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SUPREME COURT
STATE OF WASHINGTON

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No. 83797-0

CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

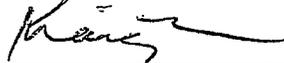
v.

JASON A. WILSON
Appellant.

ANSWER TO PETITION FOR REVIEW

THE HONORABLE GORDON L. GODFREY, JUDGE

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 

KRAIG C. NEWMAN
Senior Deputy Prosecuting Attorney
WSBA #33270

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON


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STATEMENT OF CASE

On December 10, 2007, the defendant was sentenced on two counts of Identity Theft in the Second Degree to a sentence of 43 months in the custody of the Department of Corrections. (CP 46-53). This judgment and sentence was the result of a plea agreement between the defendant the State, which was filed with the court. (CP 38-42). In that plea agreement, a criminal history was listed for the defendant. Also in the plea agreement is a section where the defendant agrees that his offender score is eight on each count. In writing near the section is a statement that the defendant intended to request a sentencing hearing. This portion was crossed out and the defendant initialed the section that says, "The defendant agrees that the following is accurate."

The plea agreement and judgment and sentence listed a VUCSA out of King County from March 2005 and counted it as one point on his offender score. On the plea agreement there is a notation next to this entry that states, "pled attempt." In the state of Washington an attempt to a felony VUCSA is a felony.

After sentencing, the defendant was informed by another attorney that one of his listed felonies was, in fact, pleaded as a misdemeanor. This was done in King County Superior Court.

The appellant argued to the court of Appeals that this error in the Judgment and Sentence justified re-sentencing without the necessity of withdrawal of his guilty plea. The State argued that the error was one of

fact and not law as explained in *State v. Collins*, 144 Wash App. 547, 182 P.3d 1016 (2008). The Court of Appeals did not reach these issues because it found that it did not matter whether the anticipatory offense was a misdemeanor or a felony. The Court stated that pursuant to RCW 9.94A.525(4) any anticipatory offense to a felony would count as the completed crime for the purposes of the offender score.

The State has been order to respond in the petition for review.

ARGUMENT

The state has been unable to find any case law to support the Court of Appeals holding. A case on point, *State v. Sherwood*, 71 Wash.App. 481, 860 P.2d 407 (1993), which ruled that such conviction should not be included in an offender score, was cited by the Court of Appeals in its written opinion. There was no explanation of the reversal. Moreover, statutory construction and English usage suggest that the word "felony" modifies the phrase "anticipatory offenses," meaning anticipatory offenses that are felonies.

The Court of Appeals cites, in its opinion, *State v. Sherwood*, 71 Wash.App. 481, 860 P.2d 407 (1993), which held that convictions such as the one at issue should not be included in an offender score pursuant to the SRA. Sherwood was convicted after jury trial of the crime of Delivery of Cocaine. *Id.* at 408. At sentencing the State asked the court to include, over the objection of the defendant, two prior Attempted Possession of

Cocain conviction, in the defendants offender score. The State argued that these conviction were felonies in the State of Washington. *Id.* at 410.

The defendant argued that the conviction were misdemeanors because the final informations in those cases cited RCW 9A.28.020 instead of the Uniform Control Substances Act attempt statute. *Id.* at 411. The court ruled that the State was foreclosed from claiming that these conviction were felonies when it negotiated the resolution of these case as misdemeanors. The Court of Appeals ultimately ordered the case remanded for re-sentencing without the inclusion of the misdemeanors.

It is a well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." *State v. Roggenkamp*, 153 Wash.2d 614, 106 P.3d 196 (2005). The legislature could have written RCW 9.94A.525 as "[s]core prior convictions for anticipatory offenses (attempt, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed crimes." if the legislature intended the result the Court of Appeals advocates. In this sentence the word "felony" is not required. If the completed crime was a felony then the anticipatory offense would be included in the offender score, and if the completed offense was a misdemeanor then it would not be included.

The word "felony" in RCW 9.94A.525 must have meaning. It adds no meaning if all that is important to the calculation is the nature of the completed offense, whether the completed offense is include has already been defined in another part of the statute. Therefore, the word "felony"

must pertain to the nature of the anticipatory offense. Whether the conviction was a misdemeanor or a felony. Be this reasoning only felon conviction for anticipatory offenses would be included in the offender score.

Finally, common usage would suggest that the word "felony" modifies the phrase "anticipatory offenses." Noun modifiers modify the word that directly follow them. In this case there are two noun modifiers "felony" and "anticipatory." The "anticipatory" clearly modifies "offense." Therefore, "anticipatory offenses" is a noun phrase, and the word "felony" is its modifier. These three words together describe offense that are felonies and anticipatory. In order that a anticipatory offense be included in the offender score it must be a felony.

CONCLUSION

This is not a concession of my original argument on this issue. I stand by my brief to the Court of Appeals and its interpretation of the holding in *State v. Collins*, 144 Wash App. 547, 182 P.3d 1016. The Court of Appeals did not resolve dispute. The defendant agreed to the inclusion of this conviction in his offender score, because of this agreement the true issue is whether the error on the Judgment and Sentence was one of law or fact. An error of law is one that is evident on the fact of the Judgment and Sentence. The Judgment and Sentence in this case; not the Judgment and Sentence in King County. In this case the

Judgement and Sentence would appear to any lawyer in the State to be correct, because Attempted Possession of a Controlled Substance is a felony in the State of Washington. Only by the introduction of facts pertaining to plea negotiation could an attorney concluded that this conviction was in fact a misdemeanor.

DATED this 18 day of March, 2010.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Senior Deputy Prosecuting Attorney
WSBA #33270

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7 THE SUPREME COURT OF WASHINGTON

8 STATE OF WASHINGTON,

9 Respondent,

No.: 83797-0

DECLARATION OF MAILING

10 v.

11 JASON A. WILSON,

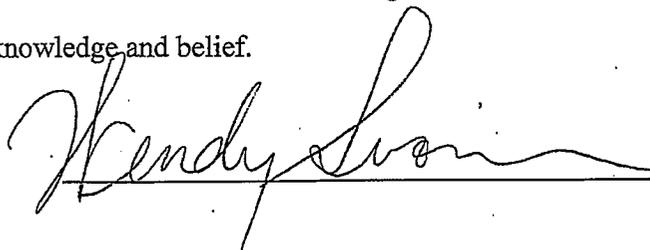
12 Appellant.

13 **DECLARATION**

14 I, Wendy Sivonen hereby declare as follows:

15 On the 19th day of March, 2010, I mailed a copy of the Answer to Petition for Review to
16 Vanessa Mi-jo Lee; Attorney at Law; 1511 3rd Avenue, Suite 701; Seattle, WA 98101-3647, and
17 Jason A. Wilson; c/o Vanessa Mi-jo Lee; Attorney at Law; 1511 3rd Avenue, Suite 701; Seattle, WA
18 98101-3621, by depositing the same in the United States Mail, postage prepaid.
19

20 I declare under penalty of perjury under the laws of the State of Washington that the
21 foregoing is true and correct to the best of my knowledge and belief.

22 
23
24

25 FILED AS
26 ATTACHMENT TO

27 DECLARATION OF MAILING -1-

ORIGINAL

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