

# SENATE BILL REPORT

## SB 5467

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As of February 6, 2023

**Title:** An act relating to encouraging treatment for possession of certain counterfeit drugs or controlled substances.

**Brief Description:** Encouraging treatment for possession of certain counterfeit drugs or controlled substances.

**Sponsors:** Senators Salomon, Lovick, Cleveland, Mullet, Rolfes, Wellman, Keiser, Kauffman, Conway, Hunt, Holy, Braun, Wilson, L., Liias, Van De Wege and Gildon.

**Brief History:**

**Committee Activity:** Law & Justice: 2/06/23.

### Brief Summary of Bill

- Requires the court to vacate the conviction of individuals convicted of possession of a controlled substance, counterfeit substance, or legend drug if the individual successfully completes substance use disorder treatment as a condition of probation.
- Requires the court to sentence individuals convicted of possession of a controlled substance, a counterfeit substance, or a schedule II legend drug who do not agree to comply with substance use disorder treatment as a condition of probation to no less than 45 days in jail.
- Provides for dismissal of a charge of possession of prohibited substance if the individual completes substance use disorder treatment prior to conviction on the charge.
- Requires the toxicology laboratory to complete the necessary analysis of suspected drug evidence within 30 days of receipt of the request for analysis.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

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## SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Joe McKittrick (786-7287)

**Background:** Prior to 2021, Washington's statute prohibiting possession of controlled substances created a strict liability crime, meaning an individual could be found guilty of possession of a controlled substance without proof the person knew they possessed the prohibited substance. In 2021, the Washington State Supreme Court decided the case of *State v. Blake*, and in doing so, found this statute unconstitutional. The court reasoned that the Legislature's criminalization of passive conduct, with no requirement to prove criminal intent, violated due process.

In response to the *State v. Blake* decision, the Legislature passed ESB 5476 which in part modified statutes for the possession of controlled substances, possession of counterfeit substances, possession of legend drugs, and possession of 40 grams or less of cannabis to prohibit the knowing possession of the prohibited substances. These offenses are classified as misdemeanor crimes, punishable by up to 90 days in jail, a \$1,000 fine, or both and were removed from the felony drug offense seriousness level table. Prosecutors are encouraged to divert such cases for assessment, treatment, and other services. The amendments to the possession statutes are set to expire on July 1, 2023.

The legislation also provided that, in lieu of booking individuals arrested for simple possession in jail, prosecutors and law enforcement must offer the individual a referral to assessment and treatment for the individual's first two arrests and may, but are not required, to continue to offer a referral to assessment and treatment for any subsequent arrest for simple possession.

**Summary of Bill:** Simple Possession. The simple possession statutes are amended to prohibit the knowing possession of the prohibited substances. Possession of a controlled substance and possession of a counterfeit substance are each classified as gross misdemeanor crimes, and carry a maximum sentence of 364 days imprisonment, up to a \$5,000 fine, or both. Possession of a legend drug, and possession of 40 grams or less of cannabis are each classified as misdemeanor crimes, and carry a maximum sentence of 90 days imprisonment, up to a \$1,000 fine, or both.

In jurisdictions that allow for officer-referred criminal cases, if a peace officer cites an individual for violating the simple possession laws, no warrant may issue for the individual's failure to appear at arraignment if the individual was not personally served with a notice to appear which must include the time and place the individual is to appear in court.

Sentencing for Simple Possession. In courts of limited jurisdiction, an individual convicted of a possession of a controlled substance or possession of a counterfeit substance who agrees as a condition of probation to submit to a substance use disorder assessment and to comply with the recommended treatment must be sentenced to 364 days in jail, all of which

must be suspended for a period not to exceed two years. An individual convicted of possession of a legend drug who agrees as a condition of probation to submit to a substance use disorder assessment and to comply with the recommended treatment must be sentenced to 90 days in jail, all of which must be suspended for a period not to exceed one year.

If an individual is convicted of possession of a controlled substance, counterfeit substance, or a legend drug that is classified as a schedule II substance, substances that have a high potential for abuse, who refuse to submit to substance use disorder treatment as a condition of probation must be sentenced to a term of confinement of no less than 45 days in jail.

Individuals who agree to substance use disorder treatment as a condition of probation must obtain a substance use disorder assessment by a substance use disorder treatment program licensed or certified by the Department of Health. Subject to appropriations, courts must provide the opportunity for individuals to receive the substance use disorder assessment at the courthouse at the time of sentencing, and all substance use disorder assessments and subsequent treatment must be provided at no cost for individuals who have been found to be indigent by the court.

Once engaged in treatment, any agency that provides treatment must immediately report to the court or the appropriate probation department where applicable, any noncompliance with the conditions of the individual's ordered treatment. If it appears to the prosecutor, or the court that the sentenced individual is performing unsatisfactorily in treatment the prosecutor, or the court must make a motion for a hearing to consider sanctions or revocation of the individual's suspended sentence is warranted. If it appears to the court that the individual has made reasonable efforts to comply but cannot comply either due to a lack of available treatment or a lack of funding for treatment for individuals found to be indigent, no sanction for a failure to comply with treatment may include jail.

For individuals who were sentenced on a conviction for possession of a controlled substance or possession of a counterfeit substance who have agreed to treatment as a condition of probation, if at any point the court finds by a preponderance of the evidence that the individual has willfully abandoned treatment or demonstrated a consistent failure to comply with treatment, the court must reinstate a term of imprisonment of no less than 45 days of the individual's suspended sentence to be served in total confinement. The court must thereafter terminate the individual's probation.

When an individual successfully completes the required treatment as a condition of probation and files proof with the court, upon verifying the successful completion, the court must vacate the conviction.

Dismissal of Simple Possession Charges. In courts of limited jurisdiction, an individual charged with possession of a controlled substance, a counterfeit substance, a legend drug, or 40 grams or less of cannabis, who subsequently enrolls in and completes a substance use disorder treatment program and files proof of completion with the court prior to conviction

on the charge may make a motion to dismiss the charge. Upon the verification of successful completion of the substance use disorder treatment program, the court must grant the motion and dismiss the charge.

Prohibited Substances Evidentiary Analysis. The Washington State Patrol Bureau of Forensic Laboratory Services must complete the necessary analysis for any evidence submitted for a suspected violation of the simple possession statutes within 30 days of receipt of the request for analysis.

Miscellaneous. The statute requiring law enforcement and prosecutors to offer a referral to assessment and treatment for an individual's first two arrests for simple possession is repealed. When a peace officer has reasonable cause to believe an individual has committed acts constituting a crime, and the individual is known to have a mental health disorder or a substance use disorder, as an alternative to arrest, the officer is encouraged to take or refer the individual to a relevant treatment facility. If there are required terms of participation in the services or treatment offered and the individual violates those terms, the treatment provider must inform the referring law enforcement agency if consistent with applicable law. In such cases, the original charges may be filed or referred to the prosecutor, and the matter may proceed accordingly.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: Many people who commit property crimes are suffering from substance use disorders. Locking these people up for possession will not solve the problem. We need to break the cycle and providing treatment will help accomplish that goal. We have seen little to no success under the current law because it is unworkable. Treatment for substance use disorder is the best way for people to regain their lives and become productive members of society. Possession of drugs creates a danger to innocent bystanders and is a criminal issue. Drug users feel trapped and when they get treatment to go to a confined space they drop out and go back to using. This bill helps provide a balance between accountability and helping those with substance use disorders. It also provides the tools to compel people into treatment and to successfully complete that treatment. Overdose deaths are on the rise in Washington at a greater pace than in the country as a whole. This bill strikes a balance and helps law enforcement keep communities safer. The current policies of the state are imbalanced and leave destruction in their wake. This bill provides justice system engagement but also provides a path out of that system. The current response to drug possession is not working. Drug possession should be a gross misdemeanor, and any legislation should focus on diversion options for those charged with possession. Cities and

counties will need more resources to get these programs off the ground. This bill will help break the vicious cycle of addiction. Treatment works, but if it's the first and only option, people may not have the necessary consequences to change their behavior. Officers have made referrals to treatment, but most refuse. We need to support our communities as well as those with substance use disorders. This bill addresses accessing treatment and addresses crime lab shortages. This bill is a good start as it focuses on treatment rather than punishment, however it is too focused on treatment. The legislation seems to be aimed at first-time offenders or low-risk offenders. However, this does not address repeat offenders or offenders who commit other crimes along with drug possession. Officers have made referrals to treatment, but most refuse. We need to support our communities as well as those with substance use disorders. The revolving door of arrest, prosecute, jail, release, and repeat is simply not effective.

CON: Public defense has never been fully funded. Making possession a gross misdemeanor is not the answer. Decriminalization is. This should be treated as a public health issue. We already have laws that allow for intervention for people with substance use disorders like Ricky's law.

OTHER: This is limited to courts of limited jurisdiction meaning that if a person is charged with both possession and a felony, either prosecutor does not charge the possession or files two separate cases. This must be accompanied by continued funding to allow the courts to address these issues.

**Persons Testifying:** PRO: Senator Jesse Salomon, Prime Sponsor; Ron Wesen, Skagit County; Rick Kuss; Jim Ferrell, Mayor, City of Federal Way; Amy Ockerlander, Mayor, City of Duvall & Association of Washington Cities; Nadine Woodward, Mayor, City of Spokane; Craig Meidl, Chief of Police, Spokane; Andrew Rolwes, Vice President, Downtown Spokane Partnership; Armondo Pavone, Mayor, City of Renton; James McMahan, WA Assoc Sheriffs & Police Chiefs; Mark Johnson, Washington Retail Association; Jeff Baker; Anne Anderson, Washington State Narcotics Investigators Association.

CON: Larry Jefferson, Director, Washington State Office of Public Defense.

OTHER: Chad Enright, Kitsap County Prosecutors; Judge Kevin Ringus, District & Municipal Court Judges Association.

**Persons Signed In To Testify But Not Testifying:** No one.