
Appropriations Committee

ESB 5476

Brief Description: Responding to the State v. Blake decision by addressing justice system responses and behavioral health prevention, treatment, and related services.

Sponsors: Senators Dhingra, Hasegawa, Hunt, Kuderer, Lovelett, Nguyen, Pedersen, Rivers, Robinson, Saldaña and Wellman.

Brief Summary of Engrossed Bill

- Modifies offenses and penalties under the Uniform Controlled Substances Act and related provisions.
- Requires the Health Care Authority to establish the Substance Use Recovery Services Advisory Committee to make recommendations for implementation of a substance use recovery services plan.
- Allows the presiding judge of the superior court of a county of any population size to appoint criminal court commissioners and allows commissioners to conduct resentencing hearings and vacate convictions pursuant to *State v. Blake*.

Hearing Date: 4/19/21

Staff: Cassie Jones (786-7303) and Yvonne Walker (786-7841).

Background:

Offenses and Penalties in the Uniform Controlled Substances Act and Related Provisions.

The Uniform Controlled Substances Act regulates the manufacture, distribution, and dispensation of controlled substances. It also criminalizes and prohibits certain conduct related to controlled substances and counterfeit substances. The criminal penalties and infractions for violating the Uniform Controlled Substances Act depend upon the nature of the violation and the

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type of substance.

A "controlled substance" means a drug or substance included in Schedules I through V, 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. Related provisions regulate legend drugs (prescription drugs).

Among others, crimes contained in the Uniform Controlled Substances Act and related provisions include:

- possession of a controlled substance, unless authorized by law or obtained through a valid prescription, which is a class C felony;
- possession of 40 grams or less of marijuana, unless authorized by law, which is a misdemeanor;
- possession, manufacture, or distribution of a counterfeit substance unless authorized by law, which is a class B or class C felony depending on the substance;
- possession, sale, or delivery of any legend drug, except pursuant to a prescription, which is a class B felony if the offense involves sale, delivery, or possession with intent to deliver, or a misdemeanor for a possession offense; and
- use, delivery, or possession or manufacture with intent to deliver, drug paraphernalia, which is generally a misdemeanor but becomes a gross misdemeanor if the drug paraphernalia is delivered to a minor at least three years younger than the defendant.

State v. Blake.

Under the Uniform Controlled Substances Act, possession of a controlled substance is a strict liability offense, meaning that no mens rea (guilty state of mind) element need be proven in order to convict a person of the offense. In *State v. Blake*, the Washington Supreme Court held that the strict liability nature of the possession statute violates the due process clauses of the state and federal constitutions and exceeds the state's police power. The Court concluded that the portion of the statute creating the possession crime is void.

Court Commissioners.

The Washington Constitution authorizes the superior courts to appoint up to three court commissioners in each county. Court commissioners appointed by constitutional authority have the power to perform all the duties of a superior court judge that do not require a trial by jury, and other duties provided by law to aid in the administration of justice. The Legislature has authorized superior courts to appoint additional commissioners who are limited to the authority that they are expressly granted in statute. Criminal commissioners may be appointed in counties with a population of more than 400,000. These commissioners have authority to preside over a variety of preliminary matters in adult criminal cases including arraignments, probable cause determinations, and bail determinations, among other matters.

Release from Confinement.

No person serving a sentence and committed to the custody of the Department of Corrections may leave the confines of the correctional facility, or be released prior to the expiration of the sentence, except under statutorily prescribed circumstances. For example, an offender may be released prior to the expiration of his or her sentence if the offender earns early release time, is given an extraordinary medical placement, or is pardoned.

Summary of Engrossed Bill:

Offenses and Penalties in the Uniform Controlled Substances Act and Related Provisions.

A mens rea element is added to the crimes of possession of a controlled substance, possession of a counterfeit substance, and possession of a legend drug. In order to be convicted of those crimes, the person must have knowingly been in possession of the substance.

Possession of a controlled substance is reclassified from a class C felony to a gross misdemeanor. Possession of a counterfeit substance is reclassified from a class B or C felony to gross misdemeanor. In cases of possession of a controlled substance, counterfeit substance, or legend drug, the prosecutor must divert a case for treatment if the alleged violation is the person's first or second violation. On a person's third and subsequent violations, the prosecutor is encouraged to divert the case for treatment.

Use or delivery of drug paraphernalia is no longer a criminal offense if the use or delivery is for the purpose of testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing a controlled substance into the human body.

Substance Use Recovery Services Advisory Plan.

The Health Care Authority (HCA) must establish the Substance Use Recovery Services Advisory Committee (advisory committee) to make recommendations for implementation of a substance use recovery services plan. The HCA must consult with the University of Washington Department of Psychiatry and Behavioral Sciences and an organization that represents the interests of people who have been directly affected by substance use and the criminal legal system in appointing members to the advisory committee who have relevant background related to the needs of persons with substance use disorder. The membership of the committee must include individuals with specified backgrounds, including, but not limited to: specified subject matter experts; persons who are currently using controlled substances without legal authority; adults and youth who are in recovery, and family members of persons with substance use disorder; substance use disorder professionals; representatives of city and county governments, law enforcement, and the legal system; a representative of fire chiefs; a representative of the Criminal Justice Training Commission; housing providers; representatives of racial justice organizations; a representative of a local health jurisdiction; and representatives of tribes.

The advisory committee must make recommendations and provide perspectives to the HCA regarding:

- reforms to state laws that align with the goal of treating substance use disorder as a

- disease, rather than criminal behavior;
- current regional capacity for existing public and private programs providing substance use disorder assessments, care, and recovery support services;
- barriers to accessing the existing health system for those populations chronically exposed to the criminal legal system, and possible innovations to improve accessibility;
- evidence-based, research-based, and promising treatment and recovery services appropriate for target populations;
- workforce needs for the behavioral health sector;
- options for leveraging existing integrated managed care, Medicaid waiver, American Indian or Alaska Native fee-for-service behavioral health benefits, and private insurance service capacity for substance use disorders;
- assistance to jurisdictions in complying with requirements relating to diversion of individuals with complex behavioral health conditions to community-based care whenever possible and appropriate;
- design of a mechanism for referring people with substance use disorder or problematic behaviors resulting from drug use into supportive services, including intercepting individuals who likely would otherwise be referred into the criminal legal system;
- design of ongoing qualitative and quantitative research about the types of services desired by people with substance use disorders and barriers they experience in accessing existing and recommended services; and
- proposing a funding framework in which resources are eventually shifted from punishment sectors to community-based care interventions such that community-based care becomes the primary strategy for addressing and resolving public order issues related to behavioral health conditions.

The HCA must submit an interim report on the progress of the advisory committee to the appropriate committees of the Legislature by December 1, 2021. The HCA must submit a summary report of the substance use recovery services plan and recommend changes to the law to the appropriate committees of the Legislature by October 1, 2022.

Court Commissioners.

Criminal court commissioners may be appointed by the presiding judge of the superior court of any county, regardless of population size. In addition to the authority granted to commissioners in current law, commissioners have the authority to conduct resentencing hearings and to vacate convictions pursuant to *State v. Blake*.

Release from Confinement.

An offender may be released from confinement if he or she is entitled to vacation of a conviction or the recalculation of his or her offender score pursuant to *State v. Blake* if the offender has already served a period of confinement that exceeds his or her new standard range. This provision is deemed not to create a right to release from confinement prior to resentencing.

State v. Blake Reimbursement Account.

The *State v. Blake* reimbursement account (account) is created. Expenditures from the account

may be used only for state and local government costs resulting from the *State v. Blake* decision and to reimburse individuals for legal financial obligations paid in connection with sentences that have been invalidated as a result of the decision.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately, except for section 6, relating to legend drugs, which due to a delayed effective date in prior legislation takes effect July 1, 2022.