



Court OKs Measuring Combined Bags in Drug Cases

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In [State v. Huerta](#), the court of appeals recently reaffirmed its controlled substance “combination decisions.” Here’s what happened. Huerta was convicted of, among other things, trafficking by possession of more than 400 grams of cocaine. During a search of Huerta’s house, officers found three caches of what turned out to be cocaine: (1) one kilogram-sized brick of white powder, (2) a plastic bag containing ten individually wrapped packets of white powder, and (3) a grocery bag containing two large plastic ziplock bags, each with twelve individual packages of white powder. Because the officers wanted to have the packaging material tested for fingerprints, they separated the substance in the packages from the packaging. Specifically, they emptied the ten individual packets in the second cache into one bag and emptied the contents of the packages in the third cache into another bag. They then sent the three bags to the SBI for testing. After receiving the bags, an agent weighed them and performed initial chemical testing on the material in each. The powder in each bag responded consistently to the chemical reagent. The agent then combined the material in the three bags for further testing. At trial the agent explained that if evidence is collected from the same location, packaged in the same manner, appears the same, and gives the same preliminary test, it is combined for analysis to confirm its identity. In this case, that analysis consisted of an infrared spectrophotometer test, which showed the material to be cocaine hydrochloride. The combined material weighed 1,729.5 grams. Although the agent tested the material in the bags for a broad range of controlled and non-controlled substances, she did not find any substances in the mixture other than cocaine hydrochloride. At trial, her testing was admitted to establish that the substance was cocaine and that it weighed more than 400 grams. As noted Huerta was convicted.

On appeal Huerta argued that the trial court erred by admitting the evidence regarding the testing on the single bag. He asserted that because the three bags were combined into a single bag before being tested with the infrared spectrophotometer, the evidence failed to establish that all three bags contained cocaine. He further argued that he could have only been convicted of trafficking in cocaine based upon the weight of the cocaine in the smallest of the three bags (250 grams). This would have significantly lowered his sentence. Citing prior case law, *State v. Worthington*, 84 N.C. App. 150 (1987) (upholding a conviction where a chemical analyst combined the contents of three separate containers of powder before testing the combined mixture); *State v. Horton*, 75 N.C. App. 632 (1985) (same as to six packets of heroin); *State v. Dorsey*, 71 N.C. App. 435, 438 (1984) (same as to 105 bags of heroin), the court disagreed stating:

[I]n each of these cases, several containers of powder suspected to be a controlled substance were seized from the defendant and combined prior to the performance of chemical testing. Even so, on each occasion, we held that the jury should decide whether the defendant possessed the requisite amount of contraband and that speculation concerning the weight or concentration of the substance in each container did not render expert testimony that the combined mixture had a specific total weight inadmissible.

It thus concluded that the evidence was admissible and that the issue of whether the defendant possessed more than 400 grams of cocaine was a question for the jury not the judge.

This makes sense. There was no real challenge to the expert’s opinion as to the identity and weight of the substance. Rather the defendant’s argument was that the State failed to prove that prior to combining the bags the defendant possessed more than 400 grams of cocaine or a mixture containing cocaine. Clearly the jury thought otherwise. And

that's not surprising given the facts. Recall that before she did the definitive test, the agent found that all three bags reacted similarly in preliminary testing. Also, it appears that the whole mixture contained pure cocaine hydrochloride. There may be cases in which the practice of combining bags creates a better factual issue for defense counsel to develop and argue to the jury. But *Huerta* confirms that any such argument won't get the defense very far in terms of contesting the admissibility of the expert's opinion as to the nature and weight of the combined substance.