

Officials grapple with questions raised by court voiding state's drug possession law

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Kitsap Sun

March 15, 2021

Two weeks after the state Supreme Court dropped its decision in State vs. Blake, ramifications are coming in waves like a hit of acid, a substance that is no longer illegal to possess under state law, along with meth, heroin and cocaine.

Though local and state officials are unsure what to do next and, more importantly, who will pay for all the new mandates flowing from the decision, there is broad agreement the court striking down the state law prohibiting simple drug possession doesn't just affect future cases, but cases going back decades.

"It's been hard to find an accurate idea of how massive this is, but it is massive," said state Rep. Tarra Simmons, D-Bremerton, who said lawmakers are discussing how to respond to the Blake decision, but like prosecutors and defense attorneys, they have more questions than answers.

Further, Simmons and others said there is a reluctance by any one stakeholder to act too quickly without first clarifying the details of the ruling.

Sources also agreed it will take money to enforce the ruling, but the action comes at a time when Kitsap County has been cutting budgets as a result of the economic downturn from the coronavirus pandemic.

"The nice thing about legislative action is that it allows the government to plan for all potential consequences that are going to come," Kitsap Prosecutor Chad Enright said. "When courts act sometimes there are a lot of unintended consequences that come of it."

The court's decision, which applies retroactively, found the state's law against drug possession violated the state and U.S. Constitution's due process guarantee because it didn't force prosecutors to prove a person intended to possess drugs. It came from a curious case out of Spokane County where Shannon Blake, the case's namesake, was found guilty of felony drug possession despite claiming she didn't know she had a small amount of meth in her jeans.

Blake's use of what attorneys call the "not my pants defense" caught the eye of the justices, who noted when striking down the "simple possession" law that Washington state was the only state in the country with such a statute.

“... in this case, (prosecutors) did not prove that Blake did anything except wear jeans that had pockets,” read the majority opinion written by Justice Sheryl Gordon McCloud, a Bainbridge Island resident.

Questions about Blake could be premature, Simmons noted, as Spokane County prosecutors may ask the justices to reconsider their decision. If successful, that could clarify for judges, attorneys and lawmakers what to do next, but attorneys said the court doesn't usually grant such requests.

Since the decision came down, police have ceased arresting people for possession and Enright estimated the office has dismissed about 650 pending counts. They are also vacating old convictions as requests roll in.

What comes next — that is, what happens to cases that came and went before the Blake decision — may not be so simple, or cheap.

Attorneys believe the decision could require the refunding of all court fees — called legal financial obligations, which are a minimum of \$500 per case — for every single drug possession conviction going back as far as 1970.

Sources were unable to put an exact number on how many people that might include or how much that would cost — and many older court records for people convicted decades ago have likely been destroyed — but all sources agreed it could include “hundreds of thousands” of people across Washington. Attorneys also say they don't yet know who will pay that money back. The counties? The state?

On Thursday Simmons and the criminal justice reform nonprofit Civil Survival, where she works, announced a lawsuit against King and Snohomish counties to have legal fees refunded. She said a ruling in that case could help clarify how the process will work or possibly create a fund to start paying back the court fines.

Then there is the question of inmates currently serving prison sentences for drug possession, along with people currently on probation for such a conviction. State Department of Corrections figures provided to local attorneys say there are 39 people in prison from Kitsap County who have a drug possession conviction and 538 people on department supervision, though local attorneys questioned whether those numbers were accurate.

On Friday, Corrections released inexact figures of inmates impacted by the decision, saying there are “fewer than” 2,700 inmates in state prisons who are convicted of simple drug possession. Of those, “fewer than” 100 inmates are convicted of possession alone. The rest have other convictions in addition to possession.

“The department is working with the Office of the Attorney General to understand the decision and its potential impacts,” a statement from Corrections said.

Though people with pending charges have been released from jail, also yet unanswered is, what about people in jail for state Department of Corrections probation violations for an underlying possession conviction?

An even more daunting question is, what about all the people in prison convicted of other crimes, but who had a prior conviction for drug possession? Due to how the state sentences people to prison — the longer your rap sheet, the more time you get — those people could all ask for re-sentencing as their criminal histories just got smaller, which could dramatically increase local court caseloads.

Enright, who for about four years prior to becoming a prosecutor worked as a defense attorney, said another wrinkle is that all Kitsap prosecutors in his office have to recuse themselves from any case that he or his former firm worked on as a defense attorney. This will likely require prosecutors' offices around the state in the same situation to swap attorneys.

Kitsap Chief Public Defender Steve Lewis threw out a couple other more practical, logistical questions. If all these inmates are to be resentenced, will they be shipped back to the counties where they were convicted? That's how it usually happens, but instead of one or so at a time, Blake could impact thousands all at once.

“Right now all of that is up in the air, I don't know how that's going to shake out,” Lewis said.

Though Enright estimated he will need, in addition to his current staff, a full-time attorney and a full-time legal assistant for the next two to three years just to handle resentencings, Lewis noted that public defenders have caseload limits that prosecutors don't, possibly requiring the county to hire many more additional defense attorneys.

Lewis said when he first read the decision, he saw it as a boon for defendants and the office, where about a fifth of their cases are for simple possession. Then the questions started popping up. Add to that police are arresting people for new crimes every day.

“We have regular day jobs,” Lewis said. “This just created all this extra work.”

The decision also raises the question of what the state should do about the law struck down, if drug possession should be made illegal again. Enright said he didn't know if he supported legalization or decriminalization for adults but is certain the Legislature needs to act now to make it illegal for juveniles.

“We can have a public debate over whether adults can possess a controlled substance, but I don't believe there is much debate whether kids should,” he said.

Simmons agreed that should be a priority. As for adults, she wants people who are addicted to receive treatment but wants to be cautious about criminalizing drug possession, saying those laws disproportionately hit communities of color and low-income people.

“We have seen over and over again you cannot incarcerate the addiction out of people,” she said.

Prior to becoming an attorney, entering recovery and becoming an advocate for criminal justice reform, Simmons spent time in state prison for addiction-related crimes.

“The wealthy white men snorting cocaine in the boardroom are not being criminalized for drug possession. I know who ends up in jails and prisons,” she said.

Though selling drugs is illegal, and so is driving under the influence, still unanswered is what to do with drugs on a person who otherwise isn’t committing a crime?

“It’s not legal to buy or sell drugs. It’s not legal to possess drugs, it’s just not illegal, which is a double negative,” said Tom Weaver, a Bremerton defense attorney.

Though the court's decision took many by surprise, there may have been hints along the way. Weaver recently argued a Supreme Court case over the sentencing of a drug dealer from Lewis County, pending the same time as Blake.

He said he was puzzled by the briefing requests he kept receiving from justices.

“I thought (the requests) were weird at the time and now they make a lot more sense in light of Blake,” he said.