

SENATE BILL REPORT

SB 5536

As of February 18, 2023

Title: An act relating to justice system and behavioral health responses for persons experiencing circumstances that involve controlled substances, counterfeit substances, legend drugs, and drug paraphernalia.

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

Sponsors: Senators Robinson, Lovick, Rolfes, Mullet, Dhingra, Billig, Hasegawa, Keiser, Kuderer, Lias, Lovelett, Nobles, Randall, Stanford, Wellman and Wilson, C..

Brief History:

Committee Activity: Law & Justice: 2/06/23, 2/09/23 [DPS-WM, DNP, w/oRec].
Ways & Means: 2/18/23.

Brief Summary of First Substitute Bill

- Increases the penalty for knowing possession of a controlled substance or counterfeit substance to a gross misdemeanor.
- Creates a pretrial diversion program for individuals charged with possession of prohibited substances.
- Provides for vacating possession convictions contingent on the individual completing substance use disorder treatment.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5536 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Kuderer, Pedersen, Salomon and Valdez.

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.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; McCune, Torres and Wilson, L..

Minority Report: That it be referred without recommendation.

Signed by Senator Wagoner.

Staff: Joe McKittrick; Kevin Black (786-7287)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Corban Nemeth (786-7736)

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. 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.

Summary of Bill (First Substitute): 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.

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 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.

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 substance use disorder evaluation from an approved substance use disorder treatment program. 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 meaningfully engaging in the recommended treatment or services, the defendant is convicted of an offense that reflects the defendant's propensity for violence, 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 including meaningful engagement with treatment or services, the court must dismiss the charge or charges.

Vacation of Simple Possession Convictions. An individual convicted of simple possession who subsequently engages with a substance use disorder treatment program may file proof of meaningful engagement with the court. Upon verification that the individual meaningfully engaged with the substance use disorder treatment program, 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 public health supplies, including injection syringe equipment, smoking equipment, or testing equipment, through public health programs and community-based HIV prevention programs and pharmacies. Cities, towns, and counties or other

municipalities are preempted from enacting laws and ordinances relating to drug paraphernalia that are not specifically authorized by state law or are inconsistent with state law.

Opioid Treatment Program Rural Access and Expansion. Opioid treatment programs (OTPs), including mobile or fixed-site programs, 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. A requirement for DOH to hold a public hearing in a community where an OTP is proposed to be located is removed. Cities and counties are prohibited from imposing a maximum capacity on OTPs.

Appropriations. Appropriations are made from the state general fund to the Health Care Authority (HCA) as follows:

- \$36.6 million to expand efforts to provide opioid use disorder (OUD) medication in city, county, regional, and tribal jails;
- \$7 million to provide support for new and established clubhouses throughout the state; and
- \$3.2 million to establish and expand 23-hour crisis relief centers distributed to an equivalent number of crisis services providers in Western Washington and Eastern Washington.

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 substance use disorders, mental health, or behavioral health concerns such that they are unable to represent their own interests or their parental rights may be restricted. The court may appoint counsel or a guardian ad litem for the child.

Establishing Health Engagement Hubs. HCA must develop licensure standards and payment structures by January 1, 2024, for health engagement hubs (hubs), defined as mobile or fixed-site opioid treatment program medication units. Hubs must be open to youth and adults, 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. 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 substance use disorders, adaptive and functional communication strategies with a person with a substance use disorder, 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.

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 substance use disorders 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, the Department of Health (DOH) must contract with a vendor to provide a dynamically updated, statewide tool to direct individuals with behavioral health disorders to treatment and recovery support locations.

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

Establishing a Safe-Supply Work Group. HCA must establish and staff a Statewide Safe Supply Work Group with members appointed by the Governor to make recommendations related to providing a regulated, tested supply of controlled substances to individuals at risk of drug overdoses, with a preliminary report due to the Governor and Legislature on December 1, 2023, and a final report due on December 1, 2024.

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.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):

- Permits pre-charging diversion to programs such as arrest and jail alternative programs and law enforcement assisted diversion programs.
- Exempts substance analyzing and testing equipment from the definition of drug paraphernalia.
- Clarifies that public health programs and community-based HIV prevention programs may distribute public health supplies.
- Removes the requirement that defendants waive the right to trial by jury in order to enter pre-trial diversion.
- Requires that substance use disorder (SUD) assessment reports be filed under seal.
- Clarifies that immunity in the SUD assessment only applies to the pending possession

charge.

- Eliminates the 12-18 month time parameter for completing pretrial diversion.
- Allows a court to appoint counsel for a child's parent, guardian, or custodian if the court determines they are affected by SUDs, mental health disorders, or behavioral health concerns such that they are unable to represent their own interests, or their parental rights may be restricted, and allows appointment of counsel or a guardian ad litem for the child.
- Directs HCA to make funding available for construction and services related to recovery residences in all regions of the state.
- Creates a real and personal property tax exemption for property used in maintaining a registered recovery residence and provides a tax preference statement.
- Requires HCA to consult with DCYF to develop a training for parents of children and transition-age youth with SUDs.
- Requires DCYF to make opioid overdose reversal medication available for use by its employees who may come in contact with individuals experiencing overdose.
- Requires HCA to develop a common data implementation platform to support recovery navigator programs.
- Requires HCA to contract with WSIPP to conduct a long-term study of the effectiveness of the recovery navigator program, collaborate over data collection, and expedite approval submissions to Washington State Institutional Review Board.
- Requires HCA and DOH to develop standards and rules and make funding available for implementation of Health Engagement Hubs which provide mobile or fixed-site access to medication-assisted treatment for OUD and other patient-centered medical home services to youth and adults around the state.
- Requires HCA to establish grants for programs that assist persons recovering from SUDs with employment opportunities.
- Requires DOH to provide a dynamically updated statewide tool to map and direct persons with behavioral health disorders to treatment and recovery support services.
- Appropriates \$36.6 million from the state general fund to HCA to expand efforts to provide OUD medication in city, county, regional, and tribal jails.
- Appropriates \$7 million from the state general fund to HCA to provide support for new and established clubhouses throughout the state.
- Appropriates \$3.2 million from the state general fund to HCA to award grants to establish and expand 23-hour crisis relief centers distributed to an equivalent number of providers in Western and Eastern Washington.
- Directs HCA to convene a work group to recommend changes to intake, screening, and assessment processes for SUD services.
- Directs HCA to convene a Statewide Safe Supply Work Group to evaluate potential models for development of a safe supply services framework in Washington State in which a regulated, tested supply of controlled substances is provided to individuals at risk of a drug overdose.
- Adds an intent section.

Appropriation: The bill contains appropriations totaling \$46.8 million from the state

general fund.

Fiscal Note: Available.

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

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Law & Justice): *The committee recommended a different version of the bill than what was heard.* PRO: 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. Pretrial diversion incentivizes treatment, by allowing the charge to be dismissed if treatment is completed. The use of drugs propagates other crimes such as burglaries and theft. This bill will help break the vicious cycle of addiction. The best path for individuals to receive treatment is with an incentive through the courts. Leaving people in the spin-cycle of addiction will not help. The path to recovery should be accompanied by a dismissal of the charges, but there should also be consequences for the person's failure or refusal to do treatment. Focusing intervention on pretrial diversion is much cheaper and will have the greatest impact for communities. It generally costs around \$5,000 to \$10,000 to prosecute a gross misdemeanor. We have seen that recidivism is much less when individual's cases are processed through therapeutic courts rather than the traditional adversarial courts. Evidence has shown that courts and jails are not effective settings for addressing substance abuse issues. What we need now is a legal framework that shifts the focus to providing treatment rather than punishment. This bill authorizes and supports pre-booking intervention as well as incentivizing those charged with possession to get into treatment. This is the best policy because it aligns with therapeutic court models already in place in many courts. It also provides clarity and guidance for law enforcement to help individuals with substance use disorders. This bill should be amended to clarify that cities will not need to cover the cost of providing treatment services to indigent individuals who are not covered by insurance.

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. Criminalizing drug possession has had a disproportionate effect on people of color. This bill prioritizes and incentivizes treatment using the criminal justice system to address those who refuse or abandon treatment. This takes a significant step towards addressing substance abuse issues in our communities by reestablishing accountability and addressing the need for treatment. Cities and counties must have continued input on the siting of treatment facilities to ensure there is not a conglomeration of these facilities in underserved

communities.

CON: If this bill passes, we are putting the solution in the same category as the problem. Classifying cannabis and other medicinal plants like fungi is harmful to those who need these medicines. For millennia, indigenous people have honored these medicines, but criminalizing these plants prohibits their use. Classifying possession as a gross misdemeanor will not help save lives, and increased investment in notoriously biased drug courts will only disparage black and brown people. Diversion is useful, but the state needs pre-booking diversion as well. Going to jail is a traumatic experience and adding trauma to the trauma individuals with substance use disorders suffer will only exacerbate the situation. Drug use can be devastating, but so to can the response. These policies will disproportionately increase police contacts with black and brown communities.

OTHER: This bill needs to address the potential immigration consequences of drug charges. People with immigration issues are doubly punished because they face consequences in criminal court which may lead to deportation or the person not being able to proceed with their immigration case. Vacating a conviction will not work because the definition of vacation in immigration courts is different than the state definition. All diversion is not created equal, and if this does not include immigration-safe language this could be a recipe for failure for noncitizens. The criminal system should not be used to achieve public health policy. Drug use is a health crisis not a legal crisis. Many people in rural areas of the state currently do not have access to substance use treatment. This needs to include investments in community health services. Without this investment those individuals sent to diversion in rural areas will not be able to access treatment. While this bill is a good start, it should also address those who are arrested for possession and other, often more serious, crimes. Whatever the solution, it should be data-driven. This must be accompanied by continued funding to allow the courts to address these issues. We need to institutionalize the sequential intercept model.

Persons Testifying (Law & Justice): PRO: Senator June Robinson, Prime Sponsor; David Hayes, Washington Council of Police and Sheriffs; Breean Beggs, Spokane City Council President; Jim Ferrell, Mayor, City of Federal Way; Amy Ockerlander, Mayor, City of Duvall & Association of Washington Cities; Mary Lou Pauly, Mayor, City of Issaquah; Armondo Pavone, Mayor, City of Renton; Dan Templeman, Police Chief, City of Everett; James McMahan, WA Assoc Sheriffs & Police Chiefs; Barbara Tolbert, Mayor, City of Arlington; Jon Nehring, Mayor, City of Marysville; Celia Jackson, Office of King County Exec; Mayor Victoria Woodards, City of Tacoma.

CON: Lauren Feringa; Don Julian; Malika Lamont, VOCAL-WA; Adam Palayew; Jude Ahmed, Urban League of Metropolitan Seattle & Tacoma.

OTHER: Lisa Daugaard, Public Defender Association; Chad Enright, Kitsap County Prosecutors; Matt McCourt, Washington State Narcotics Investigators Association; Judge Kevin Ringus, District & Municipal Court Judges Association; Larry Jefferson, Office of Public Defense; Jason Schwarz, WA Defender Assn/WA Assn of Criminal Defense

Lawyers; Sarah Hudson, WA Defender Assn/WA Assn of Criminal Defense Lawyers; David Larson, Federal Way Municipal Court.

Persons Signed In To Testify But Not Testifying (Law & Justice): No one.

Staff Summary of Public Testimony (Ways & Means): PRO: This bill creates opportunities to provide cost effective substance use disorder services. Law Enforcement Assisted Diversion (LEAD) and Alternatives to Arrest and Jail (AJA) programs work and we would like to see distinct funding in the bill for these programs. This is the most important issue you will tackle this session. Please allocate funding for pretrial diversion programs and make investments for opioid treatment more flexible for all substance use disorder programs. We have seen an increase in police response to drug infractions. Providing sufficient resources is critical and we encourage options that get individuals into treatment. The Legislature needs to ensure expanded efforts are funded on behalf of cities. This bill promotes compassion, accountability, and community. Please ensure funding so local programs in the bill are successful. We support pre-booking diversion and are glad to see its inclusion in this bill. This bill does a good job balancing accountability and treatment. Please consider stronger focus on incentives for treatment as you move this bill forward.

CON: The SURSA committee voted on decriminalization and I agree with that view. I encourage an approach that is more compassionate. This bill is weakened from the version heard in policy committee. There is less incentive for individuals to get help. This is both a public health and criminal justice problem.

OTHER: The Legislature needs to fund treatment through drug courts and the criminal justice treatment account. The faster that treatment is provided, the more successful the intervention is. The Substance Use Recovery Services Advisory (SURSA) Committee recommendations in this bill could result in an uptake of service delivery. Individuals want to obtain treatment and do not need coercion to do so. This bill has a concerning focus on accommodating drug use. The threat of punishment generally does not help get individuals into treatment. LEAD and AJA programs need to be modified and expanded. The State Patrol Crime Lab turn-around time will be a barrier to the intent of this bill. Misdemeanor testing can take up to a year to be completed. We can't coerce people into treatment. If you criminalize possession, then you need to fully fund public defense. We don't want to make employment for attorneys, which is what criminalization does. Absent legislation, drugs become legal on July 1st of this year. We support leveraging the consequences of the criminal justice system to get individuals into treatment. Constitutional defense for criminal drug possession is a cost not reflected in the fiscal note. We need 40 additional defenders plus support staff to meet the demand in the bill.

Persons Testifying (Ways & Means): PRO: Senator June Robinson, Prime Sponsor; T. Scott Brandon, Olympic Peninsula Community Clinic; Dana Ralph, Mayor of the City of

Kent; Armondo Pavone, Mayor, City of Renton; Candice Bock, Association of Washington Cities; Nancy Backus, City of Auburn, Mayor; Michael Held, Snohomish County Prosecuting Attorney's Office; Todd Morrell, Burien Police Department; Dan Templeman, Police Chief, City of Everett; Carolina Hershey, Arrest & Jail Alternatives, Olympia; Mayor Sean Kelly, City of Maple Valley; Michael Transue, WA Fraternal Order of Police.

CON: Don Julian; Gretchen McDevitt.

OTHER: Bob Cooper, WA Association of Drug Courts; Caleb Banta-Green, University of Washington- Addictions, Drug & Alcohol Institute; Anne Anderson, Washington State Narcotics Investigators Association; Vanessa Martin; Lisa Daugaard, Public Defender Association; Malika Lamont; Chad Enright, Kitsap County Prosecutor; Larry Jefferson, Washington State Office of Public Defense; James McMahan, WA Assoc Sheriffs & Police Chiefs; Adán Espino, WA Defender Assn/WA Assn of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.