testing in the form of an “onsite preliminary chemical breath analysis” if there is reasonable cause that “alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of them” has affected the ability to drive.

Rockind doesn’t believe saliva test results under the new law would hold up in court.

“I repeatedly remind my clients to politely refuse to participate in roadside testing programs, be it roadside gymnastics or so-called chemical tests,” he said. “I would hope that my client had heard me preach this admonition in the past and/or heard it from one of my peers. Were a client to participate, I’d vigorously fight it and a part of that fight would be on the scientific reliability of the test.”