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Recent Drug Law Cases

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Numerous drug law cases have been decided by the North Carolina appellate courts in recent months. These decisions deal with manufacture, possession, sales, trafficking, conspiracy, search and seizure, and illegal prescriptions.

MANUFACTURE AND MEDICAL USE

In State v. Piland, 58 N.C. App. 95 (1982), a medical doctor was tried for the manufacture and felonious possession of marijuana. The marijuana, which was growing on the defendant doctor's property, was observed by a law enforcement officer from an adjoining property owner's yard.

At his trial, the defendant testified that he was growing the marijuana for the purpose of treating a chemotherapy patient for nausea. (And indeed, ample evidence was presented that marijuana is effective for that purpose.) The doctor was found guilty on both charges and appealed from the imposition of a suspended sentence.

Among the issues on appeal was whether the trial court should have charged the jury on G.S. 90-87(15), which provides that "manufacture . . . does not include the preparation or compounding of a controlled substance . . . by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice." The appellate court concluded that G.S. 90-87(15) did not apply to this case because the defendant was doing more than preparing or compounding marijuana--he was in fact growing it. The defendant also relied on the provisions of G.S. 90-101(h),

which provides that "a physician . . . may possess, dispense or administer tetrahydrocannabinols." He argued that this term included marijuana, but the court stated:

> Assuming that tetrahydrocannabinols includes marijuana, we do not believe that a statute which allows a physician to possess it in pharmaceutical form could lead a physician of common intelligence to believe he could grow marijuana and possess it in its raw form [58 N.C. App. at 101].

Defendant's remaining assignments of errors were overruled and his trial court conviction upheld.

State v. Fleming, 52 N.C. App. 563 (1981), concerned the attempted use of a forged prescription in violation of G.S. 90-98 and G.S. 90-108(a)(10). The defendant had presented a prescription for Dilaudid at a Revco drugstore. The prescription, which was purportedly signed by Dr. Mark Dellasega, was on a prescription form of North Carolina Memorial Hospital in Chapel Hill. Dr. Dellasega testified that he did not sign the prescription or authorize anyone to sign his name on the prescription blank. The defendant was duly convicted and sentenced to a prison term.

On appeal the defendant contended that the trial court erred in admitting evidence of previous occasions when he presented prescriptions for Dilaudid to the same pharmacist. The Court of Appeals held, however, that this evidence was competent on at least two grounds: (1) to show the pharamacist's ability to recognize and identify the defendant as being the person who presented the prescription at the time in question; and (2) to show guilty knowledge or intent or a plan or design. In upholding the conviction, the court also stated: "When a defendant is found with a forged paper and is endeavoring to obtain property with it, a presumption arises that he either forged the paper or had knowledge that it was a forgery" [52 N.C. App. at 568].

CONSTRUCTIVE POSSESSION

Several recent cases have involved constructive possession. In State v. Collins, 56 N.C. App. 352 (1982), the defendant was convicted of the felonious possession of marijuana. On appeal he contended that the evidence was not sufficient to sustain his conviction because it did not establish actual or constructive possession of the marijuana. The Court of Appeals, in finding plenary evidence of possession, noted that: (1) defendant paid rent on the house where the drugs were found; (2) he had assumed liability for water

service for the house and had requested that the water service be discontinued; (3) a water bill indicating that the defendant was the party billed and an envelope from a law firm addressed to him at the house in question were found. The court stated, "The fact that the marijuana was found on premises under the control of the defendant, in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession" [56 N.C. App. at 357].

The case of State v. Williams is somewhat unusual because there was no evidence that the defendant had ever been in the house or nearby building where the drugs were found. The North Carolina Supreme Court, in reversing the Court of Appeals, found substantial evidence of constructive possession of the dwelling and outbuilding because: (1) defendant had been seen in the yard; (2) bills addressed to him were found in the house; (3) a bottle of pills bearing his name was in the house; (4) the mailbox in front of the house had his last name on it [No. 454A82-Cumberland (filed Jan. 11, 1983)].

In State v. Reddick, 55 N.C. App. 646, cert. denied, 305 N.C. 398 (1982), the defendant was convicted of felonious possession of marijuana. Officers, searching the premises at 507-B Darden Drive (in Greenville) pursuant to a search warrant, found slightly less than a pound of marijuana located in a bedroom closet. At the time of the search the defendant was present on the premises. The officers also found (1) a marriage certificate of the defendant and his wife; (2) an Employment Security Commission card bearing the defendant's name; (3) an application for a North Carolina driver's license bearing the defendant's name and the address 507-B Darden Drive; and (4) a Division of Motor Vehicles registration card bearing the defendant's name and the address 507 Darden Drive. In upholding the defendant's conviction, the Court of Appeals stated: "This evidence sufficed under the Harvey standard, to present a jury question as to whether defendant was in control of the premises or in such close juxtaposition to the narcotic drugs as to justify a conclusion that they were in his possession" [55 N.C. App. at 649].

In State v. Roseboro, 55 N.C. App. 205 (1981), cert. denied and appeal dismissed, 305 N.C. 155 (1982), the defendant was found guilty of manufacture and possession of marijuana and cocaine. The defendant contended that the State had failed to present sufficient evidence of his possession of the two drugs. On appeal the court noted that law enforcement officers had found: (1) both marijuana and cocaine in a bedroom; (2) cocaine in a pocket of a suit in a bedroom closet; and (3)

marijuana in the water heater located in the kitchen. It was also noted that, at the time of the search, the defendant was present in the house. A letter addressed to the defendant was discovered on the headboard of the bed and a savings book in his name was found in a closet off the bedroom. The appellate court concluded that defendant's possession could be based on his control of the premises in which the drugs were found.

From a reading of the above cases, it can be discerned that no particular set of circumstances will necessarily constitute the control necessary to establish constructive possession. However, ownership or occupancy of the premises where the drugs are located are obviously key elements in proving possession.

SALES

The defendant in State v. Ellers, 56 N.C. App. 683 (1982), was convicted of selling marijuana to a 12-year-old. The minor testified that he had purchased a marijuana cigarette on the Thursday after Hallowe'en. But other prosecution witnesses indicated that the purchase was actually made on the Thursday before Hallowe'en. The defendant contended that a party may not impeach its own witness and evidence that is contradictory is not admissible for purposes of corroboration unless there is only a slight discrepancy between the testimony of the prosecution witness and that offered in corroboration. The Court of Appeals, in upholding the conviction, stated that time was not of the essence, since no statute of limitations was involved.

In State v. Poplin, 56 N.C. App. 304 (1982), the defendant was convicted of aiding and abetting the sale of cocaine. On appeal he contended that there was insufficient evidence to support his conviction. The state's evidence had shown that the defendant remained in the living room of his home while the buyer and an undercover SBI agent got the cocaine from a birdhouse in the back yard. However, the purchase price of $1,200 was paid in the defendant's presence. (Also, the agent had talked by phone to the defendant regarding the sale before the actual transaction.) The Court of Appeals concluded that (a) the defendant was at the scene ready to render assistance with the sale of the cocaine, and (b) this constituted aiding and abetting in the sale.

A question involving the admissibility of evidence arose in State v. Haynes, 54 N.C. App. 186 (1981). In that case the defendant was convicted of the felonious possession of methaqualone. The trial court had permitted the introduction into evidence of papers, removed from defendant's billfold at the time of his arrest, that read "345 decimal plus 1 gram" and

"coke." The defendant contended that this evidence was immaterial and had the sole effect of inciting the prejudice of the jury. In upholding the conviction, the appellate court stated: "In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found."

DELIVERY

The defendant in State v. Pevia was convicted of the felonious sale or delivery of marijuana and amphetamines, among other things. The State failed to introduce evidence as to the quantity of marijuana allegedly delivered by defendant. Counsel for the defendant contended that the transfer of five or more grams of marijuana and the receipt of remuneration for the transfer were essential elements of delivery. In upholding the trial court conviction, the Court of Appeals stated: "Since the transfer of marijuana for remuneration constitutes a delivery in violation of G.S. 90-95(a)(1)--regardless of the amount transferred--the court properly denied defendants' motion to dismiss." [State v. Pevia, 56 N.C. App. 384, 388, cert. denied, 306 N.C. 391 (1982)].

TRAFFICKING

There have been several recent drug trafficking cases. In one of these the primary issue was whether the offense depended on the weight of the pure drug or the weight of the mixture [State v. Tyndall 55 N.C. App. 57 (1981)]. Defendant in that case was convicted of feloniously trafficking in cocaine in violation of G.S. 90-95(h)(3)(a). The weight of the substance in question was 37.1 grams, but only 5.565 grams of this was cocaine---the rest was a noncontrolled (and legal) substance. Defendant contended that the statute under which he was convicted did not prohibit the sale of a mixture unless it contained at least 28 grams of cocaine. The Court of Appeals disagreed, stating that "the quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation of G.S. 90-95(h)(3)(a) [55 N.C. App. at 60]. In other words, it is the weight of the entire mixture, rather than the weight of the controlled substance, that is determinative in this type of drug-trafficking case.

In State v. Anderson, 57 N.C. App. 602 (1982), defendants were charged in four-count indictments as follows: (1) possession of 2,000 pounds or more but less than 10,000 pounds of

marijuana, in violation of G.S. 90-95(h)(1)(c); (2) manufacture of 2,000 pounds or more but less than 10,000 pounds of marijuana, in violation of G.S. 90-95(h)(1)c; (3) conspiracy to possess 2,000 pounds or more but less 10,000 pounds of marijuana, in violation of G.S. 90-95(i); and (4) conspiracy with others to manufacture 2,000 pounds or more but less than 10,000 pounds of marijuana, in violation of G.S. 90-95(i). The trial court dismissed the first and third counts, holding that G.S. 90-95(h)(1) creates only a single felony known as "trafficking in marijuana" and that G.S. 90-95(i) creates a single felony known as "conspiracy to traffic in marijuana." Reversing the trial court, the Court of Appeals stated in part: "We hold that under G.S. 90-95(h) if a person engages in conduct which constitutes possession of in excess of 50 pounds of marijuana as well as conduct which constitutes manufacture of in excess of 50 pounds of marijuana, then the person may be charged with and convicted of two separate felonies of trafficking in marijuana [57 N.C. App. at 606]."

CONSPIRACY

The difficulty of proving a conspiracy case is well illustrated by State v. LeDuc, 306 N.C. 62 (1982). In that case the defendant was found guilty of conspiracy to possess 22.4 pounds of marijuana. Considerable circumstantial evidence indicated that defendant participated in some manner in the possession and delivery of marijuana by boat. His fingerprints were found in several places in the boat, and the jury found that his signature was the one affixed to the agreement when the boat was chartered. (Interestingly enough, the Supreme Court ruled that the jury could make this determination without the benefit of expert testimony.) The Court reversed the conviction, however, because there was no direct evidence that the defendant participated in an unlawful agreement to possess the marijuana being transported.

Another conspiracy conviction was overturned in State v. Hammette, 58 N.C. App. 587 (1982). In that case the defendant had been convicted of conspiracy to sell and deliver over 50 pounds of marijuana. Apparently he had acted as an intermediary between an undercover agent who was offering to buy marijuana and a supplier, but he was not present at the time of the sale. The Court of Appeals, in reversing the conviction, noted that a conspiracy is an unlawful agreement by two or more persons to do an unlawful act or to do a lawful act in an unlawful way. However, if one person merely feigns acquiescence in the proposed criminal activity, no conspiracy exists between the two because there is no mutual understanding or concert of wills. Since one of the alleged conspirators in

this case was actually a law enforcement officer acting in the discharge of his duties, the other person could not be convicted of a conspiracy. The court went on to say: "If an undercover agent acts in conjunction with more than one person to violate the law, his participation will not preclude the conviction of others for conspiracy among themselves" [58 N.C. App. at 589].

EVIDENCE

The defendant in State v. Johnson [Wilkes County No. 81CRS2283 (filed Jan. 18, 1983)] was convicted of trafficking in drugs. The officers seized 123 bales of marijuana but destroyed 121 bales pursuant to a signed order. Two bales and samples from each of the destroyed bales were saved. The defendant's motion to suppress evidence related to the destroyed bales was denied by the trial court. The Court of Appeals, in upholding the conviction, noted that photographs of the bales were taken while the cache was still in defendant's basement and a sample was taken from the center of each bale. Also, the samples were tested twice--once by the SBI and again (at defendant's request) by an independent scientist at North Carolina State University. Both chemists concluded that the material was marijuana.

SEARCH AND SEIZURE

In State v. Hall, 52 N.C. App. 492, cert. denied and appeal dismissed 304 N.C. 198 (1981), defendant was convicted of the felonious possession of LSD. His car had been seized pursuant to a court order, and a search of the vehicle revealed a medicine bottle containing twenty-two LSD pills. On appeal the defendant contended that the officers' search of a closed opaque medicine bottle exceeded the permissible scope of a valid "inventory search" of a lawfully impounded vehicle. The appellate court held that the vehicle had been lawfully seized in the precise manner authorized by G.S. 90-112 but concluded that "this inventory search was unreasonable in its scope and we are compelled to hold that, though the officers were authorized to inventory the vehicles contents, they were not further empowered, without first obtaining a warrant, to go beyond the mere surveying and accounting of items, in terms of whole units, and search a closed container, whose contents were not in plain view, ostensibly for the sake of safeguarding its contents" [52 N.C. App. at 499]. The court also concluded that the inventory procedure was a pretext that concealed an investigatory police motive.