

No. 365PA09

DISTRICT FIVE

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

v. )

JIMMY WAYLON WARD )

From NEW HANOVER County

06 CRS 60670, 60685 - 89

\*\*\*\*\*

DEFENDANT-APPELLEE'S NEW BRIEF

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QUESTION PRESENTED

**DID THE COURT OF APPEALS ERR WHEN IT HELD THAT, IN DRUG PROSECUTIONS, CONTROLLED SUBSTANCES MUST BE IDENTIFIED THROUGH THE USE OF A CHEMICAL ANALYSIS RATHER THAN THROUGH MERE VISUAL INSPECTION?**

STATEMENT OF THE CASE

This was an action heard at the Criminal Session of Superior Court in New Hanover County between January 7 - 14, 2008 presided over by the Honorable Charles Henry, on bills of indictment charging the defendant, Jimmy Waylon Ward, with: Trafficking in Opium (six counts); Intentionally Maintaining a Vehicle for the Keeping of Drugs (two counts); Possession with Intent to Sell or Deliver Cocaine; Intentionally Maintaining a Dwelling for the Keeping of Drugs; Possession with Intent to Sell or Deliver Ritalin; Possession with Intent to Sell or Deliver Xanax; Possession with Intent to Sell or Deliver Valium; Possession with Intent to Sell or Deliver Lortab; Possession with Intent to Sell or Deliver Lorcet (two counts); Sale or Delivery of Lorcet; Operating a Motor Vehicle with a Fictitious Tag; Possession with Intent to Sell or Deliver Percocet; Possession with

Intent to Sell or Deliver Oxycodone; Possession with Intent to Sell or Deliver Adderall, and; Possession of Drug Paraphernalia.

Both the State and Defense offered evidence. At the close of the State's evidence, Judge Henry dismissed the following charges: Possession with Intent to Sell or Deliver Lortab; Possession with Intent to Sell or Deliver Lorcet (two counts); Sale or Delivery of Lorcet; Operating a Motor Vehicle with a Fictitious Tag, and; Possession with Intent to Sell or Deliver Adderall.

The jury found Mr. Ward guilty of the following offenses: Trafficking in Opium (six counts); Intentionally Maintaining a Dwelling for the Keeping of Drugs; Possession of Cocaine; Intentionally Maintaining a Vehicle for the Keeping of Drugs; Possession with Intent to Sell or Deliver Ritalin; Possession with Intent to Sell or Deliver Xanax; Possession with Intent to Sell or Deliver Valium; Possession with Intent to Sell or Deliver Oxycodone, and; Possession of Drug Paraphernalia.

The jury acquitted Mr. Ward of Possession with Intent to Sell or Deliver Percocet. Judge Henry arrested the jury's verdict of guilty of Possession with Intent to Sell or Deliver Oxycodone.

Judge Henry consolidated all charges for judgment and imposed an active sentence in the Department of Correction of 90 – 117 months. Judge Henry also imposed a fine of \$100,000.00.

Mr. Ward gave oral notice of appeal to the North Carolina Court of Appeals on January 14, 2008. The case was assigned to the Office of the Appellate Defender and that office assigned the case to Paul F. Herzog, Attorney-at-Law, on January 22, 2008.

On August 18, 2009, a unanimous panel of the North Carolina Court of Appeals reversed some, but not all, of Mr. Ward's convictions.<sup>1</sup> It did so on two grounds: (1) the trial court erred in admitting evidence of other crimes or misconduct pursuant to N.C. Gen. Stat. §§ 8C-1, Rule 401 – 404, and; (2) the trial court erred in admitting testimony by an SBI Chemist identifying certain items of evidence - alleged to be prescription medicines - as controlled substances solely on the basis of a visual identification. *State v. Ward*, \_\_\_ N.C. \_\_\_, 681 S.E.2d 354 (2009).

On September 4, 2009, the State petitioned this Court for discretionary review of the Court of Appeals' opinion as to holding number two only (immediately above). This Court granted the State's petition, and the State filed its brief on November 9, 2009. On November 18, 2009, this Court allowed counsel for Mr. Ward until December 23, 2009 to file his brief.

### **STATEMENT OF THE FACTS**

Mandy Pope's mother had a problem. She was a drug addict. Mandy, an exotic dancer, wanted to do something about her mom's addiction. She decided to go to the New Hanover County Sheriff's Office and volunteer her services as an informer in order "to get rid of" the person she believed to be responsible for her mother's problems. She thought that Jimmy Waylon Ward was the cause of her mother's problems with prescription pain medication. (T. pp. 50 – 55, 82, 213 - 215)

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<sup>1</sup> The opinion of the Court of Appeals was authored by Judge Sam Ervin, IV, one of the Court's recently elected judges. Two of the Court of Appeals longest serving and most experienced jurists concurred: Chief Judge James Martin and Judge James Wynn.

The Court of Appeals "left Defendant's convictions for trafficking in opium on 23 August 2006 and possession of cocaine undisturbed," as well as his "mandatory sentence for a single count of trafficking in opium in an amount between 14 and 28 grams." (90 - 117 months). See, *State v. Ward*, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d at 373 (2009)



According to Mandy Pope, she had known Mr. Ward about two and one-half years as of August 2006. She testified that she had previously bought prescription pain medicine from Mr. Ward on several occasions, both for her own use and for her mother's consumption. (T. pp. 50 – 59)

On August 22, 2006, at the behest of a member of the New Hanover County Sheriff's Office, she contacted Mr. Ward by telephone and agreed to meet him for the purpose of buying pain medication. Ms. Pope was provided a recording device, which she carried in her purse. An officer provided her \$300.00 in cash. (T. pp. 61, 219)

Ms. Pope was accompanied by a female member of the New Hanover County Sheriff's Office, Nancy Willaford. The two drove in a minivan to the Carolina Beach Exxon across from Drifter's Reef Motel. Jimmy Ward, an older white man with thick glasses, met them. He was driving a black Monte Carlo. (T. pp. 62 – 63, 88 – 93)

Ms. Pope got out of the minivan and into the car driven by Mr. Ward. Detective Willaford stayed in the minivan. Once inside the Monte Carlo, Mandy Pope had a conversation with Mr. Ward. (T. p. 63)

At that point, both Mandy Pope and Mr. Ward got out of the car. Mr. Ward removed something from the trunk of his car. The two got back in the Monte Carlo. Mandy Pope testified that she then purchased thirty blue, oval-shaped pills for \$180.00. She believed these pills to be Lorcets. While still sitting in the car,

Ms. Pope also agreed to meet Mr. Ward for sex an hour later at the Drifter's Reef Motel. (T. pp. 63 – 72, 89 – 99, 219, 225)

Mr. Ward then drove off and Mandy Pope and Nancy Willaford returned to the New Hanover County Sheriff's Office. The thirty blue, oval-shaped pills were turned over to officers that day. (T. pp. 66 – 73, 98 – 102, 230)

At this point, Deputy Chris Robinson of the New Hanover County Sheriff's Office went to a magistrate to secure an arrest warrant. A search warrant was issued on August 23, 2006 to Deputy Robinson authorizing him to enter and search Mr. Ward's home at 6514 Myrtle Grove Road, Lot 39, located in the Midway Mobile Home Park between Wilmington & Carolina Beach. (T. pp. 237 – 238)

Other officers set up surveillance outside Mr. Ward's home. An officer radioed Deputy Robinson that Mr. Ward was driving the Monte Carlo close to his home and Robinson stopped him. Deputy Robinson informed Mr. Ward he was under arrest for "selling pharmaceuticals." Mr. Ward's person was searched and three pill bottles were found along with a large amount of cash. One of the pill bottles was labeled with the name of Jimmy Ward and another was in the name of Manuel Ward. (T. pp. 242 – 243)

Mr. Ward told Dep. Robinson that the car he was driving belonged to his cousin from California, Manuel Ward. He further indicated he didn't know what was in the trunk since it was broken and he had no access to it. Mr. Ward also stated that he had a power of attorney executed in his favor from his cousin,

Manuel, to control his (Manuel's) affairs while he was away from North Carolina. (T. pp. 272 – 273, 309 - 310)

A search was conducted of the trunk of the Monte Carlo. Inside was a box containing several bottles of what appeared to be pharmaceuticals and some cash. When the trunk carpeting was pulled back, some more cash and a prescription bottle were found. (T. p. 151)

A search was then conducted of 6514 Myrtle Grove Road, Lot 39. A number of items were located inside, to include: surveillance cameras; police scanners; prescription bottles for diabetic medicines, antibiotics and blood pressure medications; an empty prescription bottle for Hydrocodone in the name of Manuel Ward; a white rock-like substance; digital scales with a chalky residue; some firearms, and; some paperwork in the names of both Jimmy Ward and Manuel Ward. (T. pp. 287 - 306)

A further search was conducted of a storage shed on the premises. A blue prescription bottle in the name of Manuel Ward containing 93 pills was located. (T.p. 307)

An SBI chemist was called to the stand by the State. He identified the various substances seized during the searches as: cocaine, Dihydrocodeinone (Hydrocodone), amphetamine, Alprazolam (Xanax), Diazepam (Valium), Oxycodone, Soma, and Ritalin. The SBI chemist's testimony is discussed in detail, under the argument section of this brief. (T. pp. 399 – 430)

Mr. Ward offered evidence. Records at Seashore Discount Drugs indicated that Mr. Ward had prescriptions filled eight times for Oxycodone and Hydrocodone between January 5 and August 15, 2006. The records of that store also showed that Mr. Ward filled prescriptions for medicines designed to treat diabetes, cholesterol, allergies, ulcers, viral problems, bacterial infections, and muscle issues. (T. pp. 496 – 501)

Mr. Ward testified on his own behalf that he was sixty eight years of age and hard of hearing. He had memory problems, trouble reading, and “never got out of sixth grade.” During August 2006, he was living part-time at 6514 Myrtle Grove Road with his girlfriend. The rest of the time he stayed with a niece. (T. pp. 506 – 507, 516)

He denied selling drugs to Mandy Pope on August 22, 2006, stating that he met her at the Exxon station because she had been soliciting him for sex. He further indicated that the bottles found on him during his August 23<sup>rd</sup> arrest contained his prescription medicine. He stated that when he was arrested the trunk wasn't working properly on the car he was driving and, that some of the contents of the trunk may have belonged to his girlfriend. (T. pp. 505 – 513)

He denied possession of most of the drugs found at 6514 Myrtle Grove Road, testifying that some of them may have belonged to Manuel Ward or his girlfriend - with whom he been having relationship problems. He denied needing to sell drugs because he made substantial amounts of money selling cars. His

participation in the car business also accounted for the large amount of cash found on him and in the automobile he was driving on August 23, 2006. Finally, he stated that he was in the car business with his cousin Manuel; had a power of attorney from him, along with a driver's license with Manuel's name but his (Jimmy's) picture on it; was storing property for Manuel, and; had last seen Manuel "not long before this happened." (T. pp. 512 – 516, 569)

Pearl Bellerose testified that she had a brother named Manuel Jackson Ward. Manuel Ward had left the Wilmington area about fifteen years before the trial. Manuel had come back to the area seven to eight months prior to the trial and stayed with her for almost three months. He then returned to the Spokane, Washington area. (T. pp. 570 – 571)

## **ARGUMENT**

**THE COURT OF APPEALS DID NOT ERR WHEN IT HELD THAT, IN DRUG PROSECUTIONS, CONTROLLED SUBSTANCES MUST BE IDENTIFIED THROUGH THE USE OF A CHEMICAL ANALYSIS RATHER THAN THROUGH MERE VISUAL INSPECTION.**

### ***A. Facts***

At trial, SBI Chemist Irvin Allcox testified that he received several of the State's exhibits from the New Hanover County Sheriff's Office for examination and testing. These exhibits were seized by law enforcement during the previously described events of August 22 – 23, 2006. Mr. Allcox indicated that he did an

actual chemical analysis of some of the materials he received, but did not do chemical analysis on others.

With respect to some exhibits involving what appeared to him to be prescription drugs, Mr. Allcox identified unknown substances by referring to pictures appearing in a book he referred to as the "*Micromedics Literature.*"<sup>2</sup> (T. p. 408, l. 4)

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<sup>2</sup> Mr. Ward agrees with the State that "The Micromedics Literature" referred to by Agent Allcox in the transcript is likely a mistake by the court reporter, and the correct name for this publication is probably the "The *Micromedex Literature.*" (See, State's New Brief, p. 11) "*Micromedex*" appears to be a subdivision or subsidiary of the Thompson Reuters Corporation. See, [www.micromedex.com](http://www.micromedex.com). A review of this website demonstrates that it is difficult to obtain very much substantive information at all concerning the exact nature and contents of "The *Micromedex Literature.*" See also, [http://thomsonreuters.com/products\\_services/healthcare/?view=Standard](http://thomsonreuters.com/products_services/healthcare/?view=Standard).

Counsel will continue to refer to this publication or publications as it appears in the transcript, to wit: "The *Micromedics Literature.*" A quick check of the available information on the Internet reveals that little other substantive information can be obtained about *Micromedex*. Not even the open source Internet encyclopedia, "*Wikipedia*" contains much information on *Micromedex* or "The *Micromedex Literature.*" *Micromedex* is mentioned only in a "stub" or highly abbreviated article on Wikipedia. See, [http://en.wikipedia.org/wiki/Thomson\\_Healthcare](http://en.wikipedia.org/wiki/Thomson_Healthcare). Additional web searches via "Google" reveal little else.

From a close inspection of the information that can be gleaned by Internet research, "The *Micromedex Literature*" is largely directed at physicians and other healthcare personnel. Counsel is unable to locate any literature or other documentation issued by the authors or publishers of "The *Micromedex Literature*" indicating that it is intended for law enforcement use in the prosecution of suspected criminals.

The fact that physicians may use "*Micromedics Literature*" to identify prescription medicines does not automatically render visual identifications of pills or tablets using it *alone* admissible in the courts of this state. This literature may be satisfactory for use by doctors faced with making a quick call when a comatose person with a pocket full of pills is brought into an ER. It goes almost without saying, however, that a use like this does not automatically render identifications based on visual means alone sufficient to meet the standards set up for expert testimony in this state in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). See pp. 30 -37 of this brief, below.

The "*Micromedics Literature*" was further defined by Mr. Allcox as:

a listing of all the pharmaceutical markings to identify the content, the manufacturer and the type of substances in the tablets... *Micromedics* is a medical publication that is used by doctors in hospitals and pharmacies to identify prescription medicine... (T. p. 408, l, 4 – 10)

Using the "*Micromedics Literature*," Mr. Allcox went on to identify State's Exhibit 3-A as containing 30 blue tablets containing the Schedule III controlled substance Hydrocodone or Dihydrocodeinone, an opium derivative. No chemical testing was performed on this exhibit. Defendant-Appellant objected. (T. pp. 408 – 410)<sup>3</sup>

Allcox used the same procedure to identify the contents of the following State's Exhibits:

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<sup>3</sup> When asked why he used visual inspection and comparison with the "*Micromedics Literature*" instead of actual chemical analysis on the questioned pills, Agent Allcox had two responses. First, he assumed that the tablets contained in Exhibit 3-A involved only a misdemeanor amount (30 pills), and therefore Exhibit 3-A did not merit an actual chemical analysis. Second, he thought it just too burdensome and too time consuming for him to chemically analyze all the exhibits contained in this case. (T. pp. 438, l. 14 – 22, 441, l. 20 – 442 – l. 9)

This contention sounds remarkably like the one advanced by the prosecution in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527; 174 L. Ed. 2d 314 (2009). In that case, prosecutors complained that it would be too burdensome to actually require chemical analysts to come to court and testify to the results of their testing in the presence of the defendant. In dispensing with this argument, Justice Scalia wrote: "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause -- like those other constitutional provisions -- is binding, and we may not disregard it at our convenience." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. at 2450, 174 L. Ed. 2d at 330. Likewise, requiring an expert witness with a degree in chemistry to do an actual chemical analysis may seem burdensome and time consuming. Mr. Ward contends that this Court should not relax its requirements concerning the reliability of expert testimony in the face of demands by the prosecution for expediency. This is especially so because of the holding in *Melendez-Diaz*.

- State's Exhibit 26-A-4: three blue tablets and fragments, Amphetamine – Schedule II (objected to) (T. pp. 415 – 416)
- State's Exhibit 26-B-3: 83½ blue oval tablets, Alprazolam – Schedule IV, aka Xanax; 14 blue tablets, Diazepam, aka Valium - Schedule IV; 15½ orange tablets, Methylphenidate – Schedule II, aka Ritalin (objected to) (T. pp. 418 - 420)
- State's Exhibit 26-B-5: 23 white tablets, Oxycodone, Schedule III (objected to) (T. pp. 422 – 423)
- State's Exhibit 26-B-6: 5½ white tablets, Methylphenidate – Schedule II, aka Ritalin (objected to) (T. pp. 424)
- State's Exhibit 26-B-9: 13 blue tablets, Hydrocodone – Schedule III (objected to) (T. pp. 426 – 427)

Mr. Allcox, the chemist, actually performed some chemical – rather than visual - analysis on some State's exhibits. *See*, Appendix One, for a list of those exhibits actually subjected to chemical analysis and the results from those analyses.

### ***B. Standard of Review***

1. The standard of review applicable to review by this Court of a decision by the Court of Appeals “is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before us for review.” *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994)

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2. The standard of review for the admissibility of expert opinion testimony is abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 540 S.E.2d 388 (2000). This is also the standard of review for the admission of evidence under N.C. Gen. Stat. § 8C-1, Rule 403. *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 285, 372 S.E.2d at 527. If this Court finds that a trial court abused its discretion, the defendant is entitled to a new trial if there is a reasonable probability that, had the abuse of discretion not occurred, a different result would have been reached at trial. *State v. Mewborn*, 178 N.C. App. 281, 631 S.E.2d 224, *disc. rev. denied*, 360 N.C. 652, 637 S.E.2d 187 (2006); N.C. Gen. Stat. § 15A - 1443(a).

### ***C. Discussion of Relevant Authority***

1. *The Court of Appeals properly applied the existing law of this state in this case.*

In *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009), this Court reversed the Court of Appeals on the issue of visual identification of white powder as cocaine, disallowing such testimony. In so doing, this Court specifically adopted Judge Steelman’s dissent in *Llamas-Hernandez* as the law of this state. *See*, 189 N.C. App. 640, 659 S.E.2d 79 (2008).

The Court of Appeals in the case at bar, duly acknowledged this Court's adoption of Judge Steelman's dissent. It further noted that the core of Judge Steelman's dissent was based on the proposition that:

the General Assembly has adopted "a technical, scientific definition of cocaine..." As a result, [b]y enacting such a technical, scientific definition of cocaine, Judge Steelman concluded that "it is clear that the General Assembly intended that expert testimony be required to establish a substance is in fact a controlled substance." *State v. Ward*, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d at 371.

Relying on this Court's adoption of Judge Steelman's dissent in *Llamas-Hernandez*, the Court of Appeals held in the instant case that:

Existing precedent suggests that controlled substances can only be identified through the use of chemical analysis rather than through the use of lay testimony based on visual inspection. *State v. Ward*, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d at 371.

The Court of Appeals then went on to examine whether Agent Allcox's testimony was properly received under the rubric of "expert testimony." In dealing with this issue the lower court held:

we conclude that the approach employed by Special Agent Allcox is not consistent with the general thrust of existing precedent concerning how controlled substances should be identified in criminal trials and that the methodology he utilized is not sufficiently reliable for other reasons as well. First, we are convinced that the essential logic underlying the Supreme Court's decision in *Llamas-Hernandez* militates against the use of the visual identification approach employed by Special Agent Allcox. Special Agent Allcox identified both Schedule II and Schedule IV controlled substances using this approach in this case. *State v. Ward*, *State v. Ward*, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d at 371.

The lower court went on to note that “given the record in this case” Agent Allcox’s visual identification of the pills in this case was unreliable for four reasons: (1) nothing indicated Allcox had any special training in identifying pills just by their appearance; (2) the record failed to show that a visual approach to pill identifications is reliable; (3) nothing in the record shows that Allcox’s specific approach to visual identification of pills is reliable, and; (4) reliable data exists to the effect that “up to 60% of drugs sold in developing countries and up to 20% of sold in developed countries are counterfeit.” *State v. Ward*, slip op. at. 42 – 43.

As a result, there exists a “significant risk of misidentification that appears inherent in the methodology employed by Special Agent Allcox.” *State v. Ward*, slip op. at 42 – 43. Accordingly, the Court of Appeals concluded that, “the visual identification procedure utilized here does not provide adequate ‘indices of reliability’ sufficient to support the admission of expert testimony.” *State v. Ward*, slip op. at. 43.

2. *The Court of Appeals decision is entirely consistent with the prior settled case law of this state.*

The identifications of the pills and tablets made by SBI Chemist Allcox pursuant to visual means alone were inadmissible. This is so because this process (looking at pills or tablets and comparing them to pictures in a book) is inherently unreliable.

Boiled down to its essence, Agent Allcox's testimony in the disputed cases amounts to the following: (1) he looked at pills or tablets submitted to him by law enforcement officers from New Hanover County; (2) he compared the unknown samples to pictures in a book, and; (3) he then formed an opinion as to the chemical composition of the questioned pills or tablets based on this process alone – without subjecting the unknown samples to any accepted scientific test. This process offends N.C. Gen. Stat. § 8C-1, Rule 702, which governs the admissibility of expert testimony in this state. It also violates the dictates of N.C. Gen. Stat. § 8C-1, Rules 401 – 403.

In 2004, this Court set forth the requirements for the admissibility of expert testimony in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Relying on existing law, our Supreme Court held that for expert testimony to be admissible pursuant to Rule 702 it must meet several criteria:

The most recent North Carolina case from this Court to comprehensively address the admissibility of expert testimony under Rule 702 is *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), which set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? *Id.* at 527-29, 461 S.E.2d at 639-40. (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640. (3) Is the expert's testimony relevant? *Id.* at 529, 461 S.E.2d at 641. *Howerton*, at 458, at 686.

Under prevailing North Carolina law, several general statements can be made concerning the admissibility of expert opinion. First, in order for expert

testimony to be admissible it must be “reliable.” *Howerton, State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), and *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995). Reliable means “empirically sound.” See *Howerton, Goode, and Spencer*. Furthermore, the trial court has a responsibility to exclude unreliable testimony. *Howerton, Goode, Spencer, and State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990) Additionally, the proponent of the proposed testimony has the burden of establishing the empirical soundness of the opinion testimony it seeks to offer. See, N.C. Gen. Stat. § 8C-1, Rules 702 and 705. Finally, even opinions by experts qualified in “established” scientific fields are excludable if not based upon a firm scientific foundation. *Howerton, Goode, Spencer, and Pennington*.

3. *The Court of Appeals decision is consistent with the commentary by legal scholars and the law of other jurisdictions.*

As noted by two commentators in the area of drug law and expert testimony, evidence of the sort offered by Agent Allcox is very troubling for at least two reasons: (1) “it simply cannot be done; no one can reliably identify an unknown substance simply by looking at it...” and; (2) there exists an “increasing problem of imitation drugs, which are designed to appear to be controlled substances but are actually fraudulent substitutes.” Blanchard & Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 Am. U. L. Rev. 557, at 565 (1998).

The Ninth Circuit over forty years ago noted the inherent unreliability of visual inspections in determining the chemical make-up of an unknown substance: “whether or not a powder or substance is a narcotic cannot be determined by a mere inspection of its outward appearance.” *Cook v. United States*, 362 F.2d 548, at 549 (9<sup>th</sup> Cir. 1966). Even courts that provide for some limited admissibility of visual identification of controlled substances, express healthy skepticism about the process: “it would be a rare case in which a witness's statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction.” *Commonwealth v. Dawson*, 504 N.E.2d 1056, 1057 - 1058 (Mass. 1984).

In *People v. Mocaby*, 882 N.E.2d 1162 (Ill. App.- 2008), an appellate court in Illinois faced a situation very similar to the case at bar.

In the present case, there was no chemical analysis of the tablets involved in count III. The sole analysis consisted of a physical identification. The only information we have regarding the physical identification is that the tablets were compared to pictures in a book. Lively did not describe the tablets, nor did she elaborate about which publication she used to make the physical identification. There is no indication that Lively did anything more than engage in conjecture that the tablets were diazepam based on her comparison with a depiction of tablets with similar characteristics, in some unknown publication. It is not enough to speculate that a substance is a controlled substance. The tablets could be look-alike substances. More conclusive evidence is needed. The State could have conducted a scientific analysis that would have conclusively determined that the tablets contained a controlled substance. Because the evidence regarding the composition of the tablets was not based on a conclusive scientific analysis, we find that the State failed to meet its burden of proof beyond a reasonable doubt that the tablets at issue in count III

contained a controlled substance, and we therefore must reverse the defendant's conviction on count III. *Mocaby* at 1167.<sup>4</sup>

A similar result occurred in *State v. Colquitt*, 137 P.3d 892 (Wash. App., 2006). In *Colquitt*, the only evidence offered to establish the identity of the substance in question was a statement from the arresting officer that he thought the substance appeared to be cocaine and evidence that the substance tested positive in a field test for cocaine. The Washington Court of Appeals, in deciding the case for the defendant, held that "speculation and an unverified field test, with nothing more, is insufficient to support a conviction." *Colquitt* at 893.

Likewise, Mr. Ward contends that this Court expressed a profound reluctance to admit testimony identifying suspected controlled substances "solely

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<sup>4</sup> The State cites cases from three other states for the proposition that: "Other jurisdictions permit visual identification of pills by an expert." (State's Brief, pp. 31 - 32) In support of this proposition the State puts forth: *State v. Clark*, 198 P. 3d 809 (Mont. 2008); *State v. Carter*, 981 So.2d 734 (La. Ct. App. 2008), and; *State v. Stank*, 708 N.W.2d 43 (Wis. Ct. App. 2004).

Mr. Ward responds to these cases in three ways. (1) "[W]hile decisions from other jurisdictions may be instructive, they are not binding on the courts of this State. See, *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 465, 515 S.E.2d 675, 686 (1999)." *Morton Bldgs., Inc., v. Tolson*, 172 N.C. App. 119 (2005). Each side in this case cites authority from other jurisdictions in support of its position. Even so, none of this authority from other jurisdictions is necessarily binding on this Court. Nevertheless, Mr. Ward contends that the out-of-state authority represents the trend nationwide and is entirely consistent with the Court of Appeals decision in this matter, not to mention prior precedent issued by this Court. (2) Montana and Louisiana are *Daubert* states, and this Court has rejected the standard set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) as the proper one for the admissibility of expert testimony. See, *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). (3) In the Wisconsin case, *Stank*, a fair reading of the evidence shows that the identification of the questioned pills as Oxycontin was based on both the use of the Physicians Desk Reference and "subsequent confirmatory testing." *Stank, supra*, at 46.

upon the witness's visual examination" when it adopted Judge Steelman's opinion as the law of this state. *See, State v. Llamas-Hernandez*, 189 N.C. App. 640, 659 S.E.2d 79 (2008), *rev'd per curiam*, 363 N.C. 8, 673 S.E.2d 658 (2009). This reluctance notwithstanding, Mr. Ward acknowledges that the Court of Appeals has allowed visual identification of both marijuana and crack cocaine by experienced police officers. *See, State v. Fletcher*, 92 N.C. App. 50, 373 S.E.2d 681 (1988); *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876 (2007), *disc review denied*, 362 N.C. 178, 657 S.E.2d 663 (2008). It should be noted that - unlike questioned powders, tablets and pills - marijuana and crack cocaine have a distinctive look, feel, and smell that makes them readily identifiable. As a result, *Fletcher* and *Freeman* are easily distinguishable from the instant case.

Irrespective of whether or not *Fletcher* and *Freeman* are distinguishable from *Llamas-Hernandez* and the case at bar, Mr. Ward urges this Court to overrule these cases because "no one can reliably identify an unknown substance simply by looking at it..." Blanchard & Chin, *supra*, at 565 (1998). The potential for miscarriage of justice is manifest in cases involving drug identification on anything less than a chemical analysis is profound. Examples of such miscarriages of justice, both anecdotally and in the case law of other states, are easily found.<sup>5</sup>

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<sup>5</sup> *See, e.g.: In re Timothy F.*, 681 A.2d 501 (Md. 1996), where dried milk or soap chips - which were visually identified as crack cocaine by an officer - turned out to be no controlled substance upon chemical analysis; *Allen v. State*, 605 A.2d 994 (Md. App. 1992), where an officer visually identified a



This issue becomes even more thorny when one recalls that the trial court admitted Mr. Allcox as an expert in the fields of “chemical analysis” and “forensic chemistry.” (T. p. 403, l. 18 - 19) First of all, it is questionable whether Mr. Allcox’s complained of testimony even falls within the rubric of “expert testimony” at all. As noted by one treatise on North Carolina’s law of evidence: “Caution should be exercised in assuring that the subject matter of the expert witness’s testimony relates to the expertise the witness brings to the courtroom.” Blakey, Loven & Weissenberger, *North Carolina Evidence: 2008 Courtroom Manual*, at 236. This treatise gives the following example illustrating the cautionary remark set forth immediately above:

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substance in a jar as PCP. It turned out to be parsley. 605 A.2d at 996; *Waltman v. Payne*, 535 F.3d 342, 344 (5<sup>th</sup> Cir. 2008), highly experienced officers visually identified plants in a field as marijuana. Testing showed the plants to be “kenaf,” a plant frequently grown for fiber. The Fifth Circuit noted that “certain strains of kenaf are virtually indistinguishable from marijuana by visual inspection.” *Id.* at 344. In August 2009, an officer arrested a suspect for crack cocaine possession because he was chewing on breath mints when he was pulled over for a traffic violation. “The officer claimed he field-tested the evidence and it tested positive for drugs.” See, “Mints Believed to be Crack Land Man in Jail.” <http://www.wftv.com/news/20435114/detail.html>, attached as Appendix Two. The undersigned counsel is much indebted to Ms. Anne Bleyman of Chapel Hill for the above-listed material. See Ms. Bleyman’s NCAJ Amicus Brief, filed on today’s date on behalf of Mr. Ward and for a more detailed discussion of these cases.

In a criminal prosecution, X is prosecuted for possession of marijuana and a police chemist is qualified as an expert in identifying the marijuana. The chemist testifies that he thought the substance was marijuana because the container in which the substance was found looked like ones he saw used for that purpose in Mexico. Such an opinion is not directly related to his qualification as a police chemist. Blakey, Loven & Weissenberger, *supra.*, at 236.<sup>6</sup>

Just as the opinion of the “police chemist” in the illustration cited above was not related to his field of expertise, the “visual” opinion of SBI Chemist Allcox was not related to his qualifications as a chemical analyst. Allcox’s “visual” opinion testimony was based on his ordinary perceptions, not his specialized experience.

Moreover, and as noted by Blanchard and Chin, “there seems to be a scientific consensus that narcotics do not display external physical characteristics

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<sup>6</sup> Without meaning to be flippant in the least, counsel for Mr. Ward believes the following example is as equally enlightening as the cited treatise. Suppose that an SBI DNA analyst is called to testify about his opinion in a paternity case. The DNA analyst states under oath: *"I have looked at a picture of the baby and I have personally looked at the accused father. In my expert opinion the defendant is without a doubt the daddy of the baby. I base my expert opinion on the fact that I have seen a picture of the baby and I can see the defendant from where I am sitting. I realize that I could have done an analysis of the DNA of both the baby and accused father, but visual identification alone meets SBI standards. Besides actual DNA testing is just too time consuming and burdensome. After all, it's just a paternity case."*

Counsel for Mr. Ward suggests this example is not far-fetched. If the State obtains the ruling it seeks, prosecutors will undoubtedly use that opinion to seek additional shortcuts and the further relaxation of scientific standards in all sorts of criminal cases. Defense lawyers will then be required, at a minimum in drug prosecutions, to determine what - if any - chemical analysis was done by law enforcement. If visual inspection alone was performed by the SBI, it will be incumbent on defense lawyers to seek their own, independent testing of suspected drugs. Effective assistance of counsel will demand this. Costs for both sides will mushroom. The tax payers of this state will bear most of those costs.

discernible to mere mortals that can be reliably used to distinguish them..." *Supra*, at 565. These commentators go on to state:

Texts from the discipline of forensic toxicology bear this out. Even well recognized tablets and capsules are suspect: visual recognition can only be regarded as a useful clue; even tablets with well-known brand names may be faked. Thus, forensic chemists have developed a range of sophisticated analytical methods for determining the chemical composition of a substance, including color tests, immunoassays, thin-layer chromatography, gas chromatography, high pressure liquid chromatography, ultraviolet, visible, and fluorescence spectrophotometry, mass spectrometry, infra-red spectrophotometry, nuclear magnetic resonance spectroscopy, and countless subtechniques of these tests. Blanchard and Chin, *supra*, at 566.

Moreover, as Dr. James Tong, Director of the Forensic Chemistry Program at Ohio State University has said:

Why do we buy instruments that may cost hundreds of thousands of dollars (such as a GCMS, a gas chromatograph mass spectrometer) to identify substances, if we can tell what they are just by looking at them? Why have analytical chemistry at all if we can tell what something is based on appearance? Quoted in Blanchard and Chin, *supra*, at 565.

Indeed, why has the Legislature of this state provided funds for the establishment of an SBI crime lab? Why has it enacted statutes covering the discovery of the reports generated by this laboratory, and enacted a "short-cut" procedure for the admission of SBI lab reports if simple visual inspection of suspected substances is sufficient to identify them in court? See, N.C. Gen. Stat. § 15A – 903 *et seq.*; N.C. Gen. Stat. § 90 – 95(g) & (1).

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Finally, the question arises of how can one discern between “the genuine article” and a counterfeit controlled substance by visual evidence alone? Indeed, the problems generated by counterfeit substances are real ones. As noted by Blanchard and Chin:

The rise of criminal prohibitions on sale of imitation narcotics is also evidence of the tremendous practical problem that would arise from wider adoption of the visual identification rule. Trafficking in “look-alike” imitation controlled substances is so pervasive that legislatures have enacted criminal statutes proscribing their sale. Blanchard and Chin, *supra*, at 569.

This state is one of those states that recognizes the problem of counterfeit controlled substances and has enacted statutes to deal with the issue. *See*, N.C. Gen. Stat. § 90 - 95(a)(2).

This issue is one of national and, indeed, worldwide proportions. Both the U.S. Food & Drug Administration and the National Association of Boards of Pharmacy have Internet sites warning of the danger of counterfeit drugs. *See*, <http://www.fda.gov/oc/initiatives/counterfeit/qa.html>; and <http://www.nabp.net/ip.asp>. Last year ABC News published an Internet article on the subject. That article quotes Pat Ford, Pfizer’s director of global security on the subject: counterfeit and real drugs can be virtually indistinguishable: “Until we are able to put them [real and counterfeit samples] side-by-side and do chemical testing, virtually you can't tell the difference between the two products.” Thomas, Winner & Cook, *Counterfeit Drug, Real Problems*, ABC News (Sept. 14, 2008)

<http://abcnews.go.com/TheLaw/Story?id=5796287&page=2> (Reprinted as Appendix Three of this brief) Finally, as noted by the Court of Appeals in its opinion in the case at bar, “in light of the reality of counterfeit drugs...we are troubled by the significant risk of misidentification that appears to be inherent in the methodology employed by Special Agent Allcox.” *Ward, supra*, at 373.

The Court of Appeals’ research on the subject notwithstanding,<sup>7</sup> the State’s brief in this case attempts to “pooh-pooh” or minimize the rising problem of counterfeit controlled substances. The State relies heavily on Agent Allcox’s testimony that he, personally, has not seen any counterfeit controlled substances since the 1970’s and that counterfeit pharmaceuticals are not a problem often seen by other employees of the SBI Laboratory. (T. p. 431) Agent Allcox’s assertions seem hopelessly out of date considering the plethora of research material available by via simple “Google” search of the internet. For example:

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<sup>7</sup> The Court of Appeals cited as its source for this proposition: “*8 Wake Forest Intell. Prop. L.J.* 387, 389 (stating that ‘[t]he World Health Organization estimates that up to 60% of drugs sold in developing countries and up to 20% sold in developed countries are counterfeit’...” *State v. Ward, supra*, at 236.

“there exists the danger of medications that are manufactured by rogue companies that are either incorrectly formulated or have falsified contents incorporated in the pills or capsules which are then purchased by consumers or dispensed at treating facilities such as hospitals, clinics and the like.

It is therefore of some interest as well as concern to find means for preventing counterfeiting of medications using methods that are not readily detectable by obvious methods such as visual examination of the exterior of the pill or capsule.” Walker, *Method For Authenticating Pharmaceuticals*,  
<http://www.wipo.int/pctdb/ja/ia.jsp?ia=US2009%2F002517&IA=US2009002517&DISPLAY=DESC>

Moreover, a chemist with expertise in the field of chromatography asserts:

“Counterfeit drug products and active pharmaceutical ingredients are a great concern to government regulatory agencies, pharmaceutical companies, health care providers, and consumers... [T]he U.S. Center for Medicine in the Public Interest has predicted that global counterfeit drug sales will reach \$75,000,000,000 in 2010, a 95% increase since 2005. All countries, regardless of efforts in drug regulation, are affected by this increase, especially in light of the ease of purchase of questionable drugs on the internet...” Sherma, *Analysis Of Counterfeit Drugs By Thin Layer Chromatography*, *Acta Chromatographica*, (2007), available at [http://livewww.us.edu.pl/universytet/jednostki/wydzialy/chemia/acta/ac19/zrodla/01\\_AC19.pdf](http://livewww.us.edu.pl/universytet/jednostki/wydzialy/chemia/acta/ac19/zrodla/01_AC19.pdf)

Furthermore, the high degree of visual similarity between “the genuine article” and counterfeit controlled substances is of undoubted legal importance as noted by Blanchard and Chin:

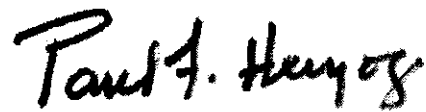
The prevalence of imitation controlled substances, and the concomitant potential for error in identifying genuine controlled substances, creates the risk of inaccuracies in the determination of guilt or innocence. Particularly in light of the fact that penalties for offenses involving genuine and imitation controlled substances may differ widely, courts should take care to prevent misidentification. Blanchard and Chin, *supra*, at 569.

Finally, Mr. Ward contends that the testimony about the visual identification of the five complained of exhibits as controlled substances, without more, violated N.C. Gen. Stat. § 8C-1, Rule 403. Introduction of this testimony likely produced a high potential for “unfair prejudice, confusion of issues, or misleading the jury...” As noted by the Court of Appeals of Maryland, under these circumstances there exists the distinct possibility that jurors “may be lulled by a convincing witness into accepting a flawed or unfounded opinion.” *Robinson v. State*, 348 Md. 104, at 127, 702 A.2d 741, at 752 (1997) This is especially so when the witness is an SBI chemist accepted by the trial court and tendered to the jurors as an expert in “forensic chemistry.” Accordingly, the trial court violated not only the rules concerning the admissibility of expert testimony, but also offended the standard set up by N.C. Gen. Stat. § 8C-1, Rule 403.

**CONCLUSION**

For all the foregoing reasons, Mr. Jimmy Waylon Ward, Defendant-Appellee defendant respectfully contends that the unanimous opinion of the Court of Appeals in this matter should be AFFIRMED.

Respectfully submitted this the 23<sup>rd</sup> day of December, 2004.



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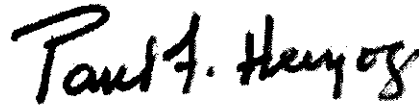


**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the original Defendant-Appellee's New Brief has been filed by mail pursuant to Rule 26 by sending it first-class mail, postage prepaid to the Clerk of the Supreme Court of North Carolina, Post Office Box 2170, Raleigh, North Carolina 27602, by placing it in a depository for that purpose.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's New Brief has been duly served upon Amy Kunstling Irene, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by first-class mail, postage prepaid.

This the 23<sup>rd</sup> day of December, 2009.



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Paul F. Herzog  
Attorney-at-Law

**APPENDIX ONE**

*List of State's Exhibits & Results,  
where SBI Chemist Allcox  
performed actual chemical analysis.*

**List of State's Exhibits & Results,  
where SBI Chemist Allcox  
performed actual chemical analysis.**

- State's Exhibit 26-A-1, tan colored solid material, cocaine, Schedule II (T. p. 413)
- State's Exhibit 26-A-3, 96 green tablets, Dihydrocodeinone, Schedule III (T. pp. 415)
- State's Exhibit 26-B-1, 18½ blue tablets, Dihydrocodeinone, Schedule III (T. p. 417)
- State's Exhibit 26-B-4, 66 blue tablets, Dihydrocodeinone, Schedule III (T. p. 421)
- State's Exhibit 26-B-7 19 white tablets, Dihydrocodeinone, Schedule III (T. p. 425)
- State's Exhibit 26-B-12, 13 white tablets, Dihydrocodeinone, Schedule III (T. p. 429)

**APPENDIX TWO**

Thomas, Winner & Cook, *Counterfeit Drug, Real Problems*,  
ABC News (Sept. 14, 2008)

<http://abcnews.go.com/TheLaw/Story?id=5796287&page=2>



## Counterfeit Drugs, Real Problems

**Global Black Market, Potential for Health and Safety Issues Concern Officials**

By **PIERRE THOMAS, TED WINNER and THERESA COOK**

Sept. 14, 2008—

The international, multi-billion-dollar black market for counterfeit pharmaceuticals is of growing concern to law enforcement because of the sometimes lethal consequences for patients taking medicine that doesn't perform as advertised.

"It's a serious problem, simply because of the potential for health issues, and the potential for deaths if it is not taken seriously," said Matthew Friedrich, the acting assistant attorney general for the Justice Department's criminal division.

He said organizations such as the World Health Organization "put the annual amount of counterfeit drugs sales at something like \$35-40 billion per year. So there's no question that it's a large problem globally."

Pharmaceutical giant Pfizer estimates its annual losses to counterfeit drug sales at \$2 billion. The company calls it flat-out fraud.

Pat Ford, Pfizer's senior director for global security, said the situation is "like the Wild West," which poses a particular problem for those dispensing the drugs.

"It gets to the point that pharmacists can't tell the difference. That's why we educate them" on features in the packaging that help distinguish the real from the fake.

And it's not just an international problem, but one unfolding right here in the United States.

Friedrich said U.S. regulatory and enforcement efforts help, "but it's certainly something that we need to stay on guard about."

Case in point: Jordanian national Iyad Dogmash, who recently pleaded guilty to selling fake Viagra on the streets of New York. Law enforcement caught him with more than 38,000 pills in his possession.

Dogmash may invite comparison to the classic snake oil salesman, selling to anyone willing to buy. But Friedrich said the counterfeit drug trade can be far more sinister.

"It is scary, but there's one difference: a snake oil salesman is selling snake oil. What Mr. Dogmash was selling was a brand. He was selling a trusted brand, and he was taking advantage of the marketplace's trust for that specific label."

Dogmash's counterfeit Viagra contained almost none of the pharmaceutical ingredients that make up the

drug, though it looked just like the real thing.

Ford says counterfeit drugs can be virtually indistinguishable "between the shape of the product, the size of the product. Until we are able to put them side-by-side and do chemical testing, virtually you can't tell the difference between the two products."

Authorities say some consumers are playing Russian roulette when they pop pills. The reason: some consumers are not buying drugs at their local pharmacies, but on street corners and, increasingly, through online pharmacies.

Friedrich said there are some practical measures consumers can take to protect themselves.

"One thing that probably is the most important is, use your common sense," he said. "If you receive a spam e-mail from someone who you don't know, soliciting you to buy specific pharmaceuticals, that should be a red flag."

Friedrich continued, "If you want to go to the Internet and you find a pharmacy that is willing to sell you a prescription drug at a very low price, without a doctor having seen you, and without a prescription, watch out."

But there are legitimate online pharmacies, and Friedrich said that if consumers educate themselves, they can reduce the risks of problems. One site he recommends is [www.VIPPS.info](http://www.VIPPS.info), a resource maintained by the National Association of Boards of Pharmacy.

The World Health Organization estimates that one in three drugs on the worldwide market today is counterfeit. Sometimes the fake drugs contain toxic substances -- chemicals that can kill.

"We've seen boric acid, we've seen heavy metals, we've seen road paint, we've also seen floor wax to coat the pills and give them a shine," said Ford. "Obviously, they are detrimental to anyone's health."

And the counterfeit are often produced in awful conditions, lacking sanitation or any type of procedure to keep the drugs safe.

Kevin Fagan knows all too well the damage counterfeit drugs can do. His son, Tim, took critical prescription medication after he had a liver transplant. But every time he took a dose, his pain grew worse.

After two months, the Fagans found out that the drug they had purchased at their local pharmacy was counterfeit. Fake packaging disguised the fact that the pills contained 20 times less of the drug than Tim's required dose.

"My son was just wracked in extreme body cramps throughout his whole body," recalls Kevin Fagan. "He couldn't move his arms, his legs, his entire body was just racked in pain and my wife and I were absolutely frantic with worry."

Today, "Tim Fagan's Law" is pending in the House of Representatives, an effort to better protect consumers against counterfeit drugs.

"They are preying on people's ignorance of the possibility that someone like this could be this bad," said Ford.

Fake Drugs, Real Problems: How to Tell

Page 3 of 3

"Criminals don't care about the health of the consumer, this is a low risk, high reward business."

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**APPENDIX THREE**

*"Mints Believed to be Crack Land Man In Jail"*  
WFTV, Orlando Florida (August 17 & 19, 2009)  
<http://www.wftv.com/news/20435114/detail.html>



## Mints Believed To Be Crack Land Man In Jail

Posted: 5:27 pm EDT August 17, 2009 Updated: 11:30 am EDT August 19, 2009

<http://www.wftv.com/irresistible/20435114/detail.html>

**KISSIMMEE, Fla.** -- A man is suing the Kissimmee Police Department for an arrest over mints. When officers pulled Donald May over for an expired tag, they thought the mints he was chewing were crack and arrested him.

May told Eyewitness News they wouldn't let him out of jail for three months until tests proved the so-called drugs were candy.

May said he was just minding his business, driving home from work, when a Kissimmee police officer pulled him over near 192.

"I don't know how it occurred," he said.

May was pulled over for an expired tag on his car. When the officer walked up to him, he noticed something white in May's mouth. May said it was breath mints, but the officer thought it was crack cocaine.

"He took them out of my mouth and put them in a baggy and locked me up [for] possession of cocaine and tampering with evidence," May explained.

The officer claimed he field-tested the evidence and it tested positive for drugs. The officer said he saw May buying drugs while he was stopped at an intersection. He also stated in his report May waived his Miranda rights and voluntarily admitted to buying drugs.

May said that never happened.

"My client never admitted he purchased crack cocaine. Why would he say that?" attorney Adam Sudbury said.

May was thrown in jail and was unable to bond out for three months. He didn't get out until he received a letter from the Florida Department of Law Enforcement and the State Attorney's Office that test results showed no drugs were found.

"While I was sitting in jail I lost my apartment. I lost everything," he said.

While May was behind bars, the Kissimmee Police Department towed his car and auctioned it off. He lost his job and was evicted. Now May is suing the city for false arrest and false imprisonment. He wants to be compensated for the loss of his car and job.

May's attorney and the city of Kissimmee discussed a possible settlement last year, but failed to reach an agreement.

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<http://www.wftv.com/irresistible/20435114/detail.html>