

State v. Blake and You

481 P.3d 521 (Wash. 2021)

NOT MY PANTS

They came from
the store like
that...



NOT MY METH

A friend had bought the jeans secondhand and given them to Blake two days before Blake's arrest...



RCW 69.50.4013

It is unlawful for any person to possess a controlled substance...

RCW 69.50.4013

It is unlawful for any person to possess a controlled substance...

What's missing here?

Unwitting Possession

State v Cleppe:

...ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance.



Unwitting Possession

State v Cleppe:

If the defendant can affirmatively establish his “possession” was unwitting, then he had no possession for which the law will convict.



Unwitting Possession

State v Cleppe:

The burden of proof, however, is on the defendant.



Strict Liability

State v. Bradshaw:

- Two defendants cross border with over 70lbs of MJ each in “borrowed” truck.
- Acquitted on delivery charge but convicted of possession.



Strict Liability

State v. Bradshaw:

- “appealed their convictions, arguing that the trial court erred in failing to require the State to prove that they **knowingly possessed a controlled substance**, and that the evidence was insufficient to prove actual or constructive possession.”



Strict Liability

State v. Bradshaw:

- *A Mens Rea Element is Unnecessary when Legislative Intent to Omit a Mens Rea Element is Clear*



Strict Liability

State v. Bradshaw:

- *Possession Does Not Require Knowledge and the Affirmative Defense of Unwitting Possession Does Not Improperly Shift the Burden of Proof*



Strict Liability

=

No intent
element.



State v. Blake

State legislatures have the police power to criminalize and punish much conduct. But the **due process** clauses of the state and federal constitutions limit that power. The key limit at issue here is that those due process clause protections generally

bar state legislatures from taking innocent and passive conduct with no criminal intent at all and punishing it as a serious crime.

State v. Blake

Unfortunately, that is exactly what [RCW 69.50.4013](#), the strict liability felony drug possession statute, does. And it is the only statute in the nation to do so. We therefore conclude that it violates the state and federal constitutions.

State v. Blake

Attaching the harsh penalties of felony conviction, lengthy imprisonment, stigma, and the many collateral consequences that accompany every felony drug conviction to entirely innocent and passive conduct exceeds the legislature's powers.

State v. Blake

- 1) Innocent / Passive Conduct
- 2) No Intent Element
- 3) Serious crime (Felony)



State v. Blake

Innocent / Passive Conduct
unaccompanied by an intent
element:

- 1) LA Registration requirement
(California v. Lambert)
- 2) Florida law criminalizing “night
walking” (Papachristou v. City of
Jacksonville)
- 3) Seattle ordinance that
prohibited “accompanying a
child during curfew hours.” (City
of Seattle v. Pullman)



State v. Blake

Innocent / Passive Conduct
unaccompanied by an intent
element:

Criminalization of passive
nonconduct without mens rea
“makes no distinction between
conduct calculated to harm and
that which is essentially innocent”
and therefore exceeds the State's
police power.



State v. Blake

NOT Innocent / Passive Conduct
unaccompanied by an intent
element:

To be sure,
active *trafficking* in
drugs, unlike standing
outside at 10:01 p.m., is
not innocent conduct.



State v. Blake

NOT Innocent / Passive Conduct
unaccompanied by an intent
element:

Rape of a Child 3rd
Degree.



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69.50.4012 << 69.50.4013 >> 69.50.4014

RCW 69.50.4013

Possession of controlled substance—Penalty—Possession of useable marijuana, marijuana concentrates, or marijuana-infused products—Delivery.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony, punishable under chapter 9A.20 RCW.

(3)(a) The possession, by a person twenty-one years of age or older, of useable marijuana, marijuana concentrates, or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.

(b) The possession of marijuana, useable marijuana, marijuana concentrates, and marijuana-infused products being physically transported or delivered within the state, in amounts not exceeding those that may be established under RCW 69.50.365(3), by a licensed employee of a passenger carrier, when performing the duties authorized in accordance with RCW 69.50.382 and 69.50.385, is not a violation of this section, this chapter, or any other provision of Washington state law.

(4)(a) The delivery by a person twenty-one years of age or older to one or more persons twenty-one years of age or older, during a single twenty-four hour period, for noncommercial purposes and not conditioned upon or in any way connected with the provision or receipt of financial consideration, of any of the following marijuana products, is not a violation of this section, this chapter, or any other provisions of Washington state law:

- (i) One-half ounce of useable marijuana;
- (ii) Eight ounces of marijuana-infused product in solid form;
- (iii) Thirty-six ounces of marijuana-infused product in liquid form; or
- (iv) Three and one-half grams of marijuana concentrates.

(b) The act of delivering marijuana or marijuana product as authorized under this subsection (4) must meet one of the following requirements:

- (i) The delivery must be done in a location outside of the view of general public and in a nonpublic place; or
- (ii) The marijuana or marijuana product must be in the original packaging as purchased from the marijuana retailer.

(5) No person under twenty-one years of age may possess, manufacture, sell, or distribute marijuana, marijuana-infused products, or marijuana concentrates, regardless of THC concentration. This does not include qualifying patients with a valid authorization.

(6) The possession by a qualifying patient or designated provider of marijuana concentrates, useable marijuana, marijuana-infused products, or plants in accordance with chapter 69.51A RCW is not a violation of this section, this chapter, or any other provision of Washington state law.

RCW 69.50.4013 is VOID

Accordingly, RCW 69.50.4013(1)—the portion of the simple drug possession statute creating this crime—violates the due process clauses of the state and federal constitutions and is **void**.



Void vs Voidable?

Void = the law was always bad



Why do I care?

Dismissal of all active simple possession cases



Why do I care?

Vacation of possession
convictions and resentencing



Why do I care?

Significant reduction in
felony scoring



Why do I care?

Unforeseen impact on other types of cases



Other Impacts?

Drug possession is a gateway
crime



Other Impacts?

Investigation techniques:

Dog sniff... PC for What?



Warrants.

A declaration that a statute or ordinance is unconstitutional does not necessarily invalidate an earlier determination that there was probable cause that a person had violated the statute or ordinance.



State v. Durone, ___ Wn. App.
2d ___, 2021 WL 2346160, at *5
n.2 (June 8, 2021)(unpublished)

Warrants..

The United States Supreme Court has indicated that unconstitutionality of a law would not invalidate a prior determination of probable cause, except possibly when the law was “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.”



State v. Durone, ___ Wn. App.
2d ___, 2021 WL 2346160, at *5
n.2 (June 8, 2021)(unpublished)

Warrants...



The Washington Supreme Court has added that a prior determination of probable cause would be invalidated where “substantially the same” statutory language had been invalidated before the determination of probable cause.

State v. Durone, ___ Wn. App.
2d ___, 2021 WL 2346160, at *5
n.2 (June 8, 2021)(unpublished)

Warrants?

Possession with Intent

Mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver. State v. Darden, 145 Wash.2d 612, 624, 41 P.3d 1189 (2002); see also State v. Brown, 68 Wash.App. 480, 483, 843 P.2d 1098 (1993). Rather, at least one additional factor must be present. Zunker, 112 Wash.App. at 136, 48 P.3d 344.



Warrants?

Possession with Intent

“[b]are possession of a controlled substance is not enough to support an intent to manufacture conviction; *at least one additional factor, suggestive of intent, must be present.*” *Id.* at 466, 123 P.3d 132 (emphasis added) (citing *State v. McPherson*, 111 Wash.App. 747, 759, 46 P.3d 284 (2002)).



Why you (might) care?

- Clients' criminal records could be reduced or eliminated
- Impact on Civil cases:
 - Employment issues?
 - Family Law proceedings?
- War on Drugs:
 - Expense
 - Racial Justice implications
- Personal reasons





State v. Sprague

10 grams of methamphetamine

a scale

Bundle of plastic grocery store bags

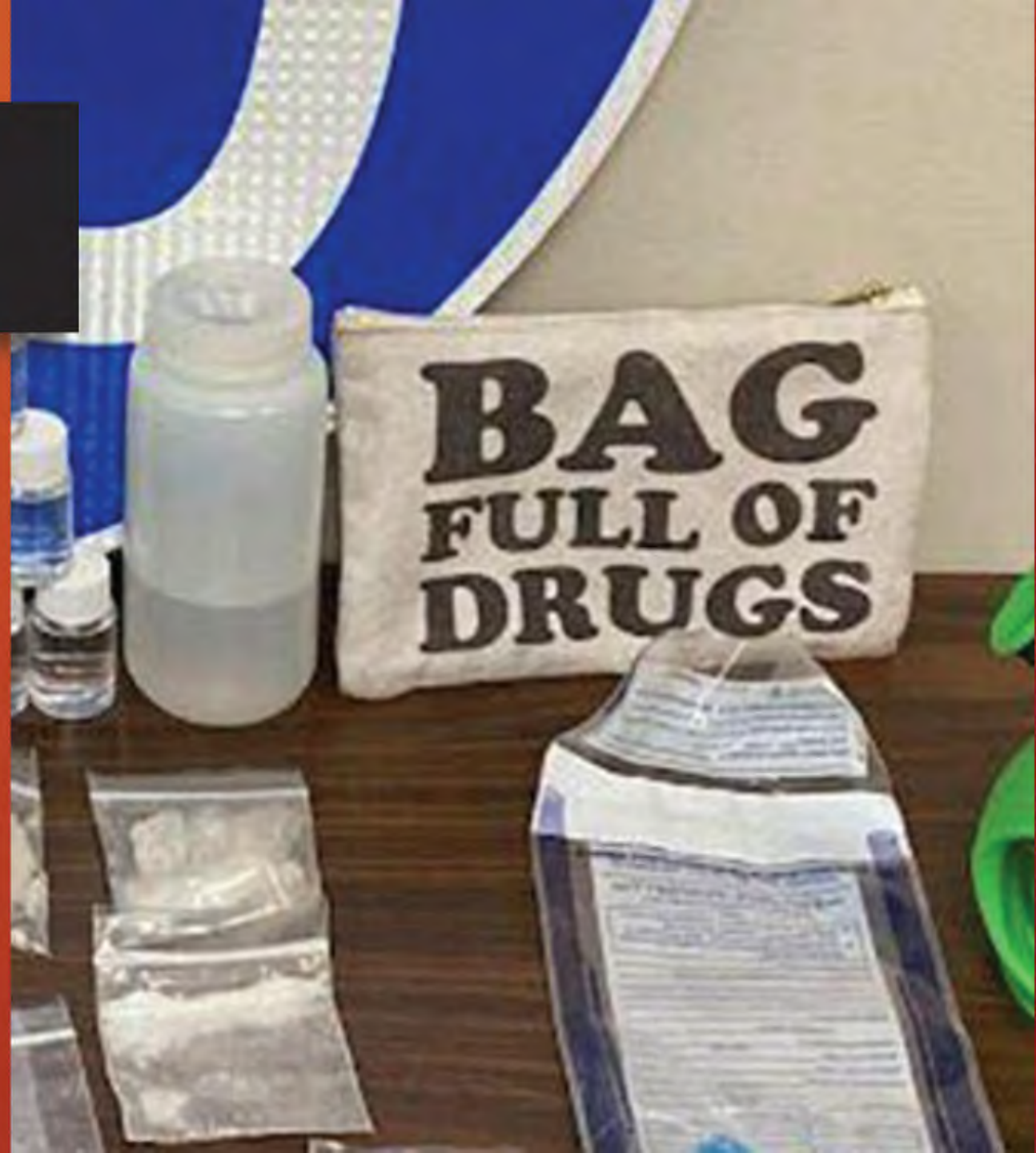
+ incriminating statements



State v. Sprague

Corpus Delicti

State's independent evidence
“must be consistent with guilt and
inconsistent with a hypothesis of
innocence.”

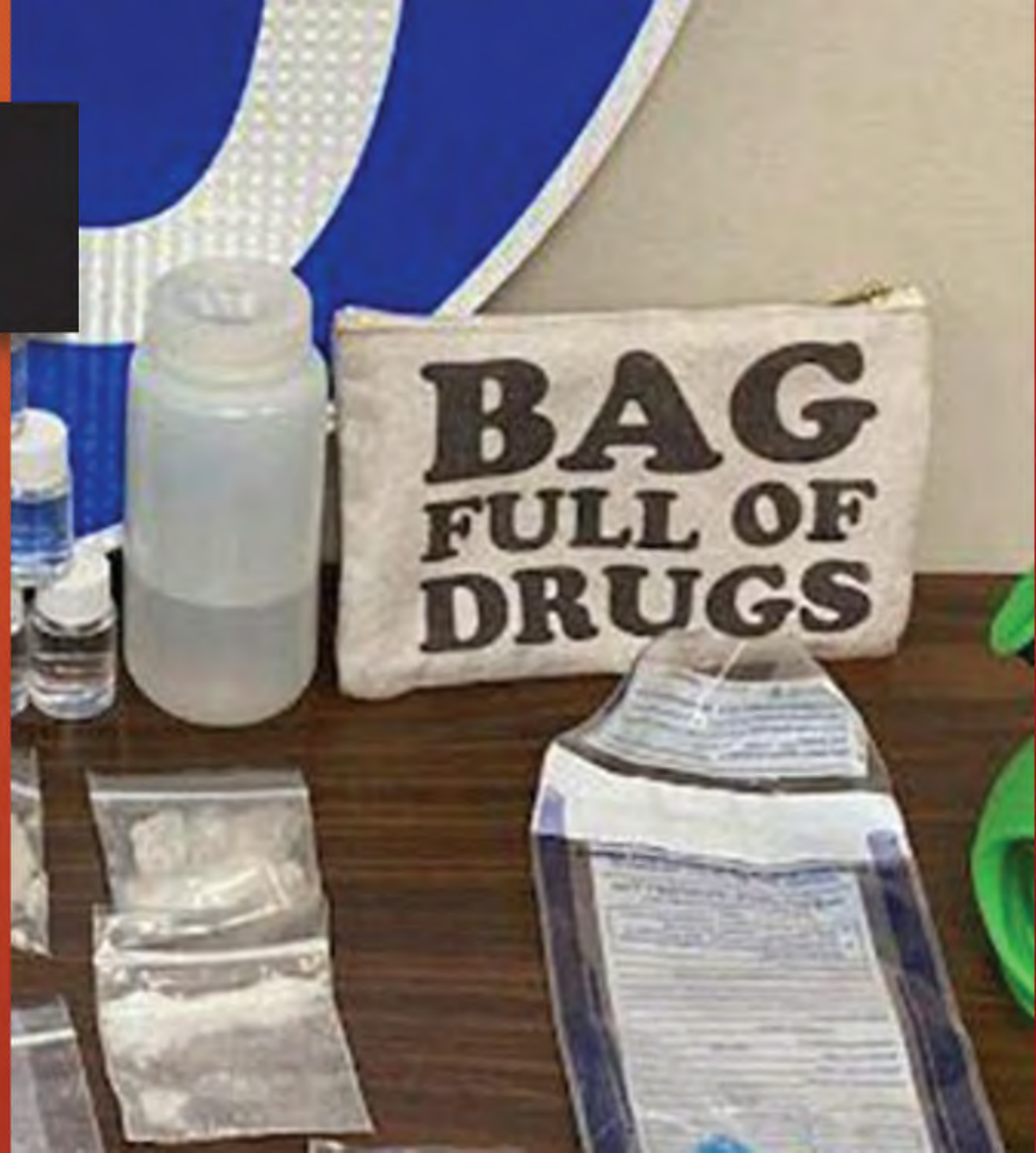


State v. Sprague

Take away?

Large quantity of drugs +
incriminating statements NOT
ENOUGH

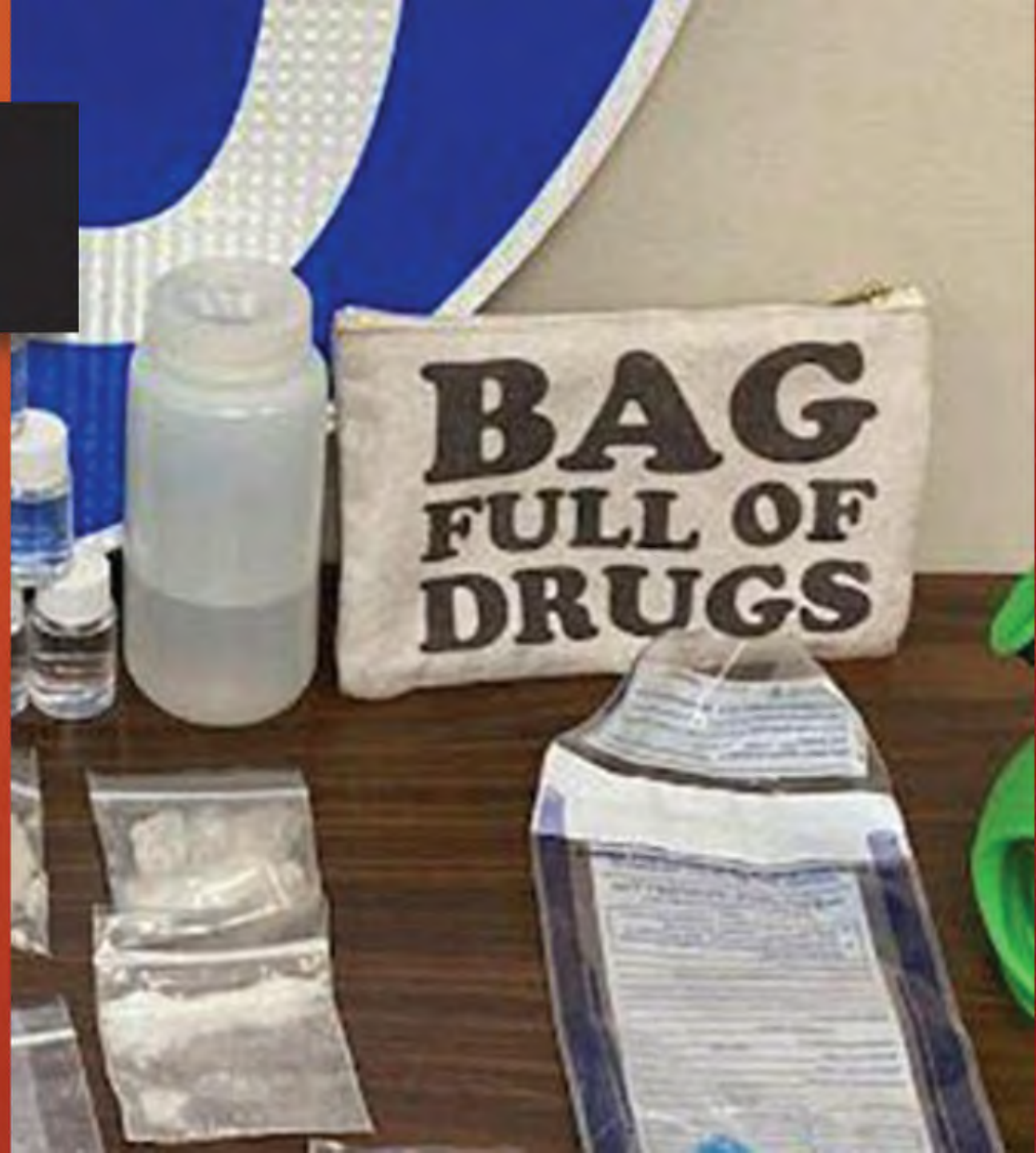
Large quantity of drugs, a scale,
and bags that COULD be used for
packaging +
incriminating statements NOT ENOUGH



State v. Sprague

What is enough?

Safes or locked containers,
documents or communications
reflecting sales, and observed
transactions...



What about Drug Paraphernalia?

Not void... BUT

- Charging
- Warrants



Was this “fixed”?

- Senate Bill 5476

The legislature finds that substance use disorder is a disease and should be treated using a public health, rather than a criminal justice-centered, approach.



Was this “fixed”?

- Senate Bill 5476

Knowingly Possess

Gross Misdemeanor

Mandatory/Encouraged Diversion

Good until 2023



Recovery Navigator Program

Community-based outreach, intake, assessment, and connection to services and, as appropriate, long-term intensive case management and recovery coaching services, and shall facilitate and coordinate connections to a broad range of community resources including treatment and recovery support services



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Recovery Navigator Program

LEAD diverts individuals who are engaged in low-level drug crime, prostitution, and crimes of poverty away from the criminal legal system—bypassing prosecution and jail time—and connects them with intensive case managers



SEATTLE | KING COUNTY

Pre-booking Diversion

First two “cases” shall be diverted

- Referral to recovery navigator



Pre-booking Diversion

Subsequent possession “cases” encouraged to be diverted to treatment



Questions?

