

Court of Appeals Rules that Ignorance of the (Pseudoephedrine) Law Is an Excuse

Author : Jeff Welty

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Last week, the North Carolina Court of Appeals reversed a defendant's conviction under [G.S. 90-95\(d1\)\(1\)\(c\)](#), which makes it unlawful to "[p]ossess a pseudoephedrine product if [a] person has a prior conviction for the possession or manufacture of methamphetamine." The court ruled that the defendant's "due process rights under the United States Constitution were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of convicted felons to which he belonged." In other words, the defendant's apparent ignorance of the law excused his violation of it.

Background. Austin Miller was convicted in 2012 of "possession of a methamphetamine precursor and maintaining a vehicle or dwelling for sale or delivery of a controlled substance," and was sentenced to probation. Effective December 1, 2013, the General Assembly enacted G.S. 90-95(d1)(1)(c), making it illegal for Miller to possess any product containing pseudoephedrine, which may be used to relieve cold and allergy symptoms, but also may be used to manufacture methamphetamine. On January 5, 2014, Miller purchased "one 3.6 gram box of allergy and congestion relief medicine, a pseudoephedrine product," from Walmart in Boone, North Carolina. Based on the purchase, he was arrested and charged with unlawful possession of pseudoephedrine.

Trial court proceedings. Miller moved to dismiss, arguing that the statute was unconstitutional as applied to him because "the State failed to provide him any notice of the statute and its implications." The State argued that no notice was necessary in light of the extreme danger posed by manufacturing methamphetamine, and contended that the situation was no different from the law prohibiting convicted felons from possessing firearms. A superior court judge ruled for the State. Miller was convicted and sought review in the court of appeals.

Court of appeals opinion. A panel of the court of appeals ruled unanimously that the statute violated due process as applied to Miller. The opinion, by Judge Stephens, is available [here](#). In a nutshell, the court reasoned:

- The statute creates a strict liability offense that contains no intent or *mens rea*
- Strict liability offenses generally violate due process, unless they concern conduct so inherently threatening to public welfare, and so naturally likely to be regulated, that notice of the law's existence may reasonably be inferred.
- The conduct prohibited by the pseudoephedrine statute does not concern such conduct. After all, "[p]ossession of pseudoephedrine products is an innocuous and entirely legal act for the majority of people in our State, including most convicted felons."
- Therefore, the statute is unconstitutional as applied to Miller, where there was no evidence that Miller was aware of the statute.

The court noted that a similar statute was ruled unconstitutional in *Wolf v. State of Oklahoma*, 292 P.3d 512 (Okla. Ct. Crim. App. 2012). It also distinguished the law forbidding felons from possessing firearms, in part because the latter

statute applies to all convicted felons generally.

Implications. The court's ruling seems to call into question all convictions that have been incurred under the new statute, except perhaps those in which there was evidence of the defendant's actual knowledge of the illegality of his or her conduct. Looking forward, prosecutors likely will need to prove a defendant's awareness of the law in order to proceed under it. Indeed, the court itself suggested that some notice procedure should be adopted, stating: "We leave it to the other branches of government to determine the best manner in which to [provide notice], whether by individually contacting the special subset of felons to whom the new subsection applies, requiring that signs regarding the provisions of the new subsection be posted at pharmacy counters, adding an informational statement to the NPLeX system, or some other method."

More broadly, perhaps there are other strict liability statutes to which the reasoning of *Miller* might apply. Readers are invited to nominate offenses in the comments.

Finally, although there was no dissent in the court of appeals, the State might seek further review of this case in the state supreme court. Although I have not studied the matter closely, the opinion may take a more restrictive approach to strict liability offenses than previous cases have. A blog post by Jessie Smith, [here](#), provides an overview of some previous decisions regarding strict liability.