

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 99498-6
Respondent,)	
)	
vs.)	MOTION TO AMEND
)	ISSUES FOR REVIEW
JAMES BALLARD)	IN RESPONSE TO
Appellant.)	<u>STATE V. BLAKE</u>
_____)	

I. IDENTITY OF MOVING PARTY

Petitioner, James Ballard, by and through counsel of record, Erin Moody 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. Ballard 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 briefing 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

Ballard appeals from his judgment and sentence for possession of a stolen vehicle (while on community custody). CP 35. The trial court imposed a term of 50 months for this offense, the middle of the standard range given Mr. Ballard's offender score of 18. CP 38-40; RCW 9.94A.510., .515.

The Court of Appeals affirmed his conviction and Mr. Ballard filed a petition with this Court on February 11, 2021. That petition 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.

The prior convictions contributing to Mr. Ballard’s offender score begin in 1984 and include no class A felonies. CP 37. They include four convictions for simple possession, and three of these constitute the only criminal history listed between 1994 and 2005. CP 37. It therefore appears likely that simple possession convictions are having an outsize effect on Mr. Ballard’s score, preventing the washout of convictions in 1984, 1986, 1990, and 1994. CP 37; RCW 9.94A.525(2)(b), (c).

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. Ballard's 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. Ballard's offender score. His appeal is not yet final, so he is entitled to the benefit of this Court's intervening decision in Blake.¹ Thus, even if this Court denies review of the issue raised in Mr. Ballard's petition, 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, 79442-6-1, 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.

Brewer appears to recognize that the primary duty of Washington's appellate courts is "to see that justice is done in the

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

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. Ballard 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. Ballard respectfully requests this Court accept this motion in lieu of a supplemental brief and consider whether remand

announced eight days before denial of petitioner’s motion for reconsideration, and so his direct appeal was not yet final).

is warranted for the trial court to determine what effect Blake has on his offender score.

DATED this 11th day of March, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "E. J.", written over a horizontal line.

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Transmittal Information

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