No. I02579-3
Court of Appeals No. 38630-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH KOZIOL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FERRY COUNTY

Petition for Review

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A. Introduction

Because it criminalized "innocent passivity" *Blake* found the former drug possession statute unconstitutional. In doing so, *Blake* recognized and sought to ameliorate the numerous and significant consequences which flowed from the criminalization of this passive non conduct.

But *Blake's* promise has been artificially hampered. Courts across the State continue to burden people with unlawful convictions arising in the course of prosecutions for the passive nonconduct of drug possession. Thus, despite *Blake* people face prosecution and remained burdened with convictions, and all the attendant consequences, based on the initial and unlawful prosecution for that nonexistent crime of possession.

In order to fully address the harms caused by the unconstitutional drug possession statute, it is necessary to recognize that bail jumping charges stemming from those unlawful prosecutions are themselves unlawful.

B. Identity of Petitioner and Opinion Below

Joseph Koziol asks this Court to accept review of the opinion of the Court of Appeals in *State v. Koziol*, 38630-9-III.[1]

C. Issue Presented

A void statute is a legal nullity. When this Court struck down the drug possession statute, it voided all actions taken in reliance on the statute. Accordingly, the prosecution never had the authority to charge Mr. Koziol with drug possession, and the trial court never had the authority to compel his appearance in a prosecution for that nonexistent crime. As a result, the bail jumping charge for not appearing at a pretrial hearing regarding a nonexistent crime is also void.

D. Statement of the Case

The prosecutor charged Mr. Koziol with possessing drugs. CP 1. Mr. Koziol was jailed pretrial for about 2 months before the court released him. CP 4.

[1] A petition for a related issue is pending in *State v. Strandberg-Biggs*, 38830-1-III.

The prosecutor objected to Mr. Koziol's release. *Id.* When he failed to appear at a subsequent "status" hearing, the prosecutor seized the opportunity to immediately charge Mr. Koziol with bail jumping, filing the charge that same day. CP 1, 4.

While both charges were pending, *Blake* found the drug possession statue unconstitutional from its inception. *State v. Blake*, 197 Wn.2d 170, 185, 481 P.3d 521 (2021).

In response, the trial court dismissed the possession charge. The trial court also concluded the prosecution could not go forward on the bail jumping charge alone. RP 11, CP 44-47. The trial court correctly reasoned it lacked authority to set conditions of release on the nonexistent and unconstitutional charge of possession. *Id.*

Insisting they must be allowed to prosecute Mr. Koziol for his failure to appear for a "status hearing" on a nonexistent and unconstitutional charge, the State appealed.

The Court of Appeals reversed the trial court's order.

E. Argument

The opinion of the Court of Appeals seeks to limit the scope of this Court's landmark decision in *Blake*. The court's effort to limit the relief *Blake* sought to provide is contrary to this Court's decisions and presents an issue of substantial public interest. Each of these considerations warrant this Court review pursuant to RAP 13.4.

The trial court correctly found that it never had personal jurisdiction over Mr. Koziol because the State never lodged a valid criminal charge against him.

RCW 69.50.4013 never properly defined a crime. *Blake* the criminalization of "passive and wholly innocent nonconduct falls outside the State's police power to criminalize." *Blake*, 197 Wn. 2d at 185. If a statute is unconstitutional, it is and has always been a legal nullity. *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952).

"Jurisdiction means the power to hear and determine" a case. *State ex rel. McGlothern v. Superior Court*, 112 Wash

501, 505, 192 P. 937 (1920). There are three types of jurisdiction: "jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment." *Marriage of Little*, 96 Wn.2d 183, 197, 634 P.2d 498 (1981). The trial judge found that because there was no valid possession statute, the court lacked authority to limit Mr. Koziol's liberty and thus he could not be charged with bail jumping. RP 11.

Washington courts only have criminal jurisdiction over a person who commits a crime. RCW 9A.04.030. The trial court's power to order a defendant to appear in court to answer for the crime arises only when the court's jurisdiction over the person has been established by the filing of an affidavit establishing probable cause to believe that an offense has been committed. RCW 10.16.080. Only then can the court order the defendant to appear either with a summons or an arrest warrant. On the other hand: "If it should appear upon the whole examination that no offense has been committed, or that there is

not probable cause for charging the defendant with an offense, he or she shall be discharged." *Id.*

The former bail-jumping statute, RCW 9A.76.170, stated:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail-jumping.

This requires three things. First, the persons must be held for, charged with, or convicted of a "particular crime." *State v. Williams*, 162 Wn.2d 177, 188, 170 P.3d 30 (2007), *abrogated on other grounds*, *State v. Bergstrom*, 199 Wn.2d 23, 502 P.3d 837 (2022).[2] The person must know of the requirement of a subsequent personal appearance. *Id.* Finally, the person must fail to appear as required. *Id.*

[2] *Bergstrom* abrogated *Williams* only with respect to its interpretation of the knowledge element of the charge. *Bergstrom*, 199 Wn.2d at 27 n.1.

The first line of the statute states that the charge presumes the defendant has "been released by court order or admitted to bail." This can only be read to mean the State has filed a valid information or arrest warrant establishing probable cause to believe a crime has been committed. The Fourth Amendment does not permit pretrial restrictions on a person's liberty absent a judicial finding of probable cause to believe they have committed a crime. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). Consistent with that constitutional limitation RCW 10.16.080 requires "if it should appear upon the whole examination that no offense has been committed" the trial court lacks any power over the person and may even dismiss the charge.

There was never a valid, constitutional criminal charge under RCW 69.50.4013. As a result, the trial court could not determine probable cause existed to limit Mr. Koziol's liberty pretrial. And the court did not have the authority to enter an order requiring him to appear in court or to punish him when he

did not. *See also* RCW 9A.04.030 (limiting court's jurisdiction to acts constituting a "crime").

But the opinion concludes otherwise. In doing so the opinion rejects the noncontroversial point that courts only have criminal jurisdiction over a person who commits a crime. Opinion at 8. The opinion suggests instead "[i]f followed to its logical end . . . a court lacks jurisdiction wherever a defendant has been charged with but not yet convicted of a crime." *Id*. That is not Mr. Koziol's argument nor a logical extension of it. Mr. Koziol's argument does not turn on the fact that he has not yet been convicted of a crime. Instead, his argument rests on the point that no crime was ever committed because there was no valid statute rendering drug possession illegal. Because a person who possessed drugs had not committed a crime, the court lacked criminal jurisdiction of them. That simply is not the case with respect to a person who commits an actual crime

RCW 10.16.080 requires "if it should appear upon the whole examination that no offense has been committed" the

trial court lacks any power over the person and may even dismiss the charge. Where an actual crime has been committed a court can readily find probable cause and impose conditions on the person's release pending trial. That is not the case where the person has not committed an actual crime.

But the court brushes that aside observing RCW 10.16.080 is concerned with "frivolous" charges. Opinion at 8-9. The court does not explain the distinction it would draw between "frivolous" complaints and charges for nonexistent crimes. The court fails to appreciate in both this case and in its prior decision in *State v. Paniagua*, 22 Wn. App. 2d 350, 511 P.3d 113, *review denied*, 200 Wn.2d 1018 (2022), is that possession of drugs was never a crime. It is impossible to imagine a more frivolous charge than one for a nonexistent crime.

Because he was not charged with an actual crime, the court lacked any authority to impose conditions on Mr. Koziol's release. Because the court lacked authority to impose

those conditions, the trial court properly dismissed the charges recognizing the State could not prosecute Mr. Koziol for bail jumping.

The opinion of the Court of Appeals is contrary to decisions of this Court. Most troubling, the Court of Appeals opinions in this and other bail jumping cases work to artificially limit the relief this Court intended in *Blake*. This Court should accept review under RAP 13.4.

F. Conclusion

The trial court properly dismissed the bail jumping charge against Mr. Koziol. The Court of Appeals's opinion warrants review by this Court.

This brief complies with RAP 18.17 and contains 1581 words.

Submitted this 21st day of November, 2023.

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September 26, 2023

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CASE # 386309
State of Washington v. Joseph James Koziol
FERRY COUNTY SUPERIOR COURT No. 1910002410

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please see word count rule change at https://www.courts.wa.gov/wordcount, effective September 1, 2021. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW:jab
Attachment

c: **E-mail**—Hon. Lech J. Radzimski

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In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Appellant, v. JOSEPH JAMES KOZIOL, Respondent.	)	No. 38630-9-III UNPUBLISHED OPINION

C●●NEY, J. — The State appeals the trial court's dismissal of Joseph Koziol's bail jumping charge. Mr. Koziol was charged with one count of bail jumping after he allegedly failed to appear at a status hearing on August 19, 2019, for a pending charge of unlawful possession of a controlled substance. Following the Supreme Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), the trial court dismissed Mr. Koziol's unlawful possession of a controlled substance charge. With the underlying charge dismissed, Mr. Koziol then moved the trial court to dismiss the bail jumping charge, arguing he could not be prosecuted due to the underlying charge, for which his order of release was imposed, being unconstitutional. The trial court, without the benefit of this court's decision in *State v. Paniagua*, 22 Wn. App. 2d 350, 511 P.3d 113, *review denied*, 200 Wn.2d 1018, 520 P.3d 970 (2022), agreed and dismissed the bail jumping charge with prejudice.

The State argues the trial court erred in dismissing the bail jumping charge in light of *Paniagua*. Mr. Koziol contends *Paniagua* fails to address the question of whether the trial court has jurisdiction over an ongoing bail jumping prosecution where there was never a constitutionally valid criminal charge to support an order of release.

We reverse and remand for further proceedings.

BACKGROUND

On January 11, 2019, the State charged Joseph Koziol with one count of unlawful possession of a controlled substance and one count of use of drug paraphernalia. The trial court ordered conditions of pretrial release, including the imposition of a $5,000 bond. On March 18, 2019, over the State's objection, the trial court granted Mr. Koziol's motion for release on his own recognizance based, in part, on the entry of a notice of settlement. A week later, Mr. Koziol failed to appear at a scheduled plea and sentencing hearing. A month later, Mr. Koziol appeared before the trial court and revoked the notice of settlement. The trial court entered a new scheduling order on April 29, 2019, which set a status hearing for June 17. Mr. Koziol appeared in court on June 17 as ordered and waived his right to a speedy trial. The trial court set a status hearing for August 19 and reset trial to September 3. Mr. Koziol then failed to appear on August 19. On August 28,

the trial court found probable cause for the charge of bail jumping under former RCW 9A.76.170 (2001)[1] and ordered a bench warrant for Mr. Koziol's arrest.

In February 2021, the Washington Supreme Court delivered its opinion in *Blake*, which held the portion of RCW 69.50.4013(1) that related to simple unlawful drug possession offenses, violated the due process clauses of the state and federal constitutions and was therefore void. *Blake*, 197 Wn.2d at 195. Relying on *Blake*, the State moved to dismiss Mr. Koziol's charge of unlawful possession of a controlled substance. The trial court granted the motion. With the possession of a controlled substance charge dismissed, Mr. Koziol then moved to dismiss the bail jumping charge under Criminal Rule (CrR) 8.3, arguing the trial court lacked authority to order any conditions of release related to the unlawful possession of a controlled substance charge. The State opposed the motion, asserting the bail jumping charge remained viable despite the unconstitutionality of the underlying offense.

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[1] Former RCW 9A.76.170 (2001) stated,

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, . . . and who fails to appear . . . is guilty of bail jumping.

The State charged Mr. Koziol under subsection (3)(c), which designated bail jumping as "[a] class C felony if the person was held for, charged with, or convicted of a class B or class C felony." Former RCW 9A.76.170(3)(c). Here, the underlying unlawful possession charge was a class C felony. *See* Clerk's Paper's at 17-18.

Over the State's objection, the trial court granted Mr. Koziol's motion and dismissed the bail jumping charge with prejudice. The trial court concluded the *Blake* decision rendered former RCW 69.50.4013(2) (2017) "totally inoperative," and reasoned "if it was unconstitutional to prosecute an individual for this offense then the imposition of any conditions of release related to the offense would likewise be unconstitutional." Clerk's Papers (CP) at 46; *see also* Rep. of Proc. at 11-12. The trial court added it would not exercise its discretion "to selectively pick, and validate, aspects of a criminal prosecution that was based on a statute that has been determined to be unconstitutional on its face." CP at 46.

The State timely appealed.

ANALYSIS

The State contends the trial court erred when it dismissed Mr. Koziol's bail jumping charge. We agree.

A defendant may move to dismiss a charge "due to insufficient evidence establishing a prima facie case of the crime charged." CrR 8.3(c); *see also State v. Knapstad*, 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986). A *Knapstad* motion should be granted and a criminal charge dismissed if there are "no disputed material facts and the undisputed facts do not raise a prima facie case of guilt as a matter of law." *State v. Bauer*, 180 Wn.2d 929, 935, 329 P.3d 67 (2014) (citing *Knapstad*, 107 Wn.2d at 356-57).

In deciding a defendant's motion, "the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney." CrR 8.3(c)(3). We review a trial court's decision on a motion to dismiss de novo. *State v. Barnes*, 189 Wn.2d 492, 495, 403 P.3d 72 (2017).

Mr. Koziol was charged with bail jumping under former RCW 9A.76.170 (2001). There are three elements of bail jumping: "(1) the accused was held for, charged with, or convicted of a crime, (2) the accused possessed knowledge of the requirement of a subsequent personal appearance, and (3) the accused failed to appear as required." *Paniagua*, 22 Wn. App. 2d at 357; *see* former RCW 9A.76.170(1) (2001).

In granting Mr. Koziol's motion, the trial court reasoned the prosecution could not proceed because the underlying unlawful possession of a controlled substance charge, which imposed his conditions of release, was unconstitutional. Stated otherwise, because the conditions of Mr. Koziol's release were imposed on an invalid offense, he was never subject to a valid order of release that required his appearance in court. The State contends the dismissal was erroneous in light of *Paniagua*, where this court interpreted the elements of the former bail jumping statute and rejected the argument that bail jumping required proof of a valid predicate crime.

Mr. Koziol relies on the description of the first element of bail jumping used in *State v. Williams*, 162 Wn.2d 177, 188, 170 P.3d 30 (2007), *abrogated on other grounds*, *State v. Bergstrom*, 199 Wn.2d 23, 502 P.3d 837 (2022), to allege that the first element of bail jumping requires a person to be held for, charged with, or convicted of a "'particular crime.'" *See* Br. of Resp't at 6. The language of *Williams* Mr. Koziol cites is lifted from *State v. Pope*, where the court interpreted a different version of the bail jumping statute to determine whether failing to appear at a probation hearing would fall within the purview of the statute. 100 Wn. App. 624, 626-28, 999 P.2d 51 (2000); *see* former RCW 9A.76.170 (1983). While the language of *Pope* is instructive, there is no reason to question the particularity of the crime underlying Mr. Koziol's bail jumping charge.

In *Paniagua*, this court recently considered whether, in the context of a defendant's offender score, a bailing jumping conviction under former RCW 9A.76.170 (2001) was invalid when the conviction was predicated on an unlawful possession of a controlled substance conviction. *Paniagua*, 22 Wn. App. 2d at 353-54. Though its focus was on the validity of the bail jumping conviction, this court specifically examined the elements required to prove the offense of bail jumping. *Id.* at 356-57. Under former RCW 9A.76.170 (2001), the same statute under which Mr. Koziol was charged, this court concluded that the first element of bail jumping only required proof that the defendant "be under charges at the time of the failure to appear." *Id.* at 356. In interpreting the

statute, the court expressed there was no implied element "that the charge underlying the bail jumping must be valid at the time the defendant failed to appear." *Id.* at 357. Accordingly, we held that a constitutionally valid, "predicate crime does not constitute an element of bail jumping." *Id.* at 356.

Although this appeal requires us to review the bail jumping statute from a different procedural posture, our analysis of former RCW 9A.76.170 (2001) in *Paniagua* controls. Like the holding in *Paniagua*, in *State v. Downing* Division Two of this court reviewed the same bail jumping statute and concluded, "the State is not required to prove that a defendant was detained under a constitutionally valid conviction." 122 Wn. App. 185, 193, 93 P.3d 900 (2004). The unconstitutionality of a statute under which Mr. Koziol was charged did not excuse his failure to appear.

The record supports a prima facie case that Mr. Koziol was under charges (i.e. RCW 69.50.4013) (2017)), understood and was aware of his obligation to appear against such charges, and failed to appear on August 19, 2019. The particularity of the underlying crime does not demand proof at all stages of criminal proceedings that the statute supporting the predicate offense be constitutionally valid. Such a result would confound the legislature's intent to effectuate the orderly administration of justice. *Paniagua*, 22 Wn. App. 2d at 359. Had Mr. Koziol questioned the constitutionality of the

underlying charge, his remedy was "to seek a declaration of the unconstitutionality of the statute, not flee from justice." *Id.* at 359.

Mr. Koziol fails to distinguish his case from *Paniagua*. Instead, foreseeing the impact of *Paniagua*, he attempts to compel a different outcome by contending that, because the unlawful possession of a controlled substance statute is and has always been a legal nullity, the trial court lacked jurisdiction to hold him on that charge as "Washington courts only have criminal jurisdiction over a person who commits a crime." Br. of Resp't at 5.[2] His argument lacks legal support. If followed to its logical end, Mr. Koziol posits that a court lacks jurisdiction wherever a defendant has been accused of, but not yet convicted of, a crime.[3] Although Mr. Koziol cites RCW 10.16.080 to support his contention that the trial court lacked jurisdiction, the statute demonstrates the opposite. RCW 10.16.080 addresses frivolous and malicious complaints, stating that "[i]f it should appear . . . that no offense has been committed, or that there is not probable cause for charging the defendant with an offense, he or she shall be discharged." The

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[2] Mr. Koziol relies on RCW 9A.04.030 for this assertion, which is titled "State criminal jurisdiction." (Boldface omitted.) However, the title of the section has no legal weight and the text of the section defines who is subject to punishment, not who is subject to the court's jurisdiction. *See* RCW 9A.04.010(5) ("Chapter, section, and subsection captions are for organizational purposes only and shall not be construed as part of this title.").

[3] *See also State v. Posey*, 174 Wn.2d 131, 135, 272 P.3d 840 (2012) (noting Washington superior courts have original jurisdiction over all criminal felony cases).

statute addressing discharge at the preliminary hearing says nothing about the trial court's authority to hear a case in the first place. Mr. Koziol never invoked this statute in his motion to dismiss and it lacks significance on appeal.

Because the State presented sufficient facts to establish a prima facie case for the charge of bail jumping, the trial court erred when it granted Mr. Koziol's motion to dismiss. Accordingly, we reverse and remand for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Fearing, C.J.

Staab, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Three** under **Case No. 38630-9-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: November 21, 2023

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