

Felony drug possession change in law rocks state legal system

Washington state's law outlawing possession of drugs for personal use was unconstitutional

By Mike De Felice
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PORT ORCHARD — Ripple effects of the Washington Supreme Court's decision last year to overturn the felony drug possession law are still being felt by the state's legal system.

As a result of the decision, county prosecutors, public defenders and court staff are putting in long hours to wipe away drug possession convictions from people's criminal history, some dating back 40 years.

In February 2021, the Supreme Court ruled in a 5-4 decision that Washington state's law outlawing possession of drugs such as cocaine, methamphetamine and heroin for personal use was unconstitutional. The decision led to the immediate dismissal across the state of pending drug possession charges and the need to vacate or erase prior convictions under the drug statute.

The bombshell case — titled *State of Washington v. Blake* — rocked the criminal justice system.

"Statewide prosecutors' offices were pretty shocked," said Cami Lewis, senior deputy prosecuting attorney for the Kitsap County prosecutor's office. "We had 40 years of precedent where the statute had been fine.

"Law enforcement were relying on it, prosecutors were relying on it, courts were relying on it, and the Supreme Court relied on it. It was pretty shocking for them just to overturn it."

Now, nearly a year and a half after the Blake decision, authorities are primarily focused on removing drug possession convictions from individuals' criminal history and resentencing those in custody. Removing the convictions will result in reduced sentences — in some cases by years — for defendants, even those serving time on non-drug crimes.

Clearing a drug possession conviction from one's criminal history can also impact the person's ability to get employment and housing. If the only conviction on someone's record is a possession case, once it is removed the person can indicate on their job and housing applications that they have not been convicted of a crime, according to officials.

“We have been getting requests from people in prison who have a possession charge in their history,” Lewis said. “I would say I get about 10 a week where people just show up in our office or call or email us.”

Those currently incarcerated who need to be resentenced can navigate the procedure quite effectively, she said.

“When a defendant sends notice either to their prior attorney or our office asking to be resentenced, we schedule a hearing where they appear [on Zoom] from prison. We appear in the courtroom and the court essentially just resentsences them,” the prosecutor said.

So far, 1,668 Blake-impacted cases in Kitsap County have been modified, Lewis noted. How many other cases that require action is unknown.

Finding criminal cases that require adjustments called for by the Supreme Court decision is not as simple as pressing a button and coming up with a complete and accurate list of cases. To assist in locating drug convictions that need to be vacated, the prosecutor’s office has reached out to the public defender’s office.

Kitsap County Office of Public Defense staff indicate they are doing their best to locate and help Blake-impacted clients, but the office has only been in operation since 2009 and is without information on cases before then. “So, we don’t have all the information,” said public defender supervising attorney John Purves.

The public defender’s office is also regularly contacted by individuals seeking help clearing their criminal history of drug possession convictions.

The vast majority of defendants in custody have had their drug possession convictions removed, Purves said.

“We are pretty fortunate in Kitsap County. The prosecutor has been very proactive,” Purves said. “For folks in custody, everyone has been addressed outside of a handful of cases. Those few cases involve individuals serving massive amounts of time and practically speaking [vacating the drug convictions], it would have no effect.”

Court-imposed fines

Once drug convictions are removed from an individual’s rap sheet they are to be refunded any court-imposed costs they paid. The costs — referred to as legal financial obligations, or LFOs — were significant amounts years ago and now average around \$700 per case. Interest was also tacked on to unpaid amounts in some cases.

“It’s not unusual to see a conviction from 2010 to have over \$2,000 in fines,” prosecutor Lewis said.

Between 1993 and February 2021, Kitsap County Superior Court judges imposed \$31 million in fines, costs and interest in 6,055 drug possession cases, according to Sharon Gibson, court finance supervisor in the Kitsap County clerk's office.

While most of those fines were never paid, the clerk's office has been working to administratively remove those financial obligations from the books, Gibson said. Defendants, however, did pay \$3.7 million in LFOs on possession convictions — and that money needs to be returned. To date, only about \$100,000 has been refunded, she said.

Those who paid court-imposed fines in Blake-impacted cases need to apply for refunds through the Superior Court clerk's office, she added.

Facts of Blake case

The case involved Shannon Blake, a Spokane woman who was arrested on an unrelated charge. Upon being booked into jail, a guard recovered methamphetamine from the jeans she was wearing. She was charged with possession of a controlled substance, classified as simple possession.

Blake unsuccessfully fought the charge arguing that a friend had given her the jeans and that Blake was unaware there were drugs in the pocket.

The overturned drug statute stated, "It is unlawful for any person to possess a controlled substance ...". The law was viewed as a "strict liability" crime since the state did not need to prove any intent. Legally speaking, it was enough to charge Blake merely because she wore the jeans.

In overturning the drug possession law, the state Supreme Court ruled the drug possession law violated due process since it "criminalized wholly innocent and passive nonconduct on a strict liability basis." The ruling went on: "In this case, the State did not prove that Blake did anything except wear the jeans that had pockets."

At the time of Blake's conviction, Washington was the only state in the country that did not require a person to knowingly possess drugs to be found guilty of the offense, the court stated. Since the Blake decision, lawmakers in Olympia took action in the last legislative session to contend with the banishment of the felony drug possession law.

Under a new drug law passed by the state Legislature, the first two times an individual is caught with enough illegal drugs for personal use, law enforcement is to refer the person to drug treatment, deputy prosecutor Lewis said.

"Basically, the individual is given a list of agencies they can go to get treatment," she said. "It is on the individual whether or not they want to seek out treatment. Upon the third contact, the case can be referred to the prosecutor's office for a misdemeanor charge."

The new statute now requires the state to prove an individual “knowingly” possessed the unlawful drugs. So far, the county prosecutor’s office has not filed drug possession charges under the new law.

“I’m not aware of any charges across the state that have been charged that way.”

The new drug possession law is set to expire July 1, 2023.