

SENATE BILL REPORT

SB 5536

As of February 2, 2023

Title: An act relating to justice system and behavioral health responses for persons experiencing circumstances that involve controlled substances, counterfeit substances, legend drugs, and drug paraphernalia.

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

Sponsors: Senators Robinson, Lovick, Rolfes, Mullet, Dhingra, Billig, Hasegawa, Keiser, Kuderer, Lias, Lovelett, Nobles, Randall, Stanford, Wellman and Wilson, C..

Brief History:

Committee Activity: Law & Justice: 2/06/23.

Brief Summary of Bill

- Requires knowing possession of prohibited substances.
- Creates a pretrial diversion program for individuals charged with possession of prohibited substances.
- Provides for vacating possession convictions contingent on the individual completing substance use disorder treatment.
- Expands access to substance use disorder treatment programs in under-served and rural areas.

SENATE COMMITTEE ON LAW & JUSTICE

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Background: Prior to 2021, Washington's statute prohibiting possession of controlled substances created a strict liability crime, meaning an individual could be found guilty of

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possession of a controlled substance without proof the person knew they possessed the prohibited substance. In 2021, the Washington State Supreme Court decided the case of *State v. Blake*, and in doing so, found this statute unconstitutional. The court reasoned that the Legislature's criminalization of passive conduct, with no requirement to prove criminal intent, violated due process.

In response to the *State v. Blake* decision, the Legislature passed ESB 5476 which in part modified statutes for the possession of controlled substances, possession of counterfeit substances, possession of legend drugs, and possession of 40 grams or less of cannabis, to prohibit the knowing possession of the prohibited substances. These offenses are classified as misdemeanor crimes, punishable by up to 90 days in jail, a \$1,000 fine, or both. Prosecutors are encouraged to divert such cases for assessment, treatment, and other services. The modifications to these possession statutes are set to expire on July 1, 2023.

The legislation also provided that, in lieu of booking individuals arrested for simple possession in jail, prosecutors and law enforcement must offer the individual a referral to assessment and treatment for the individual's first two arrests and may, but are not required, to continue to offer a referral to assessment and treatment for any subsequent arrest for simple possession.

Summary of Bill: Simple Possession. The simple possession statutes that take effect July 1, 2023, are amended to prohibit the knowing possession of the prohibited substances. Law enforcement officers are encouraged to offer any individual arrested for simple possession a referral to assessment, treatment, or other services in lieu of booking the individual in jail and referring the case for prosecution. Possession of a controlled substance and possession of a counterfeit substance are classified as gross misdemeanor crimes and carry a potential maximum sentence of 364 days in jail, a \$5,000 fine, or both. Possession of a legend drug and possession of 40 grams or less of cannabis remain misdemeanor crimes and carry a maximum sentence of 90 days in jail, a \$1,000 fine, or both.

Pretrial Diversion. A pretrial diversion program for individuals charged with simple possession is created. The program consists of the defendant agreeing to engage in, and successfully completing, a substance use disorder treatment program in exchange for the state dismissing the simple possession charge. At arraignment on a charge of simple possession, the judge must advise the individual of the availability and process of the pretrial diversion program.

Upon the motion of the defendant, and an agreement to waive their right to a speedy trial, and trial by jury if granted pretrial diversion, the court may grant the motion, continue the hearing, and refer the defendant for a substance use disorder evaluation from an approved substance use disorder treatment program. The treatment program must make a written report to the court, which must also be provided to the prosecutor and the defendant or the defendant's attorney, outlining its findings and treatment recommendations.

After receiving the treatment report, the court must hold a hearing to determine if the defendant consents to participating in pretrial diversion, and if the defendant should be granted diversion.

If granted pretrial diversion, the defendant must comply with the recommended treatment. The program will last between 12 and 18 months, however, may be extended for good cause. If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily, the defendant is convicted of an offense that reflects the defendant's propensity for violence, or the defendant is convicted of a felony, the prosecutor, the probation department, or the court may make a motion to terminate pretrial diversion.

If the defendant successfully completes pretrial diversion, including all treatment requirements, the court must dismiss the charge or charges.

Vacation of Simple Possession Convictions. An individual convicted of simple possession who subsequently completes an approved substance use disorder treatment program, and who files proof of completion with the court, may petition the court to vacate the conviction. If the court verifies the individual successfully completed the substance use disorder treatment, the court must vacate the conviction.

Drug Paraphernalia. The prohibition against giving or permitting drug paraphernalia to be given is eliminated. Selling or permitting drug paraphernalia to be given remains a class I civil infraction. The prohibitions related to drug paraphernalia do not apply to the legal distribution of injection syringe equipment or smoking equipment through public health and community-based HIV prevention programs and pharmacies. Cities, towns, and counties or other municipalities are preempted from enacting laws and ordinances relating to drug paraphernalia that are not specifically authorized by state law or are inconsistent with state law.

Substance Use Disorder Treatment Program Rural Access and Expansion. By December 31, 2023, the Department of Health must adopt rules allowing a substance use disorder treatment program to establish off-site medication units located as free-standing facilities, collocated in a community setting such as a hospital or pharmacy, or mobile medication units.

The comprehensive growth management plan of each county and city must include a process for identifying and siting essential public facilities. Essential public facilities include those that are typically difficult to site, including substance use disorder treatment programs including both mobile and fixed-site medication units, recovery residences, and harm reduction programs, excluding safe injection sites, that emphasize working directly with people who use drugs to prevent overdose and infectious disease transmission, improve the physical, mental, and social well-being of those served, and offer low-threshold options for accessing substance use disorder treatment and other health care services.

Counties and cities may require a conditional use permit with reasonable conditions for siting opioid treatment programs only to the extent that such reasonable conditional use requirements applied to opioid treatment programs are similarly applied to other essential public facilities and health care settings. No city or county legislative authority may impose a maximum capacity for an opioid treatment program. The requirement that the Department of Health hold a public hearing in the community where the essential public facility is to be located is eliminated.

Subject to appropriations, a program is established in the Department of Health to fund the construction costs necessary to start up substance use disorder treatment programs in regions of the state that currently lack access to such programs. The funding must be used to increase the number of substance use disorder treatment programs in underserved areas such as central and eastern Washington and rural areas.

Miscellaneous. The statute requiring law enforcement and prosecutors to offer a referral to assessment and treatment for an individual's first two arrests for simple possession is repealed.

Appropriation: None.

Fiscal Note: Requested on January 26, 2023.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.