

| Recent Developments

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- Controlled Substance Offenses
- ACCA and Different Occasions
- Increased 922 maximum penalty



Are North Carolina
Drug Offenses
“Controlled
Substance
Offenses”?



MAYBE



Categorically, what is a “controlled substance offense” under §4B1.2(b)?

United States v. Campbell, 22 F.4th 438 (4th Cir. 2022)

- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this guideline—

“*Crime of violence*” and “*controlled substance offense*” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“Controlled Substance Offense” ≠ Attempt

West Virginia statute: “unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance”

Deliver means: “the actual, constructive **or attempted** transfer from one person to another”

“In other words, the least culpable conduct criminalized by the West Virginia statute is an attempt to deliver a controlled substance”

“[T]he question is whether U.S.S.G. § 4B1.2(b)'s definition of ‘controlled substance offense’

includes an **attempt** to deliver a controlled substance”

Attempt is not in the definition of
“controlled substance offense,” it is in the
Commentary

“[A] definition which declares what a term
‘means’ excludes any meaning that is not stated.”

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“[W]hen commentary is inconsistent with an unambiguous guideline, ‘the Sentencing Reform Act itself commands compliance with the guideline.’” (quoting *Stinson v. U.S.*, 508 U.S. 36 (1993))

A violation of the West Virginia statute is not a controlled substance offense because it is broader (includes attempt)

(a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance.

What about
North Carolina?

Yes and No (for
now)



(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

United States v. Locklear, 2022 WL 2764421
(4th Cir. July 15, 2022) (unpublished)

NC felony sale or delivery within 300 feet of a school

NC state case law: Sale includes delivery

Delivery includes attempted delivery – too broad, not a controlled substance offense

North Carolina Issues

- Sale – “Sale or delivery” includes attempts, not CSO (or completed crime of sell/transfer, yes CSO?)
- Deliver – Includes attempts, not CSO
- Trafficking – “sells, manufactures, delivers, transports, or possesses” – Includes attempts, not CSO

- PWIMSD – Cannot intend to attempt to deliver?,
CSO, *see U.S. v. Garth*, 954 F.3d 395 (6th Cir. 2020)

“The North Carolina statute does not define multiple offenses; rather, its subcategories provide different ways of committing the same offense. The North Carolina statute was drafted so that manufacturing, selling, and delivering are all violations of the same subsection. Moreover, the same penalties apply to all violations of § 90-95(a)(1), regardless of whether the controlled substance was manufactured, sold, or delivered or possessed with the intent to do so. Finally, the North Carolina statute is almost identical to a counterpart West Virginia statute, which our Court of Appeals reviewed under the categorical approach.”

United States v. Sprinkle, No. 5:21-CR-00149, 2022 WL 3010534, at *3 (S.D.W. Va. July 29, 2022)

MDNC Current Status:

- PWIMSD = Controlled Substance Offense
Judges Osteen, Schroeder, Eagles
- Delivery ≠ Controlled Substance Offense
Judge Osteen

Federal Issue

21 U.S.C. § 841 –Fourth Circuit considering in *U.S. v. Groves*, 22-4095 (argued Sept. 14)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Distribute, dispense mean deliver; deliver means actual, constructive, or attempted transfer (21 U.S.C. § 802(8))

Object object object!



ACCA

“Separate Occasions”



“[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)

“[A sentencing judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.” *Mathis v. United States*, 579 U.S. 500, 511–12 (2016)

The MDNC U.S. Attorney's CURRENT policy is "separate occasions" must be admitted or proven to a jury

Object object object!



(*Wooden v. United States*, 142 S.Ct. 1063 (2022) left this issue unresolved – see NACDL amicus brief)



Bi-Partisan Safer Communities Act

- 18 U.S.C. § 924(a)(8)
- INCREASES MAXIMUM SENTENCE TO 15 YEARS FOR SOME FIREARMS OFFENSES
- 922(g) – Disqualified persons
- 922(d) – Straw purchases



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