

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHN COOPER,

Petitioner

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SUPPLEMENTAL BRIEF OF PETITIONER

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25228

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A. INTRODUCTION

The Sentencing Reform Act (SRA) permits inclusion of a prior offense in an offender score calculation only if the prior offense was a "conviction." The SRA provides a specific definition of conviction which includes only formally entered, specific, judicial findings of guilt. Because John Cooper's deferred adjudications from Texas never resulted in a formal judicial entry of a specific finding of guilt, they cannot be considered "convictions" nor included in his offender score.

B. ISSUE PRESENTED

In Washington, before a sentencing court may include a prior out-of-state adjudication in an offender score, the prosecution must prove that guilt has been adjudicated. John Cooper had two prior deferred adjudications in Texas. Where the State failed to show these deferred adjudications were adjudications of guilt, and therefore failed to show they were convictions, did the trial court err by including these findings in Mr. Cooper's offender score?

C. STATEMENT OF THE CASE

On May 3, 2010, John Cooper entered a guilty plea in Clark County, Washington, to attempting to obtain a false prescription for

vicodin and bail jumping. CP 6; RP 5. The court accepted Mr. Cooper's plea of guilty. RP 6.<sup>1</sup>

Approximately two months prior to the Washington plea, on March 11, 2010, Mr. Cooper had appeared in the District Court of Travis County, Texas. CP 24-49.<sup>2</sup> In Travis County, Mr. Cooper entered *nolo contendere* pleas and the court deferred adjudication to resolve the two theft allegations from incidents in 2008. *Id.* As part of the deferred adjudication process, Mr. Cooper agreed to an order of community supervision in each case, requiring compliance with a community service officer, restitution, asset forfeiture, drug/alcohol counseling, and other terms. CP 35, 46-48.

On May 7, 2010, Mr. Cooper appeared again before the Clark County court for sentencing. RP 7-15. At sentencing, the State argued the two Texas deferred adjudications were prior convictions for purposes of calculating Mr. Cooper's offender score. RP 8-10. Mr. Cooper argued that the two Texas matters are not convictions under RCW 9.94A.030, since the Texas court deferred any adjudication of guilt in both cases. RP

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<sup>1</sup> The 2010 Washington case alleged conduct committed on July 19, 2009. CP 1-2.

<sup>2</sup> Although the deferred adjudication paperwork is dated March 11, 2010, the judge's signature is dated March 17, 2010. CP 24-49.

8. Despite Mr. Cooper's objection, the trial court included both Texas deferred adjudications in the offender score. RP 17-18.

The pertinent facts are further addressed below.

D. ARGUMENT

TEXAS DEFERRED ADJUDICATIONS CANNOT BE CONSIDERED CONVICTIONS FOR THE PURPOSE OF CALCULATING AN OFFENDER SCORE UNTIL THEY ARE REVOKED.

Washington "Court[s] ha[ve] consistently held that the State bears the constitutional burden of proving prior convictions by a preponderance of the evidence." State v. Hunley, 161 Wn. App. 919, 927, 253 P.3d 448 (citing State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)), review granted, 172 Wn.2d 1014 (2011). The burden is on the State "because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" Ford, 137 Wn.2d at 480 (quoting In re Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). For this reason, the record before the sentencing court must fully support the criminal history determination. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "This reflects fundamental principles of due process, which require that a sentencing court base its decision on

information bearing ‘some minimal indicium of reliability beyond mere allegation.’” Id. (emphasis in original, citation deleted).

1. The Sentencing Reform Act limits “conviction” to a trial court’s formal finding of guilt.

A “conviction” is “an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” RCW 9.94A.030(9).

In each of these instances, some involvement by the trial court is necessary to attach legal significance, i.e. to constitute an adjudication of guilt. RCW 9.94A.030(9). A jury’s verdict of guilty is not self-executing. Instead, a trial court judgment, which must reflect the verdict, is the adjudication. A finding of guilt by a court, again, necessarily requires a judicial finding of guilt. See CrR 6.1(d) (requiring entry of written findings following bench trial); JuCR 7.11(d) (requiring entry of written findings following juvenile adjudication). Similarly, the statute does not afford legal significance to a guilty plea until the trial court “accept[s]” the plea.

The statutory construction principle of *ejusdem generis* provides “wherever a law lists specific things and then refers to them in general, the general statements only apply to the same kind of things that were specifically listed.” Bowie v. Washington Dept. of Revenue, 171 Wn.2d

1, 12, 248 P.3d 504 (2011) (citing State v. Flores 164 Wn.2d 1, 13, 186 P.3d 1038 (2008); State v. Gamble, 168 Wn.2d 161, 191, 225 P.3d 973 (2010)). The specific examples of “conviction” in RCW 9.94A.030(9) each involve specific and formal findings of guilt by a trial court. Thus, *ejusdem generis* requires the conclusion that “conviction,” as used in the SRA, is limited to formal and specific findings of guilt by a trial court.

2. A deferred adjudication following a plea of *nolo contendere* does not involve a formal and specific entry of a finding of guilt unless and until the deferred adjudication is revoked.

As an initial matter, Washington does not permit a deferred adjudication of an adult felony. In addition, Washington neither recognizes nor permits *nolo contendere* pleas. CrR 4.2(d);<sup>3</sup> see also Reynolds v. Donoho, 39 Wn.2d 451, 455, 236 P.2d 552 (1951). As the Eleventh Circuit Court of Appeal aptly stated:

A *nolo [contendere]* plea means “no contest,” not “I confess.” It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea.

United States v. Willis, 106 F.3d 966, 969 (11th Cir. 1997).

The SRA only permits prior convictions to count in the offender score. RCW 9.94A.525; RCW 9.94A.030(9). In Washington, convictions

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<sup>3</sup> CrR 4.2(d) provides: “[a] defendant may plead not guilty, not guilty by reason of insanity, or guilty.”

require a formal adjudication of guilt following “a verdict of guilty, a finding of guilty, [or] acceptance of a plea of guilty.” RCW 9.94A.030(9).

Under Washington law an accused person may enter an Alford<sup>4</sup> plea to a charge where the accused does not admit guilt. However, an Alford plea requires the accused acknowledge the weight of the State’s case and likely success at trial. Most importantly, the court must determine a factual basis for the charge and plea and enter a formal determination of guilt. State v. Zhao, 157 Wn.2d 188, 197-98, 137 P.3d 835 (2006) (emphasis added). But under Texas law no similar adjudication occurred.

Instead, Texas law provides:

[W]hen in the judge’s opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant’s guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.

Texas C.C.P. Art. 42.12(5)(a) (emphasis added).

A defendant who appears before a trial judge and is granted a deferred adjudication under Article 42.12 has not been convicted of a crime under Texas law. Instead, an adjudication of guilt does not occur

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<sup>4</sup> North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

unless the person violates a condition of community supervision, and is then arrested and brought back before the trial court. Texas C.C.P. Art. 42.12(5)(b). A new hearing must be conducted, limited to the determination of whether to “proceed[ ] with an adjudication of guilt on the original charge.” Id. (emphasis added).

Texas’s revocation procedure, in the case of deferred adjudications, is described in Jordan v. State, 36 S.W.3d 871 (Tex. Crim. App. 2001). In Jordan, the Texas Court of Criminal Appeals held that unlike regular probation matters, “a deferred adjudication does not constitute a final conviction for the purpose of determining eligibility for probation in a subsequent prosecution.” Id. at 876. The appellate court held that “only upon revocation (i.e. adjudication of guilt) does a deferred adjudication become a conviction.” Id. (parenthetical in original). The Jordan Court found that only following the revocation of a deferred adjudication does a defendant’s situation resemble that of a defendant in a standard case, because only at that time, does he or she gain the status of a convicted person.<sup>5</sup>

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<sup>5</sup> The Jordan Court proceeds to discuss that once a defendant’s deferred adjudication has been revoked, that defendant’s remedies are limited to motions for a new trial and appellate review. Jordan v. State, 36 S.W.3d 871, 876 (Tex. Cr. App. 2001).

In Castro v. State, the Texas Court of Criminal Appeals refined Jordan, holding that a deferred adjudication “does not cause [a defendant] to suffer a conviction until community supervision is revoked and guilt is adjudicated.” 184 S.W.3d 252, 256 (Tex. Cr. App. 2005); see also Tackett v. State, 989 S.W.2d 855, 858-59 (Tex. App. 1999) (interpreting Watson v. State, 924 S.W.2d 711 (Tex. Cr. App. 1996) (stating that deferred adjudication is also not a form of punishment).

In Castro, the Texas Court of Appeals considered the jeopardy implications where a defendant enters a plea in exchange for deferred adjudication and community supervision. 184 S.W.3d at 255. The Texas Court of Appeals found no double jeopardy violation where the court accepted the defendant’s plea of guilty, where the defendant allocuted to facts establishing guilt, and where the court deferred a finding of guilt, as part of a plea bargain. Castro, 184 S.W.3d at 255. The Castro court held that in a negotiated plea proceeding, jeopardy attaches when the trial court accepts the plea bargain; however, where a court accepts a plea and then later rejects it, as in Castro, no jeopardy violation occurs. Castro, 184 S.W.3d at 256; Ortiz v. State, 933 S.W.2d 102, 107 (Tex. Cr. App. 1996).<sup>6</sup>

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<sup>6</sup> Although the Court of Appeals found Castro inapposite, it applies here because it shows a typical instance in which the Texas courts interpret Texas C.C.P. Art. 42.12(5)(a) to mean that a deferred adjudication is not a conviction until revocation. 184 S.W.3d at 256.

The only similar felony proceeding in Washington is a deferred disposition in a juvenile case pursuant to RCW 13.40.127. Courts interpreting that statute have concluded that:

When a trial court defers disposition of a juvenile offense under RCW 13.40.127, there has been no final settlement of the case. "Defer" means "to postpone" or "delay." Black's Law Dictionary 454 (8th ed.2004). To enter an order deferring the disposition means that the actual disposition will occur at some future time, depending on the juvenile's future conduct. Disposition may occur when the conviction is vacated and dismissed with prejudice under RCW 13.40.127(9) because the juvenile satisfied the terms of supervision. Or it may occur when an order of disposition is entered after a case proceeds to "disposition hearing" under RCW 13.40.150 because the juvenile did not satisfy the terms of supervision. The statute thus unambiguously provides that an order deferring disposition is not itself a disposition.

State v. M.C., 148 Wn.App. 968, 972, 201 P.3d 413 (2009). Thus, there is no finality, or adjudication, until the court takes some further step.

Similarly, under Texas law, a deferred adjudication is not a final determination of guilt, and is therefore not a conviction. Texas C.C.P. Art. 42.12(5)(a). The SRA expressly requires an "adjudication of guilt" in order for a prior offense to qualify as a "conviction." RCW 9.94A.030(9). The SRA provides a list of examples of convictions, each of which requires a formal adjudication of guilt. Nothing in this list is comparable to a deferred adjudication following a plea of *nolo contendere* in Texas.

Moreover, there is no Washington procedure or sentence that is comparable to a deferred adjudication following a plea of *nolo contendere*. The Texas proceedings lack the essential requirements for a prior “conviction” under the SRA, and should not have been included in Mr. Cooper’s SRA offender score.

3. Because deferred adjudications are not convictions, it was error to include Mr. Cooper’s Texas deferred adjudications in his offender score, and reversal is required.

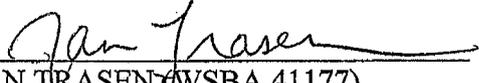
Mr. Cooper entered *nolo contendere* plea agreements as part of the deferred adjudication process on March 11, 2010. The Travis County court orders specifically state that “the best interests of society and the defendant will be served in this cause by deferring further proceedings without entering an adjudication of guilt pursuant to Article 42.12, Section 5 of the code of Criminal Procedure, as amended.” CP 46-49; 56-59. The State has not offered any evidence that Texas has moved to revoke Mr. Cooper’s deferred adjudications or adjudicated him guilty of those offenses. The State’s failure to prove that fact precludes the use of those proceedings as “convictions” in determining Mr. Cooper’s offender score. Mendoza, 165 Wn.2d 913, 920.

E. CONCLUSION

For the reasons stated above, Mr. Cooper respectfully asks this Court find that Texas deferred adjudications are not “convictions” for offender score calculation purposes in Washington. This Court should then reverse and remand his case for resentencing.

DATED this 17<sup>th</sup> day of May, 2012.

Respectfully submitted,

  
\_\_\_\_\_  
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**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. 86733-0**, 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:

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- petitioner
- Attorney for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
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Date: May 17, 2012

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