

**THE LAW - NCGS § 90-95 (a) (3) (2005)**

**WHAT CONSTITUTES POSSESSION OF A CONTROLLED  
SUBSTANCE**

**CASES ON POSSESSION  
DISCUSSION  
CASES**

- ~ DAYE CASE
- ~ GADDIS CASE
- ~ PIERCE CASE

# **THOSE ARE NOT MY DRUGS: Attacking the Elements of Possession**

## I. POSSESSION OF CONTROLLED SUBSTANCES NCGS § 90 - 95 (a) (3)

A. This is the most common retort of most clients in the initial interview. It does not matter whether it is a street buy, (where the drugs are found on the ground), drugs found in the car, drugs found in the house, or sometimes when drugs are found in your client's clothing.

It seems to be a continuation of the way the facts play out and your plight oftentimes seem hopeless. However, that is where you, as the advocate, have to find a way to show that your client does not have an interest in the drugs.

### 1. ELEMENTS

a) The first element of possession is it must be possessed and must be knowingly possessed.

(1) Possession can be broken down in two areas, Actual and Constructive.

#### **(a) ACTUAL POSSESSION**

(i) This is the most common type of problem that you will have to attack. When your client has drugs in his pocket then you have to assume that he knows whatever is in his pocket. However, on these rare occasions your client may have on outerwear that contraband was found in.

#### (a) Defenses

II. This is not my jacket.

III. Some one else wore my jacket.

*Explanation:* First, I borrowed a jacket and I did not know this was in the pocket. This only works if there is nothing else in the pocket and no identification, or any reason why he should have gone in the pocket. The hope is to hang the jury up. It

would be exceptionally hard to get twelve (12) jurors to buy into this particular argument. However, if you pick your jury right then one (1) or two (2) of your jurors may side with you if you make your argument convincing.

(i) Ways of Convincing

(a) Police officers observations

(b) Client's response to being informed about the discovery.

(c) Any witnesses that were with the Defendant.

(d) Manner in which he or she was caught.

(e) Amount of the drugs.

These are all of the points that can be attached on direct and cross-examination. (KNOWLEDGE IS THE KEY)

(a) CONSTRUCTIVE POSSESSION

(i) This is an area that is very ripe for attack. Most of these cases arise when drugs are found and the person has no knowledge of their presence. This can occur in residences, cars, as well as in common areas. The main theme in this is was the person able to exercise possession and control over the contraband? Knowledge is the key. Did he know or should have known that there were drugs in the house, car or presence. I should have known because the main item of knowledge does not allow us to blindly look away. This comes into play with family members, roommates or girlfriends. Allowing a person to have drugs in your environment may subject your client to possession charges. Harvey Case (1972).

(a) Defense

IV. Fingerprints are an out

*Explanation:* Believe it or not fingerprints can help you and your client with the jury. This method has been successfully employed in

cases. People (jurors) believe in the system. They watch CSI and all of the forensic stories and then they ask themselves where is the smoking gun or corroboration necessary to prove beyond a reasonable doubt. That is when you ask about fingerprints. You should know by this point through Discovery that there were no tests done. So, you can take it as far as you like and make a big point out of the fact that your client had not touched anything. Thus, there was no reason to know drugs were there.

Example Argument: They have one (1) out of ten (10) chances to get it right. Why didn't they at least take a chance at finding a print so his rights are at least protected.

## **CONCLUSION**

### **THINK OUTSIDE THE BOX**

The only other advice that can be given in defending possession cases is to Think Outside The Box. Most of what you do is going to be based solely on your particular set of facts.

### **DO NOT HESITATE TO MAKE NEW LAW**

Attack the State Case, officers included with a vengeance and they will get the message. Explore your constitutional law options and exploit them.

### **THINK OUTSIDE THE BOX**

1. N.C. Gen Stat § 90-95(a)(3) (2005)
2. *State v. Davis*, 650 S.E. 2d 612 (2007)
3. *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977)
4. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)
5. *State v. Williams*, 149 N.C. App. 795, 798-99, 561 S.E.2d 925, 927, *disc. review denied*, 355 N.C. 757, 566 S.E. 2d 481, *cert. denied*, 537 U.S. 1035, 123 S. Ct. 553, 154 L.Ed.2d 455 (2002)
6. *State v. Williams*, 649 S.E. 2d 478 (2007)
7. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E. 2d 701, 702 (1985) (emphasis added) (citing *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1971))
8. *State v. Bogle* 324 N.C. 190, 195, 376 S.E. 2d 745, 748 (1989)
9. *State v. Allen*, N.C. 406, 410-11, 183 S.E. 2d 680, 683 (1971) (citing *Rodella v. United States*, 286 F.2d 306 (9<sup>th</sup> Cir.) (1960))
10. *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E. 2d 61, 62 (1973), *disc. rev. denied*, 284 N.C. 618, 202 S.E. 2d 274 (1974)
11. *State v. Boone*, 310 N.C. 284, 294-95, 311 S.E. 2d 552, 559 (1984)
12. *State v. Fuqua*, 234 N.C. 168, 66 S.E. 2d 667
13. *State v. Bagnard*, 24 N.C. App. 54, 210 S.E. 2d 93 (1974)
14. *State v. Brown*, 310 N.C. 563, 569, 313 S.E. 2d 585, 589 (1984)
15. *State v. Hamilton*, 145 N.C. App. 152, 156, 549 S.E. 2d 233, 235 (2001)
16. *Hunt v. State*, 158 Tex. Cr. R. 618, 258 S.W. 2d 320
17. *People v. Galloway*, 28 Ill. 2d 355, 192 N.E. 2d 370