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Supreme Court No. 98413-1
(COA No. 36034-2-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LESLIE PITTMAN,

Petitioner.

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

PETITION FOR REVIEW

KATE R. HUBER
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katehuber@washapp.org
wapofficemail@washapp.org

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Leslie Pittman petitions this Court for review of the Court of Appeals opinion in *State v. Pittman*, No. 36034-2-III. RAP 13.1(a), 13.3 (a)(1), (b), 13.4(b)(3)-(4). In the opinion (issued March 17, 2020) the Court of Appeals rejected Mr. Pittman's challenge to the unlawful possession of a controlled substance statute. Mr. Pittman argued the Court must read the statute to include a knowledge element or declare the statute unconstitutional. The identical issues are currently pending before this Court in *State v. Blake*, 194 Wn.2d 1023, 456 P.3d 395 (2020) (oral argument scheduled for June 11, 2020).

B. ISSUES PRESENTED FOR REVIEW

1. Criminal laws that lack a mens rea element and shift the burden to defendants to prove their innocence are contrary to the fundamental principles of the presumption of innocence and due process of law. In Washington, courts have interpreted possession of a controlled substance as a strict liability crime, and a person in possession of a controlled substance is presumed guilty unless he can prove "unwitting possession." Does this presumption of guilt impermissibly shift the burden of proof and violate the presumption of innocence and due process, and should this Court declare RCW 69.50.4013 unconstitutional?

2. The possession of a controlled substance statute does not expressly require proof of knowing possession, but courts must construe statutes to avoid constitutional deficiencies. If construed as a strict liability crime without a knowledge element, the statute is unconstitutional because it violates the presumption of innocence and due process of law. Consistent with the constitutional-doubt canon, should this Court read RCW 69.50.4013 to require the State to prove beyond a reasonable doubt the defendant had knowledge of the possession?

C. STATEMENT OF THE CASE

Mr. Pittman is homeless man who follows a regular path of "dumpster diving" to find what he needs to survive. RP 361. Mr. Pittman mainly searches for discarded food to eat, discarded items of value to sell, or discarded items he can use himself. RP 361-62. One of the spots he frequents on his "routes" is the dumpster at the Horizon Apartments. RP 362. Mr. Pittman includes this spot on his regular routes because of the success he has had in scavenging from the dumpster when the building evicts people. RP 362. At the time, Horizon Apartments was known as a troubled area frequented by people hanging out, doing drugs, and rummaging through stuff, and the area with the dumpsters often had discarded items and trash strewn about. RP 205, 240-41.

On the day of his arrest, as Mr. Pittman approached the dumpsters at Horizon Apartments, he discovered a new car that was damaged with all the doors open and with "crap scattered everywhere." RP 363. Mr. Pittman looked inside of the car but did not take anything from it or damage it. RP 393, 400-02. As Mr. Pittman was sorting through the trash in the area, the apartment manager approached him and told him to clean up the area or he would call the police. RP 232, 246, 367-69. Not wanting to lose this regular spot on his route, Mr. Pittman started cleaning up the area, placing items in the dumpster, in his pockets, and in the car. RP 368-70.

One of the apartment residents flagged down a police officer who was in the area on an unrelated investigation and directed him to Mr. Pittman. RP 226-27. The resident initially noticed Mr. Pittman because he "didn't look like he belonged with the car," and the resident claimed to have seen Mr. Pittman move the car and "yank[] stuff out of the back of the car." RP 195, 197-98. The officer discovered the vehicle had been stolen from a local car dealership and arrested Mr. Pittman. RP 233-34.

When police searched Mr. Pittman, they recovered pieces of folded foil and paper from his pants pockets. RP 292. These small folded objects contained methamphetamine. RP 337-40. Mr. Pittman denied knowing he possessed methamphetamine in his pockets. RP 375. He surmised the

foil and paper were probably among items of trash he picked up and put in his pocket on his route that day, but he did not specifically recall putting those items in his pocket. RP 375, 380-83, 388-89. Mr. Pittman admitted to the arresting officer he had consumed methamphetamine either the day before his arrest or earlier that day. RP 389, 404.

Mr. Pittman denied stealing, possessing, or damaging the car. RP 372-73, 376-79, 400-02. The jury believed him, acquitting him of possession of a stolen motor vehicle and malicious mischief. CP 74-77, 79. As to the drug possession charge, the court instructed the jury Mr. Pittman had to prove his possession was unwitting. CP 103; RP 435. After receiving this instruction, the jury convicted Mr. Pittman of possession of a controlled substance. CP 78.

D. ARGUMENT

1. This Court should grant review because Mr. Pittman's petition presents identical issues to those under review in this Court in *State v. Blake* and reviewed by this Court in *State v. A.M.*.

Washington courts interpret possession of a controlled substance as a strict liability crime with no mental element. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). People who innocently possess drugs can avoid conviction only if they prove they unwittingly possessed the drugs. *Bradshaw*, 152 Wn.2d at 537-38. The absence of a knowledge element

and placing the burden on the defense presumes guilt rather than innocence.

In *State v. A.M.*, this Court considered whether the drug possession statute is unconstitutional and whether courts must interpret it to include a knowledge element. 194 Wn.2d 33, 448 P.3d 35 (2019). However, the Court resolved the case on other grounds and did not address the possession statute. *Id.* at 44. The Court later granted review in *State v. Blake*, 194 Wn.2d 1023, 456 P.3d 395 (2020). *Blake* presents the same issues this Court declined to address in *A.M.* The case is pending before this Court with oral argument scheduled for June 11, 2020.

Mr. Pittman raises the same challenges to the possession statute this Court reviewed in *A.M.* and is reviewing in *Blake*. The Court of Appeals rejected Mr. Pittman's challenges, relying on *Bradshaw* and *Cleppe*. Opinion at 2-3. The grant of review in *A.M.* and *Blake* demonstrates this Court finds these issues involve significant questions of constitutional law and substantial public interest. RAP 13.4(b)(3), (4). This Court should grant review and stay Mr. Pittman's petition pending this Court's decision in *Blake*.

2. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Pittman to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law.

It is fundamental that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191, 2196-97, 204 L. Ed. 2d 594 (2019) (recognizing "scienter's importance in separating wrongful from innocent acts" and interpreting statute to require knowledge of both possession of firearm and knowledge of unlawful status). Washington courts have construed the possession of a controlled substance statute as creating a strict liability crime with no mental element. *Bradshaw*, 152 Wn.2d at 537; *Cleppe*, 96 Wn.2d at 380. This interpretation conflicts with the presumption of innocence, impermissibly shifts the burden of proof to the defense, and violates due process of law.

This Court recently considered these issues in *A.M.*, although it declined to resolve the case on those issues because it reversed on other grounds. 194 Wn.2d at 38-44. In her concurrence, Justice Gordon McCloud, joined by Justice González, urged the Court to reach the issue of "the ongoing criminalization of innocent conduct in Washington's war on drugs" created by the absence of a knowledge requirement in the

statute. *Id.* at 45 (Gordon McCloud, J., concurring). The two Justices recognized that "the settled interpretation of Washington's basic drug possession statute offends due process insofar as it permits heavy criminal sanctions for completely innocent conduct" because it allows conviction for possession without knowledge of possession. *Id.* They also found that *Cleppe* and *Bradshaw* both departed from "the common law's presumption in favor of mens rea," and therefore erred in declining to read the statute "to require some showing of a guilty mind." *Id.* at 49. But, because the legislature so created the statute, they found, "The strict liability drug possession statute exceeds the legislature's authority and offends the Fourteenth Amendment right to due process." *Id.* at 59.

As the *A.M.* concurrence recognized, the Court's interpretation of the drug possession statute as a strict liability offense void of a mens rea element is wrong. In reaching this conclusion, the Court relied on the fact the legislature appeared to have omitted a mental element from the statute. *Bradshaw*, 152 Wn.2d at 534-35; *Cleppe*, 96 Wn.2d at 379-80. The "failure to be explicit regarding a mental element is not, however, dispositive of legislative intent." *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); *accord United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). The apparent absence of a mental element from a statute does not mean none is

required. *Elonis v. United States*, 575 U.S. 723, ___, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015).

Unless it can be absolutely shown that the legislature intended to exclude a traditional mental element, the courts will infer one. *See, e.g.*, *Anderson*, 141 Wn.2d at 366-67 (declining to interpret unlawful possession of firearm statute as strict liability offense and instead interpreting knowledge element, despite absence of apparent mental intent element in statute). Failure to presume the legislature implied a mens rea element creates the potential to criminalize innocent conduct.

Statutes are interpreted to avoid constitutional doubts. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); *accord Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"). Unless interpreted to have a knowledge element, the constitutionality of the statute is dubious in light of fundamental due process principles.

A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v.*

New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). "The presumption of innocence unquestionably fits that bill." *Nelson v. Colorado*, __ U.S. __, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017). History and tradition provide guidance on when the constitutional line is crossed:

> Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); *see Schad*, 501 U.S. at 650 (Scalia, J. concurring) ("It is precisely the historical practices that *define* what is 'due.'"). Due process limits a legislature's authority to define crimes absent a mens rea element. *See, e.g.*, *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (holding strict liability offender registration statute violated due process when applied to defendant who had no knowledge of duty to register). Washington appears to be the only state that interprets drug possession as a true strict liability crime. *State v. Adkins*, 96 So. 3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring); *see Bradshaw*, 152 Wn.2d at 534; *Dawkins v. State*, 313 Md. 638, 647 n.7, 547 A.2d 1041 (1988); *State*

v. Bell, 649 N.W.2d 243, 252 (N.D. 2002) (legislature changed North Dakota law to require mental element); *Adkins*, 96 So. 3d at 415-16 (Florida applying knowledge requirement to possession, although not exact nature of substance).

That nearly every drug possession offense in this country has a mens rea requirement is unsurprising. As acknowledged in *Bradshaw*, the Uniform Controlled Substances Act of 1970 has a "knowingly or intentionally" requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401(c); *Bradshaw*, 152 Wn.2d at 534. This element demonstrates the offense of possession of a controlled substance has traditionally required proof of knowledge. Washington's drug possession law is contrary to the practice of every other state. It is contrary to the tradition of requiring the State prove a mens rea element in drug possession crimes. This indicates the possession statute violates due process. *Schad*, 501 U.S. at 640. Stripped of the traditional mental element of knowledge, there is no "wrongful quality" about a person's conduct in possessing drugs. To conclude otherwise criminalizes the innocent behavior of possessing property.

If Washington's possession statute does not require proof of knowledge, it violates due process principles and is unconstitutional. U.S. Const. amend. XIV; Const. art. I, § 3. As explained, Washington's drug

possession statute crosses the constitutional line and criminalizes innocent behavior. For the innocent to avoid a felony conviction, they must disprove the presumption that they were aware of the substance they possessed. This burden shifting scheme for possession of a controlled substance is unlike any in the union. The possession statute turns the presumption of innocence, fundamental to our nation's history and traditions, on its head. This Court should hold the statute unconstitutional.

If this Court finds the statute unconstitutional, it must reverse Mr. Pittman's conviction and dismiss the charge because unconstitutional statutes are void. *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975). Alternatively, if interpreted to require proof of knowledge, the trial court erred by failing the require the prosecutor to prove beyond a reasonable doubt this essential element. The jury's failure to consider an essential element is presumed prejudicial, and this Court must reverse the conviction and remand for a new trial unless the State can prove this constitutional error is harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *A.M.*, 194 Wn.2d at 41-42.

Because the missing element of knowledge is not supported by uncontroverted evidence, the error here was not harmless. *Neder*, 527 U.S. at 18; *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The

trial court instructed the jury the State need prove only that Mr. Pittman possessed the controlled substance to convict him of the offense. CP 99-102; RP 434-435. The court further instructed the jury Mr. Pittman must to prove the possession was unwitting. CP 103; RP 435. Thus, the court did not require the State to prove knowing possession, and the court placed the burden of proving lack of knowledge on Mr. Pittman.

The facts on which the jury convicted Mr. Pittman here are strikingly similar to the scenario of which the *A.M.* concurrence warned.

> A person might pick up the wrong bag at the airport, the wrong jacket at the concert, or even the wrong briefcase at the courthouse. . . . All this conduct is innocent; none of it is blameworthy.

A.M., 194 Wn.2d at 64. Here, Mr. Pittman collected trash, including some paper. RP 368-70. Unbeknownst to him, the paper contained a small foil of methamphetamine. RP 375. The State presented no evidence Mr. Pittman knew he possessed the methamphetamine. Because Mr. Pittman "contested the omitted element and raised evidence sufficient to support a contrary finding," the error is not harmless. *Neder*, 527 U.S. at 19.

E. CONCLUSION

For the reasons set forth above, Mr. Pittman requests this Court grant review and stay consideration of the case pending the Court's decision in *Blake*.

DATED this 13th day of April, 2020.

Respectfully submitted,

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorneys for Petitioner
katehuber@washapp.org
wapofficemail@washapp.org

APPENDIX A

March 17, 2020, Unpublished Opinion

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

STATE OF WASHINGTON, Respondent, v. LESLIE LEE PITTMAN, Appellant.	))))))))))	No. 36034-2-III UNPUBLISHED OPINION

KORSMO, J. — Leslie Pittman appeals from his conviction for possession of a controlled substance, raising either well-settled or moot claims. We affirm the conviction, but remand to strike certain financial matters from the judgment and sentence.

FACTS

Mr. Pittman was convicted by a jury in the Spokane County Superior Court that rejected his theory of unwitting possession. The jury was instructed that to convict Mr. Pittman, the State needed to prove that he "possessed methamphetamine." Clerk's Papers at 100. There was no objection to the instruction.

At sentencing, the court included six prior Texas convictions in the offender score, resulting in an offender score of 9. The defense stipulated that four of the convictions were comparable and counted in the offender score, but challenged two "unauthorized

use of a vehicle" convictions. Although sentenced to 23 months in prison, Mr. Pittman was released on the day of sentencing due to credit for time served.

He appealed to this court. A panel considered his case without hearing argument.

ANALYSIS

Mr. Pittman argues both that the drug possession statute is unconstitutional unless a mens rea is read into it and that the court erred in considering his prior Texas convictions when calculating the offender score. The first argument is precluded by precedent and the second is moot.

Drug Possession Elements

The jury was instructed, consistent[1] with RCW 69.50.4013, that it had to find that Mr. Pittman "possessed methamphetamine." He argues that the absence of a mens rea element renders the statute unconstitutional since the affirmative defense of unwitting possession shifts the burden of proof to the defendant. He cites no relevant authority for this proposition.

The Washington Legislature did not include a knowledge element in the unlawful possession statute. Our court subsequently concluded that the omission was intentional and that a knowledge element should not be read into the statute.[2] *State v. Cleppe*, 96

[1] "It is unlawful for any person to possess a controlled substance." RCW 69.50.4013.

[2] In order to ameliorate the harshness of strict liability, the court created a common law defense of unwitting possession. *State v. Cleppe*, 96 Wn.2d 373, 380-381, 635 P.2d 435 (1981).

Wn.2d 373, 635 P.2d 435 (1981). Reviewing the issue a generation later, our court again concluded that *Cleppe* was correctly decided. *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004).[3] Those decisions are binding on this court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

The arguments Mr. Pittman raises now were expressly rejected by *Bradshaw*. 152 Wn.2d at 533-539. Since this court lacks authority to overrule that decision, he must ask that court to do so.

The conviction is affirmed.

Sentencing Claims

Mr. Pittman raises several sentencing-related arguments: (1) the two Texas unauthorized use of a motor vehicle offenses were improperly included in the offender score, (2) his counsel erred in stipulating to the remaining Texas convictions, and (3) certain financial obligations are improper.

The two offender score calculation issues are moot. An issue is moot if a court can no longer give effective relief. *E.g., In re Det. of LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). That is the situation here. Mr. Pittman has already served his sentence.

[3] After *Bradshaw*, our legislature rejected an effort to amend the drug possession statute to require the State to prove knowing possession. *See* H.B. 1695, 61st Leg., Reg. Sess. (Wash. 2009).

Recalculation of his offender score, the remedy if he were to succeed on the merits of his arguments, would not change the fact that his sentence has been served.

The State agrees with Mr. Pittman that revisions to our sentencing laws require the court to strike the criminal filing fee and the DNA collection fee. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The same revisions also require the court to strike the interest accrual provision of the judgment and sentence.

Affirmed and remanded.

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.

Korsmo, J.

WE CONCUR:

Pennell, C.J.

Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36034-2-III
	)	
LESLIE PITTMAN,	)	
	)	
PETITIONER.	)	

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SPOKANE COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA PORTAL
1100 W. MALLON AVENUE		
SPOKANE, WA 99260		

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF APRIL, 2020.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

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