Combining Drug Quantities

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I've recently been asked several variants of this question: If a suspect sells drugs to an undercover officer on multiple occasions over a few days or weeks, can the drug quantities involved in each sale be aggregated to reach the trafficking threshold? That led me to spend some time looking at the more general issue of when multiple caches of drugs can be combined. This post lays out the law.

It is proper to combine multiple packages of drugs possessed at the same time. So, if a defendant has three bags of cocaine is his dresser drawer, it would be proper to add the weights of the bags together. In fact, the case law holds that it is even proper to mingle similar substances together before testing and weighing. There are many cases on point. *See, e.g., State v. Huerta*, 221 N.C. App. 436 (2012) (proper to combine white powder from multiple bags found in defendant's attic into a single mixture exceeding the trafficking threshold prior to testing); *State v. Worthington*, 84 N.C. App. 150 (1987) (similar, and collecting cases).

This is so even when the caches are in distinct locations. If the defendant has one bag of cocaine in his dresser and another in his truck, parked in the driveway outside his house, these quantities, too, may be added together. *State v. Hazel*, __ N.C. App. __, 739 S.E.2d 196 (2013) (proper for "heroin recovered from Defendant's person to be combined with the heroin recovered from [his] apartment for the purposes of charging Defendant with trafficking"; defendant possessed both caches of drugs "simultaneously" and apparently for the same purpose of distribution; the evidence suggested that the drugs recovered from the defendant were taken from the larger cache in his apartment; the court states that whether quantities may be combined will depend on the "particular circumstances" of each case); *State v. Johnson*, 217 N.C. App. 605 (2011) (proper to combine drugs found in defendant's socks and shoes with drugs found in the vehicle in which he had recently been a backseat passenger); *State v. Edwards*, 207 N.C. App. 525 (2010) (unpublished) (proper to combine heroin sold to informant with heroin recovered shortly thereafter from the defendant's house; court states that "[o]ur Court has held that separate caches of drugs stored in different locations may be used to support a single possession conviction," citing *State v. Smith*, 99 N.C. App. 67 (1990), a case concerning caches of "drugs located within a few feet of each other in the same room"; court emphasizes evidence indicating that the defendant possessed all the heroin at one time); *State v. Kornegay*, 153 N.C. App. 201 (2002) (unpublished) (proper to combine cocaine seized from defendant's vehicle with cocaine seized from defendant's home; "[t]he State's evidence . . . established defendant's knowing possession of 29.4 grams of cocaine at one time, albeit in two locations, and was sufficient to show trafficking by possession"; court emphasizes that the possession was "simultaneous").

There may be an exception where caches are for distinct purposes. There may be an exception to the above rules where the evidence suggests that some caches are for personal use while others are for distribution. The case that may support such an exception is *State v. Rozier*, 69 N.C. App. 38 (1984). In that case, the defendants sold five ounces of cocaine to an undercover officer and were arrested moments later while still in possession of two small vials of cocaine. They were convicted of felony possession of the five ounces and misdemeanor possession of the vials. On appeal, they contested the misdemeanor convictions, arguing that "possession of the two differing amounts of cocaine constituted a single continuing offense."

The court of appeals disagreed. It stated that "[t]he circumstances of each case will determine whether separate

offenses may properly be charged." It further pronounced that "if all the cocaine had been found on defendants' persons at the same time, only one offense could be charged," but noted that there was a temporal gap, albeit small, between the defendants' possession of the five ounces and their arrest. It also noted that the larger quantity had been possessed for sale while the vials were for personal use. It therefore affirmed both convictions.

It's a little hard to know what to make of *Rozier.* The court emphasized the existence of a temporal gap between the offenses, but the gap was trivially small and it appears that the defendants possessed both the five ounces and the vials at the same time. It may therefore be reasonable to focus on the other justification presented in *Rozier* for treating the caches separately: that they were possessed for distinct purposes. If a defendant possessed, for example, 27 grams of cocaine packaged for sale and 2 grams packaged for personal use, this aspect of *Rozier* could perhaps support a defense argument that the proper charges are PWISD and simple possession rather than trafficking by possession.

Multiple sales over multiple days probably can't be combined. *Hazel* and the other opinions discussed above place a heavy emphasis on the *simultaneous* possession of multiple caches of drugs. When a defendant makes several sales over multiple days, there is a realistic possibility that the defendant re-stocked in between sales and did not possess all the drugs at once. *Cf. Edwards*, *supra* (noting defendant's argument regarding the sufficiency of the evidence of simultaneous possession based on the "possibility that he could have exited through an unmonitored rear entrance and acquired additional heroin following his sale to the informant"). Therefore, the quantities sold over time probably can't be aggregated. Although I'm not aware of a North Carolina appellate case directly on point, cases from other states tend to find this fact pattern insufficient to support combining weights. *See, e.g., Deonarine v. State*, 967 So. 2d 333 (Fla. Dist. Ct. App. 2007) (prescriptions for controlled substances written in bad faith over a three-month time period could not be aggregated to support a trafficking conviction; "These prescriptions occurred over a significant spatial and temporal time that allowed the defendant to pause, reflect, and form a new criminal intent between the occurrences."); *People v. Collins*, 828 N.W.2d 392 (Mich. Ct. App. 2012) (concluding that "defendant's various deliveries of 0.5 to 28 grams of heroin on separate occasions may not be aggregated to support a conviction for delivering 50 grams or more . . . of heroin"; the court reasoned that the punishment scheme created by the legislature "would be undercut by allowing the prosecution to aggregate multiple small deliveries," that the language of the statute suggested that aggregation was not appropriate, and that case law did not support aggregation). Maryland appears to have adopted a contrary rule by statute. Md. Criminal Law Code § 5-612(b) ("For the purpose of determining the quantity of a controlled dangerous substance involved in individual acts of manufacturing, distributing, dispensing, or possessing under [the state's 'volume dealer' statute], the acts may be aggregated if each of the acts occurred within a 90-day period.").

Conspiracy may sometimes be a way to combine multiple sales. In some cases, there may be evidence of a conspiracy to sell a trafficking amount of drugs over time, even if no single completed sale involves a trafficking amount. In a part of the *Rozier* opinion dealing with a different set of facts than the one addressed above, the court ruled that a conspiracy charge was properly based on an agreement to transact an ounce of cocaine, i.e., 28.349 grams, even though only 27.71 grams was sold. The court stated "that it is the amount of contraband agreed upon, not the amount actually delivered, which is determinative in a narcotics conspiracy case." Certainly not every series of drug sales is pursuant to an overarching agreement, but there may be instances in which, for example, drug traffickers agree to sell an informant 75 tablets of MDMA now and 75 more in a week. Such facts might suffice to establish a conspiracy to sell more than 100 tablets of MDMA.

When permitted, aggregation may be mandatory. Often the aggregation of multiple caches of drugs works to the State's advantage, but not always. For example, if a defendant simultaneously possesses ten bags, each containing 28 grams of cocaine, the State might prefer to pursue ten counts of trafficking 28 grams or more rather than one count of trafficking 200 grams or more. I doubt that it would be proper to do so. The North Carolina case law never suggests that the State has any authority to disaggregate a single crime into multiple charges, and out of state cases also lend support to the conclusion that if aggregation is permitted, it likely is mandatory. *Cf. Com. v. Rabb*, 725 N.E.2d 1036 (Supr. Ct. Mass. 2000) (indicating that where "separate and distinct" caches of a controlled substance are involved, a

prosecutor may have the discretion to bring charges based on each cache separately, but that where multiple caches are part of a single "continuous crime," that "requires a prosecutor to aggregate all of the controlled substance[s]" involved); *Straughn v. State*, 876 So.2d 492 (Ala. Ct. Crim. App. 2003) (stating that "the evidence at trial established that the marijuana found on [the defendant's] property and the marijuana found at the neutral site were part of a single growing operation and, thus, constituted a single act of possession," though ruling that the defendant had failed to preserve the issue).

Sorry for the long post. This is an important issue and I wanted to include as much of the relevant law as possible. But there was a lot to sift through and I may still have missed some important cases. If you think that I did, please send me an email or post a comment.