Supreme Court No. 101613-1
Court of Appeals No. 56432-7-II

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

STATE OF WASHINGTON,
Respondent

v.

BROOKE LAINE HAGEN,
Appellant

PETITION FOR REVIEW

SUZANNE LEE ELLIOTT
Washington Appellate Project
Suite 610, 1511 Third Ave.
Seattle WA 98101
206-587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Brooke Laine Hagen seeks review of the opinion in *State v. Hagen, #56432-7-II*. See attached.

II. ISSUE PRESENTED FOR REVIEW

May a bail-jumping charge be predicated on missing court for a charge premised on innocent conduct - possession of a controlled substance - voided by *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021)?

III. INTRODUCTION

This Court's holding in *Blake*, that the Washington drug possession statute was void because it criminalized wholly innocent conduct, deprived the trial court of jurisdiction over the defendant when she was charged and convicted. As a result, convictions, like bail-jumping, premised on the void charge are also void.

A definitive answer of whether a conviction premised on a conviction voided by *Blake* is also void is necessary from this Court.

IV. STATEMENT OF THE CASE

Brooke Hagen was charged with the crime of unlawful possession of a controlled substance. CP 44. She failed to appear for a pretrial hearing on that charge, so the information was amended to include a count of bail-jumping. CP 79. Hagen later pleaded guilty to both counts. CP 62. Hagen was sentenced to a Drug Offender Sentencing Alternative. CP 51.

Hagen's possession charge was voided by *Blake.* Hagen moved to vacate her convictions for both possession and bail-jumping. CP 38. The State conceded the possession conviction should be vacated but objected to the vacation of the bail-jumping conviction. CP 31.

The trial court granted the motion to vacate both the possession and bail-jumping convictions. CP 27. The trial court reasoned that the bail-jumping conviction was "predicated on the

exercise of jurisdiction that, in light of *Blake*, the court did not possess at the time" because the statute underlying Hagen's possession conviction was later held to be unconstitutional. CP 27.

The Court of Appeals reversed in an unpublished decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Whether a bail-jumping charge predicated on missing court for a possession of a controlled substance charge which was voided by *Blake* is a substantial and recurring constitutional issue.

This Court should accept review because this case raises a substantial and recurring constitutional question: May a bail-jumping charge be predicated on missing court for a possession of a controlled substance charge voided by *Blake*? RAP 13.4(3) & (4).

This issue has been raised in numerous cases, many of which are still pending. See *e.g., Matter of Stac*y, 2022 WL 4090744, motion for discretionary review pending; *State v. Lindberg*, 2021 WL 5578390; *State v. Willyard*, 2022 WL 17343628; *State v. Garoutte*, 2022 WL 3137100; *State v. Koziol*, 38630-9-III; and *State v. Strandberg-Biggs*. 38830-1-III.

This Court recently denied review of the issue in *State v. Paniagua*, 22 Wn. App. 2d 350, 511 P.3d 113, review denied, 520 P.3d 970 (2022). But denial of review by this Court petition is not an adjudication on the merits of the claim. See, *e.g., Matia Contractors, Inc. v. City of Bellingham*, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008) (Supreme Court's denial of review has never been taken as expressing the court's acceptance of an appellate court's decision).

The question will continue to be raised for the foreseeable future because many defendants have prior convictions for bail-jumping premised on a missed court date for a drug possession offense. Those defendants will continue to challenge the inclusion of bail-jumping charges in their offender scores. A definitive answer from this Court is necessary.

2. The trial courts have jurisdiction only over a person who commits a crime.

Washington courts have jurisdiction only over a person who commits a crime. RCW 9.04.030. "Jurisdiction means the power to

hear and determine." *State ex rel. McGlothern v. Superior Court*, 112 Wn. 501, 505, 192 P. 937 (1920).

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 filing 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.*[1]

RCW 69.50.4013 never properly defined a crime. It criminalized "innocent passivity" and violated the federal and state rule that "passive and wholly innocent nonconduct falls outside the State's police power to criminalize." *Blake*, 197 Wn.2d at 185.

---

[1] The Court of Appeals held that the portion of the statute "addresses frivolous complaints." Slip Opinion at 4. It reads the word "discharge" as being released from what was otherwise valid jurisdiction. The Court fails to cite any authority for this construction of the statute. And nothing in the word "discharge" means that every criminal charge is valid until "discharged."

The trial judge correctly found that the trial court never had personal jurisdiction over Ms. Hagen because she was charged with bail-jumping when she committed no crime. CP 10. The first line of the bail-jumping statute, RCW 9A.76.010, 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. Otherwise, the court would have no authority to order the person to appear at a later date. *See* RCW 10.16.080. But "if it should appear upon the whole examination that no offense has been committed" the trial court lacks any power over the person and cannot compel that person, much less punish them, for violating an order from a court that had no personal jurisdiction over the defendant. Any conviction based on an order to appear when the trial court lacked jurisdiction over the defendant is void.

3. The commission of a felony is an express element of the crime of bail-jumping.

The second element of the charge requires the State to prove beyond a reasonable doubt that Ms. Hagen was charged with a "B or C felony." 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.

Had Ms. Hagen proceeded by way of a jury trial, the jury would have been instructed that it could find her guilty only if the State proved these elements beyond a reasonable doubt.

> (1) That on July 19, 2018 Ms. Hagen failed to appear before a court;
>
> (2) That Ms. Hagen was charged with a class B or C felony;
>
> (3) That Ms. Hagen had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
>
> (4) That any of these acts occurred in the State of Washington.

WPIC 120.41 Bail-Jumping—Elements, 11A Wash. Prac. Pattern Jury Instr. Crim. WPIC 120.41 (5th Ed).

Because the possession of a controlled substance statute was void, no offense has been committed despite the fact an information was filed. Because the possession statute was void when Ms. Hagen was charged, she was not charged with a crime at all much less a B or C felony.

As the trial court recognized here, bail-jumping cannot be premised simply on "a charge." It must depend on a ***valid*** criminal charge. The possession of a controlled substance charge was beyond the court's jurisdiction because it criminalized wholly innocent and passive nonconduct.

Without a valid criminal charge, the court had no jurisdiction over Ms. Hagen such that it could force her to appear. And, without that authority, there is no basis to convict or punish Ms. Hagen for bail-jumping.

4. The *Blake* decision is unprecedented and earlier cases discussing bail-jumping are inapplicable here.

Blake was an unprecedented decision. Ms. Hagen cannot find any other instance in which Court has held a criminal statute void

because it criminalized innocent conduct. The Court of Appeals failed to recognize the holding in *Blake* is unprecedented. Because of this failure, the Court of Appeals relied on cases that do not apply because they do not discuss the present or future use of a statute that was void because it criminalized innocent conduct.

The Court of Appeals extensively relied on *State v. Downing*, 122 Wn. App. 185, 93 P.3d 900 (2004). But *Downing* clearly differs. There the defendant was charged under a statute – unlawful issuance of bank checks - that properly defined a crime and has never been deemed void. From the start of his prosecution until the charges were later dismissed the trial court had jurisdiction over Mr. Downing and had the power to order him to appear and punish him for failing to do so.

The Court also cited to *United States v. Williams*, 341 U.S. 58, 59, 71 S. Ct. 595, 596, 95 L. Ed. 747 (1951). It, too, is distinguishable. There the defendants were charged with perjury. In dicta, the Court held a perjury charge can be sustained even if the statute out of which the perjury proceedings arose is

"unconstitutional." *Id.* at 68. But a finding of "unconstitutionality" is not the same as a finding of void because a statute criminalized innocent conduct.

V. CONCLUSION

This Court should grant review and provide a definitive answer to this recurring question.

This document complies with RAP 18.17 and contains 2,067 words.

RESPECTFULLY SUBMITTED this 9th day of January 2023.

/s/Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Brooke Hagen

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

December 20, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. BROOKE LAINE HAGEN, Respondent.	No. 56432-7-II UNPUBLISHED OPINION

GLASGOW, C.J.—Brooke Laine Hagen was charged with unlawful possession of a controlled substance under former RCW 69.50.4013 (2017). Due to her failure to appear in court on that charge, she was subsequently charged with bail jumping. Hagen pleaded guilty to both counts.

Then the Washington Supreme Court held that former RCW 69.50.4013 was unconstitutional in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Later that year, the trial court vacated Hagen's convictions for possession of a controlled substance and bail jumping. The trial court concluded that it had no jurisdiction to order Hagen to appear in court, nor did it have jurisdiction to convict Hagen for failing to appear where the predicate offense was constitutionally invalid.

The State appeals the portion of the order vacating the bail jumping conviction, arguing that the trial court had jurisdiction and that the validity of the underlying offense is not an implied element of bail jumping. We reverse the portion of the trial court's order that vacates Hagen's conviction for bail jumping and remand for proceedings consistent with this opinion.

FACTS

In March 2018, the State charged Hagen with unlawful possession of a controlled substance under former RCW 69.50.4013(1). This crime was a felony. In July 2018, Hagen failed to appear in court as required. As a result, the State amended the information to include a count of felony bail jumping. Hagen later pleaded guilty to both charges.

In 2021, the Supreme Court held that former RCW 69.50.4013(1), which criminalized simple drug possession, violated "the due process clauses of the state and federal constitutions and is void." *Blake*, 197 Wn.2d at 195. After *Blake* was published, Hagen moved to vacate her conviction for unlawful possession of a controlled substance and her conviction for bail jumping. She argued that both convictions had to be vacated because they were premised "on violating a statute that was declared void." Clerk's Papers (CP) at 38 (emphasis omitted).

The trial court concluded in a memorandum opinion that "a constitutionally invalid statute may not be the predicate offense upon which future criminal prosecution is based" and that "the court had no jurisdiction to order the Defendant to appear in court, much less to convict her of a crime for failing to do so." CP at 10.[1] The trial court then entered an order vacating both convictions.

The State timely appeals the portion of the order vacating Hagen's bail jumping conviction.

[1] The trial court concluded that the State could still charge Hagen with misdemeanor bail jumping because the conditions of release that applied to the drug possession charge also applied to a charge of using drug paraphernalia, a misdemeanor.

ANALYSIS

I. JURISDICTION

The State argues that the trial court abused its discretion in finding that it lacked jurisdiction over Hagen's bail jumping charge because "the court's jurisdiction does not depend on the constitutional validity of the charges or the outcome of the case." Opening Br. of Appellant at 10. Hagen counters that the trial court was correct when it held that it "never had personal jurisdiction over Ms. Hagen because she was charged with bail-jumping when she had committed no crime." Br. of Resp't at 1-2.[2]

In general, this court reviews a trial court's decision to vacate a conviction for abuse of discretion. *See State v. Hawkins*, ___ Wn.2d ___, 519 P.3d 182 (2022). However, whether "a particular court has jurisdiction is a question of law reviewed de novo." *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003).

Washington superior courts have original jurisdiction in all felony cases. *State v. Posey*, 174 Wn.2d 131, 135, 272 P.3d 840 (2012); *see also* WASH. CONST. art. IV, § 6. "Original jurisdiction" is a "court's power to hear and decide a matter before any other court can review the matter." BLACK'S LAW DICTIONARY 1019 (11th ed. 2019). A "court's jurisdiction *cannot* hinge on the result it reaches." *Posey*, 174 Wn.2d at 139. Additionally, Washington superior courts have personal jurisdiction over anyone who commits any crimes, in whole or in part, within the state. RCW 9A.04.030(1); *State v. Anderson*, 83 Wn. App. 515, 518, 922 P.2d 163 (1996).

[2] The trial court did not refer to personal jurisdiction. It simply used the word "jurisdiction." CP at 10.

A trial court's authority to determine a criminal matter remains even if an appellate court later determines that the charge is unconstitutional. *See State v. Downing*, 122 Wn. App. 185, 193, 93 P.3d 900 (2004); *cf. United States v. Williams*, 341 U.S. 58, 68-69, 71 S. Ct. 595, 95 L. Ed. 747 (1951) (holding that a federal district court has jurisdiction in a criminal matter even if an appellate court later concludes that the criminal statute is unconstitutional). For example, in *Downing*, this court affirmed a bail jumping conviction predicated on three dismissed counts of unlawfully issuing checks because the trial court still had "jurisdiction to order [the defendant] to . . . answer for those charges, even if his answer could have been that double jeopardy barred further prosecution." 122 Wn. App. at 193.

Here, the trial court had personal jurisdiction over Hagen because she was accused of possessing drugs and jumping bail in the state. Additionally, the trial court had original jurisdiction over Hagen's case under article IV, section 6 of the Washington Constitution. Hagen was charged with two different felonies: possessing drugs and bail jumping while charged with possessing drugs. Although the statute underlying Hagen's drug possession charge was unconstitutional, that finding did not remove the trial court's power to hale Hagen to court for the purpose of hearing and deciding her case. *See id. Blake* did not retroactively remove the trial court's jurisdiction or its authority to order Hagen to appear until her case reached resolution.

Although Hagen cites RCW 10.16.080 to support her argument that the trial court lacked jurisdiction, the statute demonstrates the opposite. RCW 10.16.080 addresses frivolous complaints, stating that "if 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 word "discharge" means to "release from an obligation." WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY 644 (2002). Here, the word indicates that the trial court must release its power over the defendant, not that the court lacked that power in the first place.

Thus, the trial court erred in concluding that it lacked jurisdiction over Hagen when she was charged with a crime.

II. BAIL JUMPING CONVICTION

The State relies on *Downing* to argue that the trial court abused its discretion in vacating Hagen's bail jumping conviction because "the validity of the underlying charge is not an implied element of Bail Jumping." Opening Br. of Appellant at 11. Like the *Downing* court, the State analogizes bail jumping to escape, noting that this court has held the State need not prove that a defendant was detained under a constitutionally valid conviction when prosecuting them for escape.

Hagen counters that a valid information or arrest warrant is an element of the crime of bail jumping, distinguishing *Downing* because there "the defendant was charged under a statute—unlawful issuance of bank checks—that properly defined a crime and has never been deemed unconstitutional." Br. of Resp't at 4. Hagen further argues that the State "fails to address the difference between bail-jumping and escape," given that the latter involves leaving a custodial facility and reveals "clear culpability and a criminal intent." *Id.* at 5. Finally, Hagen points out that criminalizing a lack of appearance in court has a disproportionate impact on people experiencing poverty and that "[u]nbridled prosecutorial discretion to charge bail jumping has resulted in substantial unfairness." *Id.* at 7.

Determining whether the validity of the underlying charge is an implied element of bail jumping requires us to engage in statutory interpretation. "Construction of a statute is a question of law, which we review de novo." *State v. Kindell*, 181 Wn. App. 844, 851, 326 P.3d 876 (2014).

Former RCW 9A.76.170(1) (2001) stated that 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." Bail jumping has three elements, and they "are satisfied if the defendant (1) was held for, charged with, or convicted of a particular *crime*; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required." *Downing*, 122 Wn. App. at 192 (emphasis added).

One could argue that absent a constitutionally valid crime, the first element was never satisfied. But considering the statutory language as a whole, which broadly contemplates early stages of criminal proceedings, the better reading is that the validity of the underlying offense is not an implied element of the crime. Otherwise, a criminal defendant would be left to decide whether to submit to the court's authority based on the defendant's own assessment of the validity of the underlying crime or criminal charge. There is no indication that the legislature intended this result. We instead apply *Downing* and conclude that a bail jumping conviction remains intact whether a court strikes down the underlying offense because of the State's conduct or because of an unconstitutional statute. *See id.* at 193; *see also State v. Paniagua*, 22 Wn. App. 2d 350, 356, 359, 511 P.3d 113 (2022) (holding that "a predicate crime does not constitute an element of bail jumping" and reasoning that a defendant must submit "to the authority of the law, until held unconstitutional, rather than taking the law into one's own hand").

Hagen rightfully notes that criminalizing a failure to appear in court disparately impacts low-income communities and people of color. Aleksandrea E. Johnson, *Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for Washington's Bail Jumping Statute and Court Nonappearance*, 18 SEATTLE J. FOR SOC. JUST. 433, 442 (2020). However, it is fundamentally the legislature's role to determine what conduct is criminalized. And the legislature has recently amended the bail jumping statute, perhaps in response to these concerns. *See* RCW 9A.76.170.

Here, Hagen pleaded guilty, admitting to the elements of bail jumping. The State charged Hagen with a crime, she knew she was required to appear, and she failed to appear. While *Blake* later declared the statute defining that crime unconstitutional, the offense's validity is not an element of bail jumping. Because we hold that the trial court had jurisdiction over Hagen when she committed the crime of bail jumping, it was an abuse of discretion for the trial court to vacate her bail jumping conviction.

CONCLUSION

We reverse the portion of the order vacating Hagen's conviction for bail jumping and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Lee, J.

Cruser, 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 of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56432-7**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondents Jesse Espinoza & Zachary Snipe
[jespinoza@co.clallam.wa.us]
[zsnipe@protonmail.com]

☐ Attorney for other party

TAYLOR HALVERSON, Legal Assistant
Washington Appellate Project

Date: January 9, 2023

WASHINGTON APPELLATE PROJECT

January 09, 2023 - 3:39 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56432-7
Appellate Court Case Title:	State of Washington, Appellant v Brooke L. Hagen, Respondent
Superior Court Case Number:	18-1-00130-6

The following documents have been uploaded:

- 564327_Petition_for_Review_20230109153932D2705686_8897.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp_010923-05.pdf

A copy of the uploaded files will be sent to:

- jespinoza@co.clallam.wa.us
- jesse.espinoza@clallamcountywa.gov
- karim@suzanneelliottlaw.com
- zsnipe@co.clallam.wa.us
- zsnipe@protonmail.com

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Suzanne Lee Elliott - Email: suzanne@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20230109153932D2705686