FILED
SUPREME COURT
STATE OF WASHINGTON
4/19/2021 9:48 AM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
4/27/2021
BY SUSAN L. CARLSON
CLERK

No. 99592-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JEFFREY CONAWAY,
Petitioner.

BRIEF OF WACDL AND WDA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REVIEW

Mark B. Middaugh, #51425
mark@middaughlaw.com
WACDL Amicus Committee
600 University Street, Suite 3020
Seattle, WA 98101
Ph: (206) 919-4269

Alexandria Hohman, #44104
ali@defensenet.org
Washington Defender Ass'n
110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104
Ph: (206) 623-4321

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI 1

ISSUE ADDRESSED BY AMICI 1

ARGUMENT WHY REVIEW SHOULD BE GRANTED 1

- **A. This issue is important to litigants beyond the defendant in this matter** 1
- **B. The Court of Appeals erred** 3

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

State v. Haggard, 195 Wn.2d 544, 461 P.3d 1159 (2020).......................... 3

STATUTES

RCW 26.50.110 2
RCW 46.61.502 .... 2, 4
RCW 46.61.5055 .... 2, 4
RCW 9.68A.090... 2
RCW 9.94A.640... 4
RCW 9.96.060 .... 4, 5
RCW 9A.36.041... 2
RCW 9A.46.020... 2
RCW 9A.46.110... 2
RCW 9A.52.100... 2

RULES

RAP 13.4... 1

IDENTITY AND INTEREST OF AMICI

The identity and interest of *amici* are set forth in the accompanying motion for leave to file this brief.

ISSUE ADDRESSED BY AMICI

Whether the State may elevate a charge from a misdemeanor to a felony based on the fact that the defendant previously resolved a misdemeanor charge by successfully completing the terms of a deferred sentence, culminating in the entry of a plea of not guilty and the dismissal of the charges.

ARGUMENT WHY REVIEW SHOULD BE GRANTED

The issue raised in the petition for review is of substantial public importance to criminal defendants in Washington State, and the trial court and the Court of Appeals both ruled incorrectly on this important issue. This Court should grant review to provide clear guidance to litigants and correct the erroneous logic of the courts below.

A. This issue is important to litigants beyond the defendant in this matter

This Court should grant review because the issue it presents is of "substantial public interest." RAP 13.4(b). The logic of the Court of Appeals opinion may not be limited to individuals charged with repeat indecent exposure offenses. Instead, there are multiple statutes that elevate an offense from a misdemeanor to a felony based on the

defendant's criminal record. Although not all of the statutes are worded identically, the Court of Appeals' opinion could arguably be extended to apply to some of the most commonly prosecuted offenses in our state, such as:

- Vehicle Prowling (RCW 9A.52.100(3));
- Violation of a Court Order (RCW 26.50.110(5));
- Domestic Violence Assault Fourth Degree (RCW 9A.36.041(3));
- Harassment (RCW 9A.46.020(2)(b));
- Stalking (RCW 9A.46.110(5)(b); and
- Communicating with a Minor for Immoral Purposes (RCW 9.68A.090(2)).[1]

If trial courts adopt the logic of the Court of Appeals opinion, it may therefore affect not only Mr. Conaway, but a large number of other criminal defendants facing potential felony prosecutions in the future. Litigants should have clarity from this Court about whether a prior charge that was dismissed pursuant to a deferred sentence can be used as a predicate conviction to elevate their charges from a gross misdemeanor to a felony.

---

[1] Driving under the influence, RCW 46.61.502(6), would not be affected by the Court's ruling in this case, because it enhances a sentence based on a "prior offense" rather than a "conviction." The term "prior offense" is defined in a separate statute, RCW 46.61.5055.

B. The Court of Appeals erred

This Court should also grant review because the Court of Appeals decision was incorrect. When a defendant has completed the terms of a deferred sentence, the trial court enters a plea of not guilty and dismisses the case. It defies a common-sense understanding of the terms "not guilty" and "dismissed" to hold that a charge disposed of in that manner would constitute a prior conviction for the purposes of elevating a later charge from a misdemeanor to a felony.

In *State v. Haggard*, this Court did rule that a charge dismissed pursuant to a deferred sentence counted as a conviction for the purposes of calculating the "washout period" of the Sentencing Reform Act. 195 Wn.2d 544, 461 P.3d 1159 (2020). But in reaching that holding, this Court was also careful to say that its holding applied only to the definition of conviction under the Sentencing Reform Act. *Id.* at 552 ("The SRA is a technical statute, with specific definitions for the terms it uses."). In fact, this Court specifically noted that the language of the statute governing deferred sentences "does not contain language allowing future prosecutions to use a previously dismissed conviction." *Id.* at 552. The Court of Appeals ignored this critical language when it ruled that Mr. Conaway could face a felony charge instead of a misdemeanor charge based on the prior dismissed case.

Further, our legislature is well aware of how to structure a statute to elevate an offense to a felony based on a finding that the defendant had prior charges dismissed pursuant to a deferred sentence. Our driving under the influence statute, RCW 46.61.502, elevates that crime from a misdemeanor to a felony if the defendant has three "prior offenses" in the previous ten years. In defining the term "prior offense," the legislature explicitly spelled out that a misdemeanor charge dismissed pursuant to a deferred sentence constituted a prior offense.
RCW 46.61.5055(14)(a)(xvii). The fact that the legislature chose not to include the same language in the indecent exposure statute (or other laws that make repeat offenses more serious crimes) indicates that it did not intend for such dismissed cases to serve as predicate offenses in this context.

The same specificity is contained in the statutes governing vacation of conviction. In RCW 9.94A.640, the legislature made clear that under certain circumstances, a vacated felony conviction may qualify "as a prior conviction for the purpose of charging a present recidivist offense." RCW 9.94A.640(3)(b). So too in RCW 9.96.060, the statute governing vacating misdemeanor convictions. Under the terms of that statute, only certain vacated domestic violence convictions constitute prior convictions for the purposes of elevating a future charge to a felony.

RCW 9.96.060(6)(a)-(b). No such language exists to indicate that sentences dismissed pursuant to a deferred sentence may be alleged as prior convictions in future prosecutions, indicating that the legislature did not intend for those convictions to be used in such a manner.

CONCLUSION

This case presents an issue of significant public importance. This Court should grant review to clarify that a misdemeanor charge that was dismissed pursuant to a deferred sentence does not constitute a prior conviction that may be used to elevate an offense from a misdemeanor to a felony.

Respectfully submitted this 19th day of April, 2021.

s/Mark B. Middaugh
WSBA #51425
Attorney for Amicus Curiae WACDL
E-mail: mark@middaughlaw.com

s/Alexandria Hohman
WSBA #44104
Attorney for Amicus Curiae WDA
E-mail: ali@defensenet.org

I certify that on the 19th day of April, 2021, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts' Secure Portal.

s/Mark Middaugh

MIDDAUGH LAW, PLLC

April 19, 2021 - 9:48 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99592-3
Appellate Court Case Title:	State of Washington v. Jeffrey David Conaway
Superior Court Case Number:	16-1-00155-7

The following documents have been uploaded:

- 995923_Briefs_20210419094325SC228483_0113.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Conaway Amicus Brief.pdf
- 995923_Motion_20210419094325SC228483_2109.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Motion to File.pdf

A copy of the uploaded files will be sent to:

- ICPAO_Webmaster@islandcountywa.gov
- ali@defensenet.org
- lila@washapp.org
- m.safstrom@islandcountywa.gov
- wapofficemail@washapp.org

Comments:

Sender Name: Mark Middaugh - Email: mark@middaughlaw.com
Address:
600 UNIVERSITY ST STE 3020
SEATTLE, WA, 98101-4105
Phone: 206-919-4269

Note: The Filing Id is 20210419094325SC228483