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Washington State
Court of Appeals
Division Two

November 16, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOSHUA D. VANORMAN, Appellant, v. STATE OF WASHINGTON, Respondent.	No. 55086-5-II UNPUBLISHED OPINION

CRUSER, J. – Joshua D. VanOrman appeals from the superior court's denial of his petition to restore his firearm rights. He argues that the superior court erred when it concluded that he was ineligible to have his firearm rights restored because he had been sentenced to a crime with a maximum penalty of 20 years based on the doubling provision of RCW 69.50.408 when the prior misdemeanor offense that would have triggered the doubling provision was not reflected in the criminal history in the felony judgment and sentence and the felony judgment and sentence stated that the statutory maximum for the offense was 10 years. Because the prior misdemeanor drug

conviction is now invalid under *State v. Blake*,[1] we reverse the order denying restoration of VanOrman's firearm rights and remand for further proceedings consistent with this opinion.[2]

FACTS

The facts of this case are not disputed. According to the parties,[3] in August 2003, VanOrman was convicted in Elma Municipal Court of misdemeanor possession of less than 40 grams of marijuana under former RCW 69.50.401(e) (1998).[4] Former RCW 69.50.401(e) was a strict liability offense.

In September 2004, VanOrman pleaded guilty to the felony offense of manufacturing methamphetamine. The judgment and sentence for the felony offense did not list the 2003 misdemeanor conviction as a prior conviction,[5] and it stated that the maximum penalty for the felony offense was 10 years. This felony conviction resulted in VanOrman losing his right to use or possess firearms.

On June 5, 2020, VanOrman petitioned under RCW 9.41.040(4)(a)(ii)(A) to restore his firearm rights. The State responded that VanOrman was not eligible for restoration of his firearm

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[1] 197 Wn.2d 170, 173, 481 P.3d 521 (2021).

[2] VanOrman also argues that the legislature did not intend for the doubling provision to prohibit the restoration of firearm rights when the conviction at issue was a class B felony drug offense with a 10-year statutory maximum. Because we reverse the superior court's decision on other grounds, we do not address this argument.

[3] There is nothing in the appellate record independent of the parties' own statements regarding this prior offense.

[4] In 2003, effective July 1, 2004, the legislature recodified this statute as RCW 69.50.4014. Laws of 2003, ch. 53, §§ 331, 335.

[5] The criminal history section of the 2004 judgment and sentence stated, in full, "The State is unaware of any prior felony criminal history for this defendant." Clerk's Papers at 10.

rights because the statutory maximum for the felony offense was 20 years rather than the 10 years stated in the 2004 judgment and sentence. The State asserted that even though neither the prior misdemeanor conviction nor the 20 year statutory maximum were reflected in the 2004 judgment and sentence, this was error because the prior misdemeanor conviction automatically triggered the doubling provision of RCW 69.50.408,[6] making the maximum penalty for the felony offense 20 years.

VanOrman admitted that the prior misdemeanor conviction existed. But he argued that the court could not consider the misdemeanor conviction because the State had not alleged or proved the existence of that conviction at sentencing, and the judgment and sentence stated that the maximum penalty was 10 years. The State responded that it was not required to plead and prove the prior offense to trigger the doubling provision.

The superior court agreed with the State and denied VanOrman's petition. VanOrman appeals.

On February 25, 2021, shortly after the final brief in this case was filed, our supreme court issued *Blake*, in which it invalidated strict liability drug possession convictions under former RCW 69.50.4013 (2017). *Blake*, 197 Wn.2d at 195. We requested that the parties file supplemental briefs addressing the effect of *Blake* on this case.

[6] RCW 69.50.408 provides, in part:

> (1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.
>
> (2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

ANALYSIS

We hold that under *Blake* the prior misdemeanor offense is no longer valid and, therefore, it is no longer part of VanOrman's criminal history. Accordingly, the superior court cannot consider the misdemeanor offense when determining whether VanOrman has met the criteria to have his firearm rights restored.

In *Blake*, our supreme court held that the strict liability offense of felony unlawful possession of a controlled substance under former RCW 69.50.4013 (2015)[7] exceeded the State's police powers and violated defendants' state and federal due process rights, thereby invalidating this offense. 197 Wn.2d at 195. As the State points out, *Blake* did not address former RCW 69.50.401(e), the misdemeanor possession of marijuana statute in effect at the time of VanOrman's conviction. But the State's argument that *Blake* did not invalidate misdemeanor drug possession convictions because *Blake* discussed defendants' due process rights in the context of felony offenses and did not expressly discuss misdemeanor drug possession offenses is not well taken.

It is true that *Blake* addressed a felony unlawful possession of a controlled substance conviction. But we discern no reason to differentiate strict liability felony drug offenses from strict liability misdemeanor drug offenses. Although *Blake* discusses the significant penalties and consequences that arise when a defendant is convicted of a felony drug offense, the due process analysis hinges on the fact the statute "criminalize[d] wholly innocent and passive nonconduct on a strict liability basis" rather than the serious nature of the potential penalties. 197 Wn.2d at 193. Notably, belying the State's assertion that the court's decision was based on the severity of

[7] The crime at issue in *Blake* was committed in 2016, so the relevant version of the statute is the 2015 version.

punishment for a *felony* offense, the court relied, in part, on *Seattle v. Pullman*, 82 Wn.2d 794, 514 P.2d 1059 (1973), which addressed the validity of a municipal curfew ordinance and held that it was invalid because it did not distinguish between harmful and essentially innocent conduct. *Id.* at 182-83.

In *Blake*, the court stated that "[v]alid strict liability crimes require that the defendant actually perform some conduct," without distinguishing felony and misdemeanor offenses. *Id.* at 195. And there is no indication in the opinion that the court's language referring to the offense as a felony offense is not solely due to the fact it was the felony offense statute that was challenged.

Furthermore, the recognition that the felony offense is a "serious crime" that carries "substantial penalties" does not preclude the conclusion that a misdemeanor drug offense can also be a "serious crime" that carries "substantial penalties." *Id.* at 173. Although the sentences for a misdemeanor offenses are shorter, such convictions can still result in incarceration, which is in no way an inconsequential penalty. And this case itself demonstrates that misdemeanor offenses can also carry serious collateral consequences such as doubling the maximum penalties for any future drug offenses and the potential of permanently depriving a defendant of their right to restore their constitutional firearm rights. Accordingly, we hold that *Blake* also invalidates strict liability misdemeanor drug possession convictions.

Because the misdemeanor unlawful possession of marijuana conviction is invalid under *Blake*, it cannot serve to double the maximum sentence for the felony drug conviction. So, regardless of whether the doubling provision applied at the time of the felony conviction, the doubling provision can no longer apply, and the maximum penalty for the felony offense is 10

years. Thus, under *Blake*, the superior court's denial of the petition for restoration based on the length of the maximum penalty for the offense was improper.

Accordingly, we reverse the order denying VanOrman's motion to reinstate his firearm rights and remand this matter to the superior court for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, P.J.

We concur:

VELJACIC, J.

PRICE, J.