Michigan’s Oral Fluid Roadside Testing Law

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Prosecuting Attorneys Association of Michigan

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Background
NHTSA ROADSIDE SURVEY—FEBRUARY 6, 2015

• Alcohol use has declined dramatically
  – Only 1.5% of weekend nighttime drivers had BACs at or above 0.08

• However, 22.5% tested positive for drugs, an increase from 16.3% in 2007; 12.6% were positive for marijuana, compared to 8.6% in 2007
MICHIGAN

- Fatal impaired driving crashes in Michigan have been steadily increasing over the last five years
- Michigan experienced a 32% increase in impaired driving fatalities, from 179 in 2015 to 236 in 2016
- Several major incidents involving impaired drivers: five bicyclists killed in Kalamazoo, tow-truck driver killed in St. Clair County, and Detroit police officer killed in Detroit
SWIFT FAMILY TRAGEDY

• Thomas and Barbara Swift, 73, of Escanaba, died due to injuries suffered when their car was struck by a logging truck that failed to stop for a red light on U.S. 2 and M-41 in Gladstone in March 2013

• Thomas Swift died at the scene; his wife, Barbara Swift, died several days later from injuries she sustained in the crash
SWIFT FAMILY TRAGEDY

- Harley Durocher, the suspect in the deadly car crash, was found guilty on six counts after a two-day trial.
- Durocher was found guilty on two counts of driving with a suspended or revoked license causing death, two counts of reckless driving causing death, and two counts of operating with the presence of THC in his system causing death (2 nanograms).
Legislation
Barbara J. and Thomas J. Swift Law

- Effective September 26, 2016, the law authorizes the Michigan Department of State Police (MSP) to establish a one-year pilot program in five counties for roadside drug testing.
- Requires the MSP to develop a written policy for the implementation of the pilot program and the administration of roadside drug testing.
- Allows the MSP to adopt rules to implement the pilot program.
- Requires the MSP to report on the pilot program to certain committees of the legislature within 90 days after the pilot program concludes.
- Allows the MSP, subject to appropriation, to establish additional pilot programs in other counties for up to one year.
Further, the law authorizes a peace officer who is certified as a drug-recognition expert in a county participating in the pilot program to require a person to submit to a preliminary oral fluid analysis under certain conditions.

Authorizes an officer to arrest a person based on the results of a preliminary oral fluid analysis and to make those results admissible in a criminal prosecution for limited purposes and/or an administrative hearing.

Requires an officer to use the results of an oral fluid analysis to determine whether to order a commercial motor vehicle (CMV) driver out of service and requires an officer to order out of service a CMV driver who refuses to submit to a preliminary oral fluid analysis.

Provides that a person who refuses to submit to a preliminary oral analysis is responsible for a civil infraction.
Committee
Committee composed of subject matter experts to assist in making the pilot program successful

Members:
- Prosecuting Attorneys Association of Michigan (two TSRPs)
- Traffic Services Section
- Alcohol Enforcement Unit
- Impaired Driving Unit
- Drug Recognition Expert (DRE) coordinator from the Office of Highway Safety Planning (OHSP)
- Forensic Science Division
- Executive Resources Section
The counties for the Oral Fluid Roadside Analysis were selected on the following criteria:

- Number of serious injury and fatal impaired driving crashes
- Number of impaired driving arrests
- Number of DREs in the county
- Number of DRE prosecutors in the county and their knowledge of the program
- Geographic diversity around the state of Michigan
FIVE COUNTIES SELECTED

- Berrien
- Delta
- Kent
- St. Clair
- Washtenaw
All law enforcement agencies were represented in this pilot program: state, local, township and county

Twelve participating law enforcement agencies

Only the 27 DRE officers within those five counties were participating in the Oral Fluid Roadside Analysis pilot program

All law enforcement agencies in the selected counties agreed to participate in the pilot program
**SELECTION CRITERIA**

- Portable, hand-held
- Rechargeable and fully automated analyzer
- On-screen instructions
- Results within five minutes or less
- THC cutoff level no higher than 25 ng/mL
- On-board heater
- Battery life capable of running 50 tests
- Printer included with device
The pilot program committee researched several vendors of Oral Fluid Roadside Analysis testing instruments.

Manufacturers were given an opportunity to give a presentation and demonstration to committee members.

Seven different oral fluid testing manufacturers gave presentations and were evaluated by committee members.

The committee members developed specifications that met the needs of the pilot program.
SELECTED INSTRUMENT

- Formally known as the DDS2

SoToxa™
MOBILE TEST SYSTEM
SoToxa™ MOBILE ANALYZER
QUALITY CONTROL

QC testing

• QC testing to validate SoToxa™ device is correctly detecting positive and negative results each day prior to use
SoToxa™ ORAL FLUID DEVICE

- Rapid sample collection
- Sample volume adequacy indicator
- Robustly designed for active swabbing
BENEFITS OF THE TEST INSTRUMENT

- Compact and portable
- Easy to use
- Results within five minutes
- Easy-to-read positive or negative results
- Can store up to 10,000 tests, and comes with a printer
- Rapid, simple, noninvasive
- No medical professional required; saves time and money
- Parent drug reflects recent drug use
- Specimen taken proximate to time of driving, crash, workplace accident, etc.
# SoToxa™ DRUG PANEL

<table>
<thead>
<tr>
<th>Drug Class</th>
<th>Cutoff (ng/mL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amphetamine</td>
<td>50</td>
</tr>
<tr>
<td>Benzodiazepines</td>
<td>20</td>
</tr>
<tr>
<td>Cannabis (Δ⁹ THC)</td>
<td>25</td>
</tr>
<tr>
<td>Cocaine</td>
<td>30</td>
</tr>
<tr>
<td>Methamphetamine</td>
<td>50</td>
</tr>
<tr>
<td>Opiates</td>
<td>40</td>
</tr>
</tbody>
</table>
• Test instrument will display a positive, negative or invalid test reading for each drug category
  – Positive result: Indicates presence of drug in the driver’s system; it does not detect impairment
  – Negative result: Below the cutoff level; negative result does not preclude a driver from being impaired
  – Invalid result: Normally insufficient volume of oral fluid
### SoToxa™ SCREEN

**RESULTS:**

<table>
<thead>
<tr>
<th>Substance</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>COC</td>
<td>POSITIVE</td>
</tr>
<tr>
<td>OPI</td>
<td>POSITIVE</td>
</tr>
<tr>
<td>MAMP</td>
<td>NEGATIVE</td>
</tr>
<tr>
<td>THC</td>
<td>NEGATIVE</td>
</tr>
<tr>
<td>BZO</td>
<td>NEGATIVE</td>
</tr>
<tr>
<td>AMP</td>
<td>NEGATIVE</td>
</tr>
</tbody>
</table>

OK
VALIDATION TESTS

• A separate secondary oral fluid test is completed, when possible, from a suspect
  – The secondary test is completely voluntary
  – The voluntary test is sent to the Forensic Fluid Laboratory in Kalamazoo for analysis
    • Shipped overnight by UPS
    • Analysis results are normally returned within 24 hours
• In November 2017, DREs and prosecutors from the five selected counties were trained

• Trained in the following:
  – Laws governing the Oral Fluid Roadside Analysis pilot
  – Policies and procedures of the program and MOA
  – Proper utilization of the oral fluid test instrument
  – Proper procedure to collect independent lab sample
  – Reporting requirements and forms
BLOOD ANALYSIS

- Blood is collected when an arrest is made, either voluntarily or by search warrant
- Blood testing is done by MSP
PROGRAM PROCESS

• Participating DREs shall fully develop probable-cause factors before administering the oral fluid test (SFST, PBT)
• Quality control
• 10-minute observation period
• SoToxa™ test
• Secondary test: forensic fluids
• Blood test
BEST PRACTICE

• DRE officer does not view the SoToxa™ results until the DRE has completed their investigation or evaluation
• DRE officer uses the SoToxa™ results in the affidavit for a blood search warrant
I am requesting that you take a chemical test to check for alcohol and/or controlled substances in your body. IF YOU WERE ASKED TO TAKE OR TOOK A PRELIMINARY BREATH TEST OR ORAL FLUID TEST BEFORE YOUR ARREST, YOU MUST STILL TAKE THE TEST I AM OFFERING YOU.
Phases I and II
PHASE I INFORMATION

- Counties that participated: Berrien, Delta, Kent, St. Clair and Washtenaw
- 31 DREs participated
- 92 oral fluid roadside tests conducted, with one refusal
- 89 drivers were arrested during the first pilot
  - 79 drivers consented to a blood draw
  - eight search warrants were obtained
PHASE I RESULTS

Roadside Oral Fluid Test Results

<table>
<thead>
<tr>
<th>Substance</th>
<th>Positive</th>
<th>Negative</th>
<th>Invalid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amphetamine</td>
<td>10</td>
<td>70</td>
<td>0</td>
</tr>
<tr>
<td>Benzodiazepine</td>
<td>15</td>
<td>50</td>
<td>0</td>
</tr>
<tr>
<td>Cocaine</td>
<td>20</td>
<td>65</td>
<td>5</td>
</tr>
<tr>
<td>Methamphetamine</td>
<td>15</td>
<td>60</td>
<td>0</td>
</tr>
<tr>
<td>Opiates</td>
<td>25</td>
<td>45</td>
<td>5</td>
</tr>
<tr>
<td>THC</td>
<td>20</td>
<td>40</td>
<td>20</td>
</tr>
</tbody>
</table>

Number of Tests
PHASE II RESULTS

- October 1, 2019, to September 30, 2020
- 69 counties had oral fluid cases
- 131 DREs from 65 law enforcement departments participated
- 661 oral fluid incidents
- 547 voluntary oral fluid tests
- 632 blood tests
PHASE II COUNTIES

Michigan Counties Covered by OFRAP II
Expanded Oral Fluid Roadside Analysis Pilot Program

• 59 total counties covered
• 83 total DREs participating
  (30 MSP + 53 agencies)
PHASE II RESULTS

Roadside Oral Fluid Test Results

- Amphetamine
- Benzodiazepine
- Cocaine
- Methamphetamine
- Opiates
- Cannabis (THC)

Legend:
- Positive
- Negative
- Invalid
SoToxa™ COMPARED TO BLOOD METHAMPHETAMINES

- 121 true positives  22 false positives
- 6 false negatives   435 true negatives
- **Accuracy**
  - Estimate: **95.20%**
  - Lower confidence level: **93.20%**
  - Upper confidence level: **96.70%**
SoToxa™ COMPARED TO BLOOD COCAINE

- 59 true positives    27 false positives
- 6 false negatives    501 true negatives
- Accuracy
  - Estimate: 94.40%
  - Lower confidence level: 92.30%
  - Upper confidence level: 96.00%
• Oral fluid has been found to be accurate for purposes of preliminary roadside testing
• It is one of many tools that officers can use during impaired driving investigations
• Roadside oral fluid test results alone do not determine if a driver is impaired or not impaired
ORAL FLUID TESTING IS A TEST TO DETERMINE RECENT DRUG USE

- Oral fluid testing is a test to determine drug use, not impairment
  - SFSTs, DRE evaluation, behavior noted and, poor driving, all equal signs of impairment
- Result can be used to support the DRE officer’s opinion about which drug(s) is/are responsible for the observed impairment
- Oral fluid drug testing is a tool that assists with the DRE investigation, providing real-time chemical test information that can be used by the officer in questioning the subject about their drug use
- SFSTs first, followed by the oral fluid field test
CONCLUSION

• On November 8, 2017, the Oral Fluid Roadside Analysis pilot program officially began

• With the ever-increasing impaired drivers and fatalities, the opioid epidemic, and states legalizing marijuana, it’s a great time to implement the pilot program

• The Michigan State Police and the members of the committee are very proud of the accomplishments so far with the Oral Fluid pilot program

• We look forward to assisting other states and other countries
QUOTE FROM BRIAN SWIFT

“We have worked hard over the past year to turn the horror of losing our mom and dad into saving others. Our pain never goes away, but we know my parents would want to help others, and we think it is worth the fight.”
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