

NO. 72810-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

XHAVIER A. TERRY,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

2015 APR 28 AM 11:14

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Where the sole issue on appeal is a challenge to the offender score should this court dismiss the appeal when the defendant has served the entire confinement time imposed by the trial court?

II. STATEMENT OF THE CASE

The defendant, Xhavier Terry, was charged with one count of Unlawful Possession of a Firearm Second Degree on September 26, 2014. 1 CP 70-71. The defendant pled guilty to the charge on September 29, 2014. 1 CP 48-64. The defendant agreed that his offender score should include prior convictions for harassment and second degree taking a motor vehicle without owner's permission. 1 CP 57, 62. He argued that his prior Texas juvenile court conviction in 2004 for aggravated assault with a deadly weapon was not legally comparable to a Washington offense, and should therefore not be included in the offender score. 11/20/14 RP 5-8; 1 CP 27-47, 57. The State argued the Texas conviction was legally and factually comparable to second degree assault, felony harassment, and unlawful possession of a firearm second degree. 11/20/14 RP 4; 2 CP ____ (sub 17 State's Sentencing Memorandum).

The court concluded that the Texas conviction for aggravated assault with a deadly weapon was comparable to second degree assault, felony harassment, and unlawful possession of a firearm second degree. It therefore included that conviction in the defendant's criminal history for purposes of calculating the defendant's offender score. 11/20/14 RP 10. Because second degree assault is a violent offense, the court counted the juvenile conviction as one point. The defendant's offender score was determined to be "3." The standard range was 9-12 months confinement. 1 CP 15-16. The court sentenced the defendant to 9 months confinement. 11/20/14 RP 12; 1 CP 17. The defendant served his sentence and was released on or about February 3, 2014. 2 CP ___ (sub 38 Return of Commitment Judgment and Sentence).

III. ARGUMENT

A. WHETHER THE OFFENDER SCORE WAS CORRECTLY CALCULATED IS MOOT.

The defendant challenges the trial court's determination that his Texas conviction for aggravated assault with a deadly weapon should be included in his offender score. Out of state convictions are classified according to their comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3).

Comparability includes both a legal and a factual inquiry. State v. Morely, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the elements of the crime under the Washington statute are identical to or broader than the foreign statute then the foreign statute is legally comparable, and the court includes the prior out of state conviction in the offender score. State v. Collins, 144 Wn. App. 547, 553, 182 P.3d 1016 (2008), review denied, 165 Wn.2d 1032 (2009). If the Washington statute defines the conduct more narrowly than the foreign statute, then the court looks to whether the defendant's conduct as evidence by the records of the foreign conviction would have violated a Washington statute. Id. at 554.

If this court determined the record does not support the conclusion that the Texas conviction was either legally or factually comparable to second degree assault then the defendant would be entitled to remand for resentencing.¹ State v. Thiefault, 160 Wn.2d 409, 417, 158 P.3d 580 (2007). At resentencing the State would have an opportunity to provide new information on the question of

¹ The trial court found the Texas conviction was also comparable to harassment and unlawful possession of a firearm. Neither of these offenses had any impact on the defendant's offender score because they are non-violent offenses and therefore would score as only ½ point. The Texas conviction would add one point to the defendant's offender score only if it were comparable to second degree assault, a violent offense. RCW 9.94A.030(33),(45),(54), RCW 9.94A.525(7).

legal or factual comparability. State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014).

If at resentencing the State provided no new information, or the trial court concluded the new information the State provided did not establish that the Texas conviction was either legally or factually comparable to second degree assault in Washington, then the court would be required to calculate the defendant's offender score without the Texas conviction. State v. Tewee, 176 Wn. App. 964, 970-71, 309 P.2d 791 (2013), review denied, 179 Wn.2d 1016 (2014). In that case the defendant's offender score would be calculated as "2" based on one point for each of his prior felony convictions in Washington. Unlawful possession of a firearm second degree is a level III offense. RCW 9.94A.515. His standard range would be reduced from 4-12 months confinement to 3-8 months confinement. RCW 9.94A.510.

The defendant has already served his entire sentence however. 2 CP __ (sub 38 Return of Commitment Judgment and Sentence). Even if this court were to find that the trial court erred by including the prior Texas conviction in the defendant's offender score, and that decision resulted in a reduced term of confinement, that result would provide the defendant no effective relief where he

has already served the entire sentence under either calculation. Thus this court can provide the defendant with no effective relief, and the issue is therefore moot. Orwick v. Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). Generally a court will decline consideration of issues that are moot. State v. Gentry, 125 Wn.2d 570, 616-17, 888 P.2d 1105, cert denied, 516 U.S. 843 (1995).

The defendant has not addressed why this court should nonetheless consider his moot claim. Although an issue is moot, the court does have the discretion to consider a moot issue if it presents matters of continuing and substantial public interest. Seattle v. Johnson, 58 Wn. App. 64, 67, 791 P.2d 266 (1990). The criteria for determining whether an issue falls within this category are (1) the public or private nature of the question, (2) the need for future guidance of public officers, and (3) the likelihood that the issue will recur. Id.

Using these criteria the court should decline consideration of the defendant's scoring question. The law respecting scoring out of state convictions is well defined by the appellate courts already. This case involves only the application of that well developed law to the specific facts of this case. It is possible that some other defendant who has a prior conviction for aggravated assault with a

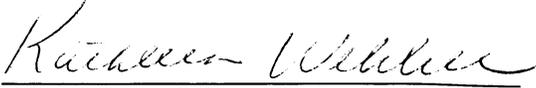
deadly weapon from Texas will come to Washington and commit a felony offense here, necessitating determination as to whether that foreign conviction should be included in his offender score. But like here, the conviction may be included in the hypothetical defendant's offender score if his conduct in Texas would have been a crime here. Whether the facts of that case would be the same as the facts in this defendant's case is more speculative. Thus it cannot be said with any certainty that the likelihood of the specific issue in this case would recur.

IV. CONCLUSION

For the foregoing reasons the State asks the court to dismiss the defendant's appeal as moot.

Respectfully submitted on April 23, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent



**Snohomish County
Prosecuting Attorney
Mark K. Roe**

Criminal Division
Joan T. Cavagnaro, Chief Deputy
Mission Building, MS 504
3000 Rockefeller Ave.
Everett, WA 98201-4060
(425) 388-3333
Fax (425) 388-3572

April 23, 2015

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

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**Re: STATE v. XHAVIER A. TERRY
COURT OF APPEALS NO. 72810-5-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Attorney(s) for Appellant

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document. I also provided a copy of proof of postage to the defendant's attorney.

27th
April

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THE STATE OF WASHINGTON,

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of April, 2015, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 27th day of April, 2015



DIANE K. KREMENICH
Legal Assistant/Appeals Unit