

Statutes:

N.C. Gen. Stat. §90-87(16).

(16) "Marijuana" means all parts of the plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

N.C. Gen. Stat. §90-95(h).

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 39 months in the State's prison and shall be fined not less than five thousand dollars (\$ 5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 51 months in the State's prison and shall be fined not less than twenty-five thousand dollars (\$ 25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 93 months in the State's prison and shall be fined not less than fifty thousand dollars (\$ 50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 222 months in the State's prison and shall be fined not less than two hundred thousand dollars (\$ 200,000).

Relevant Case Law:

State v. Anderson, 57 N.C. App. 602 (N.C. Ct. App. 1982).

The amount in question here was 2,700 pounds and the statutory threshold for this level of trafficking was 2,000 pounds. The defendant did not contest at trial that mature stalks were

included. He argued on appeal that the evidence was destroyed by the police, who intentionally destroyed the evidence to make room for storage (took up three truck loads), and that this deprived him of his right to test the evidence. Essentially, because the evidence was destroyed, he could not determine whether mature stalks and other non-marijuana material were included in the total weight. The court finds no error since there was no evidence submitted by the defense in support of their motion. The defendant's discovery rights were not violated because 3-4 pounds of randomly sampled material and photographs of the material were made available to the defendant who failed to test or show that the weight was a critical issue at trial.

State v. Gonzales, 164 N.C. App. 512 (N.C. Ct. App. 2004).

Here the police officers at the scene cut the marijuana plants at the point where they joined the soil. That day, the weight of the marijuana plants was 25.5 pounds. The weight used is the weight at the time of collection and will also include the water weight. Defendant must raise the issue that what was collected as evidence may contain "non-marijuana." A jury must then decide whether that non-marijuana material makes up the difference over the legal limit. Explained again later in *Manning*. The court finds that since the amount (25.5 pounds) is 155% higher than the 10 pound threshold, clear and substantial evidence exists that the defendant trafficked at least 10 pounds of marijuana. The motion to dismiss should not have been granted, so judgment was reversed.

"At trial, the defendant is free to challenge, among other facets of the State's case, the method the marijuana was weighed, the scales used, and whether all of the substance weighed was marijuana as defined in N.C. Gen. Stat. § 90-87(16). Furthermore, defendant could offer as evidence the 6.9-pound weight taken of the marijuana at the SBI as evidence that there was excess water or other extraneous debris in the first recorded weight because the disparity between the two figures is beyond that of typical dehydration." *State v. Gonzales*, 164 N.C. App. 512, 522 (N.C. Ct. App. 2004)

State v. Manning, 184 N.C. App. 130 (N.C. Ct. App. 2007).

Defense expert witness testified that the marijuana collected included 30-40% mature stalks/non-marijuana. He testified that the green weight was between 5.1 and 10.2 pounds. Court cites *Anderson* and *Gonzalez*- burden is on the defendant to show that the plant is not "marijuana" legally and that the jury then decides weight of the "non-marijuana." The jury must then mentally subtract that amount/number from the total number and decide if that final number is higher than the statutory minimum. Ex. 15 pounds of plants less the 10 pounds in mature stalks would be 5 pounds and therefore not meet the statutory minimum. Using the defense expert's estimations, the state met its burden because his highest estimate of 40% non-marijuana material of the initially weighed 25.5 pounds (15 pounds) would still be higher than the statutory threshold. The defense also made arguments about accuracy of the scale which did not succeed. The court found no error.

State v. Mitchell, 336 N.C. 22 (N.C. 1994).

The record did not show any evidence that the marijuana had been weighed. The arresting officer eyeballed the amount in the defendant's possession and made an arrest. The record never described the size of the bag, whether it was half-full, whether it was almost empty, and no weight was ever recorded. The state has the burden of either submitting into evidence a recorded

weight of the marijuana or, when quantities are very large, allow the jury to create a reasonable inference that the amount in question satisfies the statutory amount. The court determined that the jury could not eyeball the amount to the precision necessary to determine that the defendant was in possession of at least 1.5 ounces. Since there was no proof on the record that the marijuana was weighed or that the defendant possessed the statutory minimum amount, the conviction was reversed.

“To prove the element of weight, the State ‘must either offer evidence of its actual, measured weight or demonstrate that the quantity of marijuana itself is so large as to permit a reasonable inference that its weight satisfied this element.’” *State v. Manning*, 184 N.C. App at 137-8, citing *State v. Mitchell* 336 N.C. at 28.

State v. Browning, 2014 N.C. App LEXIS 544 (N.C. Ct. App. May 20, 2014). (Unpublished Opinion)

The amount in controversy is 10 pounds and 2 ounces. The statutory threshold is 10 pounds. The jury has the job of subtracting out the amount of non-marijuana material and determining whether the amount left satisfies the statutory minimum. The court compares this case to both *Manning* and *Mitchell*. The court says this case is more like *Mitchell* where the jury cannot determine the weight of the marijuana by visual inspection because the amount in controversy is two ounces. In *Manning*, the jurors had expert witness testimony available to help make their determination. Here, there was no expert testimony and two ounces is too close for a jury to call by visual inspection alone. The trafficking judgment was vacated.

“[T]he weight element becomes more critical as the State’s evidence of weight approaches the minimum weight charged.” *State v. Browning*, 214 N.C. App LEXIS at 12, quoting *State v. Gonzalez*, 164 N.C. App at 515.

Expert Witnesses available for weighing suspected marijuana:

See: <http://www.ncids.com/forensic/Experts/Experts.shtml>

Dr. Frederic Whitehurst
PO Box 820
Bethel, NC 27812
(252) 341-0647, (252) 825-1123
cfwhiteh@aol.com

Former FBI analytic chemist. He left the FBI after critiquing FBI lab work and inaccurate testimony. Available for re-weighing and grooming of suspected marijuana.

Amy Swaim
PO Box 770
Wendell, NC 27591
(919) 390-8542
amythedrugexpert@gmail.com

Forensic Consultant. Available for consulting, weighing, and testimony regarding marijuana weight or analysis.

Christopher Michael “Mike” Bailiff
Carlton Scale
1824 Ellison Creek Road
Lewisville, NC 27023
(336) 409-5066; (423) 306-1750
mbailiff@carltonscale.com

Available to weigh suspected controlled substances. Experience with onsite calibration, repair, and service of industrial scales. Completed Mettler Toledo Lab balance training.

North Carolina State Crime Laboratory Procedures:

The [procedure](#) for identification of marijuana includes instructions for standards and controls, calibration, and specific sampling requirements. Under 5.4.1:

5.4 Application of Procedure on Evidence

5.4.1 Plant material shall be weighed according to the Drug Chemistry Section Technical Procedure for Balances and reported with applicable measurement assurance.

The [balances](#) must be calibrated, undergo QC checks monthly (using two standard weights for bulk balances), and samples must be weighed in kg then converted to pounds. If the gross weight (the container and the contents together) is reported, there are these requirements:

5.6.2 When gross weights are reported, the following shall be included on the report:

- A notation that a gross weight of contents and packaging is being reported.
- The truncated value for the digits displayed on the balance.
- No measurement assurance values (calculated or reported).
- Example for an individual top-loading balance:
 - Cocaine – Schedule II
 - Gross weight of contents and packaging – 1.2 grams

Helpful Links:

State Crime Lab Identification of Marijuana Procedure

<http://www.ncdoj.gov/getdoc/1f4280e1-3824-4e16-9781-3d117f57a3ae/Identification-of-Marijuana-04-18-2014.aspx>

State Crime Lab Balance Procedures

<http://www.ncdoj.gov/getdoc/5d840b9b-4d83-42c1-b19d-81f1b00494bf/Balances-04-18-2014.aspx>

State Crime Lab Measurement Assurance Procedure

<http://www.ncdoj.gov/getdoc/42cc0e12-3cb2-49df-809d-979bb52cbe5e/Measurement-Assurance-12>

State Crime Lab Evidence Guide

[http://www.ncdoj.gov/getdoc/0d2d2d94-2519-46a8-88f1-2989ef651433/Evidence-Guide-10-16-2013-\(1\).aspx](http://www.ncdoj.gov/getdoc/0d2d2d94-2519-46a8-88f1-2989ef651433/Evidence-Guide-10-16-2013-(1).aspx)

State Crime Lab ISO Procedures Master List

<http://www.ncdoj.gov/About-DOJ/Crime-Lab/ISO-Procedures.aspx>