

SENATE BILL REPORT

ESB 5476

As Amended by House, April 24, 2021

Title: An act relating to addressing the State v. Blake decision.

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 History:

Committee Activity: Ways & Means: 4/05/21, 4/10/21 [w/oRec, DNP].

Floor Activity: Passed Senate: 4/15/21, 28-20.

Passed House: 4/24/21, 80-18.

Brief Summary of Engrossed Bill

- Reduces the criminal penalty for possession of a controlled or counterfeit substance from a felony to a gross misdemeanor.
- Requires the prosecutor to divert a person's first and second violations for possession of a controlled substance, counterfeit substance, or legend drug and encourages diversion thereafter when agreed by the prosecutor.
- 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, including recommended reforms to the law.
- Authorizes presiding judges of superior courts to appoint court commissioners with the authority to conduct resentencing hearings and vacate convictions pursuant to *State v. Blake*.

SENATE COMMITTEE ON WAYS & MEANS

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.

Majority Report: That it be referred without recommendation.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Braun, Carlyle, Darneille, Dhingra, Gildon, Hasegawa, Hunt, Keiser, Mullet, Pedersen, Rivers, Van De Wege and Wellman.

Minority Report: Do not pass.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Schoesler, Assistant Ranking Member, Capital; Muzzall, Wagoner and Warnick.

Staff: Kayla Hammer (786-7305)

Background: Uniform Controlled Substances Act. The Uniform Controlled Substances Act regulates the manufacture, distribution, and dispensation of controlled substances. It also criminalizes certain conduct related to controlled substances and counterfeit substances. The criminal penalties for violating the Uniform Controlled Substances Act depend upon the nature of the violation and the 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" means a controlled substance that 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 simple 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. Washington's statute governing possession of a controlled substance is a strict liability offense. That is, a person can be found guilty of possession without proof that the defendant knew they possessed the substance. In February of this year, the Washington

Supreme Court found this statute to be unconstitutional, holding that the Legislature's criminalization of passive conduct with no requirement to prove criminal intent is a violation of due process. This decision invalidated any Washington sentence for simple possession of a controlled substance.

Summary of Engrossed Bill: It is unlawful for a person to knowingly possess a controlled substance or counterfeit substance unless the use is subject to a valid prescription.

A person who is guilty of possession of a controlled substance or counterfeit substance is guilty of a gross misdemeanor. Unlawful possession of a legend drug remains a misdemeanor. Where a case involving possession is legally sufficient, the prosecutor shall divert first and second time violations to treatment.

Using or manufacturing drug paraphernalia is not illegal to the extent the drug paraphernalia is for personal use.

The Health Care Authority (HCA) is required to establish a substance use recovery services advisory committee. The HCA must appoint members in consultation with the University of Washington department of psychiatry and behavioral sciences and an organization that represents the interests of people who have been impacted by substance use and the legal system. The committee must submit to the appropriate committees of the Legislature an interim report on the progress of the committee by December 1, 2021, and a final a summary report of the substance use recovery services plan, including recommended changes to law, by October 1, 2022.

Court commissioners may be appointed by presiding judges of superior courts to assist the court in adult criminal cases including resentencing hearings and to vacate convictions pursuant to *State v. Blake*

Persons confined in correctional facilities entitled to vacation of a conviction or recalculation of an offender score pursuant to *State v. Blake* may be released from confinement pursuant to a court order. The *State v. Blake* reimbursement account is created in the state treasury. Moneys in the account may be spent only after appropriation. Expenditures must be used for state and local government costs resulting from the Supreme Court's decision in *State v. Blake*.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on April 16, 2021.

Creates Committee/Commission/Task Force that includes Legislative members: Yes.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony: PRO: The war on drugs has harmed families of color for decades and having a minimum statewide standard for treatment of possession cases will be beneficial. The current drug court system is punitive and can create financial hardships. Having a treatment-based system in place will be a better path forward. Prisons and jails do not do anything to support substance use treatment. Going to jail to detox for a few days and then getting turned back out on the streets does nothing to help people. Substance use disorder is a medical and mental health issue and should be addressed as such in a therapeutic manner versus punitive. Drugs will always be around and investments in community-based treatment options should be considered. Generally support the decriminalization of personal use amounts in the bill but it does not fully solve the issue. It is important to not rush and really dig into what is needed for all communities across Washington.

CON: This bill is not a fix. It essentially is the legalization of the distribution of legend drugs and victimizes users. This bill does not stop distribution and there are major concerns about the personal use amount specifically for Fentanyl. The criminalization of drugs does not work. The current laws are designed to hurt people of color. The legal system is not an approach to treating people with substance use disorders. The issue of substance use disorder should be treated as a public health issue and not a criminal issue. The use of Forensic Navigators does not seem appropriate since they are tied to the courts systems and the bill does not establish criteria for the role of the navigators. Creating a gross misdemeanor for individuals under the age of 21 creates a local financial burden.

OTHER: Support maintaining the class C felony for possession and support the juvenile charges but perhaps requiring a mandatory diversion may be better than establishing a personal use amount. Recriminalization to felony level may be better than what is currently proposed in the bill because felonies can be good leverage to get people into treatment. Most possession charges are currently diverted to drug courts, and this bill does not address that, perhaps personal use amounts could just be a misdemeanor. The bill should address a centralized state portal for refunding of LFOs and other expenditure related to the Blake decision. Some areas lack treatment options and it is unclear what the role of the state is in regard to funding. A stable identified funding source is needed for success as well as capital budget investments in community treatment centers. The creation of the account in the bill does not make clear what the Legislature's intent is in regard to supporting concerns about the Blake decision, and LFOs may not be the best way to fund an account since it can be an unreliable revenue source.

Persons Testifying: PRO: Senator Manka Dhingra, Prime Sponsor; Lisa Daugaard, Public Defender Association/Care First Coalition; Jerri Clark, MOMI—Mothers of the Mentally Ill; Stephen Eisler, Washington Recovery Alliance; Kurtis Robinson, I Did The Time/Revive Center For Returning Citizens; Tatiana Quintana, Decrim Nature Seattle; Victor Mendez; Malika Lamont, VOCAL-WA/LEAD Washington Expansion; Arthur Rizer, Civil Survival; Carmen Pacheco-Jones, Health & Justice Recovery Alliance; Sybill Hyppolite, Washington State Labor Council, AFL-CIO; Stacy Hamlin, Olympia Bupe Clinic—Capital

Recovery Center.

CON: Brian Luedtke, Washington State Narcotics Investigators Association; Willy Jefferson Jr., Washington Association for Criminal Defense Lawyers—Washington Defender Association; Darya Farivar, Disability Rights Washington; Dana Parnello, Deputy Mayor, City of Maple Valley; Erin Weaver, Council Member, City of Maple Valley; Patricia Taraday, City Attorney, City of Maple Valley.

OTHER: Sharon Swanson, Association of Washington Cities; Michele Walker, City of Kent; James McMahan, Washington Association of Sheriffs & Police Chiefs; Juliana Roe, Washington State Association of Counties; Ruben Alvarado, City of Pasco, Councilmember; Judge J Wesley Saint Clair, Sentencing Guidelines Commission; Russell Brown, Washington Association of Prosecuting Attorneys; Andy Miller, Benton County Prosecutor; Mary Robnett, Pierce County Prosecutor; Greg Banks, Island County; Emijah Smith.

Persons Signed In To Testify But Not Testifying: PRO: Bob Cooper, Washington Association of Drug Courts; Lucinda Grande, Olympia Bupe Clinic—Capital Recovery Center; Everett Maroon, Blue Mountain Heart to Heart.

CON: C Davis, Washingtonians to Recall Inslee; Anita Khandelwal, King County Department of Public Defense; Anne Anderson, Toyer Strategic Advisors—Washington State Narcotics Investigators Association; Laurie Layne.

OTHER: Laura Van Tosh, Self employed; Celia Jackson, King County; Sophia McSherry, Washington State Office of Public Defense; Carollynn Zimmers, Concerned Citizen; Antonio Ginatta, Columbia Legal Services.

EFFECT OF HOUSE AMENDMENT(S):

- Adds provisions requiring basic law enforcement training to include training on interactions with persons with substance use disorders developed by the Criminal Justice Training Commission in collaboration with the University of Washington Behavioral Health Institute and that the training must be made available to law enforcement agencies for use during in-service training.
- Reclassifies criminal penalties for possession of a controlled substance or counterfeit substance to a misdemeanor.
- Requires the law enforcement officer issuing an infraction to refer the person to a recovery navigator program as established in the bill for evaluation and services.
- Directs each behavioral health administrative services organization (BHASO) to establish a recovery navigator program to provide community-based outreach, intake, assessment, referral, and long-term intensive case management services to youth and adults with substance use disorders who are referred to the program from various sources.
- Directs the HCA to establish the substance use recovery services advisory committee and to collaborate with the advisory committee to adopt a substance use recovery services plan

to assist persons with substance use disorders in accessing outreach, treatment, and recovery support services. A preliminary report is required by December 1, 2021 and the final plan is due December 1, 2022.

- Directs the HCA to:
 1. establish requirements for recovery navigator programs to provide immediate response to in-custody referrals from law enforcement;
 2. provide funding to BHASOs for their recovery navigator programs;
 3. establish a grant program to provide treatment services for low-income individuals with substance use disorders who are not eligible for medical assistance programs and to provide treatment services that are not eligible for federal matching funds to individuals enrolled in medical assistance programs;
 4. establish a project for psychiatric outreach to the homeless program to expand access to behavioral health medical services for people who are experiencing homelessness and living in permanent supportive housing;
 5. establish a homeless outreach stabilization transition program to expand access to modified assertive community treatment services;
 6. increase contingency management resources for opioid treatment networks that serve people with cooccurring stimulant use and opioid disorders;
 7. administer a competitive grant process to broaden existing local community coalition efforts to prevent substance misuse by increasing protective factors and decreasing risk factors; and
 8. develop a plan for implementing a comprehensive substance misuse prevention effort by January 1, 2022.
- Removes provisions requiring a prosecutor to divert to treatment alleged violations of possession of a controlled substance, possession of a counterfeit substance, or possession of a legend drug and requires instead that, for such violations, law enforcement officers must offer a referral to available assessment and services in lieu of jail booking and referral to the prosecutor.
- Provides that if law enforcement records indicate that a person has previously been diverted to referral for assessment and services at least twice, the officer may, but is not required to, make additional diversion efforts.
- Provides that prosecutors are not precluded from exercising discretion to divert or decline to file charges when referred drug possession cases, and are encouraged to divert such cases for assessment, treatment, or other services.
- Makes appropriations.