

Delivery of a Controlled Substance and the "Pot Exception"

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G.S. 90-95(a)(1) makes it a crime to knowingly sell or deliver a controlled substance to another person. As a general rule, the delivery of marijuana—a Schedule VI controlled substance—is a Class I felony. G.S. 90-95(b)(2). However, the statute provides that it is not a delivery to transfer for no remuneration less than 5 grams of marijuana or less than 2.5 grams of a synthetic cannabinoid or any mixture containing such a substance. *Id.* This provision sometimes is called the “pot exception.” Here’s how it might apply: Two friends are sitting on a bench. One is smoking a joint. After taking a few hits, he passes it to his buddy, who does the same. No money changes hands. In this scenario, unless the joint is a monster-sized one, less than 5 grams of marijuana is likely to be involved. (Before you start pummeling me with questions and innuendo about how I know this, let me clarify: I googled it! Web sites with names like “Weedy” and “Grass City” and informed me that a joint typically contains less than 1 gram of marijuana.) But let’s get back to our example. In this scenario, there is no delivery because less than 5 grams of marijuana was transferred and no remuneration was involved. Of course, both friends are guilty of simple possession. And yes, for you zealous officers, possession of paraphernalia (the rolling paper) applies as well.

A recent case, [State v. Land](#), addressed a couple of issues regarding this offense. In *Land*, the defendant gave Andrew Demaioribus, an undercover officer, a bag containing 2.03 grams of marijuana. He was charged with, among other things, delivery of marijuana and after being convicted he appealed. On appeal, the defendant first argued that the indictment charging delivery of marijuana was defective because it failed to allege an essential element of the offense. Specifically, he asserted that because he was charged with delivery of less than 5 grams of marijuana, the indictment was defective in that it failed to allege that he received remuneration. Over a dissent, the majority rejected this argument. It cited *State v. Pevia*, 56 N.C. App. 384, 387 (1982), for the proposition that G.S. 90-95 creates a single offense of delivery of a controlled substance, with no separate offense of delivery of marijuana. As a result, it concluded, an indictment is valid when it alleges, as here, that the defendant “did unlawfully, willfully and feloniously deliver to [a specified person] a controlled substance, to wit: marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act.” It continued, explaining that under *Pevia* the State can prove delivery of marijuana with evidence either (1) of a transfer of 5 or more grams of marijuana, or (2) of a transfer of less than 5 grams of marijuana for remuneration. It concluded: “Since the methods of proof set out in [G.S.] 90-95(b)(2) are mere evidentiary matters, they need not be included in the indictment.” The dissenting judge agreed with the defendant’s argument, noting that in *State v. Partridge*, 157 N.C. App. 568, 570 (2003), the court had vacated the defendant’s conviction of felony possession of marijuana because the indictment failed to allege the amount of marijuana that he possessed.

Notwithstanding this disagreement about charging language, all three judges agreed that the trial court erred by failing to instruct the jury that a transfer of less than 5 grams of marijuana for no remuneration is not a delivery. The trial court had instructed the jury as follows:

The Defendant has been charged with delivering marijuana, a controlled substance. For you to find the Defendant guilty of this offense, the State must prove beyond a reasonable doubt that the Defendant knowingly delivered marijuana to Mr. Demaioribus. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant knowingly delivered marijuana to Mr. Demaioribus, then it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt then it would be your duty to return a verdict of not guilty.

The court concluded that because the evidence showed a transfer of only 2.03 grams of marijuana, the trial court erred by not instructing the jury that in order to prove delivery, the State was required to prove that defendant transferred the marijuana for remuneration. However, the court found that the error did not rise to the level of plain error.

Obviously, because of the dissenting opinion, we're likely to be hearing from the Supreme Court on the indictment issue. When that happens, I'll be sure to give you an update.