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Supreme Court No. _____

(Court of Appeals No. 40833-3-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

JOHN GEORGE COOPER,
Petitioner.

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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COURT OF APPEALS
DIVISION II

PETITION FOR REVIEW

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STATE OF WASHINGTON

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A. IDENTITY OF PETITIONER

John George Cooper, through his attorney, asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS DECISION

Mr. Cooper seeks review of the Court of Appeals' opinion in State of Washington v. Cooper, No. 40833-3-II. A copy of the opinion is attached as an Appendix.

C. ISSUE PRESENTED FOR REVIEW

Before a sentencing court may include a prior out-of-state adjudication in an offender score, the State must prove the adjudication is final and guilt has been adjudicated. Where the State failed to show that two prior Texas deferred adjudications were adjudications of guilt, did the court err by including these findings in the offender score?

D. STATEMENT OF THE CASE

On May 3, 2010, John Cooper entered a guilty plea to attempting to obtain a false prescription for vicodin and bail jumping. CP 6; RP 5. The trial court accepted the plea of guilty. RP 6.

On May 7, 2010, Mr. Cooper appeared before the court again for sentencing. RP 7-15. At sentencing, the State contended two Texas adjudications were prior convictions for purposes of calculating Mr. Cooper's offender score. RP 8-10. Mr. Cooper argued that the two Texas matters should not count as convictions under RCW 9.94A.030, as the Texas court deferred his adjudications of guilt in both cases. RP 8. Despite Mr. Cooper's objection, the trial court included both Texas deferred adjudications in the offender score. RP 17-18.

On appeal, Mr. Cooper argued that the trial court erred when it included the two Texas deferred adjudications in his offender score. The Court of Appeals rejected Mr. Cooper's argument and affirmed his sentence. Mr. Cooper seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

WHERE THE COURT ERRED IN INCLUDING TWO TEXAS DEFERRED ADJUDICATIONS IN MR. COOPER'S OFFENDER SCORE, THE COURT OF APPEALS DECISION IS IN CONFLICT WITH A DECISION OF THE SUPREME COURT, REQUIRING REVIEW UNDER RAP 13.4(b)(1)

The trial court concluded that Mr. Cooper's offender score included two prior Texas deferred adjudications. In August 2008, Mr. Cooper had been charged in Travis County, Texas, with one

misdemeanor and one felony. CP 38-67; RP 16-18. The conclusion to include these offenses in the offender score was erroneous, because the Texas adjudications were not "convictions" under RCW 9.94A.030.

a. A sentencing court may only include prior out of state offenses in an offender score if they are "convictions." A defendant's offender score establishes the range a sentencing court may use in determining his or her sentence. RCW 9.94A.530; RCW 9.94A.712(3). The court calculates the offender score based upon its findings of the defendant's criminal history, which is a list of the defendant's prior convictions. RCW 9.94A.030(14); RCW 9.94A.525. In Washington, Titles 10 and 13 define a conviction as an adjudication of guilt. RCW 9.94A.030(11). This may include a verdict of guilty, a finding of guilty, or an acceptance of a plea of guilty. Id.

In State v. Morley, 134 Wn.2d 588, 595-600, 952 P.2d 167 (1998), this Court held that out of state convictions which include a verdict or finding of guilty or the acceptance of a plea of guilty are convictions under the Sentencing Reform Act (SRA). The offender score includes only prior convictions for felony offenses. RCW

9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994).

b. Under Texas law, a deferred adjudication is not an adjudication of guilt; therefore, it is not a conviction. Article 42.12 of the Texas Code of Criminal Procedure governs deferred adjudications and community supervision. Section 5(a) of Article 42.12 specifically sets out the terms of the Texas deferred adjudication statute. Under Texas law,

[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, therefore, has not been convicted of a crime under Texas law. In fact, in order for an adjudication of guilt to occur upon the violation of a condition of community supervision, a defendant must be physically detained, 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 appellate courts recognize that a deferred adjudication is not considered a conviction. Castro v. State, 184 S.W.3d 252, 256 (Tex. Cr. App. 2005). In Castro, the Texas appellate court held that deferred adjudication “does not cause [a defendant] to suffer a conviction until community supervision is revoked and guilt is adjudicated.” Id. See Jordan v. State, 36 S.W.3d 871, 876 (Tex. Cr. App. 2001); 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).

c. The Court of Appeals decision affirming the inclusion of the Texas deferred adjudications in the offender score is in conflict with decisions of this Court. Mr. Cooper received deferred adjudications for his two 2008 offenses in Travis County, Texas. CP 38-59. Texas law is clear that a deferred adjudication is not a finding of guilt, and is therefore not a conviction. Texas C.C.P. Art. 42.12(5)(a).

Moreover, Mr. Cooper entered a plea agreement as part of the deferred adjudication process on March 17, 2010. The Travis

County court order specifically states 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; Appendix A. An identical court order was signed and filed in reference to Mr. Cooper’s Texas misdemeanor. CP 56-59; Appendix B.

It was error to include the deferred adjudications in Mr. Cooper’s offender score, as they were not “convictions” under Washington law. RCW 9.94A.030(11);¹ Morley, 134 Wn.2d at 595-600; Wiley, 124 Wn.2d 679.

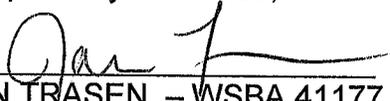
¹ “Conviction” means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty. RCW 9.94A.030(11).”

F. CONCLUSION

Mr. Cooper was denied substantial justice in the proceedings, and respectfully requests that review be granted pursuant to RAP 13.4(b)(1).

DATED this 15th day of November, 2011.

Respectfully submitted,



JAN TRASEN – WSBA 41177
Washington Appellate Project (91052)
Attorney for Petitioner

APPENDIX

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 40833-3-II

Respondent,

v.

JOHN GEORGE COOPER,

PUBLISHED OPINION

Appellant.

Hunt, P.J. — John George Cooper appeals his sentences imposed following his guilty plea convictions for bail jumping and for obtaining or attempting to obtain a controlled substance by fraud or forged prescription. He argues that the trial court erred when it determined his two Texas deferred adjudications counted as “conviction[s]” under RCW 9.94A.030(9)¹ for offender score calculation purposes. We hold that the trial court properly considered these Texas adjudications as “convictions” for offender score calculation purposes, because, despite not having “entered” these adjudications, the Texas court had accepted Cooper’s guilty pleas to these charges. Accordingly, we affirm.

¹ Although the legislature has amended RCW 9.94A.030 several times since the dates of Cooper’s offenses on July 19, 2009, and October 8, 2009, these amendments are not relevant to the issues before us in this appeal. See former RCW 9.94A.030(12) (2008); former RCW 9.94A.030(9) (2009). Accordingly, we cite the current version of the statute throughout.

FACTS

On May 3, 2010, the trial court accepted John George Cooper's pleas of guilty to charges of bail jumping and obtaining or attempting to obtain a controlled substance by fraud or forged prescription. At sentencing, Cooper and the State disagreed about whether his offender score was three or five points. Cooper asserted that his offender score should not include two 2008 Texas offenses, a theft of property of more than \$1,500 but less than \$20,000, and a "theft from a person," because these offenses were "deferred adjudications" and not "convictions" as defined by RCW 9.94A.030(9). CP at 21; VRP at 7. The State argued that Cooper's two deferred adjudications were "convictions" under RCW 9.94A.030(9) because the Texas court had accepted Cooper's guilty pleas, which were themselves convictions.

The State presented certified records of the deferred Texas adjudications. The guilty plea documents showed that Cooper had agreed to a four-year "deferred adjudication" for the property theft² and a two-year "deferred adjudication" for the theft from a person.³ The plea forms listed several "Admonishments,"⁴ including one describing a deferred adjudication as follows:

8. Deferred Adjudication: If the Court grants you deferred adjudication community supervision, on violation of any imposed condition, you may be arrested and detained. You will then be entitled to a hearing limited to the determination by the Court of *whether to proceed with an adjudication of guilt. After adjudication of guilt*, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision and your right to appeal continue as if adjudication of guilt had not been deferred. *Upon*

² CP at 42.

³ CP at 52.

⁴ CP at 42, 52.

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adjudication of your guilt, the Court may assess your punishment at any term of years and any fine within the range of punishment.

CP at 43 (emphasis added), 53 (emphasis added).

When Cooper pleaded guilty to the two charges, he “confess[ed] and admit[ed]” “each and every element” of the charged offenses. CP at 44, 54. Both guilty plea forms contained the following finding entered by the Texas court:

The Court hereby finds that (1) the Defendant was sane when the alleged offense was committed, is mentally competent, is represented by competent counsel, understands the nature of the charges against him/her, and has been warned of the consequences of a plea of guilty or *nolo contendere*, including the minimum and maximum punishment provided by law; (2) the attorney for the Defendant and the State consent and approve the waiver of a trial by jury and agree to stipulate to the evidence in this case; and (3) the Defendant understands the consequences of his plea, and the *Defendant's plea of guilty*, statements, waivers, stipulations, and judicial confession were freely, voluntarily, knowingly and intelligently made. *The Court hereby accepts the Defendant's plea of guilty* and approves the waiver of a jury trial and the consent to stipulate evidence.

CP at 45 (second and third emphasis added), 55 (second and third emphasis added).

The Texas court then deferred further proceedings by entering orders stating that (1) the Texas court had arraigned Cooper, (2) Cooper had pleaded guilty, and (3) the Texas court had “found sufficient evidence to find the defendant guilty of the offense” charged. CP at 46, 56.

These orders continued:

However, . . . the Court being of the opinion 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, it is therefore **CONSIDERED, ORDERED** and **ADJUDGED** that further proceedings in this cause shall be and are hereby deferred and the defendant placed on Community Supervision in this cause for [the specified period] from this date . . . subject [to numerous conditions of community supervision].

CP at 46 (italics and first bold added), 56 (italics and first bold added).

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Based on these documents and the parties' arguments in the instant case, the trial court agreed with the State and included Cooper's two deferred Texas adjudications in calculating his offender score. Cooper appeals this component of his offender score and the extent to which it increased his sentence.

ANALYSIS

This case involves an issue of first impression: whether Washington courts can consider Texas deferred adjudications as "convictions" for offender score calculation purposes. Cooper argues that these deferred adjudication are not "convictions" under RCW 9.94A.030(9) because the Texas trial court had deferred *entering* adjudications of guilt after accepting his guilty pleas to those two offenses. We disagree.

Resolving this issue requires us to interpret RCW 9.94A.030's definition of "conviction." We review questions of statutory construction *de novo*. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). When interpreting a statute, we first look to its plain language. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). If the plain language is subject to only one interpretation, the inquiry ends because plain language does not require construction. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Such is the case here.

RCW 9.94A.030(9) of the Sentencing Reform Act provides:

"Conviction" means 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*.

(Emphasis added). This plain language of RCW 9.94A.030(9) expressly provides that acceptance of a guilty plea is sufficient to establish a prior "conviction" for offender score and sentencing purposes. *See also State v. Morley*, 134 Wn.2d 588, 597-98, 952 P.2d 167 (1998)

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(foreign adjudications of guilt that do not comply with Titles 10 or 13 are sufficient to establish convictions under RCW 9.94A.030(9)); *State v. Partida*, 51 Wn. App. 760, 762, 756 P.2d 743 (“‘Conviction’ [under RCW 9.94A.030] means an adjudication of guilt and includes acceptance of a plea of guilty.”), *review denied*, 111 Wn.2d 1016 (1988).

The documents the State supplied at Cooper’s sentencing showed that, although the Texas court had deferred entering the adjudications in the court records, it had clearly accepted Cooper’s guilty pleas, which it had entered in the court records. Thus, the statute’s plain language supports the trial court’s inclusion of Cooper’s two Texas deferred adjudications as “convictions” in his offender score.⁵

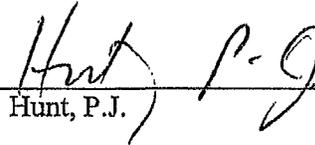
⁵ Citing *Castro v. State*, 184 S.W.3d 252 (Tex. App. 2005), *petition for review refused*, No. 07-04-0290-CR (Feb. 8, 2006), Cooper argues that Texas appellate courts have recognized “a deferred adjudication is not considered a conviction.” Br. of Appellant at 4. Again, we disagree; *Castro* does not apply here. In *Castro*, the Texas Court of Appeals addressed whether jeopardy had attached when the trial court initially accepted the defendant’s guilty plea in a deferred disposition but then later rejected the plea during the same hearing when it became clear that the defendant was not admitting to having committed the charged offense. *Castro*, 184 S.W.3d at 255. The Texas Court of Appeals held that (1) the initial guilty plea was not a conviction for double jeopardy purposes because the trial court had later rejected the plea, and (2) the deferred adjudication did “not cause him to suffer a conviction until community supervision is revoked and guilt is adjudicated.” *Castro*, 184 S.W.3d at 256 (citing *Jordan v. State*, 36 S.W.3d 871, 876, (Tex. Crim. App. 2001)). Thus, *Castro* addresses what is a “conviction” in the factual double jeopardy context of that case.

Castro does not address a specific statutory definition of “conviction” for offender score sentencing purposes under either Texas law or RCW 9.94A.030(9). Similarly, the Texas case on which *Castro* relied, *Jordan*, addressed whether deferred adjudications were “convictions” for purposes of determining probation eligibility, not for offender score sentencing purposes under either Texas law or RCW 9.94A.030(9). *Jordan*, 36 S.W.3d at 875-76. Therefore, in addition to having no precedential value in our state, these Texas cases do not even address the issue before us.

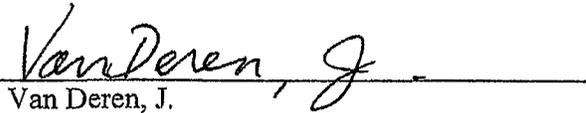
In contrast, however, the Texas criminal code does enlighten the issue before us. It specifically provides that courts may consider deferred adjudications in determining the penalty for a subsequent conviction even if the court has previously dismissed and discharged the deferred adjudication:

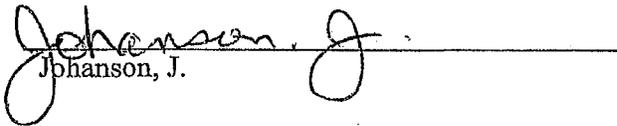
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RCW 9.94A.030(9)'s plain language includes acceptance of a guilty plea as a "conviction" for offender score and sentencing purposes. The documentation the State presented here showed that the Texas court had accepted Cooper's guilty pleas, which Texas law expressly allows later sentencing courts to consider (despite the deferred status of corresponding adjudications). *See* Tex. Code Crim. Proc. Ann. art. 42.12 § 5(c)(1). We hold, therefore, that the trial court properly included Cooper's two prior Texas deferred adjudications in his offender score. Accordingly, we affirm his sentence.


Hunt, P.J.

We concur:


Van Deren, J.


Johanson, J.

[U]pon conviction of a subsequent offense, the fact that the defendant had previously received community supervision with a deferred adjudication of guilt shall be admissible before the court or jury to be considered on the issue of penalty[.]

Tex. Code Crim. Proc. Ann. art. 42.12 §5(c)(1). The plain language of the Texas sentencing statute contravenes the proposition that Cooper unsuccessfully tries to extract from *Castro*.

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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 document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 40833-3-II**, 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:

- respondent Abigail Bartlett, DPA
Clark County Prosecutor's Office
- appellant
- Attorney for other party

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MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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