

SB 5476: *State v. Blake* Decision

The decision in *State v. Blake* that the felony Possession of a Controlled Substance (PCS) statute is unconstitutional presents our legislature with an opportunity to reset its costly approach to the War on Drugs and to undo generations of harm caused to Black, Indigenous, and other communities of color. We have many penalties in place to address the sale of drugs so it is unnecessary to recriminalize possession in order to protect the community. The legislature should limit its activities in responding to the decision this session to providing funding to support resentencing and treatment, passing legislation that will support a swift resentencing process, and the creation of a legislative workgroup.

The very fact that such a large percentage of people involved in the legal system are impacted by this ruling underscores just how costly and insidious the War on Drugs has been to our state and communities. It is important that we refocus our statewide efforts to a behavioral health model in responding to drug use and addiction rather than reinforce our failed punitive approach. As John McKay, former US Attorney for the Western District of Washington, stated in his March 9, 2021 op ed in *The Seattle Times*:

As a former prosecutor, I understand the urge to clamp down and “fix” the constitutional issue the court exposed. But such a legislative “fix” would cement a system that treats drug use as a crime, disproportionately harms communities of color and wastes public resources.

Instead of re-criminalizing possession cases, the Legislature should identify resources to secure pathways to recovery for individuals with substance use disorders. This approach would center the unique needs of individuals, providing professional and experienced support, including case management and proper medical care. A focus on recovery will result in safer and healthier communities and aligns with public opinion....

Rather than reigniting a lost war on drugs and doubling down on a system we know does not work, Washington can opt for a transformative approach — one that builds and funds systems to replace arrest and prosecution with public health solutions.

A recent survey of Washington voters by Fairbank, Maslin, Maullin, Metz & Associates to assess their attitudes about a range of issues related to drug policy in the state in the wake of the *Blake* decision showed that:

...voters are eager to seize this moment to broadly rethink the state's approach to

problematic drug use, and would like to shift from a criminal justice approach to one rooted in engagement, healthcare, treatment, and recovery services. More specifically, they embrace a policy framework that would entail no criminal penalties for possession of personal use amounts of drugs, while doing more to connect people struggling with substance use disorder with services that can help them recover. Support for that framework is remarkably broad, cutting across every major subgroup of the electorate, and is durable in the face of pro and con arguments.

We have many penalties in place to address the sale of drugs so it is unnecessary to recriminalize possession in order to protect the community. Rather than rush to needless action that may be counterproductive to a treatment first approach, a workgroup can take a measured look at the impact of the decision. It is imperative that we limit the use of this discriminatory tool that has resulted in a greatly expanded prison and criminal legal system. We need to examine how we are responding to drug use and addiction, what are best practice models, and how we can protect against the perpetuation of practices that harm low-income communities and communities of color.

Preemption is not an issue that requires legislative action. We believe RCW 69.50.608 would preempt and bar counties and cities from passing their own ordinances and that such efforts would trigger equal protection issues as well. We are working to get a ruling on this issue as quickly as possible on expedited review.

Affected community groups and legal system stakeholders have not been included as active participants in developing potential legislative responses. Their inclusion is especially important given the disparate impact of these laws on BIPOC communities and those facing economic instability. The legislature must hear from impacted individuals and their families, especially those who suffer with substance abuse issues or who are at risk of increased law enforcement interaction, and they must be at the table for any successful policy change regarding controlled substances.

Support is needed for criminal legal system *Blake* responses. This includes legislation to ensure adequate funding and access to counsel for those impacted by this decision and to streamline approaches to moving resentencing cases through the legal system.

While the current striker by Rep. Cody is an improvement upon earlier versions, we continue to oppose the bill as it recriminalizes behavior that should be handled by the behavioral health system. Any recriminalization of PCS will necessitate significant additional resources for all judicial stakeholders including clerk's offices, judicial staff, prosecutor, probation, and public defenders.

- **We strongly oppose the imposition of a misdemeanor on adults for simple possession. Prosecuting people for drug crimes, even if it is only a misdemeanor, makes us less safe.** A recent study from Boston, found that prosecuting someone for a misdemeanor

increases their chances for future arrests. Not prosecuting them reduced their chances for future arrests within two years by 58%:

<https://www.washingtonpost.com/outlook/2021/04/06/misdemeanor-prosecution-future-crime/?fbclid=IwAROSxPOjBZBBK1JTHP8pSX8YJ8GQKVWNKhMJtfJAfPlesMnS37YlgGJsm-c>.

- **Misdemeanor sentences can be more draconian and costly than the previous felony sentence for PCS. The Sentencing Reform Act (SRA) was established in part to try to counteract unequal penalties for similar behavior based upon judicial discretion. There are no such checks and balances in place for misdemeanor sentences.** Although usually a misdemeanor charge is preferable to a felony (especially as they relate to most collateral consequences), the lack of sentencing ranges means that individuals could be subject to much longer periods of incarceration. Misdemeanor sentences can include jail time of 364 days and/or up to 2 years of probation as opposed to felony sentencing ranges that begin at 0-6 months for those with little criminal history. Community custody or probation with DOC is only 12 months.
- **There is limited oversight to the filing of most criminal charges in courts of limited jurisdiction, and making these charges misdemeanors will increase caseloads in these already busy courts.** Law enforcement has to the ability to charge an individual when they believe there is probable cause a crime has been committed by citation. The lack of oversight will increase additional volume in already overtaxed courts. In 2019, these courts handled 201,840 criminal cases compared to 31,867 criminal cases filed in Superior Court in 2020 and 37,149 filed in 2019.
- **Drug courts do not exist in Courts of Limited Jurisdiction, and these courts impose more Legal Financial Obligations and probation supervision costs than for those who receive a felony sentence.** Probation costs can quickly add up to over \$1,000.
- **Collateral consequences relating to federal student loans and immigration consequences still remain for misdemeanors.**
- **Personal use amounts vary from individual to individual. We want limit pretexts for law enforcement interactions and arrests that may not stand up in court, but that will cause harm to the individual and be costly to the legal system.** For example, officers on the street will not have an ability to distinguish between small amounts of a substance in a baggie or the number of pills in a bottle, but may still arrest the individual. The evidence must be sent to the Washington State Crime Lab to determine net weight without packaging and for drug testing. The crime lab is underfunded, is experiencing backlogs, and has been experiencing problems with drug contamination. Rarely when people are buying drugs do they know the potency and the quality of drugs is often based upon ability to pay. This puts economically disadvantaged individuals at greater risk of criminal system involvement solely based on quantity.

- **Drug Paraphernalia:** We appreciate the proposed amendments pertaining to drug paraphernalia; however, would prefer all charges/references in RCW 69.50.412 be eliminated. In addition, Section 6 - RCW 69.50.445 should be repealed. If it is not repealed, then it should be modified to make clear that the civil infraction can be completed with community service or that no fine imposed. It should be clear that a civil infraction can only be issued if the court finds that the individual is not indigent and also that the individual has a present or future ability to pay (cannot be ordered to pay or do community service if the individual is indigent defined by RCW 10.101.010(3)(a) - (c) or the individual has a present or future inability to pay).
- **We worry that the references to the creation of diversion programs and navigators will be meaningless.** Requirements passed in previous legislation for local jurisdictions to develop diversion protocols have not been utilized or appropriately funded.
- **Blake legislation must avoid triggering disproportionate and devastating consequences, such as deportation, for noncitizens and their families. A diversion process that includes statutory protections informed by immigration law is the only viable path to do so in a legislative framework that relies on post-arrest diversion. Specifically, such protections must ensure that participation in diversion does not require an admission of guilt or stipulation to facts.** One million Washington residents are foreign-born (700,000 are noncitizens). In some counties, a majority of US citizen children live in families where one parent is a noncitizen. Convictions for possession of a controlled substance trigger deportation regardless of whether they are felonies or misdemeanors.
- **While we support the use of civil infractions over criminalization, civil infractions provide fewer procedural protections and require a lower burden of proof than misdemeanors.** They generally involve fines and, in this case, diversion programs if available, which also require money. Monetary penalties that may seem reasonable to a middle-class individual will be unattainable for those with no or lower incomes. Whatever scheme is put into place must have protections from criminalizing poverty and continuing involvement with the legal system.

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