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Drug Identification Testimony in Criminal Cases
Recent Cases

State v. Fletcher, 92 N.C. App. 50 (1988)
(expert testimony from experienced officers identifying marijuana properly admitted, absence of chemical analysis did not render State's evidence insufficient)
Defendant was convicted of possessing and selling marijuana based upon his sale to an undercover officer of a clear ziplock bag containing a substance that the officer identified as marijuana. No chemical analysis of the substance was performed. Two law enforcement officers testified at trial as to their expert opinions, based upon their training and experience, that the substance was marijuana.

Defendant argued that this evidence was insufficient to prove that the substance was marijuana. The court rejected that argument, finding that expert testimony was permissible since the officers were better qualified than the jury to form an opinion as to the contents of the clear plastic bag. While noting that it "[w]ould have been better for the State to have introduced evidence of a chemical analysis of the substance," the court held that absence of such direct evidence was not fatal to the State's case.

State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876 (2007)
(no error in admitting lay opinion testimony from experienced officer that pills were crack cocaine)
Defendant was convicted of possession of cocaine based upon his possession of two white pills. Trial court did not abuse its discretion by allowing the law enforcement officer who seized the pills to testify that they were crack cocaine. The officer was permitted to give his opinion about the composition of the pills based upon his eight years of experience with the police department, during which he had come into contact with crack cocaine an estimated 500 to 1000 times.

State v. Llamas-Hernandez, 363 N.C. 8 (2009), reversing for reasons stated in dissenting opinion in 189 N.C. App. 640 (2008)
(error for detectives to testify to their lay opinion that nondescript white powder was cocaine)

Defendant was charged with trafficking in cocaine based upon law enforcement officers' seizure of a white powdery substance from the linen closet in his home. A chemical analysis of the substance was excluded from evidence at trial as a discovery sanction. The detectives who seized the substance from defendant's residence were permitted to testify as lay witnesses, over defendant's objection, that the substance was cocaine. A chemical analyst who had analyzed and identified as cocaine another substance seized from a different location at which defendant negotiated a drug deal, testified that in her opinion the substance found at defendant's home was similar to the other substance she identified as cocaine.

The state supreme court reversed for reasons stated in the dissenting opinion in the court of appeals. The dissent held that the trial court erred in permitting the detectives to testify to their opinions that the substance was cocaine. Without this testimony, the dissent concluded, there was no evidence

before the jury as to the nature of the white powder; thus the trial court erred in denying the defendant's motion to dismiss these charges.

The dissent based its determination that the opinion testimony should not have been allowed on two grounds. First, the court noted that controlled substances were defined in Chapter 90, Schedules I through VI, by their chemical properties. The dissent opined that by enacting such a technical, scientific definition of cocaine, the legislature clearly expressed its intent that expert testimony based on laboratory analysis be required to establish that a substance is a controlled substance.

Furthermore, the dissent noted that, while the detectives testified about their experience in drug cases, they did not testify as to their ability to identify controlled substances by sight. In addition, the State introduced no evidence regarding any distinguishing characteristics of the white powder taken from defendant's home, such as its taste or texture.

The dissent did not view the result as controlled by State v. Freeman, 185 N.C. App. 408 (2007), as the majority had. The dissent distinguished *Freeman* on the basis that powdered cocaine is a "non-descript white powder," while crack cocaine—the substance identified in *Freeman*—is an off-white pasty substance that comes in small blobs, referred to as "rocks."

State v. Meadows, ___ N.C. App. ___, 687 S.E.2d 305 (January 5, 2010)
(error to admit testimony from a law enforcement officer that he believed substance was crack cocaine based upon visual identification)
Defendant was convicted of possession of cocaine and possession of drug paraphernalia. The court of appeals ordered a new trial based upon the trial court's erroneous admission of expert testimony identifying crack cocaine based on the results of a NarTest machine where the state failed to demonstrate the reliability of NarTest machine. The trial court also erred by admitting testimony from a law enforcement officer that he believed the substance was crack cocaine as that belief was based merely on looking at the substance.

State v. Davis, ___ N.C. App. ____, 688 S.E.2d 829 (February 16, 2010)
(stating, in dicta, that *Freeman* is still binding precedent as to an officer's lay opinion identifying crack cocaine)

The defendant was convicted of possession with intent to sell or deliver cocaine and sale of cocaine, and was sentenced as a habitual felon. Defendant failed to preserve for appeal his argument that the court improperly admitted testimony from officers involved in the drug buy that the substance was crack cocaine. The court cited State v. Freeman, 185 N.C. App. 408 (2007), in support of its conclusion that the evidence was sufficient to show the substance was cocaine and, in a footnote, stated that "[State v. Freeman] is still binding precedent as to an officer's lay opinion identifying crack cocaine."

State v. Ferguson, ___ N.C. App. ___, 694 S.E. 2d 470 (June 15, 2010).
(trial court did not err in allowing a law enforcement officer to testify to his opinion that substances were marijuana based on visual identification)

The defendant was convicted of two marijuana offenses. The arresting officer testified, without objection, that he searched the minivan in which the defendant was a passenger and found two bags of marijuana under the front passenger seat, a bag of marijuana in the glove compartment, and a burnt marijuana cigarette in defendant's pocketbook. There was no evidence that the officer had taken the

substance out of the plastic bag to identify it or that the officer opened the cigarette to see whether marijuana leaves were inside. Defendant alleged on appeal that admission of the officer's opinion testimony was plain error. The court of appeals found no error in the admission of the officer's expert testimony, holding that nothing in State v. Llamas-Hernandez, 363 N.C. 8 (2009), or the court of appeals' decision in State v. Ward, ___ N.C. App. ___, 681 S.E.2d 354 (2009), "casts any doubt on the continued vitality of *Fletcher*." The court further held that the lack of evidence regarding the officer's reliance on odor as well as visual identification goes to the weight of the evidence, not admissibility.

State v. Ward, 364 N.C. 133, 694 S.E.2d 738 (June 17, 2010)
(holding that trial court abused its discretion by permitting expert to identify pills as controlled substances based solely on a visual identification and comparison with medical literature, as this methodology was not sufficiently reliable under Rule 702)

The jury convicted defendant for numerous drug offenses, including six counts of trafficking in opium. Defendant appealed, challenging the admission of expert testimony from an SBI chemist that pills found on defendant's person, in his car, and at his house were pharmaceuticals classified as controlled substances. A unanimous panel of the court of appeals ordered a new trial as to some of the offenses for which defendant was convicted, partly on the basis that the trial court improperly admitted expert testimony indentifying controlled substances based upon visual identification of the substances rather than a chemical analysis. The North Carolina Supreme Court granted discretionary review. The state supreme court affirmed the court of appeals, determining that the trial court abused its discretion by permitting the expert to identify pills based solely on a visual identification and comparison with medical literature, as this methodology was not sufficiently reliable under Rule 702.

SBI chemist, Special Agent Allcox, testified as an expert in chemical analysis and drug chemistry. He identified several controlled substances among the items examined in defendant's case. Allcox testified he conducted a chemical analysis on about half of the items submitted. The rest he identified by visual inspection and comparison with information in Micromedex literature. Allcox testified that the listing in Micromedex literature of all of the pharmaceutical markings helped identify the contents, manufacturer and type of tablet. He said that counterfeit tablets were easy to distinguish because they lacked the uniformity associated with tablets manufactured by the pharmaceutical industry. He testified that none of the pills submitted in defendant's case was counterfeit.

Allcox testified that pursuant to SBI standard operating procedures substances supporting only misdemeanor charges were routinely identified solely by visual inspection with comparison to Micromedex literature. Substances submitted under circumstances that would support felony charges, in contrast, received "a complete analysis" pursuant to laboratory procedures.

Noting recent "acute scrutiny" of the "field of forensic science," and citing language from Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), as support, the court determined that the visual inspection methodology employed by Allcox was not sufficiently reliable to identify the substances at issue and thus the trial court abused its discretion in allowing such evidence at trial. The court rejected the State's argument that the deficiencies in visual identification were matters to be left to the jury in its determination of how much weight to accord the testimony.

The court stated that the "natural next step" following its adoption of the dissenting opinion in the court of appeals in *Llamas-Hernandez* was to require that expert testimony identifying as controlled substances the substances analyzed in this defendant's case be based on a scientifically valid analysis

and not mere visual inspection. The court based its determination that a chemical analysis was required on the legislature's adoption of specific chemical designations in Schedules I through VI, which imply that a chemical analysis is necessary to accurately identify controlled substances, and the prohibition against creating, selling, or delivering a counterfeit substance—defined in part as a tablet that is substantially identical to a controlled substance. The ban of counterfeit controlled substances evidences the legislature's view that a chemical analysis is required to differentiate real and counterfeit controlled substances. The court also relied upon Allcox's testimony in determining that the State failed to show the visual inspection was reliable, noting that Allcox's rationale for using this method was to save time and resources.

The court stated that "[u]nless the State establishes before trial that another method of identification is sufficient to establish the identity of the alleged controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. " It went on to specify that its holding was "limited to North Carolina Rule of Evidence 702" and, furthermore, that it did not deem analysis of each individual pill necessary—(more than 400 tablets were submitted to the SBI in defendant's case)—noting that the propriety of the SBI's standard operating procedures for chemically analyzing batches of evidence was not at issue.