

66464-6-I

66464-6-I

NO. 66464-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND HEATH,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 OCT 31 PM 1:25

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DEBORAH A. DWYER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	4
1. THE TRIAL COURT PROPERLY COUNTED HEATH'S FLORIDA CONVICTIONS IN HIS OFFENDER SCORE .....	4
a. The Florida <i>Nolo Contendere</i> Pleas Are In Effect Guilty Pleas.....	5
b. The Florida "Withheld Adjudications" Count In The Offender Score In Washington.....	10
D. <u>CONCLUSION</u> .....	15

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Hudson v. United States, 272 U.S. 451,  
47 S. Ct. 127, 71 L. Ed. 347 (1926)..... 7

North Carolina v. Alford, 400 U.S. 25,  
91 S. Ct. 160, 27 L. Ed.2d 162 (1970)..... 2, 4, 8

Washington State:

In re Personal Restraint of Hilyard,  
39 Wn. App. 723, 695 P.2d 596 (1985) ..... 9

State v. Cooper, 2011 WL 4944144  
(Wn. App. Div. 2, Oct. 18, 2011)..... 12

State v. Holsworth, 93 Wn.2d 148,  
607 P.2d 845 (1980)..... 9

State v. Morley, 134 Wn.2d 588,  
952 P.2d 167 (1998)..... 5

State v. Zhao, 157 Wn.2d 188,  
137 P.3d 835 (2006)..... 8

Other Jurisdictions:

Montgomery v. State, 897 So.2d 1282 (2005)..... 11, 12

Statutes

Washington State:

RCW 9.94A.010 ..... 15  
RCW 9.94A.030 ..... 5, 6, 10, 11, 12, 13  
RCW 9.94A.525 ..... 5, 6, 11  
RCW 9.95.240..... 14  
RCW 69.50.101..... 6  
RCW 69.50.206..... 6  
RCW 69.50.4013..... 6  
Title 10 RCW..... 5, 11  
Title 13 RCW..... 5, 11

Other Jurisdictions:

F.S. 893.03..... 9  
F.S. 893.13..... 9  
F.S. 921.0021..... 11

Rules and Regulations

Washington State:

CrR 4.2..... 7, 10

Other Authorities

Black's Law Dictionary 1048 (6<sup>th</sup> ed. 1991) ..... 6  
Sentencing Reform Act of 1981 (SRA)..... 5, 6, 10, 14

A. ISSUES

1. Does a "*nolo contendere*" plea from Florida result in a conviction that counts in the defendant's offender score for a subsequent felony in Washington?

2. Does a "withheld adjudication" from Florida count as a prior conviction for purposes of calculating the defendant's offender score for a subsequent felony in Washington?

B. STATEMENT OF THE CASE<sup>1</sup>

Defendant Raymond Heath was charged by amended information with Assault in the Second Degree and Assault in the Fourth Degree. CP 1-6. A jury found him guilty as charged. CP 94, 97.

At the sentencing hearing, the dispute centered on the offender score: the State believed that Heath's score was three, while Heath claimed that it should be one. RP<sup>2</sup> 2. While both parties agreed that Heath's prior Whatcom County conviction for

---

<sup>1</sup> The convictions themselves are not in dispute in this appeal. Heath challenges only the calculation of his offender score. The evidence introduced at trial is thus not relevant to the issues on appeal, and will not be set out in detail in this brief.

<sup>2</sup> "RP" refers to the verbatim report of proceedings at the sentencing hearing, held on December 3, 2010.

unlawful possession of a stolen vehicle under No. 09-1-00411-3 (Ex. 1) should count, Heath challenged the use of two prior Florida convictions for possession of cocaine under Nos. 02-14922 and 02-20533 (Ex. 2) in calculating his offender score. CP 113, 134-35; RP 2-4.

Heath's argument below was twofold. First, he argued that there was no factual basis for the pleas of *nolo contendere* ("no contest") in the Florida cases. In support of this argument, Heath told the trial court that "a plea of no contest should be treated identically to an Alford plea."<sup>3</sup> CP 120. Second, Heath argued that there was no showing that he was informed of his constitutional rights when he entered the Florida pleas. CP 113-21; RP 33.

The State responded by producing the "Plea of Guilty or No Contest to Criminal Charges in Circuit Court" for each Florida conviction. Ex. 2. The plea forms refuted Heath's arguments. Each form listed the constitutional rights that Heath was giving up by entering the plea, and Heath had initialed each of these rights. Ex. 2. In addition, each form contained the following statement

---

<sup>3</sup> Heath takes the opposite position in this appeal. He argues that, while a plea under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970) is valid in Washington, a plea of *nolo contendere* in Florida is somehow different enough that it cannot support a conviction that counts in his Washington offender score. Brief of Appellant at 10.

above the judge's signature: "I also find that the facts which the prosecution is prepared to prove are sufficient to sustain the plea."

Ex. 2.

In further support of its position, the State presented the testimony of Keri Fleck, Assistant State Attorney in Broward County, Florida. RP 9-27. Fleck had more than four years of experience as a prosecutor under Florida law. RP 9. Fleck said that, for purposes of Florida criminal law, there was no difference between a "straight plea of guilty" and a no contest plea.<sup>4</sup> RP 23.

Fleck also explained what was meant by "withhold adjudication." A defendant whose case is resolved in this manner is permitted to tell future employers (with the exception of law enforcement and teaching) that he or she has no felony convictions. RP 24, 26. The scoring consequences are the same, however: "If you have a withhold [adjudication], you do have a prior conviction for purposes of sentencing on your new case." RP 25.

The trial court found that the two Florida convictions were properly counted in Heath's offender score for purposes of

---

<sup>4</sup> This conclusion is supported by the fact that Florida uses the same plea form for either plea. Ex. 2.

sentencing in this case. RP 35-36. The court entered written findings (CP 153-56), including the following conclusions of law:

II. The Florida plea of "no contest" is functionally equivalent to the Washington Alford plea. Furthermore, Florida appears to have followed all applicable Constitutional safeguards . . . Thus, a no contest plea in Florida does create a conviction that the State of Washington must recognize.

III. The Florida sentence of "withhold adjudication" is a grant of leniency allowing certain convictions to be withheld from potential employers. However, such a sentence does not negate the existence of the conviction created by a no contest or guilty plea. Thus, a felony conviction in Florida where a defendant is sentenced to "withhold adjudication" counts towards a person's felony "score" in Washington, assuming all other necessary conditions are met.

CP 155.

The court imposed a standard-range sentence totaling 14 months of confinement. CP 122-33; RP 42-43.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY COUNTED HEATH'S FLORIDA CONVICTIONS IN HIS OFFENDER SCORE.

Heath contends that his Florida convictions are not "convictions" for purposes of Washington law, and thus should not have counted in his offender score for his current felony assault

conviction. He relies for this position both on the nature of his Florida pleas (*nolo contendere*) and on the nature of the sentences ("withhold adjudication"). Heath is wrong on both counts.

a. The Florida *Nolo Contendere* Pleas Are In Effect Guilty Pleas.

Washington defines a "conviction" as "an adjudication of guilt pursuant to Title 10 or 13 RCW," and notes that a conviction "includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). For purposes of calculating the offender score, a "prior conviction" is a conviction that exists before the date of sentencing on the current offense. RCW 9.94A.525(1). If the present conviction is for a violent offense, each prior adult nonviolent felony conviction counts as one point. RCW 9.94A.525(7).

An out-of-state conviction is classified according to the comparable Washington offense. RCW 9.94A.525(3). Out-of-state convictions need not comply with Washington criminal procedures before they may be counted as part of the offender score under the Sentencing Reform Act of 1981 (SRA). State v. Morley, 134 Wn.2d 588, 596-97, 952 P.2d 167 (1998). "The Legislature intended

sentencing courts to include out-of-state convictions when making sentencing calculations under the SRA." Id. at 597.

Heath's two prior Florida convictions for possession of cocaine are comparable to the Washington offense of possession of cocaine.<sup>5</sup> Ex. 2; RCW 69.50.101(d), 69.50.206(b)(4), 69.50.4013. Under Washington law, the Florida convictions are for nonviolent offenses. RCW 9.94A.030(32), (53); RCW 69.50.4013(b). Heath's current conviction for assault in the second degree is a conviction for a violent offense. CP 94, 122; RCW 9.94A.030(53)(a)(viii). Thus, Heath's Florida convictions should each count as one point in his offender score. RCW 9.94A.525(7).

Heath nevertheless challenges the inclusion of the two points resulting from the Florida convictions in his offender score, in part because they resulted from pleas of *nolo contendere*. A *nolo contendere* plea is defined as "a plea in a criminal case which has a *similar legal effect as pleading guilty*." Black's Law Dictionary 1048 (6<sup>th</sup> ed. 1991) (italics added). "The principal difference between a plea of guilty and a plea of *nolo contendere* is that the latter may

---

<sup>5</sup> Heath has never disputed that his Florida convictions are substantively comparable to Washington felonies.

not be used against the defendant in a civil action based upon the same acts." Id.

The United States Supreme Court, in Hudson v. United States, 272 U.S. 451, 47 S. Ct. 127, 71 L. Ed. 347 (1926), addressed the question whether a prison sentence may be imposed following acceptance of a *nolo contendere* plea. After examining the common-law history of the plea, the Court observed that the plea had changed over time:

But, even if we regard the implied confession as a petition which in Hawkins' time had to be accepted as tendered, in modern practice it has been transformed into the formal plea of *nolo contendere*. Like the implied confession, this plea does not create an estoppel; but, *like the plea of guilty, it is an admission of guilt for the purposes of the case.*

Hudson, 272 U.S. at 455 (italics added).

In Washington, "[a] defendant may plead not guilty, not guilty by reason of insanity, or guilty." CrR 4.2(a). The plea documents from Florida support the conclusion that the *nolo contendere* plea is in practical effect a plea of guilty, i.e., it is an admission of guilt for the purpose of the case, and results in a conviction that must be counted in Washington. Significantly, the plea statement is entitled: "Plea of Guilty or No Contest to Criminal Charges in Circuit Court."

Ex. 2. Thus, a defendant fills out the same plea form, and gives up the same constitutional rights, no matter what the plea is entitled.

On his Florida plea forms, Heath acknowledged that "a plea of No Contest or Nolo Contendere is a plea of convenience. If I plead No Contest I know that I am not admitting that I did anything. I am saying that I consider it to be in my best interest to resolve the matter at this time by giving up the rights listed on the front and back of this form." Ex. 2. This is remarkably similar to an Alford<sup>6</sup> plea in Washington, which "allows the defendant to take advantage of a plea offer without having to admit that his or her conduct satisfies the elements of the charged crime." State v. Zhao, 157 Wn.2d 188, 199-200, 137 P.3d 835 (2006).

The Florida plea forms go on to list a number of constitutional rights, including the right to a trial before a jury or a judge, the right to require the State to prove the defendant's guilt beyond a reasonable doubt, and the right to the presumption of innocence. Ex. 2. Heath affirmed that "[b]y pleading Guilty or No Contest, I acknowledge that I wish to give up the above listed

---

<sup>6</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).

rights." Ex. 2. Heath also affirmed his understanding that "if I have any felony convictions in the future, what happens today will be a factor in determining my punishment for that felony." Ex. 2. Heath then checked the box indicating that he was pleading "[n]o contest to the above charges." Ex. 2.

The trial court found the pleas "freely and voluntarily made with a knowing and intelligent waiver of rights." Ex. 2. The court also found as to each plea that "the facts which the prosecution is prepared to prove are sufficient to sustain the plea." Ex. 2.

Heath's Florida *nolo contendere* pleas thus fulfill the requirements for a valid guilty plea. The plea forms demonstrate that Heath was aware that he was waiving the rights to a jury trial, to remain silent, and to confront his accusers; he was aware of the essential elements of the crimes charged;<sup>7</sup> and he was aware of the direct consequences of his pleas. See In re Personal Restraint of Hilyard, 39 Wn. App. 723, 727, 695 P.2d 596 (1985) (citing State v. Holsworth, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980)). The

---

<sup>7</sup> The elements of possession of cocaine are set out in the information for each charge, as well as the appropriate statutes (F.S. 893.03(2)(a) 4; F.S. 893.13(6)(a)). Ex. 2. Heath acknowledged in his Florida pleas that he was pleading guilty to possession of cocaine. Ex. 2.

Florida court explicitly determined that Heath's pleas were "freely and voluntarily made with a knowing and intelligent waiver of rights," and that "the facts which the prosecution is prepared to prove are sufficient to sustain the plea." Ex. 2; see CrR 4.2(d).

Once the Florida court accepted Heath's pleas, Heath had convictions for the charged crimes for purposes of his Washington offender score. The definition of "conviction" in the SRA provides that a conviction comes into existence upon acceptance of a plea of guilty. RCW 9.94A.030(9). These prior convictions were properly used in computing Heath's offender score in Washington for his current felony assault conviction, regardless of the sentence imposed by the Florida court.

b. The Florida "Withheld Adjudications" Count In The Offender Score In Washington.

Heath nevertheless argues that his Florida convictions should not have been included in his offender score because his sentence in that state was designated "withhold adjudication." Ex. 2. In making this argument, he relies in part on federal cases

that interpreted Florida law in a way that has since been contravened by the Supreme Court of Florida.<sup>8</sup>

Heath also relies on the difference in the statutory language between the definitions of "conviction" in Washington and Florida. In Washington, 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 Florida, a "conviction" is "a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." F.S. 921.0021(2).

The simple answer is that Heath's *nolo contendere* plea, which was in effect a plea of guilty, was itself a "conviction" for purposes of RCW 9.94A.030(9) as soon as the Florida court accepted the plea. Thus, whether Florida labels a conviction an "adjudication" or a "determination," the effect of Heath's pleas is the same -- Heath has prior convictions for purposes of calculating his offender score under RCW 9.94A.525(1).

---

<sup>8</sup> Heath acknowledges the Florida Supreme Court's decision in Montgomery v. State, 897 So.2d 1282 (2005), wherein the court held that "withheld adjudications" are prior convictions in Florida for purposes of subsequent sentencings, but he nevertheless persists in relying on pre-Montgomery federal case law interpreting Florida law. Brief of Appellant at 6-7.

Moreover, there is no question that Heath's prior "withheld adjudications," which arose out of his *nolo contendere* pleas, would count as prior convictions in Florida for purposes of scoring on subsequent crimes. In Montgomery v. State, 897 So.2d 1282 (2005), the Florida Supreme Court resolved a split in the lower Florida appellate courts as to whether a plea of *nolo contendere* followed by a "withhold of adjudication" qualified as a prior "conviction" for purposes of a subsequent sentencing. The court determined conclusively that, for sentencing purposes in Florida, a prior "no contest" plea, even where adjudication was withheld, is a prior conviction. 897 So.2d at 1286.

The Washington Court of Appeals recently addressed a similar issue -- whether two Texas "deferred adjudications" were properly counted as "convictions" under RCW 9.94A.030(9) for purposes of calculating the defendant's offender score in Washington. State v. Cooper, 2011 WL 4944144 (Wn. App. Div. 2, Oct. 18, 2011). The defendant in that case argued that his "deferred adjudications" were not "convictions" as defined in Washington, because the Texas trial court had deferred entering

adjudications of guilt after accepting his guilty pleas to the two offenses.<sup>9</sup> Id. at \*2.

Relying on the plain language of RCW 9.94A.030(9), which includes "acceptance of a plea of guilty" within the definition of "conviction," the court noted that the Texas court had clearly "accepted" Cooper's guilty pleas. Id. at 3. The Court of Appeals also found it significant that, under Texas law, deferred adjudications could be considered in determining the penalty for a subsequent offense. Id. at \*3 n.5. The court held that the prior deferred adjudications from Texas were properly included as "convictions" in Cooper's offender score in Washington. Id.

Like Texas, Florida treats its "withheld adjudications" as convictions for purposes of sentencing a defendant when he or she commits subsequent crimes. Florida merely gives a defendant, under certain circumstances, a "shield" to aid him in job-seeking, allowing him to say in most (but not all) instances that he has no prior criminal convictions. This "shield" does not extend to

---

<sup>9</sup> While Heath's Florida pleas were not called "guilty pleas," but rather *nolo contendere* or "no contest" pleas, they were for all practical purposes and effects guilty pleas, as argued above.

subsequent criminal convictions in Florida, and it should not extend to subsequent convictions in Washington.

Counting Heath's prior "withheld adjudications" in calculating his offender score for subsequent crimes committed in Washington comports with legislative intent in this state. In Washington, even where a defendant has fulfilled all of the statutory prerequisites and has been allowed to withdraw his plea of guilty and enter a plea of not guilty, and has been "released from all penalties and disabilities," the legislature has determined that the conviction may nevertheless be used in determining punishment for future offenses: "[I]n any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed." RCW 9.95.240(1). There is thus every reason to believe that the legislature intended convictions like the Florida ones at issue here to be counted in the offender score for a subsequent criminal offense.

More generally, counting Heath's prior "withheld adjudications" in his Washington offender score is in accordance with the overall purposes of the SRA. One of those purposes is to ensure that punishment is "proportionate to the seriousness of the

offense *and the offender's criminal history.*" RCW 9.94A.010(1) (italics added). The Florida courts already offered Heath "an opportunity to improve [himself]"<sup>10</sup> by giving him the benefit of the "withhold adjudication" procedure. Now that Heath has failed to take advantage of this opportunity, and has chosen to reoffend, Washington should do as Florida would in this situation, and count the prior "withheld adjudications" in Heath's offender score for his new offense.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Heath's judgment and sentence for Assault in the Second Degree.

DATED this 31<sup>st</sup> day of October, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DEBORAH A. DWYER, WSBA #18887  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

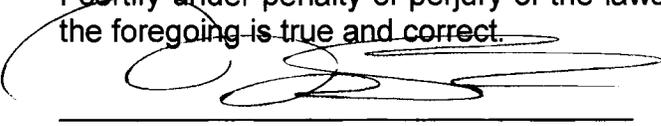
---

<sup>10</sup> RCW 9.94A.010(5).

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Susan F. Wilk**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. RAYMOND HEATH**, Cause No. **66464-6-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

10-31-2011  
Date