

## DRUGS

### **Trial Court Abused Discretion by Allowing State's Expert to Identify Pills as Controlled Substances Solely by Visual Examination Without Chemical Analysis of Any of the Pills—Ruling of Court of Appeals Is Affirmed**

*State v. Ward*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (17 June 2010), affirming, \_\_\_ N.C. App. \_\_\_, 681 S.E. 2d 354 (18 August 2009).

The defendant was convicted of several controlled substance offenses involving different substances. The state's drug expert testified that he conducted chemical analyses of some of the substances—for example, cocaine and pills determined to be amphetamines. However, other pills allegedly containing other substances were identified solely by a visual examination of their appearance and pharmaceutical markings and a comparison of the information derived from that process to information contained in Micromedex literature used by doctors in hospitals and pharmacies to identify prescription medicines. The court ruled that the trial court abused its discretion in allowing the state's expert to identify these pills as controlled substances solely by visual examination without a chemical analysis of any of the pills. The expert's visual identification of the purported controlled substances was not sufficiently reliable under Rule 702.

The court made the following statements about its ruling. Unless the state establishes that another method of identification is sufficient to establish the identity of a controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. The ruling in this case is limited to Rule 702 and does not affect visual identification techniques used by law enforcement for other purposes, such as conducting criminal investigations. Moreover, common sense limits the scope of chemical analysis that must be performed. In this case, the state submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory. A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures were not at issue. A chemical analysis is required, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration.

### **Officer's Opinion Testimony That Substances Were Marijuana Was Admissible**

*State v. Ferguson*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E. 2d \_\_\_ (15 June 2010).

The defendant was convicted of two marijuana offenses. The court ruled, relying on *State v. Fletcher*, 92 N.C. App. 50 (1988) (officers with appropriate background properly offered opinion testimony that substance was marijuana), the trial court did not err in allowing a law enforcement officer to testify that in his opinion the substances seized from a motor vehicle and the defendant's pocketbook were marijuana. The court stated that the decision in *State v. Llamas-Hernandez*, 363 N.C. 8 (2009) (reversing court of appeals ruling based on dissenting opinion, which stated that officer's opinion testimony that white powder was cocaine was inadmissible), did not cast doubt on the continuing validity of the *Fletcher* ruling.

**(1) Jury Instruction on Counterfeit Controlled Substance Was Not Erroneous**  
**(2) Evidence Was Sufficient to Support Convictions Involving Counterfeit Controlled Substance**

*State v. Bivens*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (1 June 2010).

The defendant sold for twenty dollars to undercover officers a white rock-like substance that the officers believed to be crack cocaine. It was calcium carbonate. The defendant was convicted of three counterfeit controlled substances offenses. (1) The court ruled that the trial court did not err in its jury instruction concerning what constitutes a counterfeit controlled substance. The court rejected the defendant's argument that the instruction was erroneous because it did not include paragraph two of the definition in G.S. 90-87(6)b. The court noted that the statute states that it is *evidence* that the substance has been intentionally misrepresented as a controlled substance if the specified factors are established. That does not require those factors to exist to find that a controlled substance has been intentionally misrepresented. (2) The court ruled that the evidence was sufficient to support the convictions. The defendant approached a vehicle, asked its occupants (the undercover officers) what they were looking for, departed to fill their request for a "twenty," and handed the occupants a little baggie containing a white rock-like substance. These acts were sufficient to prove that the defendant represented the substance as an illegal drug. The court also noted that the state is not required to prove that the defendant knew the substance sold was counterfeit.

**Trial Court Erred in Allowing SBI Drug Chemist to Identify Pills by Visual Inspection Without Performing Chemical Analysis**

*State v. Brunson*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (1 June 2010).

The defendant was convicted of trafficking in hydrocodone by possession and transportation. The court ruled, relying on its ruling in *State v. Ward*, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 354 (18 August 2009), the trial court erred in allowing the state's witness, a SBI drug chemist, to identify pills as hydrocodone, an opium derivative, by visual identification and the use of a Micromedics database. [Author's note: The North Carolina Supreme Court on October 8, 2009, granted the state's petition to review the *Ward* ruling. Thus, the supreme court's future ruling in *Ward* may have a direct impact on the precedential impact of the *Brunson* ruling.]

**Discovery of Odor of Marijuana from Spare Tire in Luggage Area of Chevrolet Suburban Provided Probable Cause to Make Warrantless Search for More Marijuana in Rest of Vehicle, Including Second Spare Tire in Undercarriage of Vehicle**

*State v. Toledo*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (18 May 2010).

An officer noted the odor of marijuana from a spare tire in the luggage area of a Chevrolet Suburban after the defendant had validly consented to a search of the vehicle. The officer had conducted a "ping" test, pressing the tire valve to release some of the air, and noted a very strong odor of marijuana. The officer arrested the defendant for possession of marijuana. The officer then warrantlessly searched a second spare tire located in the undercarriage of the vehicle and noted the odor of marijuana after conducting a ping test. Marijuana was found in both spare tires. At issue was the validity of the search of the second spare tire. The

court ruled, relying on *United States v. Ross*, 456 U.S. 798 (1982), that the officer had probable cause to make a warrantless search for more marijuana in the rest of the vehicle, which included the second spare tire. [Author's note: The court in footnote four appeared to suggest a separate justification for the search of the vehicle, including the spare tire in the undercarriage, under *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (court ruled that officers may search vehicle incident to arrest only if (1) arrestee is unsecured and within reaching distance of passenger compartment when search is conducted; or (2) it is reasonable to believe that evidence relevant to crime of arrest might be found in vehicle), because it was reasonable to believe that the vehicle contained evidence of the crime of arrest, possession of marijuana.]

**(1) Sufficient Circumstantial Evidence Proved That Defendant Knew Packages Delivered to Residence Contained Controlled Substance**

**(2) Trial Court Had Discretion Whether to Make Sentences for Two Drug Trafficking Convictions at Same Trial to Run Concurrently With or Consecutively To Each Other**

*State v. Nunez*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (18 May 2010).

The defendant was convicted of trafficking by possessing marijuana and trafficking by transporting marijuana. Officers discovered 25.5 pounds in two packages at a United Parcel Service hub addressed to "Holly Wright" at an address in Greenville, who no longer lived at the address with the defendant. A controlled delivery was made to the address, the defendant accepted the packages, dragged them into the apartment, and never mentioned to the delivery person that the addressee no longer lived there. The addressee testified that she had not ordered the packages. The defendant told a neighbor that her boyfriend had ordered the packages for her. The defendant did not open the packages, but immediately called her boyfriend to tell him that they had arrived. After getting off the phone with her boyfriend, she acted like she was in a hurry to leave. The boyfriend came to the apartment within thirty-five minutes of the packages being delivered. (1) The court ruled there was sufficient circumstantial evidence to prove that the defendant knew the packages delivered to the residence contained a controlled substance. (2) The court ruled that the trial court had the discretion whether to make the sentences for the two drug trafficking convictions run concurrently with or consecutively to each other. In this case, the trial court erroneously believed that it had to make the sentences run consecutively.

**(1) Sufficient Evidence of Anal Penetration to Support Conviction of First-Degree Statutory Sexual Offense**

**(2) Controlled Substances Indictments Alleging Substance as Schedule IV Benzodiazepene Were Fatally Defective**

*State v. Lepage*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (18 May 2010).

The defendant was convicted of first-degree statutory sexual offense, various controlled substance offenses, and indecent liberties. (1) The court ruled that there was sufficient evidence of anal penetration to support the conviction of first-degree statutory sexual offense. The victim felt nothing out of the ordinary in her private area before arriving at the defendant's house. The defendant drugged a pie that he served to the victim. The defendant later came into the victim's room during the night. She testified that she felt the defendant's hand go down into her pants and up into her body. She drifted in and out of consciousness

and was under the influence of a chemical that caused anterograde amnesia. The next morning, she had a fresh anal laceration that was so sensitive that it caused her to cry out in pain when a doctor examined the area. (2) The indictments charging controlled substance offenses alleged the substance as “benzodiazepines” and as a Schedule IV controlled substance. The evidence at trial showed that the drug was Clonazepam, which is specifically listed in Schedule IV and is a benzodiazepine (the indictment, however, did not allege “Clonazepam”). Benzodiazepine itself is not listed in Schedule IV. Not all benzodiazepines are Clonazepam and not all benzodiazepines are listed in Schedule IV. The court ruled, relying on *State v. Ledwell*, 171 N.C. App. 328 (2005), and *State v. Ahmadi-Turshizi*, 175 N.C. App. 783 (2006), the indictments were fatally flawed because (i) they incorrectly stated that benzodiazepine is listed in Schedule IV; and (ii) they charged the defendant with a category of substances, some of which are not regulated under Schedule IV.

### **When Two Controlled Substances Are Contained in Same Pill, Defendant May Be Convicted and Sentenced for Possession of Both Substances**

*State v. Hall*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (4 May 2010).

The defendant was convicted of possession of a Schedule I controlled substance popularly known as ecstasy and possession of ketamine, a Schedule III controlled substance. The defendant possessed two pills, each determined to contain both ecstasy and ketamine. The court ruled that double jeopardy did not bar the defendant’s convictions and sentences for both substances.

- (1) School Resource Officer’s Searches of Juvenile at School Were Constitutional**
- (2) Juvenile’s Unsolicited and Spontaneous Statement Made While in Custody Was Admissible**
- (3) Officer Was Properly Allowed to Give Lay Opinion Testimony About Drug Transactions**

*In re D.L.D.*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (20 April 2010).

The juvenile was adjudicated delinquent of possession of marijuana with the intent to sell or deliver. An officer was assigned to a high school as a resource officer and had made many arrests for controlled substances at one of the school’s bathrooms. The officer and an assistant principal (hereafter, principal) noticed on monitoring cameras that two male juveniles were entering the bathroom and one was standing outside. The principal told the officer that the situation “looked kind of fishy,” and suggested they check it. As they approached the bathroom, they saw one male student outside the men’s bathroom and another male student outside the women’s bathroom, and both stared at the officer and principal. They then saw the juvenile and two other male students leave the bathroom. When the juvenile saw them, he ran back into the bathroom, followed by the officer and principal. When the officer said that he saw the juvenile put something in his pants, the principal replied, “we need to check it.” The officer frisked the juvenile and found a container used to hold BB gun pellets. Inside the container were three individually-wrapped bags of marijuana worth \$20.00 each. The officer handcuffed the juvenile and took him to a school office. The principal told the officer that they needed to check the juvenile to make sure that he did not have anything else. The officer searched the juvenile and discovered \$59.00 in his pocket. The juvenile immediately stated, “the money was not from selling

drugs,” but was his mother’s rent money. (1) The court ruled the Fourth Amendment reasonableness standard for school searches applied to the searches by the officer, citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), *In re D.D.*, 146 N.C. App. 309 (2001), and other cases, and the searches at the bathroom and school office were constitutional. (2) The court ruled that although the juvenile was in custody and had not been given *Miranda* and statutory warnings, his statement in the school office was admissible because it was unsolicited and spontaneous and not as a result of interrogation. The court cited *State v. Hall*, 131 N.C. App. 427 (1998), and other cases. (3) The officer testified at the juvenile’s trial that based on the officer’s six years as a drug investigator, it was traditional for a person selling drugs to have in his possession both money and drugs. Also, if the person hasn’t started selling yet, he will have more inventory than money. If he is selling well, he will have more money than inventory. The court ruled, citing *State v. Hargrave*, \_\_\_ N.C. App. \_\_\_, 680 S.E.2d 254 (2009), and other cases, that the trial court did not err in allowing the officer to give this lay opinion testimony.

### **When Different Names Relate to the Same Person, The Question Of Identity Is For The Jury To Decide.**

*State v. Johnson*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Mar. 2, 2010). No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to “Detective Dunabro.” The evidence at trial showed that the detective had gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both a married and maiden name, the indictment sufficiently identified the purchaser. The court noted that “[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide.”

### **(1) Insufficient Evidence That Defendant Constructively Possessed Drugs to Support Drug Convictions**

### **(2) Arrested Defendant’s False Confirmation of Officer’s Question About Last Four Digits of Defendant’s Social Security Number Was Sufficient Evidence to Support Identity Theft Conviction**

*State v. Barron*, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 22 (2 March 2010). The defendant was convicted of possession of cocaine, possession of marijuana, and identity theft. (1) The court ruled that there was insufficient evidence that the defendant constructively possessed cocaine or marijuana to support the defendant’s possession convictions. The drugs were found in a house in which the defendant did not live and three other people were in the house when it was searched. The court noted that unless a defendant had exclusive possession of the place where drugs were found, the state must show “other incriminating circumstances” that the defendant had constructive possession, and the court concluded there was insufficient evidence of other incriminating circumstances (see the court’s opinion). (2) Upon arrest, the defendant falsely gave his brother’s name and birth date as his, and falsely confirmed in response to an officer’s question about the last four digits of the defendant’s social security number

(which were his brother's). The court ruled that the defendant's false confirmation of the last four digits of his social security number was sufficient evidence to convict him of identity theft. It was "identifying information" under G.S. 14-113.20(b)(1).

### **Actual Delivery Is Not Required For Drug Trafficking**

*State v. Beam*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 5, 2010).

The term "deliver," used in the trafficking statutes, is defined by G.S. 90-87(7) to "mean[] the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Thus, an actual delivery is not required. In a prosecution under G.S. 90-95, the defendant bears the burden of establishing that an exemption applies, such as possession pursuant to a valid prescription. In this case, the trial court properly denied the defendant's motion to dismiss and properly submitted to the jury the issue of whether the defendant was authorized to possess the controlled substances.

### **NarTest Machine Used by Officer to Determine Substance Was Cocaine Was Not Shown to Be Reliable to Allow Test Result to Be Admitted at Trial**

*State v. Meadows*, \_\_ N.C. App. \_\_, 687 S.E.2d 305 (5 January 2010).

The court ruled that the NarTest machine used by an officer to determine that a substance was cocaine was not shown to be reliable to allow a test result to be admitted at trial. The state did not present any evidence to indicate the machine uses an established technique to analyze controlled substances or that the machine has been recognized by experts in the field of chemical analysis of controlled substances as a reliable testing method. The court stated that it was unaware of any cases in which the machine had been recognized as an accepted method of analysis or identification of controlled substances in North Carolina or in any other jurisdiction in the United States.

### **Drug Loitering Ordinance Was Unconstitutionally Overbroad and Unconstitutionally Vague**

*State v. Mello*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (3 November 2009).

The court ruled, distinguishing *State v. Evans*, 73 N.C. App. 214 (1985) (upholding loitering for prostitution statute, G.S. 14-204.1), that a city drug loitering ordinance was unconstitutionally overbroad and unconstitutionally vague. Unlike G.S. 14-204.1, the city ordinance does not require proof of an intent to violate a drug law, but imposes liability solely for conduct that "manifests" such purpose. Because the ordinance fails to require proof of intent, it attempts to curb drug activity by criminalizing constitutionally permissible conduct. (See the court's opinion for its analysis why a provision in the ordinance was unconstitutionally vague.)

### **Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That There Was Sufficient Evidence to Prove Defendant Constructively Possessed Cocaine**

*State v. Alston*, 363 N.C. 367, 677 S.E.2d 455 (18 June 2009), *affirming*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 383 (18 November 2008). The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that there was sufficient evidence to prove that the defendant constructively possessed cocaine to support the defendant's conviction of trafficking by possessing cocaine. Officers with a search warrant and battering ram entered a home. It was occupied by five people, one of whom was the defendant. Knight owned the home and rented it to Hughes. Knight permitted Hughes and the defendant to sell cocaine from the home and accepted proceeds from the sales. When the officers entered the home, the defendant ran down a hallway and crashed into a locked storm door. An officer saw the defendant make a throwing motion toward the living room, but did not see anything leave the defendant's hand. The defendant retreated and was arrested in the living room. Knight and another person (Bio) were detained in the kitchen. Hughes was detained in the entertainment room. The defendant and another person (Reyes) were detained in the living room. Officers found 7.3 grams of cocaine in the living room and 32.8 grams of cocaine in the entertainment room, where the defendant's revolver was found. Cash found in the entertainment room belonged to Hughes. The defendant admitted to owning the cocaine in the living room, but did not admit to the cocaine in the entertainment room. The North Carolina Court of Appeals noted that because the defendant did not have exclusive possession of the home, the state was required to present sufficient evidence of incriminating circumstances to allow the jury to infer the defendant constructively possessed the cocaine found in the entertainment room. The court concluded there was sufficient evidence. The defendant regularly visited and sold drugs at the home; he was present in the entertainment room before the officers entered the home; he sold cocaine to Reyes in the entertainment room earlier in the evening of the officers' entrance; Hughes did not keep more than one gram of cocaine on his person and kept his cocaine buried in the yard; the defendant was Hughes' drug supplier; and the defendant's revolver was found in the entertainment room.

### **Officers Had Reasonable Suspicion of Defendant's Selling Marijuana to Make Investigative Stop**

*State v. Garcia*, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 555 (16 June 2009). A detective received information in May 2007 and on July 7, 2007, from an anonymous confidential informant that marijuana was being stored in a storage shed at a house at 338 Barnes Road and identified the defendant as the seller of the marijuana. After searching the defendant's name on a law enforcement database, the detective found his picture and information that he lived at that address and had a lengthy history of police contact, including suspicion of drug and firearms offenses. Surveillance on July 26, 2007, at the house revealed two men who left and returned several times to the residence in a black BMW. The detective thought one of the men was the defendant. She also saw both men coming from the area near the shed and enter the BMW. One of them had a black bag with large handles. Other officers who received this information from the detective followed the BMW to a place which was a known drug area. Two people (not the two who were in the BMW) fled when an officer told them he was an officer. Both men who arrived in the BMW, one of whom was the defendant, were placed in handcuffs. The court ruled, distinguishing

State v. Hughes, 353 N.C. 200 (2000), that the officers had reasonable suspicion of the defendant's selling marijuana to make an investigative stop, based on the information from the anonymous confidential informant and the officers' corroboration of that information.

### **Local School Board's Policy of Random, Suspicionless Drug and Alcohol Testing of All Employees Violates Art. I, Sec. 20 of North Carolina Constitution**

*Jones v. Graham County Board of Education*, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 171 (2 June 2009).

The court ruled, distinguishing *Boesche v. Raleigh-Durham Airport Authority*, 111 N.C. App. 149 (1993), that a local school board's policy of random, suspicionless drug and alcohol testing of all employees violated Art. I, Sec. 20, of the North Carolina Constitution that prohibits unreasonable searches.

#### **(1) Sufficient Evidence to Support Conviction of Possessing Cocaine**

#### **(3) Insufficient Evidence to Support Conviction of Maintaining Dwelling for Purpose of Keeping or Selling Cocaine**

*State v. Fuller*, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 824 (21 April 2009).

The court ruled: (1) there was sufficient evidence to support the defendant's conviction of possessing cocaine by showing the defendant's constructive possession of the cocaine; (3) there was insufficient evidence to support the defendant's conviction of maintaining a dwelling for the purpose of keeping or selling cocaine; the state failed to show that the defendant "maintained" the dwelling where the cocaine was found.

### **Court, Per Curiam and Without Opinion, Reverses Ruling of North Carolina Court of Appeals for Reasons Stated in Dissenting Opinion That Trial Judge Erred in Allowing Detective to Offer Lay Opinion That White Powder Was Cocaine**

*State v. Llamas-Hernandez*, \_\_\_ N.C. \_\_\_, 673 S.E.2d 658 (6 February 2009), reversing for reasons stated in dissenting opinion, \_\_\_ N.C. App. \_\_\_, 659 S.E.2d 79 (15 April 2008).

The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals for the reasons stated in the dissenting opinion that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder seized by officers was cocaine. The substance was not subject to preliminary testing. The identification of the powder was based solely on the detective's visual observations. There was no testimony why he believed that the white powder was cocaine other than his extensive experience in handling drug cases. There also was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture. [Author's note: This ruling raises a question about the continuing validity of *State v. Freeman*, 185 N.C. App. 408 (2007) (officer's lay opinion testimony that pills were crack cocaine

was admissible). On the other hand, the rationale for the ruling in Llamas-Hernandez does not appear to affect a ruling that an officer may offer expert opinion testimony that a substance is marijuana; see, e.g., *State v. Fletcher*, 92 N.C. App. 50 (1988).]

**Evidence Was Insufficient to Support Convictions of Trafficking in Methamphetamine By Manufacture and Possession When There Was No Determination of Exact Amount of Methamphetamine in 530 Grams of Liquid; G.S. 90-95(h)(3b) Does Not Include Weight of Mixture Containing Methamphetamine**

*State v. Conway*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 40 (2 December 2008). The defendant was convicted of trafficking by possession of 400 grams or more of methamphetamine and trafficking by manufacture of 400 grams or more methamphetamine. The state's evidence consisted of 530 grams of a liquid that contained a detectable amount of methamphetamine. The exact amount of methamphetamine was not determined. The court noted that the trafficking statutes for methaqualone, cocaine, heroin, LSD, and MDA/MDMA specifically contain the clause "or mixture containing such substance," whereas G.S. 90-95(h)(3b) for methamphetamine (as well as amphetamine) does not contain that clause. The court analyzed the statutes and case law and ruled that the state's evidence was insufficient to support the defendant's trafficking convictions because G.S. 90-95(h)(3b) requires the state to prove the actual weight of the methamphetamine in a mixture. The weight of the mixture itself is not relevant. (Author's note: The court did not discuss whether the use of the term "mixture" ("if the quantity of such substance or mixture involved") at the end of the introductory paragraph in G.S. 90-95(h)(3b) is relevant in determining the legislature's intent and outweighs what may have been the inadvertent omission of the clause "or mixture containing such substance" earlier in the paragraph.)

**(1) Sufficient Evidence to Prove Defendant's Knowing Possession of Marijuana Found in Vehicle**

**(2) Sufficient Evidence to Support Defendant's Conviction of Conspiracy to Traffic in Marijuana**

**(3) Trial Judge Did Not Err in Not Instructing on Lesser Included Trafficking Offenses Based on Lesser Amounts of Marijuana**

*State v. Robledo*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 91 (4 November 2008). The defendant was convicted of (i) trafficking in 50 pounds or more but less than 2,000 pounds of marijuana, and (ii) conspiracy to traffic by possessing 50 pounds or more but less than 2,000 pounds of marijuana. Officers intercepted a box (ox A) at a UPS store that contained 43.8

pounds. They repackaged it and waited for someone to pick it up. The defendant arrived at the store in a Pontiac Grand Am to pick up another box (box B). Box B was not addressed to the defendant, but he had an authorization note from his niece to receive the box. About a half hour later, the defendant returned to the store in the same vehicle with an alleged co-conspirator (not his niece). The coconspirator entered the store and requested box A, produced an authorization note from the defendant's niece, and with the defendant's and a store employee's assistance loaded box A into the Pontiac. Officers stopped the Pontiac as it left the store. Box B as well as box A were in the Pontiac. Box B contained 44.1 pounds of marijuana, for a total of 87.9 pounds of marijuana in both boxes. Both boxes had identical packaging inside containing Styrofoam for padding and laundry detergent to prevent detection of the marijuana. The defendant told an officer that he and his niece had previously lived at the same residence and she had received many packages from UPS. He also acknowledged he knew that he would be collecting two boxes that day. Changing the amounts during the interview, he stated that he was expecting to be paid \$50, \$100, or \$200 just for delivering the boxes. (1) The court ruled that there was sufficient evidence to prove the defendant's knowing possession of marijuana found in the two boxes in the vehicle. The evidence supported an inference that the defendant was aware of what the boxes contained, which in turn proved the defendant's knowing possession of the marijuana. (2) The court ruled that there was sufficient evidence to support the defendant's conviction of conspiracy to traffic in marijuana. The court stated that the state's voluntary dismissal of the conspiracy charge against the coconspirator was irrelevant in determining the sufficiency of evidence to support the defendant's conspiracy conviction. (3) The court ruled that the trial judge did not err in not instructing on lesser included trafficking offenses based on lesser amounts of marijuana. The court noted that the defendant did not present conflicting evidence to suggest that the defendant possessed only one of the two boxes of marijuana to require a lesser-included offense instruction based on an amount less than 50 pounds.

**Two Drug Trafficking Sentences Imposed at Same Sentencing Hearing Are Not Required Under G.S. 90-95(h)(6) to Be Imposed Consecutively to Each Other**

*State v. Walston*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 872 (7 October 2008). The court ruled, relying on *State v. Bozeman*, 115 N.C. App. 658 (1994), that two drug trafficking sentences imposed at the same sentencing hearing are not required under G.S. 90-95(h)(6) to be imposed consecutively to each other.

## **Court Upholds Convictions for Both Felonious Possession of More 1.5 Ounces of Marijuana and Possession of Marijuana With Intent to Sell or Deliver, Based on Same Marijuana**

*State v. Spencer, \_\_\_ N.C. App. \_\_\_, 664 S.E.2d 601 (19 August 2008).*

The court, relying on *State v. Pipkins*, 337 N.C. 431 (1994), and *State v. Perry*, 316 N.C. 87 (1986), and discussing in footnote four the overruling of a contrary ruling in *State v. Pagon*, 64 N.C. App. 295 (1983), upheld the defendant's convictions for both felonious possession of more 1.5 ounces of marijuana and possession of marijuana with intent to sell or deliver, based on the same marijuana.

### **(3) Sufficient Evidence to Support Conviction of Possession of Cocaine**

*State v. Sinclair, \_\_\_ N.C. App. \_\_\_, 663 S.E.2d 866 (5 August 2008).*

The defendant was convicted of possession of cocaine; resisting, delaying, or obstructing an officer; and being an habitual felon. A detective and other officers approached the defendant and others at a local hangout known for drug activity. The detective on prior dates had searched the defendant for drugs. The defendant asked the detective whether he wanted to search him, and the detective responded affirmatively and walked toward the defendant. The defendant quickly shoved both of his hands in his front pockets and then removed them. The defendant made his hands into fists as the detective got closer. The defendant said he had to leave and took off running across an adjacent vacant lot. The officers chased the defendant through the lot. The defendant eventually stopped and laid down. A search revealed a pack of cigarettes and \$170.00 in cash. An officer getting out of a vehicle saw the chase and how the grass had been bent where the chase had taken place. This officer followed the path and found a clear, plastic bag on top of the bent grass. The bag was clean and undisturbed, and cocaine was found inside. (3) The court ruled that there was sufficient evidence to support the defendant's conviction of possession of cocaine based on the following: the defendant's flight upon learning that the detective wanted to search him; the defendant's keeping his hands in front of him during the chase; the bag with the cocaine was found on the precise route of the chase; the bag was on top of the bent grass; and the bag was clean and undisturbed.

### **Defendant's Federal Drug Convictions Did Not Bar State Prosecution of Drug Charges Under G.S. 90-97**

*State v. Delrosario, \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 283 (3 June 2008).*

The court ruled that the defendant's federal drug convictions did not bar the state prosecution of drug charges under G.S. 90-97 (acquittal or

conviction under federal law or another state's law of same act bars prosecution in North Carolina state court). The defendant was convicted in state court for offenses that occurred on July 20, 2001. Although the federal court had considered the defendant's offenses on July 20, 2001, for sentencing purposes, the defendant was neither charged nor convicted in federal court for acts committed on that date.

### **Scope of Defendant's Consent to Search Included Strip Search**

*State v. Neal*, \_\_\_ N.C. App. \_\_\_, 660 S.E.2d 586 (6 May 2008).

The defendant was convicted of several cocaine offenses. The court ruled, relying on the standards set out in *Florida v. Jimeno*, 500 U.S. 248 (1991), and *State v. Stone*, 362 N.C. 50 (2007), that the scope of the defendant's consent to search included a strip search. An officer detected a mild odor of marijuana coming from the passenger side of a car in which the defendant was seated. The defendant consented to a pat-down search of her person to check for weapons and also consented to a search of her purse. A drug dog reacted to the passenger side. While the canine search was being conducted, the defendant acted very nervously and often put her hands in and out of the back of the waistband of her pants. A bulge was noticed in the back of her pants, and she was instructed to keep her hands away from the waistband. An officer informed the defendant that he wanted to conduct a better search to determine what was located in the back of her pants, and he had contacted a female officer for assistance. The female officer conducted a search of the defendant in the women's bathroom, with another officer standing outside the door to prevent others from coming in. The female officer explained to the defendant that she would be conducting a more thorough search. The defendant indicated that she understood. During the search, the defendant was asked to lower her underwear and a package containing cocaine fell out. The female officer testified that the defendant was "very cooperative, extremely cooperative" during the search and never expressed any misgivings about the scope of the search.

### **(2) Insufficient Evidence to Support Defendant's Conviction of Trafficking By Possessing Cocaine**

*State v. Zamora-Ramos*, \_\_\_ N.C. App. \_\_\_, 660 S.E.2d 151 (6 May 2008).

The defendant was convicted of several cocaine offenses based on controlled buys made by an informant under the supervision of a detective. (2) The court ruled that there was insufficient evidence to support the defendant's conviction of trafficking by possessing cocaine. The state failed to produce evidence that the defendant himself transported the cocaine, or alternatively, that the defendant was present or constructively

present when his accomplice transported the cocaine.

**(1) Sufficient Evidence to Prove Existence of “Playground” as Defined in Former Version of G.S. 90-95(e)(10) (Selling, Delivering, Etc., Drug in or Within 300 Feet of Property That Is Playground in Public Park)**

*State v. Tyson, 189 N.C. App. 408, 658 S.E.2d 285 (1 April 2008).*

(1) The court ruled that there was sufficient evidence to prove the existence of a “playground” as defined in the former version of G.S. 90-95(e)(10) to support the defendant’s conviction of possession of marijuana with the intent to sell or deliver in or within 300 feet of property that is a playground in a public park. [Author’s note: Although not applicable to this case, effective for offenses committed on or after December 1, 2007, G.S. 90-95(e)(10) applies to all public parks, whether or not there is a playground there, and within 1,000 feet of them.] The court rejected the defendant’s argument that the three separate apparatuses as defined in the term “playground” must be physically separate from each other.

**Trial Judge Did Not Err Under Rule 404(b) in Admitting Evidence of Drug Transaction Occurring Seven Weeks After Drug Transaction Being Tried Based on Their Substantial Similarities**

*State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1 (5 February 2008).*

The defendant was convicted of several drug offenses. The court ruled that the trial judge did not err under Rule 404(b) in admitting evidence of a drug transaction involving the defendant that occurred after the drug transaction being tried (approximately seven weeks later) based on their substantial similarities. (See the court’s discussion of the substantial similarities.)

**(2) Sufficient Evidence Supported Defendant’s Conviction of Possession of Controlled Substance on Premises of Local Confinement Facility**

**(3) Only One Conviction for Possession of Marijuana Is Allowed Because Defendant Possessed All the Marijuana Simultaneously and for Same Purpose**

*State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464 (15 January 2008).*

The defendant was convicted of two misdemeanor counts of possession of marijuana and one count of possession of a controlled substance (marijuana) on the premises of a local confinement facility. After a vehicle stop in which an officer discovered a marijuana joint and a chunk of marijuana in the front passenger seat, the defendant was arrested and transported to the sheriff’s department where the jail was also located. He

was required to take off his shoes and socks, and marijuana was found in his left shoe. The marijuana found in the defendant's shoe was not sent to the SBI for testing. Instead, an SBI agent with education and experience in forensic analysis was allowed to offer his opinion that the substance was marijuana. (2) The court ruled that sufficient evidence supported the defendant's conviction of possession of a controlled substance (marijuana) on the premises of a local confinement facility. "Premises" of a local confinement facility include secured areas in which arrestees are temporarily detained for search, booking, and other purposes. After appearing before a magistrate, he had been taken before a deputy sheriff to be processed because he was under a secured bond. (3) The defendant was convicted of three marijuana offenses. One for the marijuana found in his vehicle, one for the marijuana in his shoe, and one for possessing the marijuana found in his shoe on the premises of a local confinement facility. The court ruled, distinguishing the facts in *State v. Rozier*, 69 N.C. App. 38 (1984), that only one conviction was allowed because the defendant possessed all the marijuana simultaneously and for the same purpose. The state did not present evidence that the defendant came into possession of the marijuana in his shoe after he was arrested near the vehicle.

### **Trial Judge Did Not Err in Allowing Law Enforcement Officer to Offer Opinion That Seized Pills Were Crack Cocaine**

*State v. Freeman*, \_\_\_ N.C. App. \_\_\_, 648 S.E.2d 876 (21 August 2007). The defendant was convicted of possession of cocaine. The court ruled that the trial judge did not err under Rule 701 in allowing a law enforcement officer to offer his opinion that two of the pills in a pill bottle seized from the defendant were crack cocaine—based on his extensive training and experience with narcotics. The officer testified that during his eight years as an officer he had had contact with crack cocaine between 500 and 1,000 times.

### **Drugs -- Knowingly Maintaining a Dwelling for Keeping or Selling Controlled Substances -- Sufficiency of Evidence**

*State v. Carter*, 184 NC App 706 (06-1322) (17 July 2007) The trial court erred by denying defendant's motion to dismiss the charge of knowingly or intentionally maintaining a dwelling for the keeping or selling of controlled substances because the State presented insufficient evidence for a rational juror to conclude that defendant either lived at the residence or was maintaining the same when: (1) the State presented no evidence indicating that defendant owned the property, bore any expense for renting or maintaining the property, or took any other responsibility for

the residence; (2) the only evidence specifically relating to the maintenance of the property was the utility bill in the name of defendant's brother; (3) the State's evidence indicated only that defendant occupied the property from time to time and provided no indication that defendant kept possession over a duration of time; and (4) the affidavit filed in support of the search warrant indicating that defendant and his brother were in the business of selling cocaine from the residence was not admitted at trial, and is thus immaterial.

### **Positive Urinalysis Result for Marijuana Metabolites Is Insufficient Alone to Support Conviction of Possessing Marijuana**

*State v. Harris, 361 N.C. 400, 646 S.E.2d 526 (28 June 2007), affirming, 178 N.C. App. 723, 632 S.E.2d 534 (2006).*

The court ruled that a positive urinalysis result for marijuana metabolites is insufficient alone to support a conviction of possessing marijuana. [Author's note: The other ruling by the North Carolina Court of Appeals in this case was not reviewed by the North Carolina Supreme Court and remains a valid precedent: defendant's positive urine test for cocaine and a witness's testimony that she saw the defendant snort cocaine was sufficient evidence to support his conviction of possessing cocaine.]

### **Insufficient Evidence to Support Conviction of Conspiracy to Traffic in Cocaine**

*State v. Euceda-Valle, 182 N.C. App. 268, 641 S.E.2d 858 (20 March 2007).*

The defendant was convicted of trafficking by possessing over 400 grams of cocaine and conspiracy to traffic in cocaine by transporting over 400 grams of cocaine. The defendant was stopped for a traffic offense, and cocaine was found in the vehicle's trunk. There also was a passenger in the vehicle. The court ruled there was insufficient evidence to support the trafficking conspiracy conviction. There was no evidence of: (1) conversations between the defendant and passenger; (2) unusual movements or actions by either of them; (3) large amounts of cash on the passenger; (4) possession of weapons; or (5) anything else suggesting an agreement.

### **1. Drugs-Sale and delivery of cocaine-Sufficiency of indictment- failed to name the person**

*State v. Calvino 179 NCA 219 (2006)*

An **indictment for the sale and delivery of cocaine was fatally defective** where the indictment alleged that defendant sold cocaine to a confidential source of information but **failed to name the person to whom defendant**

**sold cocaine**, and it is undisputed that the State knew the name of the individual to whom defendant sold the cocaine in question.

## **2. Drugs-Keeping motor vehicle for purpose of selling controlled substance-motion to dismiss-Sufficiency of evidence**

*State v Calvino 179 NCA 219 (2006)*

The trial court did not err by denying defendant's motion to dismiss the charges of knowingly keeping a motor vehicle for the purpose of selling a controlled substance, because: (1) the focus of the inquiry is on the use, not the contents, of the vehicle; (2) although defendant contends the primary use of his vehicle was as a work van for his legitimate construction business, he cited no cases in support of his primary use argument and also did not testify, present witnesses, or offer evidence about his construction business or vehicle; and (3) a police informant testified that he was sitting in defendant's van when defendant sold him cocaine, and a week later defendant attempted to get defendant to get into the informant's car but instead the informant got into defendant's vehicle.

## **3. Constitutional Law-Double jeopardy-Multiple counts of keeping motor vehicle for keeping or selling controlled substance-Continuing offense**

*State v Calvino 179 NCA 219 (2006)*

The trial **court violated defendant's right** against double jeopardy by entering judgment on multiple counts of keeping a motor vehicle for the purpose of keeping or selling a controlled substance, because the **offense is a continuing offense**.

## **4. Narcotics-Restitution amount**

*State v Calvino 179 NCA 219 (2006)*

The trial **court erred** when it ordered defendant to pay restitution in a cocaine case without sufficient evidence to support such an award, because: (1) **defendant did not stipulate** to the amounts on the State's restitution sheet; and (2) **no evidence was introduced** at trial or at sentencing in support of the calculation of these amounts.

## **5. Evidence-Prior crimes or bad acts-Motive, opportunity, intent, and knowledge**

*State v Calvino 179 NCA 219 (2006)*

The trial court did not abuse its discretion in a double possession with intent to sell and deliver cocaine, selling and delivering cocaine, trafficking in cocaine by possession, and keeping or maintaining a motor

vehicle for the purpose of keeping or selling a controlled substance case by **admitting evidence of other crimes including defendant attending a yearly party in the mountains for drug users and sellers**, because: (1) after defense counsel objected, the trial court held a voir dire in the absence of the jury and determined that it would allow the evidence for the limited **purpose of showing defendant's motive, opportunity, intent, and knowledge**; (2) the trial court instructed the jury on the limited purpose for which the evidence was being received; and (3) presuming error, such error would not have prejudiced defendant given the other evidence presented in this case.

#### **4. Drugs--possession of cocaine with intent to sell and deliver--possession of marijuana\_ -motion to dismiss--sufficiency of evidence**

*State v Hart 179 NCA 30(2006)*

The trial court did not err by denying defendant's motion to dismiss charges of possession of cocaine with intent to sell and deliver and possession of marijuana at the close of the State's evidence and at the close of all evidence, because: (1) when controlled substances are found on the premises under the control of an accused, this fact 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; (2) the State may overcome a motion to dismiss or motion for judgment of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same were in his possession; (3) although defendant did not have exclusive possession of the premises, as shown by the fact that police found rental receipts in the name of defendant and others in another person's name, other incriminating circumstances existed such as defendant's presence on the premises, the fact that the receipts existed and were found in a dresser drawer at the time of the search of the premises, the miscellaneous drug paraphernalia on the premises, and the fact that defendant had \$2,609 in cash on him in small bills at the time of the search; (4) the State presented evidence that defendant was in close proximity to the controlled substances at the time of the raid in order to show constructive possession; and (5) the evidence including the state of the premises, the drug paraphernalia found on the premises, and the large amount of cash on defendant constitute substantial evidence of the element of defendant's intent to sell and deliver.

#### **5. Drugs\_ -maintaining dwelling for purposes of unlawfully keeping or selling controlled substances\_ -motion to dismiss--sufficiency of evidence--totality of circumstances**

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for the purposes of unlawfully keeping or selling controlled substances at the close of the State's evidence and at

the close of all evidence, because: (1) under the totality of circumstances, there was substantial evidence including that police officers found receipts for rent and utility bills in a dresser drawer of the residence that were addressed to defendant, and defendant was on the premises at the time police executed the search warrant; and (2) although the police found receipts in another person's name, when viewed in the light most favorable to the State, there was sufficient evidence that defendant kept or maintained the premises such that the trial court did not err in denying defendant's motions to dismiss.

#### **6. Drugs--instruction--acting in concert**

*State v Hart 179 NCA 30(2006)*

The trial court did not err in a possession of cocaine with intent to sell and deliver, intentionally maintaining a building for the purpose of unlawfully keeping or selling controlled substances, and possession of marijuana case by giving an instruction on acting in concert, because the evidence sufficiently established that: (1) the State recovered rent receipts for the premises, with some of the receipts addressed to defendant and other receipts addressed to another man; (2) both men were on the premises in the same room and in close proximity to the drugs at the time of the raid; and (3) officers found defendant with \$2,609.00 and the other man with \$200 at the time of the raid.

#### **7. Drugs--instruction--constructive possession**

*State v Hart 179 NCA 30(2006)*

The trial court did not err in a possession of cocaine with intent to sell and deliver, intentionally maintaining a building for the purpose of unlawfully keeping or selling controlled substances, and possession of marijuana case by an instruction on constructive possession, because: (1) the instruction is warranted if the evidence shows defendant, while not having actual possession, has the intent and capability to maintain and control dominion over the narcotics; and (2) there was sufficient evidence for the instruction.

#### **8. Drugs--intentionally keeping or maintaining a building for the purpose of unlawfully keeping or selling controlled substances--failure to instruct on lesser-included offense--misdemeanor keeping and maintaining a dwelling for controlled substances**

*State v Hart 179 NCA 30(2006)*

The trial court did not err in a prosecution for intentionally maintaining a building for the purpose of unlawfully keeping or selling controlled substances by denying defendant's motion to charge the jury on the lesser-included offense of misdemeanor maintaining a dwelling for controlled substances, because: (1) where the State's evidence is positive as to each

element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required; and (2) the evidence in the case, including defendant's receipts relating to the premises, the drug paraphernalia located on the premises, and the large quantity of cash on defendant's person support an instruction that defendant acted intentionally and sufficiently established that no instruction on a lesser-included offense was required.

### **1. Drugs\_positive urine test\_corroborating evidence required\_insufficient evidence of marijuana possession**

*State v Harris 178 NCA 723 (2006)*

**A positive urine test, without more, does not satisfy the intent or knowledge requirement inherent** in the statutory definition of possession. Here, the state presented no corroborating evidence of marijuana possession.

### **2. Drugs\_cocaine\_positive urine test\_corroborating evidence**

*State v Harris 178 NCA 723 (2006)*

There was sufficient evidence to support a conviction for the possession of cocaine where a positive urine test gave rise to the inference that defendant used cocaine and testimony from a **witness who saw defendant snort cocaine provided corroborating evidence.**

### **1. Drugs-Cocaine transportation-No evidence that cocaine was moved**

*State v. Williams 177 NCA 725 (2006).*

The trial **court erred by not dismissing** a charge of **trafficking in cocaine by transportation** where the cocaine was found in an automobile that was in a parking space and stationary during the law enforcement operation. The State presented **no evidence of how the vehicle arrived, or that defendant moved the cocaine from one place to another.**

### **3. Evidence\_shotgun\_found in drug house\_relevant**

*State v Boyd 177 NCA 165 (2006)*

A shotgun found in a house in which drugs were found was **properly admitted as relevant to charges of possession and trafficking cocaine** and a jury could have found the shotgun consistent with the charge of maintaining the dwelling for keeping or selling cocaine. Defendant did not specifically demonstrate unfair prejudice

### **Drugs-Trafficking-Awareness of illicit substance-Testimony presented-Instruction**

## **erroneously denied**

*State v. Lopez, 176 NCA 538 (2006)*

There was **plain error** and a defendant convicted of trafficking in heroin was entitled to a new trial where **he testified that he was not aware of the heroin in a refrigerator** a third party had paid him to receive, he properly **requested an instruction that he was guilty only if he knew the refrigerator contained an illicit substance**, and he did not receive that instruction. **(This only applies if Defendant alleges not knowing)**

## **Drugs\_indictment\_3,4 methylenedioxyamphetamine correct name is a must**

*State v Ahmadi-Turshizi 175 NCA 783 (2006)*

Defendant's convictions for offenses involving methylenedioxyamphetamine (MDMA) were vacated where the indictment did not include "3,4," as it was listed in N.C.G.S. § 90-89. Schedule I does not include any substance which contains any quantity of "methylenedioxyamphetamine."

## **1. Constitutional Law; Evidence\_laboratory report\_admission without lab tech--right to confront witnesses**

*State v Cao, 175 NCA 434 (2006)*

**Laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records** (and thus **admissible without the technician**) only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents is objective and does not involve opinions or conclusions drawn by the analyst. The record in this case did not contain enough information about the procedures involved in identifying cocaine to allow a determination of whether that portion of the test meets the criteria. However, there was no prejudice because defendant did not challenge the identity of the substance at trial, but portrayed himself instead as a homeless person making a delivery.

## **1. Evidence--lay opinion--identification of substance as methamphetamine**

*State v Yelton, 175 NCA 349 (2006)*

The trial court did not abuse its discretion in a second-degree murder, possession with intent to sell and deliver methamphetamine, and sale and delivery of methamphetamine case by allowing lay witness testimony that the substance given by defendant to an individual who died was methamphetamine, because: (1) the testimony was admissible under N.C.G.S. § 8C-1, Rule 701 since it was rationally based on the witness's six years of experience with methamphetamine and her perceptions while smoking the substance; (2) the witness's uncertainty as to the precise

weight and cost of an “eightball” was irrelevant; and (3) the witness's testimony was helpful for a clear understanding of her testimony or to the determination of a fact in issue.

#### **4. Drugs--possession of controlled substance with intent to sell or deliver--sale and/or delivery of controlled substance--motion to dismiss--sufficiency of evidence**

*State v Yelton, 175 NCA 349 (2006)*

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charges of possession of a controlled substance with intent to sell or deliver, and the sale and/or delivery of a controlled substance, because: (1) as a witness's identification of the substance as methamphetamine was determined by the Court of Appeals to be admissible under N.C.G.S. § 8C-1, Rule 701, the evidence was sufficient to meet the State's burden of proof regarding this element; (2) while the State presented no evidence that defendant sold the deceased methamphetamine for money, **the State presented substantial evidence that defendant provided the deceased with methamphetamine in exchange for other consideration on that date;** and (3) while some of the other statements defendant gave detectives were exculpatory and defendant has challenged the credibility of a witness's testimony, the trial court was required to view the evidence in the light most favorable to the State when ruling on defendant's motion to dismiss.

#### **1. Drugs \_conspiracy to traffic in more than 400 grams of cocaine-confession--sufficiency of evidence**

*State v Sims, 174 NCA 829 (2005)*

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to traffic in more than 400 grams of cocaine, because: (1) **our Supreme Court has held that in noncapital cases where the State relies upon defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the corpus delicti of the crime charged if the accused's confession is supported by independent evidence tending to establish its trustworthiness;** (2) defendant's statements that he had purchased a half kilo (500 grams) of cocaine from a Mexican on three occasions provided sufficient evidence; and (3) two items of independent proof establish the trustworthiness of defendant's statement including that a substantial quantity of cocaine was found in defendant's possession at the time of his arrest and a controlled buy was conducted prior to the search of defendant's home in which an informant purchased twenty-six grams of cocaine from defendant in his home.

#### **2. Drugs--possession of marijuana\_premises of local confinement facility\_secured search area**

*State v Dent, 174 NCA 459 (2005)*

The trial court properly denied defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility in violation of N.C.G.S. § 90-95 (e)(9) where the evidence tended to show that **defendant possessed marijuana in a secured area of the Forsyth County Law Enforcement and Detention Center provided for the detention and search of individuals awaiting an appearance before the magistrate.**

#### **4. Drugs--maintaining a dwelling for keeping and selling cocaine--motion to dismiss-- - sufficiency of evidence**

*State v Shine, 173 NCA 699 (2005)*

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for keeping and selling cocaine at the close of the State's evidence, because: (1) a reasonable jury could conclude that defendant kept or maintained the property based on evidence that defendant occupied the property for a period of time and paid for cable services, and defendant's probation officer visited him at the property five weeks prior to the execution of the search warrant at which time defendant confirmed it was his residence; and (2) although neither a large amount of cash was found in the residence nor did defendant admit to selling cocaine, there was other evidence that indicated controlled substances were being sold from the residence including a set of digital scales found on the same dresser as the two plastic bags of cocaine, defendant's ID card was found six inches away from the two bags of cocaine, and three pieces of scrap paper were found in the bedroom listing initials and corresponding dollar amounts which the jury could infer was a list of customers and their orders or debts.

#### **1. Drugs--possession with intent to manufacture, sell, and deliver methamphetamine\_ - motion to dismiss--sufficiency of evidence**

*State v Alderson, 173 NCA 344 (2005)*

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to manufacture, sell, and deliver methamphetamine, because: (1) defendant testified that at age forty-nine, she knew she was assisting her husband in the manufacture of methamphetamine by ordering chemistry ware for him; (2) there was ample expert testimony that numerous items found within and just outside defendant's residence were consistent with the manufacture of methamphetamine; and (3) although defendant claims the 2.9 grams of methamphetamine found at her residence was for personal use, the State presented expert testimony that indicated the items found were consistent with material used in manufacturing methamphetamine and packaging

controlled substances and that plastic bags such as those found at defendant's residence can be used to package controlled substances into smaller amounts for sale.

## **2. Drugs--manufacturing methamphetamine within 300 feet of a school\_ -motion to dismiss--sufficiency of evidence**

*State v Alderson, 173 NCA 344 (2005)*

The trial court did not err by denying defendant's motion to dismiss the charge of manufacturing methamphetamine within 300 feet of a school even though defendant contends there was insufficient evidence of manufacturing at the residence where there was testimony and physical evidence that manufacturing occurred in places other than the residence, because: (1) the jury could reasonably infer from the evidence that defendant used items seized from her outbuilding, such as tubing that had methamphetamine residue, acetone, and PVP piping together with items found in her residence to manufacture methamphetamine; and (2) the State presented physical evidence seized from inside and around defendant's residence that was consistent with methamphetamine manufacturing.

## **2. Drugs--trafficking in marijuana by possession, manufacture, and transportation--conspiracy to traffic marijuana--maintaining a place to keep a controlled substance--motion to dismiss--sufficiency of evidence**

*State v. Harrington 171 NCA 17 (2005)*

The trial **court did not err** by denying defendants' motions to dismiss the charges of **trafficking in marijuana by possession and manufacture, the conspiracy charges, and the charge of maintaining a place to keep and sell marijuana**, but erred by denying defendants' motion to dismiss the charges of trafficking in marijuana by transportation, because: (1) the evidence of drug paraphernalia found in various areas of the house where both defendants resided and the testimony of a coparticipant that both defendants were engaged in the sale of marijuana and that both had access to the garage was sufficient for the issue of possession to survive a motion to dismiss; (2) evidence of scales and plastic bags found with marijuana is sufficient evidence for the issue of manufacturing to be submitted to the jury; (3) **there was insufficient evidence that defendants had carried or moved the marijuana from one place to another for the transportation charges**; (4) the State presented a number of different acts which when taken together amount to substantial evidence that defendants had agreed to distribute marijuana for the conspiracy charge; and (5) although one defendant contends that neither the jury nor the trial court specifically found that he intentionally violated N.C.G.S. § 90-108(a) and thus the violation should have only been a Class 1 misdemeanor instead of a Class 1 felony, defendant did not present an argument in support of this assignment of error, defendant did not object to the jury instructions at

trial nor did he assign them as error, and by finding defendant guilty of maintaining a place for keeping controlled substances, the jury inherently found defendant did so intentionally.

### **1. Drugs--possession with intent to sell diazepam--30 pills--insufficient evidence of intent**

*State v. Sanders 171 NCA 46 (2005) Affirmed per curium, 360 NC 170 (2005)\**

There was **insufficient evidence of intent to sell diazepam** where the only evidence was **thirty pills found in defendant's bedroom**. Although the pills were found in a plastic bag rather than a prescription bottle, no officer testified that the packaging of the pills was indicative of intent to sell. The case was **remanded for sentencing on the lesser included offense of misdemeanor possession of diazepam**.

### **3. Evidence--hearsay--neighborhood had reputation for drug use and drug sales**

*State v. English 171 NCA 277 (2005)*

The trial **court did not err** in a sale, delivery, and possession with intent to sell or deliver a controlled substance case by **allowing an officer to testify that the neighborhood in which defendant was arrested had a reputation as a heavy, heavy area for drug use and drug sales, because:** (1) the testimony was prompted by a question by the State as to why the officer was in the neighborhood; (2) the **statement was offered to explain why the officer subsequently solicited drugs from a pedestrian in that neighborhood, and not as an assertion that the neighborhood was, in fact, known for its heavy drug traffic;** and (3) even if the evidence was considered to be inadmissible hearsay, its admission did not require a new trial due to the overwhelming evidence of defendant's guilt including an officer's testimony about defendant's role in the drug sale, the laboratory analysis proving the substance was crack cocaine, and defendant's possession of a twenty dollar bill.

### **1. Drugs--felonious possession of a controlled substance--improper indictment**

*State v. Ledwell 171 NCA 328 (2005)*

The trial court lacked jurisdiction to convict defendant of felonious possession of a controlled substance because the indictment which alleged possession of **methylenedioxyamphetamine failed to allege a substance listed in Schedule 1 of N.C.G.S. § 90-89**.

### **2. Drugs--possession with intent to manufacture, sell, or deliver cocaine--motion to dismiss--intent to sell or deliver drugs**

*State v. Nettles 170 NCA 100 (2005)*

The trial **court erred by denying defendant's motion to dismiss the charge of possession with intent to manufacture, sell, or deliver cocaine based on insufficient evidence** to show defendant intended to manufacture, sell, or deliver the cocaine found on the premises, and the case is remanded for resentencing on the lesser-included charge of possession of cocaine, because: (1) a controlled substance's substantial amount may be determined by comparing the amount possessed to the amount necessary to constitute a trafficking offense, and N.C.G.S. § 90-95(h)(3) provides that in order to be guilty of trafficking cocaine, an individual must possess at least twenty-eight grams or more of cocaine or any derivative thereof; (2) defendant possessed four to five crack cocaine rocks which weighed 1.2 grams, or .04% of the requisite amount for trafficking, and thus it cannot be inferred that defendant had an intent to sell or distribute from such a de minimus amount alone; (3) the State was required to present either direct or circumstantial evidence of an intent to sell, and there was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs; (4) defendant's actions were not similar to the actions of a drug dealer when he was home sick with a cold, the drugs were found outside his home in a parked car, and there was not a large amount of cash found; (5) although officers testified that they found a safety pin that is typically used by crack users to clean a crack pipe, there were no other drugs or drug paraphernalia typically used in the sale of drugs found on the premises; (6) viewed in the light most favorable to the State, the evidence tended to indicate that defendant was a drug user instead of a drug seller; and (7) a deputy's opinion testimony about the four to five rocks of crack cocaine, without other circumstantial evidence of defendant's intent, is insufficient to submit the issue of intent to sell and deliver to the jury.

### **1. Drugs--possession with intent to sell--drugs found on companion**

*State v. Peoples 167 NCA 63 (2004)*

A motion to dismiss a prosecution for possession of crack cocaine with intent to sell was correctly denied where the cocaine was not found on defendant's person when he was arrested. Testimony established an unbroken chain of possession from defendant to his girlfriend, from whom the cocaine was recovered.

### **1. Drugs--possession of cocaine with intent to sell--sufficiency of evidence--intent to sell**

*State v. Battle 167 NCA 730 (2005)*

The trial **court erred by failing to dismiss the charge of possession of cocaine with intent to sell** and the case is remanded for resentencing on

the lesser-included offense of possession of cocaine because **although the State presented substantial evidence as to the element of constructive, if not actual, possession of the cocaine found in the motel room, the State presented little evidence supporting defendant's alleged intent to sell cocaine.**

## **2. Drugs--intentionally keeping and maintaining room for purpose of selling cocaine--motion to dismiss--sufficiency of evidence**

*State v. Battle 167 NCA 730 (2005)*

The trial **court erred by failing to dismiss the charge of intentionally keeping and maintaining a room** for the purpose of selling cocaine, because: (1) only 1.9 grams of compressed powder cocaine, little enough to have been for personal use only according to the State's own chemist, was found; (2) the investigators found no implement with which to cut the cocaine, no scales to weigh cocaine doses, and no containers for selling cocaine doses in the motel room; and (3) investigators searched defendant's car and found neither drugs nor paraphernalia.

## **1. Drugs--possession--constructive--hand movement under blanket**

*State v. Turner 168 NCA 152 (2005)*

There was **sufficient evidence of constructive possession** of cocaine where defendant and his codefendant appeared to officers searching a house to be passing a tube of crack cocaine back and forth under a blanket which was between them on the loveseat on which they were sitting.

## **2. Drugs--intent to sell--deputy's opinion of normal amount for personal use--insufficient**

*State v. Turner 168 NCA 152 (2005)*

There was **insufficient evidence of intent to sell cocaine where the only evidence of intent was a deputy's testimony that the amount of crack found was more than most people would "normally" or "generally" carry for personal use.** However, a conviction for possession with intent to sell necessarily includes the lesser offense of possession.

## **Fourth Amendment Requires Only That Officer Make Arrest Based on Probable Cause That Crime Was or Is Being Committed; Court Rejects Requirement That Offense Establishing Probable Cause Must Be Closely Related To, and Based on Same Conduct as, Offense Officer Identified When Arrest Occurred**

*Devenpeck v. Alford December 13, 2004*

Based on information that the plaintiff had impersonated a law enforcement officer while using his vehicle to stop a motorist, an officer

stopped the plaintiff's vehicle to investigate. The officer's suspicions about the plaintiff's impersonating an officer increased based on information learned after the stop. Another officer joined the stopping officer and discovered that the plaintiff had been taping his conversations with the two officers. The two officers discussed the possible violations to charge the plaintiff—a violation of state law concerning the taping of the conversations, impersonating an officer, and making a false representation to the officer—and arrested the defendant for the state law taping violation. However, a state appellate court ruling at the time of this arrest had clearly established that the plaintiff's taping was not unlawful. The plaintiff sued the officers for making an arrest without probable cause under the Fourth Amendment. A federal appellate court ruled that the officers did not have probable cause to arrest—it rejected the officers' claim that there was probable cause to arrest for impersonating an officer and making a false representation to an officer, because those offenses were not "closely related" to the offense (illegal taping) identified by the officers when they arrested the plaintiff. The Court reversed the federal appellate court's ruling. The Court ruled, relying on *Whren v. United States*, 517 U.S. 806 (1996), and *Arkansas v. Sullivan*, 532 U.S. 769 (2001), that the Fourth Amendment requires only that an officer arrest a person based on probable cause that crime was or is being committed. The Court rejected a requirement that an offense establishing probable cause must be closely related to, and based on same conduct as, the offense the arresting officer identified when the arrest occurred. The Court stated that an officer's subjective reason for making an arrest need not be the criminal offense for which the known facts provide probable cause. [Author's note: The Court's ruling effectively overrules the "sufficiently related" analysis in *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 617 (2000).]

**1. Drugs—trafficking in cocaine--federal conviction of unlawful distribution--state prosecution barred**

*State v. Brunson* 165 NCA 667 (2004)

N.C.G.S. § 90-97 **barred the prosecution of defendant in state court for trafficking in cocaine after defendant was convicted in federal court of unlawful distribution of cocaine under federal law for the same transactions** that formed the basis for the trafficking charges. The “same act” as used in N.C.G.S. § 90-97 focuses the relevant analysis on the underlying actions for which defendant is prosecuted at the state and federal levels rather than on the elements of the offenses.

**2. Drugs--conspiracy to traffic in cocaine--federal conviction of unlawful distribution--state prosecution not barred**

*State v. Brunson* 165 NCA 667 (2004)

N.C.G.S. § 90-97 **does not bar the prosecution of defendant in state**

**court for conspiracy to traffic in cocaine by sale after defendant was convicted in federal court of unlawful distribution of cocaine** because the federal statute under which defendant was convicted only criminalizes the acts of manufacturing, distributing, dispensing or possession with the intent to engage in one of those acts; **conspiracy is separately prohibited by another federal statute; and defendant was not charged in federal court under the conspiracy statute.**

**1. Drugs--maintaining vehicle for keeping or selling controlled substances--motion to dismiss--plain error analysis**

*State v. Lane 163 NCA 495 (2004)*

The trial court did not commit plain error by failing to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances based on the holding in *State v. Best*, 292 N.C. 294 (1977), because that case focused solely on the role of medical practitioners and there is no indication that it applies to laymen.

**2. Drugs--maintaining vehicle for keeping or selling controlled substances--motion to dismiss--sufficiency of evidence**

*State v. Lane 163 NCA 495 (2004)*

The trial **court erred by denying defendant's motion to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances** because the evidence does not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor is there evidence that defendant had used the vehicle on a prior occasion to sell cocaine.

**2. Drugs--trafficking in marijuana--instructions--ten pounds or more**

*State v. Trejo 163 NCA 512 (2004)*

Jury verdicts for trafficking in marijuana by possession and transportation were ambiguous and were remanded where the jury was erroneously instructed that proof of possession of ten pounds or more was needed (the statute does not cover possession of exactly ten pounds) and the evidence could support the inference that defendant possessed ten pounds.

**Drugs--trafficking in marijuana--motion to dismiss--sufficiency of evidence--weight**  
\*\*\*\*\*

*State v. Gonzales 164 NCA 512 (2004)*

A de novo review revealed that the trial court erred by granting defendant's motion to dismiss the two trafficking in marijuana charges based on alleged insufficient evidence that the amount seized was above the statutory threshold of ten pounds provided in N.C.G.S. § 90-

95(h)(1)(a), because: (1) the **correct weight is that at seizure, thus containing its natural moisture**; (2) the “usable or suitable for consumption” standard is not within North Carolina’s statutory definition of marijuana; and (3) defendant is free to argue at trial that the 6.9-pound weight taken of the marijuana at the State Bureau of Investigation is evidence that there was excess water or other extraneous debris in the first recorded weight of 25.5 pounds for the freshly cut marijuana.

### **1. Drugs--possession of cocaine--felony--habitual felon support\*\*\*\*\***

*State v. Jones 358 NC 473 (2004)*

Possession of cocaine is a felony under N.C.G.S. § 90-95(d)(2) and can therefore serve as an underlying felony to an habitual felon indictment because the language of N.C.G.S. § 90-95(d)(2), the statute’s legislative history, the terminology used in other statutes, and the General Assembly’s acquiescence in the long-standing practice in our criminal justice system of classifying possession of cocaine as a felony all indicate the intent of the General Assembly to classify possession of cocaine as a felony offense.

### **3. Drugs--possession of drug paraphernalia--motion to amend indictment--motion to dismiss**

*State v. Moore 162 NCA 268 (2004)*

The trial **court erred** by granting the State’s motion to amend a possession of drug paraphernalia indictment by striking “a can designed as a smoking device” and replacing it with “drug paraphernalia, to wit: a brown paper container,” and by denying defendant’s motion to dismiss that charge, because: (1) the amendment constituted a **substantial alteration of the indictment** when common household items and substances may be classified as drug paraphernalia, and a defendant must be apprised of the item or substance in order to amount a defense; and (2) no evidence of a can designed as a smoking device was presented.

### **2. Drugs--possession with intent to sell or deliver cocaine--motion to dismiss--sufficiency of evidence**

*State v. Davis 160 NCA 693 (2003)*

The trial court did not err by denying defendant’s motion to dismiss the charge of possession with intent to sell or deliver cocaine at the close of all evidence, because: (1) the amount of cocaine found on defendant far exceeded the amount a typical user would possess for personal use; (2) the cocaine was packaged separately and an officer indicated that drug dealers often keep cocaine in individual packages so that it is readily

available for sale; and (3) the drugs were found in close proximity to the money that was also seized.

**4. Drugs--trafficking in cocaine by possession--trafficking in cocaine by transportation--motion to dismiss--sufficiency of evidence**

*State v. Baldwin 161 NCA 382 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine by possession and trafficking in cocaine by transportation, because: (1) an inference of defendant's knowledge of the presence of cocaine in the pertinent package can be drawn from his capability and intent to control the package by taking it inside his residence, placing it in a car, and then moving it to another car; and (2) surveillance equipment, guns, and plastic bags containing traces of cocaine were found in the residence. **See Farb p. 21**

**5. Drugs--possession of marijuana with intent to sell or deliver--motion to dismiss--sufficiency of evidence**

*State v. Baldwin 161 NCA 382 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charge of possession of marijuana with intent to sell or deliver, because: (1) the marijuana, along with surveillance equipment and other drug paraphernalia, was found in a common area of a house that was listed on defendant's driver's license and car registration as his home address; (2) defendant received mail at this address; and (3) although defendant shared the house with at least one other individual, a reasonable inference may be drawn that defendant had the power to control the use and disposition of the substance since it was located in a common area of the residence.

**6. Drugs--conspiracy to traffic in cocaine--motion to dismiss--sufficiency of evidence**

*State v. Baldwin 161 NCA 382 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to traffic in cocaine, because: (1) defendant admitted to living with another person and also admitted the house had surveillance equipment in place; and (2) defendant signed for the package that contained cocaine, placed it in his car, and then moved it to another car which was subsequently driven away by his roommate.

**7. Drugs--maintaining dwelling for purpose of keeping or selling controlled substances--motion to dismiss--sufficiency of evidence**

*State v. Baldwin 161 NCA 382 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling controlled substances because despite the fact that occupancy was the only factor shown by the evidence in this case, evidence that defendant received mail at the address for approximately one year, the fact that his driver's license showed the address as his home address, and that his car was registered at the address showed more than temporary occupancy.

### **1. Homicide--felony murder--sale of cocaine--motion to dismiss--sufficiency of evidence \*\* See Farb p. 4**

*State v. Squires 357 NC 529 (2003)*

The trial court did not err in a double first-degree murder case by denying defendant's motions to dismiss related to the sale of cocaine as an underlying felony to support the felony murder of one of the victims, because: (1) the evidence was sufficient for a reasonable juror to find **attempted sale of cocaine which is a lesser-included offense of sale of cocaine**; (2) actions to which defendant has admitted, including possession of the drugs and scales while attempting to effectuate the sale, are sufficient to establish both intent and an act in preparation of an actual transfer of cocaine; (3) defendant's contention that the language "sale of cocaine" on the verdict sheet required the jury to find that a completed sale occurred is without merit when the trial court instructed the jury that either a completed sale or an attempted sale of cocaine sufficed to support a conviction for felony murder; and (4) although defendant contends some jurors may have found a completed sale while others found an attempted sale, any member of the jury who found the elements constituting a sale of cocaine must necessarily have found the elements of attempted sale of cocaine.

### **2. Drugs--forfeiture of funds--no conviction of Controlled Substances Act offense**

*State v. Jones 158 NCA 465 (2003)*

A forfeiture of illegal drug money was vacated where **defendant was not convicted of any crime described** in N.C.G.S. § 90-112(a)(2).

### **2. Drugs--conspiracy to traffic in cocaine by possession--failure of indictment to include weight of cocaine**

*State v. Outlaw 159 NCA 423 (2003)*

Defendant was improperly convicted for conspiracy to traffic in cocaine by possession because the indictment failed to include the weight of the cocaine possessed, and that fact was an essential element of the offense charged.

## **2. Drugs--trafficking in methamphetamine by possession and by transportation-- motion to dismiss--sufficiency of evidence**

*State v. Shelman 159 NCA 300 (2003)*

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in methamphetamine by possession and by transportation under N.C.G.S. § 90-95(h)(3b), because: (1) knowing possession of any amount of methamphetamine is a felony, and the weight is relevant only as to whether trafficking can properly be charged; (2) the State is not required to prove that defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed or transported; and (3) the evidence established that several witnesses testified to observing defendant hold and carry a package that contained approximately 1700 grams of methamphetamine, defendant testified he went to his house for the express purpose of retrieving the package, and an inspector testified that defendant admitted knowing the package would contain drugs.

## **1. Drugs - trafficking - oxycodone in tablet form - weight**

*State v. McCracken, 157 N.C. App. 524 (2003)*

The **tablet form** of oxycodone was properly considered a mixture for purposes of a trafficking charge under N.C.G.S. § 90-95(h)(4). The word "**mixture**" refers to the total weight of the dosage unit rather than the actual weight of the controlled substance within the mixture under *State v. Jones*, 85 N.C. App. 56. The statutory language "or any mixture containing such substance" presents a catch-all provision and does not lead to the conclusion that the legislature did not intend to include tablets within the definition of "mixture."

## **2. Drugs - trafficking in oxycodone tablets - weight - no evidence of lesser offense**

*State v. McCracken, 157 N.C. App. 524 (2003)*

The trial court's failure to charge on the lesser-included offense of simple sale and possession of oxycodone in a prosecution for trafficking was not error. The weight to use when the controlled substance was in tablets was a question of law, and there was no evidence from which the court could have fashioned an instruction to a lesser offense.

## **2. Drugs - felonious possession of marijuana - indictment - amount not mentioned - sentencing for misdemeanor**

*State v. Partridge, 157 N.C. App. 568 (2003)*

A conviction for felony possession of marijuana was vacated and

remanded for sentencing for misdemeanor possession where the indictment did not mention the weight of the marijuana in defendant's possession, but the parties agreed during the charge conference that defendant had possessed 59.4 grams of marijuana, if any. The indictment did not charge an essential element of the crime and the court was without jurisdiction to allow the felony conviction, but the jury necessarily found all of the elements of misdemeanor possession.

### **1. Drugs--maintaining and keeping a dwelling for keeping or selling a controlled substance-motion to dismiss--sufficiency of evidence**

*State v. Harris 157 NCA 647 (2003)*

The trial court erred by denying defendant's motion to dismiss the charge of maintaining and keeping a dwelling for keeping or selling a controlled substance under N.C.G.S. § 90-108(a)(7), because: (1) the State only presented evidence that defendant was seen at the house several times over a period of two months and that an officer had spoken to defendant twice during that time; (2) there was no other evidence linking defendant to the house apart from personal property of defendant found in the bedroom; and (3) the State offered no evidence that defendant owned the property, bore any expense of renting or maintaining the property, or took any other responsibility for the property.

### **4. Drugs--possession of paraphernalia**

*State v. Harris 157 NCA 647 (2003)*

There was sufficient evidence of possession of drug paraphernalia where razor blades were found in a jacket lost by defendant when he was running from police and a set of digital scales was found in a vehicle which officers had seen defendant driving.

### **1. Drugs--felonious possession of marijuana--indictment--"felonious" not mentioned**

*State v. Blakney 156 NCA 671 (2003)*

An indictment did not support a guilty plea to felonious possession of marijuana where it did not contain the word "felonious" and did not refer by number to N.C.G.S. § 90-95(d)(4), which provides for felonious possession. Although the wording of the indictment might lead to the statute, the words by themselves do not provide specific notice of the statute.

### **3. Drugs - transporting cocaine - sufficiency of evidence**

*State v. Batchelor, 157 N.C. App. 421 (2003)*

There was sufficient evidence of an agreement between defendant and

another person to transport cocaine and the trial court correctly denied defendant's motion to dismiss a charge of conspiracy to traffic in cocaine by transportation. **See Farb p.14**

### **1. Drugs–felonious possession of drug paraphernalia–nonexistent crime**

*State v. Wagner 356 NC 599 (2002) Revd CT Appeals 148 NCA 658*

A charge of **felonious possession of drug paraphernalia is not supported by any statute**. Therefore, an indictment for felonious possession of drug paraphernalia was facially invalid, the trial court never had jurisdiction over this charge, and defendant's conviction for felonious possession of drug paraphernalia is void and is vacated.

### **4. Constitutional Law–double jeopardy–possession of cocaine with intent to sell–trafficking by possession**

*State v. Boyd 154 NCA 302 (2002)*

Convictions for possession of cocaine with intent to sell and distribute and trafficking in the same cocaine by possession did not violate double jeopardy.

### **1. Drugs--trafficking in cocaine--weight--sufficiency of evidence**

*State v. Shook 155 NCA 183 (2002)*

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in cocaine even though defendant contends there was insufficient evidence of the weight element, because: (1) the State offered evidence of the actual measured weight of the substances as well as the testimony of a detective to assist the jury in determining which item tested corresponded with each item seized from defendant; and (2) a reasonable jury in considering this evidence would find that defendant possessed and transported 28 grams or more of cocaine.

### **2. Drugs--attempted trafficking in cocaine–weight–sufficiency of evidence**

*State v. Shook 155 NCA 183 (2002)*

The trial court did not err by denying defendant's motion to dismiss the charge of attempted trafficking in cocaine even though defendant contends there was insufficient evidence of the weight element, because: (1) defendant accepted an undercover detective's order for one ounce of cocaine and then possessed, transported, sold, and delivered cocaine to fill this order; (2) the sole reason that defendant did not deliver the requisite amount was that defendant shorted the detective and procured less than the one ounce purchased; and (3) the evidence provided by a detective and the

laboratory report are sufficient for a reasonable jury to conclude that the cocaine procured was 27.1 grams, less than the 28 grams required for a completed trafficking offense.

### **1. Drugs--maintaining vehicle for drug sales--isolated incident**

*State v. Dickerson 152 NCA 714 (2002)*

The trial court erred by not dismissing a charge of keeping or maintaining a motor vehicle for the sale or delivery of cocaine where defendant was in his vehicle on one occasion when cocaine was sold.

### **2. Constitutional Law--double jeopardy--possession of cocaine--sale**

*State v. Dickerson 152 NCA 714 (2002)*

Double jeopardy was not violated where defendant was sentenced for both the sale and delivery of cocaine and possession of cocaine with intent to sell or deliver.

### **2. Drugs--possession of marijuana with intent to sell or deliver--possession of LSD with intent to sell and deliver--trafficking in LSD--motion to dismiss--entrapment**

*State v. Branham 153 NCA 91 (2002)*

The trial court did not err by failing to dismiss the charges of possession of marijuana with intent to sell or deliver, possession of LSD with intent to sell and deliver, and trafficking in LSD even though defendant pled the affirmative defense of entrapment, because although defendant's testimony that an informant pushed defendant to obtain drugs for him, that defendant attempted to get the informant to make the purchase himself, and that defendant had never before been involved in any drug sales of this quantity may have been sufficient to raise the issues of inducement and lack of predisposition to commit the offenses, it fell short of compelling a conclusion of entrapment as a matter of law.

### **Drugs--property seized pursuant to state warrants--release of funds to federal authorities**

*State v. Hill 153 NCA 716 (2002)*

The trial court erred by entering an order under N.C.G.S. § 15-11.1 directing that certain funds seized from defendants during a drug raid pursuant to state search warrants be returned by the county sheriff when said funds had been transferred to the United States Drug Enforcement Agency and were the subject of a civil forfeiture proceeding under 21 U.S.C. § 881, because: (1) once a federal agency has adopted a local seizure, a party may not attempt to thwart the forfeiture by collateral

attack in our courts, for at that point exclusive original jurisdiction is vested in the federal court by statute, 28 U.S.C. § 1355; (2) cooperation with federal authorities in enforcing the drug laws is mandated by N.C.G.S. § 90-113.5; and (3) routine intergovernmental cooperation between state and federal law enforcement agencies is not contrary to our statutory mechanism to safeguard seized property.

## **2. Evidence--drug paraphernalia--illustrative purposes**

*State v. Hyman 153 NCA 396 (2002)*

The trial court did not err in a delivery of cocaine to a minor child thirteen years or younger, second-degree kidnapping, and assault on a child under the age of twelve years case by allowing an investigator to illustrate his testimony concerning crack cocaine usage by using cocaine, marijuana, and sundry items of drug paraphernalia that were neither found in defendant's residence nor otherwise connected to the events alleged to have occurred on 19 June 2000, because: (1) the items were admitted for illustrative purposes only and no attempt was made to link defendant with the items; and (2) the trial court repeatedly gave limiting instructions emphasizing to the jury that the exhibits were not seized from defendant, were not linked to him, and were to be considered only for the purpose of illustrating and explaining the investigator's testimony.

## **1. Drugs--cocaine trafficking by possession--sufficiency of evidence**

*State v. Siriguanico 151 NCA 107 (2002)*

There was sufficient evidence that defendant possessed cocaine and was guilty of trafficking by possession where defendant was aware of and present during all conversations related to the purchase, he rode in a car from Goldsboro to Wilmington knowing that the cocaine was in the car, he accompanied the informant into an apartment in Wilmington and remained inside while the informant returned to the car for the cocaine, watched as the informant opened the package and placed the cocaine on the scales, and actively assisted the informant in weighing the cocaine on the scales.

## **2. Drugs--felonious possession of drug paraphernalia--motion to dismiss--State's concession of error**

*State v. Stevens 151 NCA 561 (2002)*

Although defendant contends the trial court erred by denying defendant's motion to dismiss the charge of felonious possession of drug paraphernalia under N.C.G.S. § 90-95(e)(3) since this offense is not a substantive charge but merely a status for sentence enhancement, this argument does not need to be addressed because defendant's conviction is vacated based on the

State's concession that defendant was improperly indicted for this charge.

### **3. Drugs--trafficking by possession of cocaine--instruction on lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine**

*State v. Reid 151 NCA 420 (2002)*

The trial court did not err in a trafficking by possession of cocaine case by denying defendant's request to instruct the jury on the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine even though defendant contends the cocaine was not fully dry when weighed after its submersion in the toilet, because it is well-established that the total quantity of the mixture containing cocaine is the relevant weight to be used in determining a violation of N.C.G.S. § 90-95(h)(3) rather than the actual weight of the cocaine portion of the mixture.

### **Requiring Suspicionless Drug Testing of High School Students Involved in Competitive Extracurricular Activities Does Not Violate Fourth Amendment**

*Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls, (27 June 2002).*

The Court ruled that requiring suspicionless drug testing of high school students involved in competitive extracurricular activities does not violate the Fourth Amendment.

### **1. Drugs--maintaining motel room to keep or sell controlled substances--sufficiency of evidence**

*State v. Kraus 147 NCA 766 (2001)*

The trial court erred by denying defendant's motion to dismiss a charge of maintaining a motel room to keep or sell controlled substances where the State presented evidence of defendant's occupancy of the room, but did not present evidence that she bore the expense of the room or otherwise maintained it in any way, and defendant had occupied the room for less than twenty-four hours.

### **1. Drugs--cocaine possession--residue in crack pipe**

*State v. Williams 149 NCA 795 (2002)*

The trial court did not err in a prosecution for possession of cocaine by denying defendant's motion to dismiss for insufficient evidence where the prosecution was based on residue found in a piece of tubing used to smoke crack and defendant argued that the residue left after the crack vaporized was not itself cocaine and that he could not possess something that could

not be held and weighed separate and apart from the pipe. An SBI chemist testified that the residue was cocaine and did not testify that it could not be weighed, only that it was not weighed under SBI reporting procedures. N.C.G.S. § 90-95(a)(3) makes it unlawful for a person to possess a controlled substance without regard to quantity.

### **1. Drugs--maintaining a dwelling to sell controlled substances--sufficiency of evidence**

*State v. Hamilton 145 NCA 152 (2001)*

The trial court erred by not dismissing a charge of maintaining a dwelling to keep or sell controlled substances where the facts could not be distinguished from *State v. Bowens*, 140 N.C. App 217, in which testimony that defendant was present in the dwelling on several occasions and that he lived at the address in question was not sufficient to support the conclusion that he kept or maintained the dwelling.

### **1. Drugs; Penalties, Fines and Forfeitures--cocaine--forfeiture proceeding--dismissal of state charges--federal conviction**

*State v. Woods 146 NCA 686 (2001)*

The trial court did not err by entering an order of forfeiture of defendant's property under N.C.G.S. § 90-112 for items allegedly purchased with the proceeds of illegal sales of substances even though the indictments against defendant for felonious trafficking in drugs and maintaining a vehicle to keep controlled substances had been dismissed by the State, because: (1) defendant was not acquitted since he was convicted of possession with intent to distribute fifty or more grams of cocaine in the federal court; (2) there is no requirement in N.C.G.S. § 90-112 for a state conviction, and it merely requires a felony under Article 5 of Chapter 90; and (3) there was no conflict between state and federal authorities concerning the forfeited items.

### **1. Drugs--intent to sell and deliver cocaine--sale of cocaine--authentication of chemical analysis report--chain of custody**

*State v. Greenlee 146 NCA 729 (2001)*

N.C.G.S. § 90-95(g)-(g1) does not represent the exclusive procedure for authenticating a report on the chemical analysis of a controlled substance and for establishing chain of custody, and the laboratory report determining that the substance purchased from defendant was cocaine was admissible in an intent to sell and deliver cocaine and sale of cocaine case, because: (1) N.C.G.S. § 90-95(g) merely establishes a procedure through which the State may introduce into evidence the laboratory report of a

chemical analysis conducted on an alleged controlled substance without further authentication; (2) a forensic chemist testified and authenticated the report, making it irrelevant whether the State complied with the notice requirements set forth in N.C.G.S. § 90-95(g); and (3) the State's evidence as to the chain of custody was sufficient.

#### **1. Evidence--SBI Lab Report--cocaine--motion in limine--notice**

*State v. Carr, 145 NC App 335 (2000)*

The trial court did not err in a possession of cocaine with intent to sell and deliver and sale of cocaine case by denying defendant's motion in limine and allowing the State to introduce an SBI Lab Report regarding the chemical contents of the substance received from defendant into evidence without further authentication under N.C.G.S. § 90-95(g), because: (1) defense counsel's admission that he had received a copy of the SBI Lab Report, coupled with the contentions of the State's attorney that defendant's former attorney had been sent notice of the State's intention to introduce the report into evidence without further authentication, are sufficient to support the factual finding that defendant received notice under N.C.G.S. § 90-95(g); and (2) having received notice, defendant failed to notify the State at least five days prior to trial that defendant objected to introduction of the report into evidence.

#### **2. Drugs--possession of cocaine with intent to sell and deliver--sale of cocaine--motion to dismiss--sufficiency of evidence**

*State v. Carr, 145 NC App 335 (2000)*

The trial court did not err by denying defendant's motions to dismiss the charges of possession of cocaine with intent to sell and deliver and the sale of cocaine because the evidence taken in the light most favorable to the State shows that defendant exchanged cocaine for three sweatshirts and a video game.

#### **3. Drugs--sale of controlled substance--any transfer in exchange for consideration**

*State v. Carr, 145 NC App 335 (2000)*

The trial court did not commit plain error by instructing the jury that exchanging cocaine for clothing or video games would constitute a sale of a controlled substance under N.C.G.S. § 90-95(a)(1), because the Legislature intended "sale" to encompass any transfer in exchange for consideration, and not just transfers of controlled substances for money.

#### **4. Drugs--sale of cocaine--sufficiency of indictment**

*State v. Redd, 143 NC App 248 (2001)*

Even though defendant contends the indictment for 98 CRS 1697 states

that defendant sold cocaine to one undercover officer while the evidence at trial indicated that another undercover officer negotiated for the purchase and later handed the bag of cocaine over to the undercover officer named in the indictment, the indictment pertaining to this sale is not subject to dismissal because the record supports that both undercover officers were involved in the buy.

### **1.Evidence--additional cocaine--insufficient link to defendant--irrelevant and prejudicial**

*State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52 (2000)*

The trial court erred in a cocaine trafficking prosecution by admitting evidence of two kilos seized from the trailer in which defendant lived with other men where the prosecution was based upon 136.69 grams seized in a van driven by defendant. There was no evidence to directly link defendant to the drugs seized at the trailer in which he occupied a bedroom, he was not charged with any offense in connection with those drugs, he consistently denied any knowledge of the drugs, and evidence introduced at trial tended to show that the two kilos seized at the trailer had been brought from Florida about 12 hours before defendant's arrest, that those drugs had been hidden under towels in a bathroom which did not belong to defendant, and that people with whom defendant was not acquainted had visited the trailer on the morning of defendant's arrest. Despite the court's limiting instruction, the jury could easily have concluded that defendant was a high level drug trafficker.

### **6.Drugs--trafficking in cocaine by possession--trafficking in cocaine by transportation--sufficiency of evidence**

*State v. Munoz, 141 N.C. App. 675 (2001)*

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine by possession and trafficking in cocaine by transportation, because: (1) constructive possession can be inferred where the evidence shows that defendant had the power to control the vehicle where the controlled substance was discovered; (2) defendant could have found the cocaine had he inspected the vehicle in a manner consistent with the inspection he conducted on the other vehicle on his truck; (3) the fax indicated the vehicle was to be shipped to Junior City, New Jersey, which the State Bureau of Investigation testified does not exist, and the contact number was a New York area code; and (4) defendant told the agents he did not know the buyer and that the buyer would not be able to contact defendant directly, but a call was received on defendant's pager from the number identified on the fax as the buyer's number.

**1. Drugs--trafficking by possession or transportation of 28 or more grams--sufficiency of evidence--average weight of sample bags**

*State v. Holmes, 142 N.C. App. 614, (2001)*

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of trafficking by possessing or transporting 28 or more grams of heroin where an SBI forensic chemist testified that he examined each of the 671 bags containing an off-white or tan substance seized from defendant, randomly selected and weighed 50 bags, and calculated the total weight of 31 grams by determining the average weight and multiplying by 671.

**1. Drugs--knowingly and intentionally maintaining a dwelling for controlled substances--sufficiency of evidence**

*State v. Bowens, 140 NC App 217 (2000)*

The trial **court erred by denying defendant's motion to dismiss** the charge of knowingly and intentionally maintaining a dwelling used for keeping or selling controlled substances under N.C.G.S. § 90-108(a)(7) because: (1) the State failed to present substantial evidence that defendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling; (2) testimony that defendant was present at the dwelling on several occasions and testimony that he lived at the dwelling cannot alone support a conclusion that defendant kept or maintained the dwelling; and (3) although men's clothing was found at the dwelling, there is no evidence the clothes belonged to defendant.

**2. Drugs--intent to sell or deliver marijuana--actual possession--constructive possession--sufficiency of evidence**

*State v. Bowens, 140 NC App 217 (2000)*

The trial **court did not err by denying defendant's motion to dismiss** the charge of possession with intent to sell or deliver marijuana in violation of N.C.G.S. § 90-95(a)(1), because there was sufficient evidence to support a conclusion that defendant had actual possession of some of the drugs and constructive possession of some of the drugs, including evidence that: (1) defendant was found in the dwelling and was seen there on several other occasions; (2) defendant attempted to flee from the officers; (3) 7.5 grams of marijuana were found on defendant's person; and (4) approximately 72.7 grams of marijuana were found in and about the house.

## **1. Drugs--trafficking in marijuana--controlled delivery--doctrine of constructive possession does not apply**

*State v. Clark, 137 N.C. App. 90 (2000)*

In a case where the police intercepted a package, opened it pursuant to a warrant, and removed most of the twelve and one half pounds of marijuana so that it would not be lost when the police undertook a controlled delivery of .13 kilograms of marijuana, the trial court erred in denying defendant's motion to dismiss the charge of trafficking in marijuana by possession at the conclusion of the State's case in chief, based on the defense that defendant never possessed ten pounds of marijuana as required by N.C.G.S. § 90-95(h), because the doctrine of constructive possession does not apply since: (1) there is no evidence as to the actual source of the drugs; and (2) there is no evidence defendant ever had the capability to exercise dominion and control over the original package.

## **2. Drugs--conspiracy--trafficking in marijuana--sufficiency of evidence**

*State v. Clark, 137 N.C. App. 90 (2000)*

In a case where the police intercepted a package, opened it pursuant to a warrant, and removed most of the twelve and one half pounds of marijuana so that it would not be lost when the police undertook a controlled delivery of .13 kilograms of marijuana, the trial court did not err in failing to dismiss the charge of conspiracy to traffic in excess of ten pounds of marijuana because: (1) defendant and his accomplice waited together in the area of the false address to take possession of a package bearing no return address; (2) defendant and his accomplice exhibited approach-avoidance behavior consistent with a desire to obtain the package coupled with knowledge that taking possession would be dangerous; and (3) even if the package contained no drugs, its delivery would still constitute evidence to support the charges of conspiracy.

## **Drugs--trafficking in cocaine--possession--sufficiency of evidence**

*State v. Wheeler, 138 N.C. App. 163 (2000)*

The trial court **erred by denying defendant's motion to dismiss the charge of trafficking in cocaine**, based on the State's failure to prove defendant possessed the cocaine during a sting operation, because defendant's handling of the cocaine for the sole purpose of inspection before he decided not to buy it did not constitute possession within the meaning of N.C.G.S. § 90-95(h)(3), as defendant did not have the power and intent to control its disposition or use.

## **3. Evidence--motion in limine--prior drug deals**

*State v. Manning, 139 N.C. App. 454 (2000)*

The trial court did not err in a cocaine prosecution by denying defendant's motion in limine to require that the State reveal those acts it intended to prove under N.C.G.S. § 8C-1, Rule 404(b) and those it would elicit under Rule 608(b), should defendant testify. The court ruled that defendant's prior drug deals could come in only if defendant opened the door by testifying that he had never dealt drugs; moreover, defendant did not make an offer of proof regarding his testimony and there is no evidence as to what his factual defense would have been.

### **1. Drugs - trafficking - weight of mixture**

*State v. Broome, 136 N.C. App. 82 (1999)*

There was no fatal variance between the indictment and the proof where defendant was indicted for trafficking by possession of 200-400 grams of cocaine, the State introduced a package of cocaine mixture seized from defendant's car weighing 273 grams, and the State's expert testified that the package contained only 27 grams of pure cocaine. N.C.G.S. § 90-95(h) (3) (a) states that it is a felony to possess a substance or mixture that is 200 grams or more and the relevant question is the weight of the total substance seized regardless of the purity.

### **1. Drugs - trafficking in cocaine - possession element - sufficiency of evidence**

*State v. Williams, 136 N.C. App. 218 (1999)*

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to dismiss based on insufficient evidence to establish the possession element of the charge, even though defendant did not have actual possession of an illegal substance, because an inference of constructive possession arises when a defendant has exclusive control over the premises where the controlled substance is found.

### **1. Drugs - Tax on seized narcotics - effect of Fourth Circuit decision - prior panel decision binding**

*State v. Woods, 136 N.C. App. 386 (2000)*

Even though the Fourth Circuit held that the North Carolina Drug Tax constitutes criminal punishment and defendant claims his double jeopardy rights will be violated if there is further prosecution against him in this case based on the Department of Revenue's prior collection of unpaid taxes on seized drugs under N.C.G.S. 105-113.105 through 105-113.113, the trial court did not err in denying defendant's motion to dismiss the charges of possession of marijuana, maintenance of a building for the purpose of keeping marijuana, possession of marijuana with intent

to sell or deliver, and possession of drug paraphernalia, because: (1) with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State and (2) another North Carolina Court of Appeals panel previously upheld assessment and collection of the Drug Tax against a challenge under the double jeopardy clause, and this panel is bound by the prior decision of another panel addressing the same issue when there has been no modification by our Supreme Court.

## **2. Criminal Law - controlled substances - keeping and maintaining a dwelling - continuous offense - separate convictions**

*State v. Grady, 136 N.C. App. 394 (2000)*

Although assignment of error may not be argued and then supplemented with a request for "partial" Anders review, the Court of Appeals exercised its discretionary power pursuant to Rule 2 to consider defendant's pro se argument concerning undercover purchases of drugs made by the same officer at the same dwelling and concluded this case must be remanded because two convictions of keeping and maintaining a dwelling for purposes related, to use, storage, or sale of controlled substances under N.C.G.S. & sec; 90-108(a) (7) violates the constitutional prohibition against double jeopardy since the offense is a continuing offense.

## **Appeal and Error - writ of habeas corpus - effect of Fourth Circuit decision - tax on seized narcotics**

*State v. Wambach, 136 N.C. App. 842 (2000)*

Defendant's appeal from the denial of his writ of habeas corpus petition seeking relief from an alleged double jeopardy violation as a result of a tax assessment on drugs and the subsequent conviction for possession with intent to sell and deliver those drugs is dismissed because no appeal lies from an order made in a habeas corpus proceeding instituted under Chapter 17 of the North Carolina General Statutes since the remedy, if any, is by petition for writ of certiorari, and the Court of Appeals declines to address these issues pursuant to a writ of certiorari since: (1) the constitutionality of the assessment and collection of the drug tax has been previously upheld by North Carolina appellate courts; and (2) federal appellate decisions are not binding upon either the appellate or trial courts of this State with the exception of decisions of the United States Supreme Court.

## **3. Narcotics, Controlled Substances, and Paraphernalia 136 (NCI4th) - maintaining vehicle for keeping or selling drugs -meaning of "keeping"**

*State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994)*

As used in the statute which prohibits the maintaining of a vehicle used for "keeping or selling" controlled substances, N.C.G.S. 90-108(a)(7), the word "keeping" denotes not just possession, but possession that occurs over a duration of time. The statute, therefore, does not prohibit the mere temporary possession of marijuana within a vehicle.

**4. Narcotics, Controlled Substances, and Paraphernalia 136 (NCI4th) - maintaining vehicle for keeping or selling drugs -insufficient evidence**

*State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994)*

The State's evidence was insufficient to show that defendant's vehicle was "used for keeping or selling" a controlled substance and thus failed to support his conviction for unlawfully maintaining a vehicle in violation of N.C.G.S. 90-108(a)(7) where it tended to show only that defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that drug paraphernalia and two marijuana cigarettes were found in defendant's home the following day.

**Narcotics, Controlled Substances, and Paraphernalia 136 (NCI4th) - maintaining vehicle and dwelling for selling narcotics - sufficiency of evidence**

*State v. Tuggle, 109 N.C. App. 235, 426 S.E.2d 724 (1993)*

**2. Narcotics, Controlled Substances, and Paraphernalia 105 (NCI4th) - conspiracy to sell quantity of marijuana - openended agreement to sell - sufficiency of evidence**

*State v. Williamson, 110 N.C. App. 626 (1993)*

Evidence of the cumulative quantity of controlled substance that a defendant sells in the course of a single open-ended conspiracy is sufficient to support his conviction for conspiracy to sell that quantity even though the agreement of the conspirators is silent as to exact quantity.

**1. Narcotics, Controlled Substances, and Paraphernalia 124 (NCI4th) - carrying drugs from house to car - leaving premises by car - substantial movement - sufficiency of evidence of trafficking by transporting**

*State v. McRae, 110 N.C. App. 643 (1993)*

**2. Narcotics, Controlled Substances, and Paraphernalia 34 (NCI4th) - trafficking by transporting and possession of same cocaine - two offenses**

*State v. McRae, 110 N.C. App. 643 (1993)*

A defendant can be convicted of and sentenced for trafficking by transporting and by possession as two separate crimes when the same cocaine is involved in both offenses.

**5. Narcotics, Controlled Substances, and Paraphernalia 114 (NCI3d) - possession of cocaine with intent to sell -possession of heroin - sufficiency of evidence**

*State v. Holmes, 109 N.C. App. 615 (1993)*

The State's evidence was sufficient to support defendant's convictions for possession of cocaine with intent to sell and deliver and possession of a Schedule I controlled substance (heroin) where it tended to show that defendant was observed carrying a package from a house known for drug activities and placing it under the front seat of the car he was driving; a pouch containing twenty-eight baggies and two tin foil packages was later discovered under the driver's seat where defendant had placed this package; the baggies contained small amounts of cocaine and were tied with twist ties, and the tin foil packages contained heroin; and an officer stated his opinion, based on his extensive training in drug enforcement, that the baggies containing cocaine were packaged for street level sales.

**Narcotics, Controlled Substances, and Paraphernalia 143 (NCI4th) - possession of cocaine with intent to sell and deliver -defendant fleeing scene - large sums of money on one defendant - sufficiency of evidence of constructive possession**

*State v. Neal, 109 N.C. App. 684 (1993)*

**5. Evidence and Witnesses 2214 (NCI4th) - identification of substance as heroin - random sampling by chemist -testimony as to whole exhibit admissible**

*State v. Harding, 110 N.C. App. 155 (1993)*

An expert chemist may give his opinion as to the whole when only part of the whole has been tested; therefore, a chemist could properly identify the contents of 165 bags as heroin in this prosecution of defendant for possession of heroin, trafficking, and conspiracy to traffic, though the chemist tested only a random sample of the bags.

**2. Constitutional Law 129 (NCI4th); Narcotics, Controlled Substances, and Paraphernalia 48 (NCI4th) - remission of vehicle forfeiture - no right to jury trial**

*State v. Honaker, 111 N.C. App. 216 (1993)*

**3. Narcotics, Controlled Substances, and Paraphernalia 42 (NCI4th) - vehicle used in felony - forfeiture - sufficiency of evidence**

*State v. Honaker, 111 N.C. App. 216 (1993)*

**1. Narcotics, Controlled Substances, and Paraphernalia 120 (NCI4th) - sale of controlled substance on school property - sufficiency of evidence**

*State v. Alston, 111 N.C. App. 416 (1993)*

In a prosecution of defendant for felonious sale of crack cocaine on or within the legal boundaries of school property, evidence was sufficient to show that the drug sale took place within 300 feet of a middle school boundary in violation of N.C.G.S. 90-95(e)(8).

**2. Narcotics, Controlled Substances, and Paraphernalia 124 (NCI4th) - trafficking in cocaine - sufficiency of evidence**

*State v. Garcia, 111 N.C. App. 636 (1993)*

Evidence was sufficient to be submitted to the jury in a prosecution for trafficking in cocaine by possession and by transportation where it tended to show that defendant and a woman were travelling together on a bus; defendant planned to pay the woman for carrying the cocaine; he instructed her about what to do with the bag containing the cocaine and where to carry it; and when the bus made stops, defendant called ahead to make arrangements about what to do with the cocaine when they arrived in Durham.

**1. Narcotics, Controlled Substances, and Paraphernalia 155 (NCI4th) - felonious possession of cocaine - sufficiency of evidence of constructive possession**

*State v. Hodge, 112 N.C. App. 462 (1993)*

**1. Evidence and Witnesses 1850 (NCI4th) - field test on counterfeit controlled substance - officer's testimony admissible**

*State v. Oakes, 113 N.C. App. 332 (1994)*

**Constitutional Law 251 (NCI4th) - narcotics - confidential informant - refusal to furnish identity - dismissal**

*State v. McEachern, 114 N.C. App. 218 (1994)*

**Narcotics, Controlled Substances, and Paraphernalia 34 (NCI4th) - trafficking in cocaine by possession - failure to pay excise tax on a controlled substance - no double jeopardy**

*State v. Morgan, 118 N.C. App. 461 (1995)*

**8. Narcotics, Controlled Substances, and Paraphernalia 220 (NCI4th) trafficking by**

**sale and trafficking by delivery consecutive sentences no double jeopardy**

*State v. Holmes, 120 N.C. App. 54 (1995)*

**2. Narcotics, Controlled Substances, and Paraphernalia 136 (NCI4th) maintaining dwelling for controlled substance activity sufficiency of evidence**

*State v. Kelly, 120 N.C. App. 821 (1995)*

The evidence was sufficient to be submitted to the jury in a prosecution for intentionally keeping and maintaining a dwelling for the purpose of using, keeping, or selling controlled substances where it tended to show that defendant possessed a key to the house in question and used it to go in and out of the house; inside the house in an upstairs bedroom was a letter from an insurance company addressed to defendant at the house in question; scales and baking soda, items commonly used to cut and package cocaine, were located in the kitchen of the house; a package containing cocaine was addressed to Randy Brown at the house; defendant stated he was Randy Brown when asked by an undercover officer; and defendant listed the address of the house as his address after he was arrested.

**3. Criminal Law 41 (NCI4th) heroin and cocaine presence at sale**

*State v. Rogers, \_\_\_ N.C. App. \_\_\_ (1-2-1996)*

The defendant was not entitled to a "mere presence" instruction in a prosecution arising from the sale of cocaine and heroin where a State's witness testified that on several occasions defendant directed the drug transactions by signaling others to obtain drugs. The evidence does not reasonably support an inference that defendant was merely present and not an active participant in the drug transactions.

**Narcotics, Controlled Substances, and Paraphernalia § 33 (NCI4th) attempt to possess cocaine sufficiency of evidence**

*State v. Gunnings, 122 N.C. App. 294 (1996)*

The evidence was sufficient to be submitted to the jury on a charge of attempt to possess cocaine where there was a significant amount of evidence offered, including that of defendant's own testimony, which would allow a jury to conclude that defendant intended to possess cocaine; she took several steps calculated to accomplish that intent, including driving to an area known for drug sales, approaching undercover officers who she believed were cocaine dealers, and exchanging money for what she thought was cocaine; and her efforts fell short of completing the offense of possession of cocaine.

**1. Narcotics, Controlled Substances, and Paraphernalia § 114 (NCI4th) possession with intent to sell and deliver cocaine sufficiency of evidence**

*State v. Carr, 122 N.C. App. 369 (1996)*

The evidence was sufficient to support a conviction of defendant for possession with intent to sell and deliver cocaine where the evidence tended to show that pill bottles containing cocaine were found in the area of a car occupied solely by defendant; defendant had conversed with a known drug user who earlier in the evening was charged with possession of a crack cocaine pipe; defendant was the only passenger who left the vehicle by the passenger side; defendant attempted to give the arresting officer a fictitious name when questioned; and the pill bottles contained one large rock of cocaine and eight smaller rocks, each the size normally sold on the street for between \$20 and \$40.

**Narcotics, Controlled Substances, and Paraphernalia § 207 (NCI4th) possession of two pounds of marijuana tax assessment not double jeopardy**

*State v. Ballenger, 123 N.C. App. 179 (1996)*

**2. Narcotics, Controlled Substances, and Paraphernalia § 196 (NCI4th) trafficking in cocaine by possession amount not in dispute no charge on lesser offense of possession**

*State v. Wilder, 124 N.C. App. 136 (1996)*

**3. Arrest and Bail § 69 (NCI4th) drug courier profile object under clothes flight probable cause**

*State v. Hendrickson, 124 N.C. App. 150 (1996)*

SBI agents had probable cause to arrest defendant for trafficking in cocaine where the evidence reveals that the agents determined that defendant conformed to the drug courier profile, the agents confirmed by examining defendant's identification that he was the person about whom they had received a tip; defendant made prolonged eye contact with the officers after deboarding the plane and quickly heading towards an airport exit; the agent noticed a round, rigid cookie shaped object in the lower abdomen under defendant's clothes while asking for defendant's identification; the agents were aware of defendant's past criminal conduct; and defendant attempted to flee when the agents seized his bag and again when they tried to arrest him.

**4. Narcotics, Controlled Substances, and Paraphernalia § 216 (NCI4th) possession of cocaine sentencing restitution of cost of drug analysis**

*State v. Johnson, 124 N.C. App. 462 (1996)*

The trial court did not err when sentencing defendant for possession of

cocaine by ordering defendant to pay restitution to the SBI for the cost of analyzing the cocaine pursuant to N.C.G.S. § 90-95.3(b).

**5. Narcotics, Controlled Substances, and Paraphernalia § 42 (NCI4th) possession of cocaine acquittal of intent to sell forfeiture of cash on person**

*State v. Johnson, 124 N.C. App. 462 (1996)*

The trial court erred in sentencing defendant for possession of cocaine by ordering forfeiture of \$460 seized from defendant's person at his arrest where defendant was acquitted of possession with intent to sell and deliver. N.C.G.S. § 90-112(a)(2) is a criminal (or in personam) as opposed to a civil (or in rem) forfeiture statute. Criminal forfeiture must follow criminal conviction.

**Sentencing - noncapital - substantial assistance - term less than structured minimum - permissible**

*State v. Saunders, 131 N.C. App. 551 (1998)*

A cocaine trafficking case was remanded for resentencing where the court found substantial assistance but stated that it was limited by structured sentencing minimum requirements. The punishment range set out in N.C.G.S. § 15A-1340.17 does not control the minimum sentence when an applicable statute requires or authorizes another minimum sentence. N.C.G.S. § 90-95 (h)(5) specifically authorizes the sentencing judge to reduce the fine or impose a less than minimum prison term once the court has made a finding of substantial assistance.