



Court Strikes Down Ban on Inadvertent Drug Possession. And Next?

Walter Olson

March 4, 2021

Until last month, the state of Washington had the nation's only law under which simple possession of illegal drugs could make you a felon regardless of whether you knew you had any such thing on your person or property. The result, as a Washington Supreme Court justice noted in a 2019 case, was to make potential felons of such hapless figures as:

a letter carrier who delivers a package containing unprescribed Adderall; a roommate who is unaware that the person who shares his apartment has hidden illegal drugs in the common areas of the home; a mother who carries a prescription pill bottle in her purse, unaware that the pills have been substituted for illegally obtained drugs by her teenage daughter, who placed them in the bottle to avoid detection.

Now that law is gone – struck down by the state's high court as violating due process by “taking innocent and passive conduct with no criminal intent at all and punishing it as a serious crime.”

The decision is of interest both because of its dramatic (if likely temporary) short-term effects and also as a possible pointer for reform in other areas in which lawmakers have made innocent or unknowing conduct criminal. Libertarians among others have urged a restoration of traditional legal standards requiring that for criminal liability there should have to be proved a guilty state of mind – *mens rea*, in the Latin.

The short-term effects were dramatic because the Washington high court struck down not just the law's application to innocent bystanders, but the whole thing. That means that – at least for the moment – knowing possession of illegal drugs suddenly isn't a violation of Washington law.

The consequences were immediate. The Seattle police chief and sheriffs across the state said they'd stop arresting persons for simple possession. The state association of prosecutors, per the Associated Press, “instructed its members to immediately drop any pending cases for simple drug possession, to obtain orders vacating the convictions of anyone doing time for simple drug possession, and to recall any arrest warrants issued in such cases.”

But the Feb. 25 ruling in State v. Blake in no way recognizes any sort of constitutional right to *knowingly* possess illegal drugs, which means state lawmakers can go back and re-enact the same law but this time with a *mens rea* provision. It appears they likely will do just that. That will put them in step with other states' drug possession laws, an exception being Oregon, where voters last November approved an initiative legalizing possession of amounts for personal use.

Having to prove *mens rea* obviously doesn't keep prosecutors in other states from getting convictions in a wide range of drug possession cases. They can ask juries to infer knowingness from the facts and circumstances of each case, such as secretive behavior or visits to a supplier.

(The *Blake* case involved a woman found with a small baggy of meth in the coin pocket of her jeans; she testified that she'd gotten the jeans secondhand from a friend two days previously.)

The ruling is also unlikely to have immediate implications beyond the Evergreen State. While the Washington high court did see the law as violating a federal standard of due process, it also rested its decision on its own state constitution, which it can and does interpret in a more liberal way than does the U.S. Supreme Court with the parallel language in the national constitution. Since state supreme courts get the final say on their own state's constitutional law, this cuts off any practical prospect of reversal on appeal.

The wider question is whether we can expect the Washington court, or others following its path, to strike down other criminal laws that lack a standard of knowing misconduct. Punishing acts that lack wrongful intent is something modern government does every day, with results that can endanger not just postal carriers in Puyallup and roommates in Redmond, but pretty much anyone around the country. "We live in a world in which everything has been criminalized," said Justice Neil Gorsuch the other day.

The court's opinion does have its sweeping moments. The five-justice majority (three others dissented, while one joined the majority result on other grounds) cites the principle that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Alas, the backtracking begins almost at once. Commendably from one point of view, the court cites "the harsh penalties of felony conviction, lengthy imprisonment, stigma, and the many collateral consequences that accompany every felony drug conviction". At the same time, it makes clear that it will find no due process violation in convictions over lesser offenses so long as the consequences are less harshly punitive. Perhaps that is inevitable – a vast scaffolding of low-level law is built on the strict liability idea, in such areas as the collection of fines for parking violations. But letting it all turn on size and scale still seems to jar with the constitutional basis – if we are demanding due process, shouldn't we demand it for offenses small as well as large?

Likewise, Washington residents shouldn't expect any relief from the currently rampant prevalence of strict liability offenses in such fields as environmental and business regulation. Per the court, the legislature remains free to create offenses lacking *mens rea* "to protect the public from the harms that have come with modern life by putting the burden of care on those in the best position to avoid those harms." A year ago, in fact, the same court revised its constitutional law to make it easier to penalize owners of real property for offenses whether inadvertent and otherwise, allowing laws of that sort to be weighed under a lenient "rational basis" standard. Just in case there were any doubt, the *Blake* court goes on to list other examples of offenses — unauthorized practice of law is one – for which it is happy to retain a strict liability standard. Dispensing legal advice for pay is going to remain illegal for paralegals and accountants in Yakima and Everett, whether or not they've done their best to walk the line.

Still, it's nice to hear a reaffirmation that some prohibitions are simply "beyond the proper police powers of the state." And the new decision does shed at least a bit of light that could potentially be helpful in getting other laws struck down. One is found in its citation of cases in which courts have struck down laws against vagrancy, loitering, and curfew-breaking (at least in non-emergency situations). In these sorts of cases, much seems to depend on courts' intuition that

much of the activity being prohibited was essentially harmless to others, leaving the law overbroad at best.

The court also suggested that rather than be penalized for “wholly innocent and passive nonconduct,” maybe a defendant should have to “actually perform some conduct” to trip the criminality wire.

If ideas like that catch on, curling up at home and minding your own business might not be punishable as a crime. What a concept!