



## Hemp or Marijuana?

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Back in November of last year, I wrote about hemp and CBD laws [here](#). I have been teaching quite a bit on the subject lately and wanted to follow up that post with an examination of how legal use of hemp products may affect marijuana prosecutions in North Carolina.

**The state of hemp.** As I outlined in the prior post, hemp products are legal under state and federal law. This is apparent to anyone that visits a hemp store, where you can purchase everything from CBD-infused gummy bears, lotions, or drinks, to hemp flowers, also known as “buds” of the plant. Hemp flowers are indistinguishable from marijuana flowers—they look the same, smell the same, and apparently taste the same. Just like dried marijuana flowers, the dried hemp buds can be smoked, vaped, or eaten. Ingesting legal hemp (in whatever form) does not cause a user to become impaired but does provide a dose of the popular compound cannabidiol, abbreviated CBD. Many hemp stores also sell paraphernalia used to smoke it, like rolling papers and pipes.

**Can you tell hemp from marijuana?** Not very easily. No field test exists of which I’m aware, and traditional chemical analysis of cannabis typically only looks for the presence of THC, which is present in both marijuana and hemp. To distinguish hemp from marijuana, a chemical analysis that provides *quantified* levels of THC must be done. From what I understand, this is not a common test, and neither the State Crime lab nor most local crime labs perform this type of testing.

The North Carolina Department of Agriculture, however, tests the dried product from hemp plants to assure it is within the legal limit for THC levels (up to 0.3%), via private labs. Two local companies are [here](#) and [here](#). From talking with retailers, it’s my understanding that they would not accept a hemp product without documentation that it has been subject to such testing and is found to be within the lawful limit.

So, it appears that while testing to distinguish hemp from marijuana exists, the state law enforcement lab infrastructure is not currently equipped to do so, and officers on the ground can’t tell the difference, at least not before the product can be seized and analyzed in a lab capable of performing this kind of testing. Which brings us to the next point . . .

**How should law enforcement treat suspected marijuana?** If hemp is legal, and it looks and smells exactly the same as illegal marijuana, and there isn’t an easy way to distinguish it outside of a lab, what are officers to do? A recent [memo](#) submitted by the State Bureau of Investigation (“SBI”) to the General Assembly describes the problem. The memo was submitted in response to [Senate Bill 315](#), pending this session, which if passed would clarify that the possession of all hemp products is legal. While the SBI memo discussed concerns if SB 315 passes, it seems fairly clear that these [concerns exist](#) under current law. To quote from the memo:

Hemp and marijuana look the same and have the same odor, both burned and unburned. This makes it impossible for law enforcement to use the appearance of marijuana to develop probable cause for an arrest, seizure of an item, or probable cause for a search warrant. In order for law enforcement to seize and analyze an item, the officer must have probable cause that the item being seized is evidence of a crime. The proposed legislation makes possession of hemp legal in any form. Therefore, in the future when law enforcement encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to

seize and analyze the item because the probable cause to believe it is evidence of crime will no longer exist since the item could be legal hemp. . . The inability for law enforcement to distinguish between hemp and marijuana is problematic in all marijuana prosecutions, from small amounts to trafficking amounts of plant material. Memorandum from the North Carolina State Bureau of Investigation, *Industrial Hemp/CBD Issues at 2*.

The memo goes on to note that police K-9's cannot tell the difference and that the same problem occurs with respect to paraphernalia.

**Odor Plus?** As the memo above lays out, without a field test or some other way to verify whether something is hemp or marijuana, officers do not have probable cause to seize it or to arrest someone in possession of it without some other reason to believe the substance is contraband. There might be times when law enforcement can develop probable cause based in part on the odor or appearance of the substance if they have other evidence that the substance is marijuana—in other words, they have observations “plus.” For example, they might observe other signs of marijuana impairment, or a suspect might admit the substance is marijuana. But if the contraband nature of marijuana is no longer immediately apparent because of its similarity to hemp, officers may lack probable cause to search, seize, or arrest based on the odor or appearance alone.

**What about *Fletcher*?** Existing state case law has allowed marijuana to be identified by visual inspection of an officer. In *State v. Fletcher*, 92 N.C. App. 50 (1988), the court held that the officer's visual identification of marijuana provided a sufficient basis for conviction of a marijuana offense. *Fletcher* may be on shaky ground because of the visual and olfactory similarity between lawful hemp and unlawful marijuana. An officer might still try to identify plant material as marijuana based on her training and experience, but most will have to acknowledge that they cannot distinguish between marijuana flowers and hemp flowers. Again, a specific chemical analysis is the only way to distinguish the two.

We've seen in other drug cases that the defendant's admission can be sufficient evidence of the identity of a substance (*see, e.g., State v. Bridges*, \_\_\_ N.C. App. \_\_\_, 810 S.E.2d 365 (Feb. 6, 2018) (summarized [here](#))), so the same may hold true in this context. But where the defendant contests the issue of whether the product is hemp or marijuana, the State will have difficulty proving identity of the substance without a chemical analysis.

**I didn't know it wasn't lawful hemp.** Drug possession in North Carolina requires that the defendant knowingly possess the drugs—that she knew what she had was an illegal controlled substance. Under *State v. Perez*, 55 N.C. App. 92 (1981), if the defendant presents evidence that she didn't know what she had was an illegal drug, the State must produce some evidence of the defendant's knowledge. So, even assuming police can lawfully seize the substance, charge the person with possession, and prove at trial that the substance is actually marijuana, the defendant might then testify at trial that she thought she had lawful hemp and not marijuana. Often, the prosecution would rely on circumstantial evidence to show that the person knew she was using illegal drugs—the presence of money, drug paraphernalia, scales, ledgers, etc., all might be used in a normal drug case to establish guilty knowledge. I'm not so sure those are as persuasive in this context—again, the same paraphernalia is used to ingest hemp as marijuana, and one engaged in the business of selling hemp flowers may look like someone involved in the marijuana trade. So what would indicate knowledge of marijuana versus hemp? Again, a specific chemical test may be necessary absent an admission by the defendant or signs of marijuana impairment.

**What about drug tests?** It isn't just a problem for law enforcement. In my earlier blog post, I advised that people using hemp products should beware for several reasons—the lack of standardized quality control in the production of hemp, the different standards for the content of hemp in other states, the possibility of THC accumulation in the body over time, causing trace amounts in hemp to cause a user to test positive for THC. For these reasons, anyone working in a position where he or she is drug tested takes a risk by regularly using a hemp product. The same caveat applies for someone on probation or post-release supervision.

I have continued to hear stories from employees about THC positive drug screens despite only using hemp. I have heard from employers trying to figure out how to determine if an employee's positive result could have been the result of CBD or hemp products. The employment implications of hemp laws are beyond the scope of a criminal law post, but I will note that an employer might incur liability for firing an employee based only on a THC positive result: a statute in North Carolina protects the "Lawful Use of Lawful Products." See [G.S. 95-28.2](#).

**How might defenders use this information in court?** To effectively make these points in court, an expert witness is likely needed. An expert witness could explain the similarities and differences among hemp and marijuana products, and that information might be used in a suppression motion or to contest a drug identification at trial. In addition to an expert witness, defenders may consider filing a pretrial motion under Rule 702 for a determination of the soundness of an officer's opinion that something is marijuana when that opinion is based only on odor or appearance. Another option might be to ask the court to take judicial notice of the laws authorizing hemp and modifying the definition of marijuana (and perhaps, the availability of hemp products in the state too). A special jury instruction on the hemp and marijuana issue might be sought. In addition, the SBI memo could potentially be introduced by someone with knowledge of its contents or possibly under the public records or residual exceptions to the hearsay prohibition.

**Where are we headed with this?** That's hard to say. The General Assembly may weigh in on this situation one way or the other. I noted in the first CBD post that a bill was pending in the legislature to decriminalize possession of marijuana under certain amounts (among other steps). I mentioned SB 315 above, which would clarify that all forms of hemp are legal to possess (although, again, that seems already to be the current state of affairs). The SBI memo proposes changes to the hemp and marijuana laws, such as outlawing the "bud" variety of hemp, outlawing paraphernalia to smoke hemp, and immunizing officers from civil liability for seizing hemp and hemp products. Hemp farmers, retailers, and consumers might have different suggestions. According to the SBI, the number of licenses to grow hemp in North Carolina increased from 348 in 2018 to over 500 in 2019, with hemp being grown on more than 4500 acres of land and in over 1.6 million feet of greenhouse space. Hemp is big business both in the state and across the nation, with an expected [market value](#) of around \$10.6 billion per year by 2025. I don't know for sure, but my anecdotal sense is that most farmers in NC are growing the "bud" variety of hemp—just look around at how many stores are selling hemp flowers and related products. If the prices for CBD products are any indication, it's a lucrative endeavor, and the industry may resist regulations like those proposed by the SBI. One thing or the other may have to go—either we regulate hemp (at least in the flower form) out of existence or we further loosen the criminal regulation of at least small amounts of marijuana. If you have other thoughts on solving this puzzle, share your thoughts in the comments below.

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