No. 96873-0

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

SHANNON B. BLAKE,

Petitioner.

PETITIONER'S ANSWER TO BRIEF OF AMICUS WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Other Cases

A. ARGUMENT

1. The felony offense of possession of a controlled substance is *not* a "public welfare offense."

In opposing Ms. Blake's statutory and constitutional arguments, the Washington Association of Prosecuting Attorneys contends possession of a controlled substance, a felony, is a "public welfare offense." And as a "public welfare offense," there is nothing constitutionally questionable about imposing strict liability on those who possess controlled substances. Br. of Amicus at 5.

This argument is incorrect because simple felony drug possession is not a public welfare offense. As explained by Justice Gordon McCloud's concurring opinion in A.M., the "purpose of Washington's basic drug possession law is not to 'heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.'" State v. A.M., 194 Wn.2d 33, 63, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring) (quoting Morissette v. United States, 342 U.S. 246, 254, 72 S. Ct. 240, 96 L. Ed. 288 (1952))."Its purpose is instead substantively criminal." Id.

Washington's felony drug possession statute at issue is not akin to the archaic federal law addressed by the United States Supreme Court about a century ago in United States v. Balint, 258 U.S. 250, 42 S. Ct. 301,

66 L. Ed. 604 (1922). In Balint, the Supreme Court upheld a narcotics law that did not require the defendant to know the item he was *selling* qualified as an unlawful narcotic within the meaning of the statute. 258 U.S. at 254; United States v. Staples, 511 U.S. 600, 606, 132 S. Ct. 593, 181 L. Ed. 2d 435 (2011). This law was a kind of public welfare offense where the activity is highly regulated. Staples, 511 U.S. at 606-07.

Moreover, "[e]ven statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct." Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 522, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994). "By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, [the United States Supreme Court has] avoided construing criminal statutes to impose a rigorous form of strict liability." Staples, 511 U.S. at 607 n.3.

In contrast, Washington's drug possession law, as currently interpreted, does not require *any* kind of knowledge by the defendant. Unlike the offense in Balint, Washington's statute is a rigorous form of strict liability. Consequently, the Association's reliance on Balint is misplaced. A.M., 194 Wn.2d at 63 n.9 (Gordon McCloud J., concurring)

(distinguishing Washington's contemporary drug possession statute from the federal drug law in Balint).

This Court should reject the Association's contention that the felony offense of drug possession is a public welfare offense. Because it is not properly categorized as public welfare offense, strict liability for simple drug possession—a felony offense with a maximum punishment of five years' confinement—remains constitutionally dubious.

2. The legislature may only enact constitutional laws.

Quoting broad language from case law, the Association makes the remarkable (and terrifying) claim that the legislature has unbounded authority to criminalize innocent conduct and shift the burden of proof to defendants to show that their conduct was blameless. Br. of Amicus at 1, 11-12.

To the contrary, the legislature is always bound to act within the confines of the state and federal constitutions, both of which forbid state laws that violate due process. In re Custody of E.A.T.W., 168 Wn.2d 335, 343, 227 P.3d 1284 (2010); U.S. Const. amend. XIV; Const. art. I, § 3. This elementary rule is so basic to our constitutional system that no citation to authority should be necessary.

The Association's position that the legislature has unrestricted authority to dispense with the traditional rule that all criminal offenses

require proof of a *mens rea* should be rejected. The Association's related position that the state and federal constitutions permit the legislature or courts to shift the burden of proof on an inherent element of an offense from the prosecution to the accused should likewise be rejected.

3. History does not require continuation of an incorrect interpretation of the controlled substances statute. Neither can history render an unconstitutional law constitutional.

The Association takes the position that history supports interpreting the drug possession law to be a strict liability offense and that this history makes the statute constitutional. Amicus Br. at 3-11. The Association is wrong on both fronts.

Washington's history of interpreting its drug possession laws not to require proof of guilty knowledge or intent is not longstanding and appears to be one of accident rather than design. Supp. Br. of Pet. at 11-12. Without acknowledgment of the *mens rea* cannon of construction or recognizing that its interpretation created constitutional doubts about the validity of the statute, this Court in 1957 interpreted the 1951 Narcotic Drug Act to not have a mental element for drug possession. State v. Henker, 50 Wn.2d 809, 812, 314 P.2d 645 (1957). Notably, the primary Washington decision cited in Henker to support this interpretation[1] has been undermined by the United States Supreme Court and this Court.

[1] State v. Lindberg, 125 Wash. 51, 52, 215 P. 41 (1923).

Staples, 511 U.S. at 617 and n.14 (recognizing this Court's opinion in Lindberg to be an outlier); State v. Anderson, 141 Wn.2d 357, 364-65, 5 P.3d 1247 (2000) (noting Lindberg, but reasoning that the maximum term of five years' imprisonment weighted in favor of reading offense at issue to have a *mens rea* element). Moreover, in Henker the issue was not even squarely before this Court because the jury instructions imposed a knowledge requirement and "became the law of the case" in evaluating whether the evidence was sufficient to sustain the jury's guilty verdict. 50 Wn.2d at 812-13.

Based on reasoning that was arguably dicta in Henker, this Court held that simple drug possession had no *mens rea* element. State v. Boggs, 57 Wn.2d 484, 486, 358 P.2d 124 (1961). This Court later construed unwitting possession to be an affirmative defense even though the statutory scheme did not expressly create such a defense or place the burden of disproving knowledge on the accused. State v. Morris, 70 Wn.2d 27, 34, 422 P.2d 27 (1966).

Based on this shaky historical foundation, the Association asks this Court to retain the contemporary drug possession scheme, a scheme which criminalizes the innocent conduct of possessing property unless the accused can rebut the presumption of guilt with proof that possession was unwitting.

History does not shackle this Court from properly interpreting the drug possession statute in a way that is both constitutional and consistent with virtually every other jurisdiction in the country. It certainly does not render an unconstitutional practice constitutional. See State v. Bassett, 192 Wn.2d 67, 80, 428 P.3d 343 (2018) (recognizing that early decisions approving of death sentences for children was "not a guiding light" for contemporary interpretation of the state constitution).

Applying the proper tools of statutory interpretation, this Court should hold that the drug possession statute requires the prosecution to prove knowledge. Supp. Br. of Pet. at 13-17. If not, this Court should declare the statute unconstitutional as violating due process. Supp. Br. of Pet. at 17-18.

4. The United States Supreme Court's recent opinion in *Kahler v. Kansas* does not support the Association's claim that Washington's freakish drug possession law is constitutional, let alone free of constitutional doubts.

Washington's drug possession law, as construed by this Court in State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004) and State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981), is out of step with the comparable laws of every other state and the federal government. Supp. Br. of Pet. at 9-10. The law shifts the burden of proof on knowledge, an inherent element of the offense, to the accused to disprove. This scheme is

not simply "different," it is "freakish." Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality).

In response, the Association cites Kahler v. Kansas, __ U.S. __, 140 S. Ct. 1021, __ L. Ed. 2d __ (2020). In Kahler, the Supreme Court held that Kansas's elimination of insanity as a defense to conviction and the shifting of some mental illness claims as an issue for sentencing rather than trial did not violate due process. 140 S. Ct. at 1030-31, 1037. More precisely, the Court held it did not violate due process for Kansas to eliminate the "moral-incapacity test for insanity." Id. at 1029. Importantly, Kansas retained mental illness as a defense when it negated a mental element of the crime and also permitted defendants to offer mental health evidence at sentencing. Id. at 1030-31. Furthermore, there is a long history and tradition of a wide variety of insanity tests or schemes addressing mental illness, which countered against requiring the moral-incapacity test for insanity as a matter of due process. Id. at 1031-37.

Unlike the varying formulations of the insanity defense and the related divergent practices on how mental illness should factor into guilt or punishment, the presumption of innocence and requirement that the prosecution prove all the elements of a criminal offense beyond a reasonable doubt are uniformly and firmly established in American jurisprudence. Nelson v. Colorado, __ U.S. __, 137 S. Ct. 1249, 1256 n.9,

197 L. Ed. 2d 611 (2017); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394 (1895).

And unlike the various insanity formulations that permeate across this nation, virtually every other jurisdiction except for Washington requires the prosecution to prove guilty knowledge or intent for drug possession. Kahler does not support the Association's claim that Washington is free to "experiment" in its criminal laws through strict liability schemes that trample on fundamental precepts of justice deeply rooted in our history and tradition.

Ms. Blake has established that unless Washington's drug possession law is read to have a knowledge element, it is unconstitutional.

5. Ruling in Ms. Blake's favor does not mean all strict liability crimes are unconstitutional or that due process forbids the legislature from imposing strict liability on corporations or its officers for public welfare offenses.

In seeking to persuade this Court to adhere to its grievously wrong decisions in Cleppe and Bradshaw, the Association predicts a parade of horribles. Specifically, the Association contends that other criminal laws will become constitutionally suspect, and prosecutions against corporations and their officers will become impossible. Amicus Br. at 15-16.

Upon a brief critical examination, this parade of horribles proves to be a fantasy. First, Ms. Blake's primary argument is that the drug possession statute should be interpreted to require proof of knowledge, as it should have been in Cleppe and Bradshaw. There will be no broad ramifications from this rather ordinary holding. The United States Supreme Court has repeatedly avoided the constitutional question created by strict liability felony offenses by employing the *mens rea* canon and reading in a mental element. Rehaif v. United States, __ U.S. __, 139 S. Ct. 2191, 2197, 204 L. Ed. 2d 594 (2019) (recognizing that its cases on this point "are legion").

Second, the Washington drug possession scheme is unique. Again, it is not a general welfare crime where strict liability may be permissible. Declaring it unconstitutional will not result in other criminal laws being declared unconstitutional. The sky has not fallen in Louisiana, where a similar law was declared unconstitutional. State v. Brown, 389 So. 2d 48, 51 (La. 1980). The Association's false prophecies should not dissuade this Court from doing its constitutional duty.

B. CONCLUSION

The Association's arguments should be rejected. The drug possession statute should be interpreted to require proof of knowledge or else be declared unconstitutional.

Respectfully submitted this 21st day of May, 2020.

Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Petitioner

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 96873-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Brett Pearce, DPA
[SCPAappeals@spokanecounty.org][bpearce@spokanecounty.org]
Spokane County Prosecutor's Office

☒ petitioner

☒ Philip Buri – WAPA
[philip@burifunston.com]

☒ Mark Middaugh – WACDL
[mark.middaugh@kingcounty.gov]

☒ William Maurer – Institute for Justice
[wmaurer@ij.org]

☒ Mark Cooke [mcooke@aclu-wa.org]
Antoinette Davis [tdavis@aclu-wa.org]
Nancy Talner [talner@aclu-wa.org]
ACLU

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 21, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

May 21, 2020 - 2:52 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96873-0
Appellate Court Case Title:	State of Washington v. Shannon B. Blake
Superior Court Case Number:	16-1-03854-0

The following documents have been uploaded:

- 968730_Briefs_20200521145044SC606386_7863.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was washapp.052120-01.pdf

A copy of the uploaded files will be sent to:

- bpearce@spokanecounty.org
- hloya@ij.org
- mark.middaugh@kingcounty.gov
- mcooke@aclu-wa.org
- philip@burifunston.com
- pleadings@aclu-wa.org
- scpaappeals@spokanecounty.org
- talner@aclu-wa.org
- tdavis@aclu-wa.org
- tom@washapp.org
- wmaurer@ij.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Richard Wayne Lechich - Email: richard@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200521145044SC606386