
**Community Safety, Justice, & Reentry
Committee**

E2SSB 5536

Brief Description: Concerning controlled substances, counterfeit substances, and legend drug possession and treatment.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Robinson, Lovick, Rolfes, Mullet, Dhingra, Billig, Hasegawa, Keiser, Kuderer, Liias, Lovelett, Nobles, Randall, Stanford, Wellman and Wilson, C.).

Brief Summary of Engrossed Second Substitute Bill

- Modifies certain regulations and prohibitions under the Uniform Controlled Substances Act and related provisions of state law, including by modifying the conduct that constitutes certain drug possession offenses and the related penalties.
- Establishes a pretrial diversion program for persons charged with certain drug possession offenses.
- Requires the court to impose a specific sentence and conditions of probation on a person convicted of certain drug possession offenses based on whether the person is willing to submit to a substance use disorder (SUD) evaluation and comply with the recommended treatment.
- Requires the court to impose minimum sanctions on a person who violates conditions of probation for certain drug possession convictions by willfully abandoning or consistently failing to comply with treatment.
- Requires the court to dismiss a person's charge or vacate a person's conviction for certain drug possession offenses if the person successfully completes SUD treatment as a part of a pretrial diversion or as a condition of probation.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

- Repeals the provision requiring law enforcement to offer a person who would otherwise be subject to arrest for certain drug possession offenses two referrals to assessment and services in lieu of legal system involvement prior to booking the person into jail and referring the case for prosecution.
- Requires the Washington State Patrol, beginning January 1, 2025, to aim to complete the necessary analysis for evidence submitted for suspected violations of certain drug possession offenses within 45 days of receiving the request for analysis.
- Modifies the scope of the civil infraction for giving, selling, or permitting the giving or selling of drug paraphernalia.
- Establishes new programs and services and modifies the scope of existing programs and services related to SUD treatment and recovery.
- Provides a right to court-appointed counsel for certain applicable parties in parenting plan and child custody proceedings.

Hearing Date: 3/20/23

Staff: Corey Patton (786-7388).

Background:

The Uniform Controlled Substances Act and Related Provisions.

The Uniform Controlled Substances Act (UCSA) regulates the manufacture, distribution, and dispensation of controlled substances, including by prohibiting and penalizing certain conduct related to controlled substances, counterfeit substances, and drug paraphernalia. Related provisions of state law also regulate legend drugs. For example, the following actions constitute either a criminal offense or civil infraction and carry specified penalties depending on the nature of the offense or infraction, subject to certain exceptions:

- Until July 1, 2023, knowingly possessing a controlled substance, counterfeit substance, legend drug, or certain quantities of cannabis constitutes a misdemeanor offense, which is punishable by up to 90 days in jail, a \$1,000 fine, or both. Prosecutors are encouraged to divert related cases for assessment, treatment, or other services.
- Giving, selling, or permitting the giving or selling of drug paraphernalia constitutes a class I civil infraction, which is punishable by up to a \$250 fine.

The first two times a person would otherwise be subject to arrest for certain drug possession offenses, law enforcement is required to offer the person a referral to assessment and services in lieu of legal system involvement. If law enforcement agency records reflect that the person has been referred to assessment and services twice or more, officers may, but are not required to, make additional diversion efforts.

A "controlled substance" is a drug or substance included in Schedules I through V of the UCSA, with some exceptions. Drugs and substances are placed on schedules based on their potential for abuse, medical use, and safety. Substances in Schedule I are the most tightly controlled, while those in Schedule V are the least tightly controlled. A "counterfeit substance" is a controlled substance which has been altered to look like a substance produced or distributed by a manufacturer, distributor, or dispenser. "Drug paraphernalia" includes all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing a controlled substance into the human body. A "legend drug" is a drug which is required to be dispensed on prescription or is restricted to use by practitioners.

State v. Blake.

Prior to 2021, the offense of Possession of a Controlled Substance under the UCSA was classified as a class C felony and was a strict liability offense, meaning that no *mens rea* (state of mind) element had to be proven to convict a person of the offense. In 2021 the Washington Supreme Court held in *State v. Blake (Blake)* that the strict liability nature of the offense exceeded the state's police power and violated the due process clauses of the state and federal constitutions. Consequently, the Washington Supreme Court's decision in *Blake* invalidated the portion of the UCSA that created the offense of Possession of a Controlled Substance.

Following the *Blake* decision, legislation was adopted in 2021 (Engrossed Senate Bill 5476, enacted as chapter 311, Laws of 2021) which, in part, amended statutory provisions related to the offenses of Possession of a Controlled Substance, Possession of a Counterfeit Substance, Possession of a Legend Drug, and Possession of 40 Grams or Less of Cannabis in the following ways:

- added a "knowing" *mens rea* element to all four offenses, which were previously strict liability offenses;
- reclassified Possession of a Controlled Substance and Possession of a Counterfeit Substance as misdemeanors, which were previously classified as class C or B felonies;
- encouraged prosecutors to divert related cases for assessment, treatment, or other services; and
- provided that these amendatory provisions expire on July 1, 2023, at which point the affected statutes will revert back to their pre-*Blake* provisions.

The Growth Management Act and Essential Public Facilities.

The Growth Management Act (GMA) provides a comprehensive land-use-planning framework for county and city governments in Washington. Under the GMA, comprehensive land-use plans must include a process for identifying and siting essential public facilities, which are facilities that are typically difficult to site, such as airports, state education facilities, state or regional transportation facilities, regional transit authority facilities, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental

health facilities, group homes, community facilities, and secure community transition facilities.

Recovery Residences.

State law requires the Health Care Authority (HCA) to maintain a registry of approved recovery residences or contract with a nationally-recognized recovery residence certification organization based in Washington to maintain the registry. A "recovery residence" is a home-like environment that promotes healthy recovery from substance use disorders (SUD) and supports persons recovering from SUDs through the use of peer recovery support. A recovery residence may choose to be included in the registry if it has been certified as meeting certain criteria.

Law Enforcement Assisted Diversion.

Law Enforcement Assisted Diversion (LEAD) is a community-based diversion approach with the stated goals of improving public safety and public order and reducing unnecessary justice system involvement for participants. In 2019 the state established a LEAD pilot project and directed the HCA to partner with the LEAD National Support Bureau to award a contract for two or more geographic areas to implement LEAD programs in Washington.

Recovery Navigator Program.

The Recovery Navigator Program is a statewide program involving a partnership between the HCA and behavioral health administrative service organizations to provide community-based outreach, intake, assessment, and connection to services for individuals with SUDs, including individuals with co-occurring SUDs and mental health conditions.

Summary of Bill:

Drug Possession.

Description of Offenses and Penalties.

Effective July 1, 2023, the conduct that constitutes certain drug possession offenses and the related penalties are modified as follows:

- Possession of a Counterfeit Substance is reclassified as a gross misdemeanor offense, which is punishable by up to 364 days in jail, a \$5,000 fine, or both; and
- the amendatory provisions adopted in 2021 (Engrossed Senate Bill 5476, enacted as chapter 311, Laws of 2021) related to the offenses of Possession of a Controlled Substance, Possession of a Legend Drug, and Possession of 40 Grams or Less of Cannabis expire, eliminating the "knowing" *mens rea* element from those offenses and reverting Possession of a Controlled Substance to a class C felony.

Effective July 23, 2023, the conduct that constitutes certain drug possession offenses and the related penalties are modified as follows:

- Possession of a Controlled Substance is reclassified as a gross misdemeanor offense, which is punishable by up to 364 days in jail, a \$5,000 fine, or both; and
- a "knowing" *mens rea* element is added to the offenses of Possession of a Controlled Substance, Possession of a Legend Drug, and Possession of 40 Grams or Less of Cannabis.

Diversions by Law Enforcement.

Effective July 23, 2023, the provision requiring law enforcement to offer a person who would otherwise be subject to arrest for Possession of a Controlled Substance, Possession of a Counterfeit Substance, Possession of a Legend Drug, or Possession of 40 Grams or Less of Cannabis at least two referrals to assessment and services in lieu of legal system involvement is repealed. Instead, law enforcement is encouraged to offer such referrals in lieu of legal system involvement.

Pretrial Diversion Program and Dismissing Charges.

Effective July 1, 2023, a pretrial diversion program is created for defendants charged with Possession of a Controlled Substance, Possession of a Counterfeit Substance, Possession of a Legend Drug, or Possession of 40 Grams or Less of Cannabis. The court must advise an applicable defendant and the defendant's counsel of the availability of the program at arraignment, including by providing a full description of the procedures for diversion and certain explanations and clear statements about subjects related to participating in diversion.

Upon the defendant's motion and agreement to waive the right to a speedy trial if granted diversion, the court may grant the motion, continue the hearing, and refer the defendant for an evaluation by a designated substance use disorder (SUD) treatment program. The following requirements apply to a defendant obtaining an SUD evaluation and treatment as a part of diversion:

- the state must make resources available to assist the defendant in obtaining the evaluation within seven days of the agreement to participate in the diversion;
- the evaluation must be provided at no expense if the defendant qualifies for public defense services or is found to be indigent;
- the evaluation must be provided at a location that is accessible to the defendant, and the court must provide the defendant with transportation assistance if needed;
- the treatment program must make a written report to the court after the examination, which must be filed under seal with the court and a copy given to the prosecutor, the defendant, and the defendant's counsel; and
- the recommended services or treatment must be provided at no expense if the defendant is found to be indigent, subject to the availability of funds.

The court may contract with a third party to provide evaluations and services, which may be collocated at the court or be provided at alternative locations, and the state must reimburse the court for costs associated with evaluations and related travel.

After receiving the SUD treatment report, if the report indicates the defendant has an SUD, the court must inform the defendant that the defendant is prohibited under federal law from possessing any firearm or ammunition, sign an order of ineligibility to possess firearms, and require the defendant to surrender all firearms.

The prosecutor may make a motion to terminate diversion if it appears that the defendant is:

- not substantially complying with the recommended treatment or services;

- convicted of an offense that reflects the defendant's propensity for violence;
- subsequently charged with certain drug possession offenses; or
- convicted of a felony.

If the defendant successfully completes diversion, including substantial compliance with recommended treatment or services, the court must dismiss the charge or charges.

Sentencing Requirements and Vacating Convictions.

Effective July 1, 2023, a court of limited jurisdiction must impose a specific sentence on a defendant convicted of certain drug possession offenses depending on the particular offense and whether the defendant agrees to submit to an SUD evaluation and comply with recommended treatment as a condition of probation.

The following sentencing requirements apply to a conviction for Possession of a Controlled Substance or Possession of a Counterfeit Substance:

- If the defendant agrees to submit to an SUD evaluation and recommended treatment as a condition of probation, the court must sentence the defendant to a term of confinement of up to 364 days, all of which must be suspended for a period not to exceed two years. The court must give credit for time served pre-sentencing if the confinement was solely in regard to the offense for which the defendant is being sentenced.
- If the defendant refuses to submit to an evaluation and recommended treatment, the court must sentence the defendant to a term of imprisonment of no less than 21 days. The court must give credit for time served pre-sentencing if the confinement was solely in regard to the offense for which the defendant is being sentenced.

The following sentencing requirements apply to a conviction for Possession of a Legend Drug:

- If the defendant agrees to submit to an SUD evaluation and recommended treatment as a condition of probation, the court must sentence the defendant to a term of confinement of up to 90 days, all of which must be suspended for a period not to exceed one year.
- If the conviction involves a Schedule II substance and the defendant refuses to submit to an evaluation and recommended treatment, the court must sentence the defendant to a term of imprisonment of no less than 21 days. The court must give credit for time served pre-sentencing if the confinement was solely in regard to the offense for which the defendant is being sentenced.

The following requirements apply to a defendant obtaining an SUD evaluation and treatment pursuant to an agreed condition of probation for an applicable conviction:

- the court must assist the defendant in obtaining the evaluation within seven days of the agreement;
- the evaluation must be provided at no expense if the defendant qualifies for public defense services or is found to be indigent;
- the evaluation must be provided at a location that is accessible to the defendant, and the court must provide the defendant with transportation assistance if needed;
- a diagnostic evaluation and treatment recommendation must be prepared by an SUD

treatment program licensed or certified by the Department of Health (DOH) or a qualified probation department approved by the Department of Social and Health Services (DSHS), and a copy of the report must be filed under seal with the court;

- the diagnostic evaluation and treatment recommendation must include the type, nature, schedule, and approximate cost of treatment;
- based on the diagnostic evaluation, the court must determine whether to require the defendant to complete a course in an alcohol and drug information school licensed or certified by the DOH, or more intensive treatment in an approved treatment program licensed or certified by the DOH; and
- the recommended services or treatment must be provided at no expense if the defendant is found to be indigent, subject to the availability of funds.

The court may contract with a third party to provide evaluations and services, which may be collocated at the court or be provided at alternative locations, and the state must reimburse the court for costs associated with evaluations.

If the SUD treatment program's report indicates the defendant has an SUD, the court must inform the defendant that the defendant is prohibited under federal law from possessing any firearm or ammunition, and sign an order of ineligibility to possess firearms.

The prosecutor or the court may make a motion for a hearing to consider sanctions if it appears that the defendant is performing unsatisfactorily in the recommended treatment program. The court may not sanction the defendant for failing to comply with the recommended treatment if the court finds the defendant has made reasonable efforts but cannot comply due to a lack of available treatment or, if the defendant is indigent, due to a lack of funding for treatment. For convictions for Possession of a Controlled Substance or Possession of a Counterfeit Substance, if the court finds by a preponderance of the evidence that the defendant has willfully abandoned or demonstrated a consistent failure to comply with the recommended treatment, the court must reinstate a portion of the defendant's suspended sentence as follows:

- for the first instance of imposing a sanction, the court must use discretion in determining an appropriate amount of time to reinstate;
- for the second instance, the court must reinstate no less than 21 days; and
- for the third or subsequent instance, the court must reinstate no less than 45 days.

If the defendant successfully completes treatment and files proof of completion, the court must terminate probation and enter an order vacating the defendant's conviction or convictions.

Analysis of Evidence.

Effective January 1, 2025, the Washington State Patrol (WSP) must aim to complete the necessary analysis for evidence submitted for suspected Possession of a Controlled Substance, Possession of a Counterfeit Substance, and Possession of a Legend Drug offenses within 45 days of receiving the request for analysis.

Giving and Selling Drug Paraphernalia.

Effective July 1, 2023, the class I civil infraction for giving, selling, or permitting the giving or selling of drug paraphernalia is modified as follows:

- The prohibition on giving or permitting the giving of drug paraphernalia is eliminated.
- Equipment, products, and materials that are used, intended to be used, or designed for testing or analyzing a controlled substance are eliminated from the definition of "drug paraphernalia."
- The distribution or use of public health supplies including, but not limited to, syringe equipment, smoking equipment, and drug testing equipment, through public health programs, community-based HIV prevention programs, and pharmacies is exempt from the infraction.
- Public health and syringe service program staff taking samples of substances and using drug testing equipment for the purpose of analyzing the composition of the substances or detecting the presence of certain substances are exempt from arrest and prosecution for applicable drug offenses.

Programs and Services Related to Substance Use Disorder Treatment and Recovery.

Opioid Treatment Programs and Other Essential Public Facilities.

The list of facilities that are considered essential public facilities for the purpose of local land-use regulations is expanded to include opioid treatment programs (OTPs), recovery residences, SUD treatment facilities, and harm reduction programs, excluding safe injection sites. Counties and cities may only impose reasonable conditional use requirements on OTPs that are similarly applied to other essential public facilities and health care settings. Counties and cities are prohibited from imposing a maximum capacity on an OTP. A mobile or fixed-site medication unit may be established as part of a licensed OTP.

Program to Fund Substance Use Disorder Treatment Programs.

Subject to appropriation, a program is established in the Department of Commerce to fund the construction costs necessary to start up SUD treatment programs in underserved regions of the state that lack access to such programs.

Recovery Residences.

Subject to availability of funding, the Health Care Authority (HCA) must:

- make sufficient funding available to support establishment of an adequate and equitable stock of recovery residences in each region of the state;
- establish a voucher program to allow accredited recovery housing operators to hold bed space for applicable individuals;
- conduct outreach to underserved and rural areas to support the development of recovery housing, including adequate resources for women, youth, and lesbian, gay, bisexual, trans, queer, intersex, and asexual plus (LGBTQIA+) communities; and
- by January 1, 2024, develop a training for housing providers to assist with providing appropriate service to LGBTQIA+ communities, including consideration of specific topics, and ensure applicants for grants or loans related to recovery residences receive access to the training.

Real and personal property used by a nonprofit organization in maintaining an approved recovery residence is exempt from taxes levied for collection in calendar years 2024 through 2033 if the property is owned by the nonprofit organization and the charge for the housing does not exceed the actual cost of operating and maintaining the housing, or if the property is rented or leased by the nonprofit organization and the benefit of the exemption inures to the nonprofit organization. A tax preference performance statement is included.

Law Enforcement Assisted Diversion Grant Program.

The Law Enforcement Assisted Diversion (LEAD) pilot project is converted to a grant program administered by the HCA. The LEAD grant program is expanded to provide that cities, counties, and tribes; subdivisions thereof; public development authorities; and community based organizations demonstrating support from necessary public partners, may apply for funding. Funds may be used to scale existing projects and to invite additional jurisdictions to launch diversion programs. Sufficient funds must be allocated from grant program funds to secure technical assistance for the HCA and implementing jurisdictions. Certain governmental entities and employees thereof, non-profit community-based organizations; tribal government entities; tribal organizations; and urban Indian organizations are granted immunity from civil liability based on the administration of LEAD diversion programs or activities, except upon proof of bad faith or gross negligence.

Recovery Navigator Program.

By June 30, 2024, the HCA must develop and implement a data integration platform to serve as a common database for diversion efforts across Washington, to serve as a data collection and management tool for practitioners, and to assist in standardizing definitions and practices. If possible, the HCA must leverage and interact with existing platforms already in use. The HCA must establish a quality assurance process for Behavioral Health Administrative Services Organizations, and employ data validation for fields in the data collection workbook.

The HCA must contract with the Washington State Institute for Public Policy (WSIPP) to conduct a study of the long-term effectiveness of the recovery navigator program, with reports due on June 30 of 2028, 2033, and 2038. The WSIPP must collaborate with the HCA and the Substance Use Recovery Services Advisory Committee to determine the parameters of the reports. By August 1, 2023, the HCA must establish an expedited preapproval process to facilitate certain data requests made by the WSIPP.

Health Engagement Hubs.

By January 1, 2015, the HCA must develop payment structures for health engagement hubs that:

- serve as an all-in-one location where people who use drugs can access a range of medical, harm reduction, treatment, and social services, excluding supervised injection services;
- may be affiliated with certain existing programs and entities;
- provide referrals or access to methadone and other medications for opioid addiction;
- function as a patient-centered medical home by offering high-quality, cost-effective patient-centered care, including wound care;
- provide harm reduction services and supplies;

- provide linkage to housing, transportation, and other support services; and
- are open to youth and adults.

The HCA must direct Medicaid managed care organizations to adopt a value-based bundled payment methodology in contracts with health engagement hubs and other OTPs. The HCA must make sufficient funding available to ensure that a health engagement hub is available within a two-hour drive for all communities and that there is at least one health engagement hub available per 200,000 residents in Washington.

Statewide Treatment and Services Mapping Tool.

Subject to the availability of funding, the HCA must collaborate with the DOH and the DSHS to expand the Washington Recovery Help Line and the recovery readiness asset tool to provide a dynamically updated statewide behavioral health treatment and recovery support services mapping tool that includes specific functions and interface capabilities.

Work Group on Treatment Intake, Screening, and Assessments.

The HCA must convene a work group to recommend changes to systems, policies, and processes related to intake, screening, and assessment for SUD services. The work group must include care providers, payors, people who use drugs, and other individuals recommended by the HCA. The work group must present its recommendations to the Governor and the Legislature by December 1, 2024.

Education & Employment Pathways.

Subject to the availability of funding, the HCA must establish a grant program for providers of employment, education, training, certification, and other supportive programs designed to provide persons recovering from SUDs with employment opportunities. The grant program must employ a low-barrier application and give priority to programs that engage with specific historically underserved communities.

Training and Resources for Parents and Caseworkers.

By June 30, 2024, the HCA must, in consultation with the Department of Children, Youth, and Families (DCYF), develop training for parents of children and transition age youth with SUDs. The training must address specific subjects, be made publicly available, and be promoted to licensed foster parents and caregivers, including any tribally licensed foster parents and tribal caregivers. The DCYF must make appropriate training and opioid overdose reversal medication available for use by caseworkers or employees that may come in contact with individuals experiencing overdose.

Right to Counsel in Family Law Proceedings.

If the court in a parenting plan or child custody proceeding determines, after consideration of specific factors, that a child's parent, guardian, or custodian is affected by SUDs, mental health disorders, or behavioral health concerns, such that it leaves the party unable to adequately represent the party's own interests or the party's rights may be restricted, the party may have the right to court-appointed counsel. If appropriate, the counsel must have an understanding of the

Indian Child Welfare Act and knowledge about tribal child welfare systems. The court may also appoint counsel for the child or a guardian ad litem.

Appropriations.

Appropriations are made for the WSP and the HCA as follows:

- WSP: \$780,000 from the State General Fund for the fiscal year ending June 30, 2024, and \$425,000 from the State General Fund for the fiscal year ending June 30, 2025, to complete the analysis of evidence in certain drug possession offense investigations;
- HCA: \$18.11 million from the State General Fund for the fiscal year ending June 30, 2024, and \$16.44 million from the State General Fund for the fiscal year ending June 30, 2025, to expand efforts to provide opioid use disorder medication in city, county, regional, and tribal jails;
- HCA: \$3.5 million from the State General Fund for the fiscal year ending June 30, 2024, and \$3.5 million from the State General Fund for the fiscal year ending June 30, 2025, to provide support for new and established clubhouses throughout the state;
- HCA: \$1.58 million from the State General Fund for the fiscal year ending June 30, 2024, and \$1.58 million from the State General Fund for the fiscal year ending June 30, 2025, to establish and expand 23-hour crisis relief centers distributed to an equivalent number of crisis services providers to the west and the east of the Cascade mountains;
- HCA: \$900,000 from the State General Fund for the fiscal year ending June 30, 2024, \$900,000 from the State General Fund for the fiscal year ending June 30, 2025, and \$1.8 million from the State General Fund—Federal for the fiscal biennium ending June 30, 2025, to maintain a memorandum of understanding with the Criminal Justice Training Commission to provide ongoing funding for certain community grants related to therapeutic interventions; and
- HCA: \$1.25 million from the State General Fund for the fiscal year ending June 30, 2024, \$1.25 million from the State General Fund for the fiscal year ending June 30, 2025, and \$2.5 million from the State General Fund—Federal for the fiscal biennium ending June 30, 2025, to provide ongoing grants to LEAD programs.

Appropriation: The sum of \$54,552,000.

Fiscal Note: Available.

Effective Date: The bill contains multiple effective dates.