

FINAL BILL REPORT

2E2SSB 5536

Synopsis as Enacted

Brief Description: Concerning controlled substances, counterfeit substances, and legend drug possession and treatment.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Robinson, Lovick, Rolfes, Mullet, Dhingra, Billig, Hasegawa, Keiser, Kuderer, Lias, Lovelett, Nobles, Randall, Stanford, Wellman and Wilson, C.).

Senate Committee on Law & Justice

Senate Committee on Ways & Means

House Committee on Community Safety, Justice, & Reentry

House Committee on Appropriations

Background: *State v. Blake Decision.* In 2021, the Washington State Supreme Court decided the case of *State v. Blake*, which struck down Washington's criminal statute prohibiting possession of a controlled substance. Prior to the *Blake* decision, possession was a class C felony. The court reasoned that the lack of a requirement to prove knowledge of possession did not force the state to prove criminal intent, violating the defendant's right to due process.

In response to the *State v. Blake* decision, the Legislature passed ESB 5476 which in part modified statutes prohibiting the possession of a controlled substance, counterfeit substance, legend drug, or 40 grams or less of cannabis, to require proof of 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. Prosecutors are encouraged to divert such cases for assessment, treatment, and other services. The modifications to these 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.

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.

The Substance Use Recovery Services Advisory Committee. ESB 5476 also created a Substance Use Recovery Services Advisory Committee (SURSAC). The 26 members appointed to SURSAC started meeting in December 2021, with the charge to develop a substance use recovery plan. The committee and its four subcommittees met a total of 65 times, and submitted a final plan with 16 recommendations to the Legislature in January 2023.

The Law Enforcement Assisted Diversion Program. The Law Enforcement Assisted Diversion program (LEAD program) is a national model program started in Seattle in which police officers exercise discretionary authority at point of contact to divert individuals to a community-based, harm-reduction intervention for law violations driven by unmet behavioral health needs. Washington State funds LEAD programs as a pilot program in which funds are provided subject to appropriation for two or more geographic areas in the state of Washington to receive technical assistance to develop a LEAD program with fidelity to the model.

Arrest and Jail Alternative Program. The Arrest and Jail Alternative Program is a grant program administered by the Washington Association of Sheriffs and Police Chiefs to support local initiatives to identify persons with SUDs and other behavioral health needs and engage them with therapeutic interventions and other services. Programs with a prebooking diversion focus are preferred.

Probation in Courts of Limited Jurisdiction. In courts of limited jurisdiction, the deferral of a criminal sentence, or suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension. Upon revocation of the deferral or suspension, the court may impose the sentence previously suspended or any unexecuted portion thereof. In any event, the court may not impose a sentence greater than the original sentence, with credit given for time served and money paid on fines and fees. At any time before entering an order terminating probation, the court may revoke or modify its order suspending the imposition or execution of the sentence. The court may terminate the period of probation and discharge the defendant whenever the ends of justice will be served or when termination is warranted by the reformation of the defendant.

Summary: Possession of a Controlled Substance, Counterfeit Substance, Cannabis, or a Legend Drug. The statutes prohibiting simple possession of prohibited substances that take effect July 1, 2023, are amended to prohibit the knowing possession of the prohibited substances. The expiration date of the current possession statutes are amended to expire on the effective date of this act. Law enforcement officers are encouraged to offer any individual arrested for simple possession a referral to assessment, treatment, or other services, such as arrest and jail alternatives and law enforcement assisted diversion programs, in lieu of booking the individual in jail and referring the case for prosecution. Possession of a controlled substance and possession of a counterfeit substance are classified

as gross misdemeanor crimes and carry a potential maximum sentence of 364 days in jail, a \$5,000 fine, or both. Possession of a legend drug and possession of an ounce or more of cannabis, or possession of any amount of cannabis for individuals under 21 years of age, remain misdemeanor crimes and carry a maximum sentence of 90 days in jail, a \$1,000 fine, or both.

Testing of Suspected Drugs in Criminal Cases. The Washington State Patrol Bureau of Forensic Laboratory Services must aim to complete the necessary analysis of suspected drugs in simple possession cases within 45 days of receipt of the request for analysis. The Washington State Patrol Bureau of Forensic Laboratory Services' failure to meet the 45 day guideline does not constitute grounds for dismissal of a criminal charge.

Pretrial Diversion. A pretrial diversion program for individuals charged with simple possession is created. The program consists of the defendant agreeing to meaningfully engage in a substance use disorder (SUD) treatment program in exchange for the state dismissing the simple possession charge. At arraignment on a charge of simple possession, the judge must advise the individual of the availability and process of the pretrial diversion program, including informing the individual that under federal law it is unlawful for any person addicted to controlled substances to possess firearms. The creation of the pretrial diversion program does not preclude the defense or prosecution from seeking to resolve possession charges through available therapeutic courts or other alternatives to prosecution.

Upon the motion of the defendant, and an agreement to waive their right to a speedy trial, if granted pretrial diversion, the court may grant the motion, continue the hearing, and refer the defendant for a SUD evaluation from an approved SUD treatment program. The state must make resources available to assist the defendant in obtaining the SUD evaluation within seven days of the defendant's agreement to participate in the diversion program. The SUD evaluation must be provided at no expense to defendants who qualify for public defense services or who are found to be indigent by the court. The evaluation must be provided at a location that is accessible to the defendant, and the court must provide the defendant with transportation assistance if such assistance is necessary to make the evaluation accessible to the defendant, and the state must reimburse local courts associated with travel related to obtaining the SUD evaluation. The court may contract with a third party to provide SUD assessments and services, which may be collocated at the court or be provided at alternative locations. The treatment program must make a written report to the court, which must also be provided to the prosecutor and the defendant or the defendant's attorney, outlining its findings and treatment recommendations.

After receiving the treatment report, the court must hold a hearing to determine if the defendant consents to participating in pretrial diversion, and if the defendant should be granted diversion.

If granted pretrial diversion, the defendant must comply with the recommended treatment. If it appears to the prosecuting attorney that the defendant is not substantially complying with

the recommended treatment or services, the defendant is convicted of an offense that reflects the defendant's propensity for violence, the defendant is subsequently charged with possession, or the defendant is convicted of a felony, the prosecutor may make a motion to terminate pretrial diversion.

If the defendant successfully completes pretrial diversion, including meaningful engagement with treatment or services, the court must dismiss the charge or charges.

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 an SUD 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 an SUD 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 SUD treatment as a condition of probation must be sentenced to a term of confinement of no less than 21 days in jail.

Individuals who agree to SUD treatment as a condition of probation must obtain an SUD assessment by an SUD treatment program licensed or certified by the Department of Health (DOH). Once the SUD assessment is filed with the court, if the report indicates the individual has a SUD, the court must inform the individual that under federal law the individual may not possess firearms, and the court must then sign an order of ineligibility to possess firearms.

Once engaged in treatment, any agency that provides treatment must 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. The court may not sanction an individual for failing to comply with the recommended treatment if the court finds the sentenced individual has made reasonable efforts to comply with treatment but cannot either due to a lack of available treatment, or, for sentenced individuals found to be indigent by the court, due to a lack of funding for treatment.

For a defendant's first instance of being sentenced under this act 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 may use its discretion in determining the appropriate amount of time of the individual's suspended sentence to reinstate given the facts and circumstances of the particular case.

For a defendant's second instance of being sentenced under this act 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 21 days of the individual's suspended sentence to be served in total confinement.

For a defendant's third or subsequent instance of being sentenced under this act 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.

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.

Drug Paraphernalia. The prohibition against giving or permitting drug paraphernalia to be given is eliminated. Selling or permitting drug paraphernalia to be given remains a class I civil infraction. Drug testing and analyzing equipment is removed from the definition of drug paraphernalia. The prohibitions related to drug paraphernalia do not apply to distribution or use of public health supplies, including syringe equipment, smoking equipment, or testing equipment, through public health programs and community-based HIV prevention programs and pharmacies. Public health and syringe service program staff are exempt from arrest and prosecution for taking samples of substances and using drug testing equipment to analyze substances or detect substances.

Law Enforcement Assisted Diversion Program. The Law Enforcement Assisted Diversion Program (LEAD program) is a grant program instead of a pilot program. Geographical and numerical limitations on the LEAD program are removed. Sufficient funds must be allocated for the LEAD Program to provide technical assistance to all implementing jurisdictions.

Opioid Treatment Program Rural Access and Expansion. Opioid treatment programs (OTPs), mobile or fixed-site medication units within OTPs, recovery residences, and harm

reduction programs including syringe service programs, are recognized as essential public facilities for the purpose of local land-use regulations. Counties and cities may only impose such reasonable conditional use requirements as are similarly applied to other essential public facilities and health care settings. Cities and counties are prohibited from imposing a maximum capacity on OTPs.

Appropriations. Appropriations are made to the Health Care Authority (HCA) as follows:

- \$36.6 million from the state general fund to expand efforts to provide opioid use disorder (OUD) medication in city, county, regional, and tribal jails;
- \$7 million from the state general fund to provide support for new and established clubhouses throughout the state;
- \$3.2 million from the state general fund to establish and expand 23-hour crisis relief centers distributed to an equivalent number of crisis services providers in Western Washington and Eastern Washington;
- \$2.5 million from the state general fund—\$5 million total funds—to provide ongoing grants to LEAD programs; and
- \$1.8 million from the state general fund—\$3.6 million total funds—to provide ongoing grants for Arrest and Jail Alternative programs.

An appropriation of \$1.2 million is made from the state general fund to the Washington State Patrol to complete analysis for any evidence submitted for a suspected violation of the possession statutes within 45 days of receipt.

Providing Counsel for Parents Affected by Substance Use Disorders in Dependency and Child Custody Cases. A court may appoint counsel for a child's parent, guardian, or custodian if the court determines the parent, guardian, or custodian is affected by SUDs, mental health, or behavioral health concerns such that they are unable to represent their own interests or their parental rights may be restricted. If appropriate, counsel must have understanding of the Indian Child Welfare Act and knowledge about Tribal child welfare systems. The court may appoint counsel or a guardian ad litem for the child.

Establishing Health Engagement Hubs. HCA must develop payment structures by January 1, 2025, for health engagement hubs (hubs), defined as all-in-one locations where people who use drugs can access a range of medical, harm reduction, treatment, and social services. Hubs must be open to youth and adults, provide referrals or access to methadone and other medications for opioid addiction, and function as a patient-centered medical home by offering cost-effective patient-centered care including wound care, provide harm reduction services and supplies, and provide linkages to housing, transportation, and support services. Hubs may not provide supervised injection services. HCA must direct Medicaid managed care organizations to adopt a value-based bundled payment methodology in contracting with hubs and other opioid treatment programs, to the extent permitted by federal law.

HCA must make sufficient funding available to ensure that a hub is available within a two-hour drive for all communities, and that there is one health engagement hub available per

200,000 residents in Washington State.

Funding, Promotion, and Training for Recovery Residences. Real and personal property owned, rented, or leased by a nonprofit organization to maintaining a registered recovery residence is exempted from taxation if the charge for the housing does not exceed the actual cost of operation and maintenance.

The HCA must make sufficient funding available to establish an adequate and equitable stock of recovery residences in each region of the state, including by expanding the revolving fund program to make loans or grants available to recovery residence operators to use for necessary capital expenses, subject to funding. HCA must establish a voucher program to allow accredited recovery housing operators to hold bed space for individuals waiting for treatment or who have returned to substance use and need a place to stay while negotiating a return to stable housing. HCA must conduct outreach to underserved and rural areas to support the development of recovery housing, including adequate resources for women, LGBTQIA+ communities, and youth.

HCA must develop a training for housing providers by January 1, 2024, to assist them with providing appropriate services to LGBTQIA+ communities, including consideration of topics like harassment, antiracism, diversity, and gender affirming behavior, and to ensure that applicants for grants or loans related to recovery residences receive access to the training.

Training for Parents of Children with Substance Use Disorders and Caseworkers Within the Department of Children, Youth, and Families. HCA in consultation with the Department of Children, Youth, and Families (DCYF) must develop a training for parents of children and transition-age youth by June 20, 2024, providing education on SUDs, adaptive and functional communication strategies with a person with a SUD, self-care, and how to obtain and use opioid overdose reversal medication. HCA and DCYF must make the training available and DCYF must promote it to licensed foster parents and caregivers, including any tribally-licensed foster parents and Tribal caregivers.

DCYF must make opioid overdose reversal medication available to case workers and employees who may encounter individuals experiencing overdoses and make appropriate training available.

Data Support and Effectiveness Studies for Recovery Navigator Programs. HCA must develop a data integration platform by June 30, 2024, to serve as a common database for diversion efforts across the state, to serve as a data collection and management tool for practitioners, and to assist in standardizing definitions and practices.

HCA is to contract with the Washington State Institute for Public Policy (WSIPP) to conduct a study of the long-term effectiveness of the recovery navigator program over 15 years with reports due in 2028, 2033, and 2038.

HCA must establish an expedited pre-approval process by August 1, 2023, allowing requests for the use of data to be forwarded to the Washington State Institutional Review Board without delay when the request is made by WSIPP for the purpose of completing a study that has been directed by the Legislature.

Creating Education and Employment Pathways. HCA must establish a grant program for programs designed to provide persons recovering from SUDs with employment opportunities, with priority given to programs that engage with Black, Indigenous, persons of color, and other historically underserved communities.

Providing a Statewide Directory of Recovery Services. Subject to funding, HCA must collaborate with DOH and the Department of Social and Health Services to expand the Washington Recovery Helpline and the Recovery Readiness Access Tool to provide a dynamically updated, statewide behavioral health treatment and recovery support services mapping tool, including a robust resource database and referral system, to facilitate the connection between individuals and facilities which are currently accepting new referrals.

Streamlining Substance Use Disorder Treatment Intakes. HCA must convene a work group to recommend changes to intake, screening and assessment for SUD services by December 1, 2023, with goal of shortening the intake process and broadening the workforce capable of processing SUD intakes. HCA must include providers, payors, and people who use drugs in the work group, and other individuals recommended by HCA.

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 police officer takes an individual to available treatment and services in lieu of jail booking or referring a case for prosecution, if the individual subsequently violates the terms of the provided treatment or services, the behavioral health or service provider must inform the referring law enforcement agency of the violation if consistent with applicable law. The original charge may be filed or referred to the prosecutor, and the matter may proceed accordingly.

Votes on Final Passage:

2023 Regular Session

Senate 28 21

House 54 41 (House amended)

(Senate refuses to concur in House amendments. Asks House for conference thereon.)

Conference Committee

Senate

House 43 55 (Conference Committee report failed)

2023 1st Special Session

Senate 43 6

House 83 13

Effective: The bill contains several effective dates. Please refer to the bill.