

Crimes, Criminal Procedure, and Immunities in Opioid Cases

Jeff Welty
UNC School of Government
Spring 2019

Drug Charges

Identifying the Schedule

| Schedule | Example Opioids (includes amendments effective 12/1/17) |
|----------|---|
| I | Heroin Many fentanyl derivatives |
| II | Opium Fentanyl Oxycodone Codeine Methadone |
| III | Certain codeine combination products Buprenorphine |
| IV | Butorphanol |
| V | Certain dilute codeine or opium products |
| VI | - |

Synthetic Opioids

- Natural opioids include opium, which is made from poppies
- Semi-synthetic opioids are synthesized from natural opioids, and include heroin, hydrocodone, and oxycodone
- Synthetic opioids are produced in a lab without any natural opioids, and include fentanyl and methadone
 - S.L. 2017-115 added many new synthetic opioids to Schedule I, though fentanyl and methadone remain on Schedule II

Identifying the Substance

A. The case may be dismissed. See *State v. Ahmadi-Turshizi*, 175 N.C. App. 783 (2006) (reversing a defendant's conviction because he was charged with offenses involving "methylenedioxyamphetamine" rather than "3, 4-methylenedioxyamphetamine," and stating that "when an indictment fails to list a controlled substance by its chemical name as it appears in [the relevant schedule], the indictment must fail").

Mixtures

A. Two. *State v. Hall*, 203 N.C. App. 712 (2010) (schedule I ecstasy and schedule III ketamine combined; separate convictions and sentences for possession of each upheld); *State v. Williams*, ___ N.C. App. ___, 796 S.E.2d 823 (2017) (schedule I methylone and schedule I 4-methylethcathinone mixed in one bag; separate convictions for each upheld).

Trafficking

A. It is enough if the entire mixture weighs >4g. State v. McCracken, 157 N.C. App. 524 (2003).

No Field Test, No Charges?

Officer Ollie saw Sam Suspect standing on a street corner. Because Sam has a history of minor drug offenses, Ollie asked whether he could search Sam, and Sam consented to the search. In Sam's back pocket, Ollie found a baggie containing a small amount of white powder. Sam clammed up at that point and wouldn't say anything about the bag or its contents. Because of concerns about the toxicity of fentanyl, Ollie's agency just adopted a policy of not field testing drugs. Ollie sent the powder to the lab and expects a result in a few weeks. Ollie arrested Sam and asks you to issue a magistrate's order for felony possession of cocaine. What do you do?



No Field Test, No Charges?

• A chemical analysis is necessary to prove the identity of a controlled substance beyond a reasonable doubt at trial

• State v. Ward, 364 N.C. 133 (2010)

• A field test is not necessary to establish probable cause if there is sufficient circumstantial evidence to identify a substance

• State v. Flores, 996 A.2d 156 (R.I. 2010) (an officer's "observation of a white powder that is packaged in a clear plastic bag, standing alone, has been found to be sufficient indicia of probable cause")

Discretion in Charging?

You live in a small community. You have known Joe for years. He is a nice guy who has become addicted to opioids. He has picked up a couple of misdemeanor convictions in recent years for PDP and simple possession of controlled substances. He has just been arrested in possession of a dozen Tylenol 3 pills (a codeine mixture, Schedule III). He admitted to the arresting officer that he had bought the drugs with a plan to use half and give half to a friend who is also an addict. The officer asks you to charge Joe with PWISD Schedule III (Class I) and with possession of Schedule III with a prior drug conviction (Class I). Do you have the discretion to charge simple possession of schedule III (Class 1 misdemeanor) instead? If so, should you do it?

Other Charges

Second Degree Murder

If a "murder . . . was proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other [controlled] substance . . . and the ingestion of such substance caused the death of the user" it is a Class B2 felony under G.S. 14-17

3 opioid overdose deaths in 2 weeks lead N.C. prosecutors to pursue murder charges

By Jeff Menendez
The Virginian-Pilot
10/16/2017

IS IT MURDER?

Man sentenced in Buncombe's first use of 2nd-degree murder charge with opiate dealer

Child Abuse/Neglect

Possibly. "Any parent of a child less than 16 years of age . . . who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse." G.S. 14-318.2.

Initial Appearance/Pretrial Release

Dealing with Intoxicated Arrestees

- Under G.S. 15A-511, you may delay the initial appearance if the defendant is “grossly intoxicated.”
- Q1. How intoxicated is “grossly intoxicated”?
 - A. Intoxicated to the extent that the defendant can’t fully understand or participate in the initial appearance.
- Q2. What do I do with them in the meantime?
 - A. Complete the “Order of Commitment” portion of the release order form to put them in jail, but limit how long they are there and check on them periodically.

Is Jail Helpful or Harmful?

When dealing with defendants who are opioid addicts, what are the benefits (to the courts, to society, or to the defendants) of keeping the defendant in jail prior to trial? What are the risks?



Taking Precautions

Has your office taken any precautions because of the risk of exposure to fentanyl and other synthetic opioids?



Fentanyl and its analogs are potent . . . but the risk of clinically significant exposure to emergency responders is extremely low. To date, we have not seen reports of emergency responders developing signs or symptoms consistent with opioid toxicity from incidental contact with opioids.”
American College of Medical Toxicology

Immunity Provisions

The "Good Samaritan" Law

- G.S. 90-96.2
- Enacted 2013
- Provides that a person shall not be prosecuted for certain drug-related offenses if the person calls authorities to seek emergency medical assistance for a person experiencing an overdose

When Does It Apply?

1. The person "sought medical assistance for an individual experiencing a drug-related overdose by contacting the 911 system" or other listed emergency responders
2. The person reasonably believed "that he or she was the first to call for assistance"
3. The person "provided his or her own name to the 911 system or to a law enforcement officer upon arrival"
4. The person "did not seek the medical assistance during the course of the execution of an arrest warrant, search warrant, or other lawful search"

What Does It Do?

- Evidence that “was obtained as a result of the person seeking medical assistance” cannot be used to prosecute the person for
 - Misdemeanor drug possession
 - Felony drug possession of <1g cocaine or <1g heroin
 - PDP

Who Does It Cover?

- “The immunity described in . . . this section shall extend to the person who experienced the drug-related overdose if [the conditions set forth in] this section are satisfied”

What’s a Magistrate’s Role?

- Magistrates generally don’t consider defenses, but the statute is an immunity provision and states that the person “shall not be prosecuted”

The “Declare Sharps” Law

“Prior to searching a person, a person’s premises, or a person’s vehicle, an officer may ask the person whether the person is in possession of a hypodermic needle or other sharp object . . . If there is a hypodermic needle or other sharp object on the person [or premises or vehicle] and the person alerts the officer of that fact prior to the search, the person **shall not be charged with or prosecuted for possession of drug paraphernalia for the needle or sharp object, or for residual amounts of a controlled substance contained in the needle or sharp object.** The exemption under this subsection does not apply to any other drug paraphernalia that may be present and found during the search.”

G.S. 90-113.22(c)

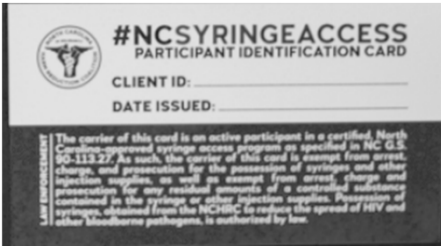
Needle Exchange

- G.S. 90-113.27
- “Any governmental or nongovernmental organization . . . may establish and operate a needle and hypodermic syringe exchange program”
- “[N]o employee, volunteer, or participant of a program established pursuant to this section shall be charged with or prosecuted for possession of . . . [n]eedles, hypodermic syringes, or other injection supplies obtained from or returned to a program established pursuant to this section” or “[r]esidual amounts of a controlled substance” contained therein
- Immunity applies only if the person “provides written verification that [the] injection supplies were obtained from” a needle exchange program

Injection Supplies



Written Verification



Naloxone/Narcan Availability

- “Opioid antagonist” that can reverse overdoses
- Prescription-only
- 90-12.7 allows medical practitioners and the State Health Director to make available to “a person at risk of experiencing an opiate-related overdose or . . . a family member, friend, or other person in a position to assist a person at risk of experiencing an opiate-related overdose”
- The State Health Director has issued such an order and Naloxone is widely available
- No civil or criminal liability for prescribing, dispensing, or administering

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