

FILED
SUPREME COURT
STATE OF WASHINGTON
3/9/2021 4:17 PM
BY SUSAN L. CARLSON
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 99337-8
Respondent,)	
)	
vs.)	MOTION TO AMEND
)	ISSUES FOR REVIEW
JUSTIN NICHOLAS JENNINGS)	IN RESPONSE TO
Petitioner.)	<u>STATE V. BLAKE</u>
_____)	

I. IDENTITY OF MOVING PARTY

Petitioner, Justin Jennings, by and through counsel of record, Jennifer Dobson of Nielsen Koch, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 1.2(a), 7.3, and 18.8 and in light of this Court's recent decision in State v. Blake, __Wn.2d__, __P.3d__, 2021 WL 728382 (2021), Mr. Jennings respectfully requests this Court accept this motion and consider the issue and argument set

forth herein when reviewing his petition for review. Alternatively, petitioner asks for permission to file on this issue

III. ISSUE

Should this Court remand for resentencing based on Blake?

As explained below, the answer is yes.

IV. FACTS RELEVANT TO MOTION AND GROUNDS FOR RELIEF

Jennings appeals from his judgment and sentence for second degree murder and unlawful possession of a firearm. Jennings was assigned an offender score of eight (“8”), which made the standard range for the murder count 257 to 357 months. CP 133. For the firearm count, his standard range was assessed as 67 to 89 months. CP 133. The trial court sentenced Mr. Jennings to 357 months for the murder count and 89 months for firearm count. CP 136. Mr. Jennings’ offender score included two points for prior convictions for possession of a controlled substance CP 132-33.

After the Court of Appeals affirm his convictions, Mr. Jennings filed a petition with this Court on December 18, 2020. That petition it is still pending.

On February 25, 2021, this Court decided Blake, holding Washington’s strict liability drug possession statute, RCW 69.50.4013, is unconstitutional because it criminalizes innocent conduct, which is beyond the legislature’s power to do. Blake, 2021 WL 728382, at *12. The Blake court declared, “RCW 69.50.4013(1)—the portion of the simple drug possession statute creating this crime—violates the due process clauses of the state and federal constitutions and is void.” Id.

A prior conviction that is constitutionally invalid on its face may not be included in an offender score. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, amended by 105 Wn.2d 175 (1986); see also In re Pers. Restraint of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) (“Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face.”). “Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude.” Ammons, 105 Wn.2d at 188.

Mr. Jennings’ prior convictions under Washington’s strict liability drug possession statute are constitutionally invalid where the Blake court declared the statute void. They therefore cannot be

counted in Mr. Jennings' offender score. His appeal is not yet final, so he is entitled to the benefit of this Court's intervening decision in Blake.¹ Removal of the prior simple possession convictions from Mr. Jennings' criminal history will reduce his offender score to a six (6), which lowers his standard range to 195 to 295 months. RCW 9.94A.510. Thus, even if this Court denies review based on Mr. Jennings' previously raised issues, remand under Blake is still appropriate.

In a recent unpublished decision, the Court of Appeals remanded for the trial court to evaluate what effect, if any, Blake had on the appellant's offender score and what effect, if any, a modified offender score would have on the standard sentencing range. State v. Brewer, 79442-6-I, 2021 WL 863710 (Wash. Ct. App. Mar. 8, 2021). Of note, the appellant in that case requested leave to file a supplemental brief on the Blake issue. This Court concluded, "We see no need for supplemental briefing and will remand the case for resentencing." Id. at n.1.

¹ See In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) (petitioner entitled to retroactive application of a new rule where it was announced eight days before denial of petitioner's motion for reconsideration, and so his direct appeal was not yet final).

Brewer appears to recognize that the primary duty of Washington’s appellate courts is “to see that justice is done in the cases which come before [them], which fall within [their] jurisdiction.” State v. Saintcalle, 178 Wn.2d 34, 71–72, 309 P.3d 326, 349 (2013), abrogated on different grounds by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) (Gonzales, J. concurring) (quoting O’Connor v. Matzdorff, 76 Wn.2d 589, 600, 458 P.2d 154 (1969)); see also, RAP 1.2 and 7.3. Indeed, this Court has “frequently recognized it is not constrained by the issues as framed by the parties” and will “reach issues not briefed by the parties if those issues are necessary for decision.” Id. (citations omitted). Brewer’s remand under Blake without additional briefing is consistent with court rules and this Court’s prior opinions.

Mr. Jennings files this motion in light of Brewer and in lieu of a supplemental brief, bringing to this Court’s attention the fact that remand is warranted under Blake. Undersigned counsel would be happy to file supplemental briefing on this issue if requested by the Court.

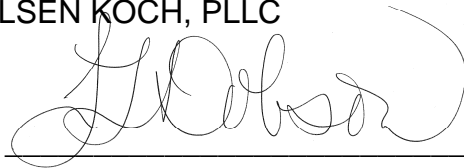
V. CONCLUSION

Mr. Jennings respectfully requests this Court accept this motion in lieu of a supplemental brief and consider whether remand is warranted for the trial court to determine what effect Blake has on his offender score and standard sentence range.

DATED this 9th day of March, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in cursive script, appearing to read "J. Dobson", is written over a horizontal line.

JENNIFER DOBSON
WSBA NO. 30487
Office ID No. 91051
Attorneys for Appellant

NIELSEN KOCH P.L.L.C.

March 09, 2021 - 4:17 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 99337-8
Appellate Court Case Title: State of Washington v. Justin Nicholas Jennings
Superior Court Case Number: 17-1-01867-0

The following documents have been uploaded:

- 993378_Motion_20210309161621SC484092_1433.pdf
This File Contains:
Motion 1 - Other
The Original File Name was State v. Justin Jennings 99337-8.Motion to Amend Issues for Review.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- Sloanej@nwattorney.net
- Theodore.Cropley@piercecountywa.gov
- pcpatcecf@piercecountywa.gov

Comments:

Motion to Amend Issues on Review in response to State v. Blake

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net

Filing on Behalf of: Jennifer L Dobson - Email: dobsonj@nwattorney.net (Alternate Email: Dobsonj@nwattorney)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20210309161621SC484092