

Determining Probable Cause for Drug Crimes without Field Tests

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Some law enforcement agencies concerned about officers' exposure to fentanyl have stopped field testing white powders. A question I've had several times is whether a magistrate may find probable cause for a drug offense involving a white powder without a field test. The answer to that question is yes, so long as the totality of the circumstances provides reason to believe that the powder in question is a controlled substance.

The opioid epidemic and the decline of field testing. [Fentanyl](#) is an opioid used for pain relief. Like other opioids, it is also subject to abuse. It is extremely powerful. The DEA [states](#) that it may be "30-50 times more potent than heroin," and a related substance, carfentanil, may be 100 times more potent than fentanyl. Very small doses of fentanyl may be harmful or even fatal.

Fentanyl may present as a white powder and so may be visually indistinguishable from other substances, controlled or otherwise, that have a similar appearance. One way to identify a substance that an officer suspects is controlled is to perform a field test. However, authorities have warned law enforcement officers and other first responders of the dangers of handling fentanyl and related substances. For example, the DEA advises as follows:

There is a significant threat to law enforcement personnel, and other first responders, who may come in contact with fentanyl and other fentanyl-related substances through routine law enforcement, emergency or life-saving activities. Since fentanyl can be ingested orally, inhaled through the nose or mouth, or absorbed through the skin or eyes, any substance suspected to contain fentanyl should be treated with extreme caution as exposure to a small amount can lead to significant health-related complications, respiratory depression, or death.

The true magnitude of the risk to first responders is unclear. There have been anecdotal reports of officers suffering adverse effects from field contact with fentanyl, some of which are referenced in [this article](#) in *The Atlantic*. However, these reports have proven difficult to confirm. The North Carolina Department of Health and Human Services [states](#) that "[t]o date, there have been no documented nor confirmed cases of overdoses among first responders in North Carolina through occupational exposure via routine duties," and that "[t]he risk of clinically significant exposure to emergency responders is extremely low."

In light of the above information, some agencies have chosen to err on the side of caution when deciding how to handle unknown white powders. NCDHHS takes the position that "[f]ield testing fentanyl or its analogs is not recommended because it increases the risk of exposure to responders." In keeping with this advice, a number of agencies in North Carolina and elsewhere have stopped field testing white powders.

Field tests aren't essential to finding probable cause. Whether probable cause exists for any offense "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366 (2003). A positive field test can certainly help to establish probable cause that a substance is contraband, but the absence of a positive field test does not necessarily mean that probable cause is lacking. Other circumstances, like the packaging of the substance, where it is located, the presence of large amounts of cash or other drug paraphernalia, and the defendant's statements about the identity of the substance, may provide reason to believe that it is a controlled substance.

Several North Carolina cases have found probable cause without a positive field test. *See, e.g., State v. Patrick*, 88 N.C. App. 582 (1988) (finding probable cause to arrest defendant for possession of cocaine where, in addition to other incriminating circumstances, officers discovered a “packet of white powder which had fallen from defendant’s clothing”); *State v. Morris*, 229 N.C. App. 682 (2013) (unpublished) (among other incriminating circumstances, an officer’s observation of a “clear plastic baggie containing a white powder along with a straw” supported the issuance of search warrant).

Cases from other jurisdictions have held specifically that a field test is not always necessary to establish probable cause to believe that an unknown substance is contraband. *See, e.g., United States v. Russell*, 655 F.2d 1261 (D.C. Cir. 1981) (rejecting the defendant’s argument that a field test of a “white substance found in the glove compartment” was necessary to establish probable cause for an automobile exception search), *vacated in part on other grounds*, 670 F.2d 323 (D.C. Cir. 1982); *United States v. Cook*, 949 F.2d 289 (10th Cir. 1991) (rejecting the defendant’s argument that an officer’s failure to test a “white rock that appeared to be cocaine” bought by a confidential informant in a controlled buy was fatal to the sufficiency of a search warrant affidavit).

[This memo](#) from the Indiana State Police is on the right track when it summarizes that in the absence of a field test, “[o]bservations, admissions, confessions, witness interviews, training, and experience” may help in “the identification of powdered substances and the development and documentation of probable cause.”

Ward doesn’t change the analysis. In *State v. Ward*, 364 N.C. 133 (2010), the Supreme Court of North Carolina held that “[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.” While *Ward* requires a chemical analysis in most cases *for proof beyond a reasonable doubt* at trial (subject to a number of exceptions discussed by Defender Educator Phil Dixon in [this](#) prior blog post), *Ward* isn’t about the much lower threshold of *probable cause* to arrest. At the probable cause stage, it is common for investigators to be awaiting further scientific testing. For example, a DWI arrest may be supported by a defendant’s bad driving and the odor of alcohol coming from his person even though a blood test for alcohol has not been analyzed. And in a sexual assault case, the victim’s statements and other physical evidence may combine to provide probable cause even though DNA testing on the rape kit remains to be performed.

Field tests aren’t useless or irrelevant. None of the above means that field tests are useless or irrelevant, or that the absence of a field test will never be significant when determining probable cause. For example, in *State v. Beaver*, 37 N.C. App. 513 (1978), an officer seized a shot glass containing white powdery residue even though he had “no creditable training in the identification of narcotics” and admitted that “he could not determine what the white powder substance was solely by sight.” In that case, the court of appeals effectively stated that probable cause lacking “until a field test was performed upon the residue,” revealing that it was an amphetamine. Again, it is the totality of the circumstances that counts, and when there are few or no circumstances suggesting that a white powder is a controlled substance, a field test may be essential to probable cause. But often the surrounding circumstances will permit an inference about the identity of a substance that is sufficient at the probable cause stage.