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Memo by Melanie Dane, TSRP WTSC

STATE v. BLAKE –summary of what it is, what it did, and how we are managing the new laws.

1. What was the Court’s ruling?
2. What did the legislature do in response?
3. How has the legislation impacted LEO’s, Prosecutors, and Courts(State and Municipal)?
4. How has the court ruling impacted strict liability crimes such as DUI, Vehicular Homicide?
5. How have Cities and Counties responded to Blake and SHB 5476?

1. **The Ruling:** [State v. Blake, 197 Wash.2d 170\(2021\)](#), a five-Justice majority of the Washington Supreme Court invalidated Washington’s strict liability drug possession statute, RCW 69.50.4013, which makes possession of a controlled substance a felony. The Majority Opinion concludes that the statute exceeds the State’s police power and violates the Due Process clauses of the state and federal constitutions because it prohibits *unintentional, unknowing possession* of a controlled substance. The Majority Opinion rejected the State’s argument that Washington case law provided an affirmative defense of “unwitting possession,” which placed the burden on a defendant to prove their possession was not knowing or intentional. This defense was insufficient to save the statute. The Washington Supreme Court further declined to read-in a “mens rea” mental element to preserve the statute, stating the prior forty years of case law counseled the intentional absence of a mens rea element in RCW 69.50.4013. This meant an immediate end to prosecuting crimes under RCW 69.50.4013.

2. What was the legislative response?

After the Court invalidated RCW 69.50.4013, the State legislature enacted [SHB 5476](#). It’s impacts have been widespread and will continue to impact cities, counties, and the state.

First, the legislature reduced the offense of simple drug possession from a felony to a misdemeanor, punishable by up to 90 days in jail and a \$1,000 fine. With that reduction, all simple possession drug charges are now all heard in courts of limited jurisdiction(CLJ’s), District and Municipal Courts. We do know that when this legislation was being considered, the state of Oregon was in the process of completely decriminalized all simple drug possession and there were proposals in Washington to do the same.

Second, the legislation requires that Law Enforcement officers “divert” or offer diversions/services to Defendants who are in possession of a controlled substance and subject to arrest under RCW 10.31.100 for RCW 69.50.4013. [RCW 10.31.115](#) was created in 2021 in SHB 5476. The legislation requires law enforcement to have specific training on drug users and directs agencies to create tracking systems to track contacts with drug offenders and track the steps they have taken to get that individual the treatment they need. Like LEO’s, Prosecutors are similarly encouraged to offer additional diversion programs, after the first 2, in lieu of conviction.

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SHB 5476 also decriminalized what most District and Municipal Court Prosecutors know as PDP, possession of drug paraphernalia. It is still a crime to possess drug paraphernalia for packing, manufacturing, cultivating...etc., but it is not illegal to possess it with intent to use it to ingest it into your body. Some Cities have repealed their city ordinances for possession of drug paraphernalia.

The legislator created grant funding for many of the therapeutic services anticipated in this bill. The legislature also authorized new commissioners to be appointed to each county to assist in the 100,000+ cases impacted in Superior Court based on the Court's decision. Commissioners were authorized to be appointed to Superior Court-not CLJ's. No additional or direct monies or additional staffing was authorized in the bill for CLJ's.

3. How has the legislation impacted LEO's, Prosecutors, and Courts(State and Municipal)?

Law Enforcement took the brunt of the impact regarding diversions. Defendants are no longer subject to felony convictions for possession of drugs-even when they are in knowing possession. Felony prosecutions are now handled by municipal and district court Prosecutors-generally your less experienced Prosecutors. Questions regarding whether to test the substance during the first two contacts/diversions continue to be decided agency by agency. Anecdotally, most cities and counties are not prosecuting possession charges.

Funding is a huge issue. The bill allocated grant money to AOC to distribute to courts of limited jurisdiction across the state for therapeutic courts. Very little direction was given about how that money could be spent. No funding was allocated to tribal courts. None of the grant dollars may be spent for incentives or rewards for Defendants succeeding in therapeutic courts-this is a common practice in drug courts-small rewards are proven to help people stay on track and sends a positive message. It is unclear whether the monies may be used for additional Prosecutor or Defense funding, both needed to run a new court docket. Courts of limited jurisdiction must apply for funds. Funding is only allocated for fiscal years 2022 and 2023. Release of funds are slow, uncertainty on how to spend the money if allocated is an issue, as is continued funding past 2023.

The bill provides a total of \$4,500,000 million dollars to AOC in grant funding for cities and counties for the establishment of municipal and district therapeutic courts. CLJ's have to apply for funding-all of which is just now starting to take place. AWC, among others, believes this funding is not sufficient to meet the needs of the CLJ's and is too limited in scope.

There is currently no statewide funding for a tracking mechanism for diversions or LEO contacts with individuals subject to diversion. This tracking is required in the bill. AWC and others are seeking additional funding for unfunded directives in the bill and build off current models which already exist, such as Lead or Sector or other statewide LEO databases. Additional requests for funding will be made for CRT (crises response teams) grant funding for cities and

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counties to start their own teams to help take some of the load off LEO's, but it is still unclear how much money will be needed, and which state agency should house the system.

What we do know is there are very few misdemeanor possession charges- if any being filed. AOC will track filings of City codes and RCW 69.50.4013. There are very few diversion programs in place and most agencies are not tracking their "diversions" or contacts with offenders. This is likely due to inadequate funding, lack of staffing, lack of direction on where to house the data, and how to implement and track a diversion program. Some cities such as Auburn, Everett, and Lakewood, Spokane (and likely others), have created diversion templates with referral services that officers carry with them. Auburn has recently implemented a therapeutic court with the intent to hear drug cases in municipal court.

We know that municipal and district courts were hit hard with 1000's of cases where convictions had to be vacated, dismissed, warrants recalled, and Defendants had to be resentenced. No funding was provided to CLJ's to offset the refunding legal financial obligations imposed and paid. Courts are not a financial institutions- fines and fees are allocated and distributed to programs statewide. The issue of refunding of LFO's is complicated. No funding was provided to Prosecutors or courts for additional staff or judges to hear these cases- whereas the bill authorized additional commissioners to be hired to hear the 100,000+ cases dismissed, resentenced, vacated, and recalled.

Prior to Blake, many offenders had an option to enter drug court through Superior Court. The immediate dismissal of charges, resentencing, and release of offenders, post Blake, left many offenders without treatment, housing, social service resources, and without drug court. CLJ's, who historically have not managed "drug" courts, are now encouraged to create drug courts, which includes: finding a location and docket for the court hearings, funding it, staffing it (case managers, prosecutors, defense, community advocates, treatment providers, judges, clerks, etc), having appropriate probation monitoring, and making sure there is stakeholder "buy in" from all participants. All of this must be done with little direction on how to spend the grant money, not enough money to go around, and with grant money set to expire in 2023.

4. How has the court ruling impacted strict liability crimes such as DUI, Vehicular Homicide?

Anecdotally, there has been little impact from Blake on strict liability crimes such as DUI and Vehicular Homicide. There is a difference between simple possession- which the court said could be completely innocent- and voluntary ingestion of drugs and alcohol and then choosing to drive, which is neither innocent nor passive. Shortly after the Blake decision, the COA, having not yet decided a Vehicular Homicide appeal, asked the state and defense to weigh in on whether *Blake* changed the landscape for strict liability as applied to Vehicular Homicide predicated on DUI.

[State v. Vanderburgh](#), COA No. 35868-2-III, affirmed that drunk driving is a crime, regardless of whether the driver causes injury or is otherwise negligent. The conduct in vehicular homicide

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by intoxication requires the choice to consume alcohol and drive, an unquestionably dangerous combination. While a defendant's driving could have been *flawless*, the law imposes absolute liability based on intoxication.

5. How have Cities and Counties responded to Blake and SHB 5476?

Some of this was addressed in Q3.

In reaching out to stakeholders, every local agency is doing something different. Whether agencies are moving forward with diversions, tracking, and or charging largely depends on agency funding and current city or county policies surrounding the bill and policies of charging defendants with possession of drugs. The lack of funding for LEO's and CLJ's, with a lack of direction on how to implement the directives in the bill, all while still managing covid, virtual courts, mandates, and illness, has likely frustrated the process. Very few cities/counties are tracking diversions, filing cases, or referring cases for charges. It is not believed that this is out of disinterest, but rather due to a:

- lack of clarity in the bill,
- lack of direction on how to implement a novel diversion program,
- lack of funding for LEO's, CLJ's, Prosecutors, and Defense for the implementation of diversion and therapeutic courts,
- lack of training,
- lack of community resources,
- lack of social services, and
- limited scope of the bill and whether it will last past 2023.

Due to the immediate impact the case had on Superior Court, much of the focus on the state has been on addressing the 100,000+ cases impacted by Blake. A workgroup for Superior Court has been addressing issues regarding dismissals and refunds of LFO's. Questions circulating include: how each county clerk handles the refund process, who holds the checks to be refunded, how to verify current addresses for persons refunds, creating a court "template" motion and order for defendants to file(which would include their current mailing address), where to publish that template for defendants, how and where to publish the process on how to obtain a refund from counties, and trying to hone in on the overall estimate of the cost of the refunds. As it stands, the Superior Court estimates roughly \$700 million dollars in refunds to defendants as a result of Blake, excluding LFO's paid to CLJ's. How this impacts the overall state budget and other agency budgets remains to be seen.

It is my understanding that stakeholders with AWC, DMCJA, AOC, WSAMA(Washington State Association of Municipal Attorneys), MRSC, various counties(possibly WASC), and LEO's have discussed the implications and its impact on Cities and Counties with regards to CLJ's. Because this is a new and novel program and because the number of diversions and charges are difficult to predict, the cost of diversion program, therapeutic courts, and LFO refunds across the

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state is very difficult to quantify. This is the first program of its kind. While the state provided some grant funding for therapeutic courts, funding is not guaranteed and not all applicants will be awarded funds. Furthermore, many rural courts and or one judge courts are simply not staffed or equipped for therapeutic courts.

The” Blake fix” did not address how CLJ’s are to refund offenders who paid LFO’s for possession cases such as expedited felonies, “attempted” possession” charges, or city charges that lacked a mens rea element. The same questions asked by Superior Court regarding refunds of LFO’s are being asked by city and county stakeholders. This is one reason stakeholders will be advocating for additional funding, direct to cities and counties, with broader use for funds with the goal of getting funds in the hands of local agencies faster to implement the programs designed by the legislature.

There is still a great deal of confusion still surrounding SHB 5476. There is hope that continued work between agencies will lead to a collaborative statewide model for tracking diversions, implementing therapeutic courts, offering community services in every community, and holding offenders accountable who decline services. With a statewide model, data can be tracked, appropriate funding can be allocated and reassessed, and outcomes can be monitored, all with the goal that offenders will be less likely to be arrested, more likely to remain in treatment, more likely to use crisis services, more likely to obtain stable housing, and more likely to lead stable and socially productive lives.

Summary:

Stakeholders continue to work towards the goal of this bill, are mindful of its parameters, are working to assess actual future costs for successful implementation and cover the costs as a result of the Blake decision and the subsequent legislation. I will be following up on the diversion tracking mechanism via Sector and share that information with AWC.

For additional questions on this or other traffic safety matters I can be reached at:

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Respectfully Yours,

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