



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: January 23, 2023

TO: Chair Kropf, Vice-Chairs Wallan and Andersen,
and Members of the House Judiciary Committee

FROM: Kimberly McCullough, Legislative Director
Oregon Department of Justice

SUBJECT: HB 2316 DUII

This testimony is presented in support of HB 2316.

SUMMARY

House Bill 2316 serves two purposes. First, it brings Oregon in line with 46 other states that allow a person to be charged with a DUII if the person drives impaired and that impairment is caused by a non-controlled substance. Second, it closes a problematic loophole in our DUII statute that currently allows an impaired driver to avoid a DUII conviction by arguing that, although the person is impaired, the impairment is caused by the non-controlled substance in their system and not the controlled substance that is also present.

BACKGROUND

There are situations where a person will take more than the prescribed dose of an over-the-counter drug or a non-controlled prescription drug, or a combination of several of these drugs, and then drive a car. However, unlike 46 other states, most recently Hawaii in 2021, the person cannot be charged with a DUII in Oregon in these situations. In addition, drugs are evolving faster than the laws can keep up with. New drugs are continually hitting the streets, including new synthetic drugs, and many are finding their way onto Oregon roadways. These are just a few examples where a person was not charged with DUII due to Oregon's current laws:

1. Tigard Case 2018

A citizen was stopped and was rear ended. The citizen got out and told the male driver to go around the corner to exchange information, but he did not follow. She went back to the scene to see that the female passenger was in the driver's seat. The female put the car into reverse and hit another car driven by an elderly woman, twice. Both individuals were extremely impaired and were not functioning coherently. A powdery yellow unknown

substance was found and tested but did not test positive for a controlled substance. The female driver had 4 non-controlled substances in her urine including Nyquil. The state could not file DUII charges due to the fact that the powdery substance was unidentified by the crime lab and the others were non-controlled substances.

2. Deschutes County, 2019

A Starbucks employee called police to report a woman who appeared intoxicated. Police contacted the woman and saw obvious impairment—confused, lethargic, terrible balance and horrible performance on the field sobriety tests. Police talked to her son who told officers that she uses cough syrup to self-medicate. The woman’s urine came back positive for Methorphan and Dextrorphan (contained in cough syrup)—both non-controlled substances.

3. Deschutes County, 2019

A citizen called to report a driver “all over the road” on Highway 20 from Sisters. The driver was going into oncoming traffic several times, tailgating, speeding over 80mph, crossed the fog line and hit the gravel, and swerved. The woman was stopped by police and they observed watery, glazed over eyes, slurred speech, a pale face, and would close her eyes many times as if she fell asleep. The woman said she took Metaxalone, a strong non-controlled muscle relaxer. Other non-controlled drugs were in also her toxicology and she was not charged with DUII.

House Bill 2316 also seeks to close a loophole commonly used in DUII cases where there is evidence that a person has consumed a non-controlled substance in combination with alcohol, cannabis, a controlled substance, psilocybin or an inhalant and the defense argues that the impairment is attributed to the non-controlled substance, therefore avoiding a DUII conviction. This type of argument happens on a regular basis as it is uncommon for someone with a drug-related DUII to only have one drug in their urine or blood. A classic example of this can be seen from a case out of Multnomah County in 2022. The defendant was stopped for poor driving, admitted to taking 6 Coricidin pills (non-controlled) because he said it gave him a better high off his methamphetamine, and admitted that he was too intoxicated to drive. Methamphetamine and methorphan was found in his toxicology. The defense argued:

“If they took an over recommended dose of cough medicine. And you heard from Mr. XX that he took 6 pills. More than a recommended dose. . . . There’s no way to determine if its meth that’s causing that or if it’s a cough medicine. And that’s critically important. Methamphetamine is a controlled substance, methorphan, the cough medicine, is non-controlled. It is not illegal in the state of Oregon to drive while you are under the influence of a non-controlled substance, cough medicine. There is no way to know what’s causing those effects. Is it the meth, is it the cough medicine?”

Oregon is currently one of only 4 states in the country where state law will not allow for a DUII charge for impairment caused only by a non-controlled substance and still has the loophole of blaming a non-controlled substance for impairment when taken with a controlled substance. In addition to the safety issues to the public, our current law also hurts the individual who may not get the treatment and other services they need. For these reasons, please support HB 2316.

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