

NO. 86733-0

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JOHN GEORGE COOPER, Petitioner

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUE PRESENTED

- I. When the petitioner had two deferred adjudications out of Texas, for which he had pled guilty, whether the trial court properly counted the petitioner's deferred adjudications as prior convictions when calculating his offender score?

B. STATEMENT OF THE CASE

On March 11, 2010, the petitioner, John Cooper (hereafter, “the defendant”) pled guilty before the Travis County District Court to one count of Theft of Property (greater than \$1,500 and less than \$20,000), in Cause No. D1DC08302304-I. (CP 46-49). On that same date, the defendant pled guilty before the Travis County District Court to one count of Theft of Property (greater than \$500 and less than \$1,500), in Cause No. D1DC08302238.¹ (CP 56-59). In both cases, the district court entered an Order of the Court Deferring Further Proceedings, pursuant to Texas Code Crim. Proc. (“CCP”) art. 42.12, sec. (5).² (CP 46, 56).

In both cases, the Orders Deferring Further Proceedings (hereafter, “deferred adjudication orders”) stated that the court made a finding that

¹ In prior briefing, both parties have referred to the crime to which the defendant pled guilty under Cause No. D1DC08302238 as “Theft from Person.” It appears the crime was referred to as “Theft from Person” because it involved a theft of \$1250.00 from the person of “Martha Wingren.” (CP 57).

² CCP 42.12 § (5) is commonly referred to as Texas’s “deferred adjudication” statute.

“the best interests of society and the defendant [would] be served...by deferring further proceedings without entering an adjudication of guilt.” (CP 46, 56). However, both orders also stated that the court made this finding after the defendant “pleaded guilty” and after the court “found sufficient evidence to find the defendant guilty” of the offenses. (CP 46, 56).

The deferred adjudication orders stated that the defendant would be placed on community supervision for a prescribed period of time, during which time the defendant must comply with a number of conditions. (CP 46, 56). One of the conditions of community supervision was that the defendant “[c]ommit no new offense against the laws of this or any State or of the United States.” (CP 46, 56). The defendant was placed on community supervision for a period of four years, for Cause No. D1DC08302304-I. (CP 46). The defendant was placed on community supervision for a period of two years, for Cause No. D1DC08302238. (CP 56).

On May 3, 2010, three months after he pled guilty before the Travis County district court and the court entered deferred adjudication orders, the defendant pled guilty before the Clark County Superior Court, under Cause No. 09-1-01247-4. (CP 6). In Cause No. 09-1-01247-4, the

defendant pled guilty to Count One: Obtain or Attempt to Obtain a Controlled Substance by Fraud or Forged Prescription and to Count Two: Bail Jumping on Class B or C Felony. (CP 6).

The defendant was sentenced before the Clark County Superior Court on May 13, 2010. (RP 14). Prior to sentencing, the State filed a declaration of criminal history for the defendant, which indicated that the defendant had a prior offender score of 4 points. (CP 21). The State calculated the defendant's prior offender score as follows:

Crime	County/State Cause No.	Date of Crime	Date of Sentence	Points
Theft of Property > \$1500 – < \$20,000	Travis / TX D1DC08302304	8/6/2008	3/17/2010	1
Theft from Person	Travis / TX D1DC08302238	8/8/2008	3/17/2010	1
Possession Marijuana Less Than 2 Ounces	Williamson / TX 06-0173-1	12/10/2005	11/20/2006	Misd.
Possession Dangerous Drug – Hydrocodone	Williamson / TX 08-02312-1	3/21/2008	11/17/2008	1
Theft of Property > \$1500 – < \$20,000	Fayette / TX 2010R-14	1/26/2010	2/17/2010	1

(CP 21). The State also provided the court with certified copies of each of the defendant's out-of-state convictions. (RP 7).

The defendant did not dispute that he was the subject of each of the out-of-state offenses listed in his declaration of criminal history. (RP 8). Also, the defendant did not dispute that any of his out-of-state offenses, for which the State had scored one point, were comparable as felony offenses in Washington. (RP 8-9). Further, the defendant's two offenses, which resulted in deferred adjudications in Texas, had not been dismissed at the time of his sentencing in Clark County and the defendant did not allege that his two deferred adjudications had been dismissed (Travis County Cause No.'s D1DC08302304 and D1DC08302238). However, the defendant argued that his two deferred adjudications should not be scored as prior convictions because "the term conviction [under RCW 9.94A.030(9)] means an adjudication of guilt" and both offenses "ended in an adjudication of - - a deferred adjudication." (RP 7-8). Meanwhile, the State argued that the defendant's two deferred adjudications qualified as prior convictions because RCW 9.94A.030(9) states that "convictions" include pleas of guilty and the defendant pleaded guilty in both instances. (RP 10).

Having considered the arguments of the parties and the relevant authority, the trial court ruled that the defendant's two deferred adjudications should be included as prior convictions for the purposes of calculating his offender score. (RP 16). The court found that the defendant's deferred adjudications qualified as "convictions" under RCW 9.94A.030(9) because the statute stated that a "conviction" in Washington included an acceptance of a plea of guilty and the defendant's deferred adjudications required him to plead guilty. (RP 16). The court calculated the defendant's offender score as 5 points for each offense and it sentenced him to 17 months on Count One and 17 months on Count Two, to be run concurrently. (CP 70-71).

The defendant timely appealed his sentence. (CP 87). In a published opinion, the Court of Appeals found the trial court properly included the defendant's deferred adjudications as "convictions," for the purposes of calculating his offender score because, "despite not having 'entered' these adjudications, the Texas court had accepted Cooper's guilty pleas to these charges." *State v. Cooper*, 164 Wn. App. 407, 408, 263 P.3d 1283 (2011).

The defendant subsequently filed a Petition for Review with this Court, which was granted by the Court. In his Petition, the defendant

argued that the trial court erred in including his deferred adjudications as prior convictions because, under Texas law, “a deferred adjudication is not a finding of guilt, and is therefore not a conviction.” See Petition for Review, at p. 7, *citing* C.C.P. Art. 42.12(5)(a). The defendant also argued that the decision of the Court of Appeals was in conflict with the decisions of this Court. See Petition, at p. 7-8, *citing State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998), *State v. Wiley*, 124 Wn.2d 679, 880 P.2d 983 (1994).

C. ARGUMENT

- I. The trial court properly counted the defendant’s deferred adjudications as convictions when calculating his offender score.
 - a. *Under the plain language of the statutes, a deferred adjudication, pursuant to CCP 42.12 § (5), qualifies as a conviction, pursuant to RCW 9.94A.030(9).*

Whether a deferred adjudication, pursuant to CCP 42.12 § (5), meets the definition of a conviction, pursuant to RCW 9.94A.030(9), is a matter of statutory construction. Construction of a statute is a question of law that is reviewed de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). When interpreting a statute, the court first looks to the plain language of the statute. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). The court must give effect to the intent of the legislature when interpreting a statute; however, when the language of the statute is

clear, then the legislative intent is derived from the language of the statute alone. *Wentz*, 149 Wn.2d at 346.

For both CCP 42.12 § (5) and RCW 9.94A.030(9), the language of the statutes is clear and unambiguous. RCW 9.94A.030(9) provides

‘[c]onviction’ 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(9) (emphasis added). Under RCW 9.94A.030(9), it is clear that a “conviction” is “an adjudication of guilt.” Under RCW 9.94A.030(9), it is also clear that an “adjudication of guilt” can occur in one of three ways: (1) a verdict of guilty; (2) a finding of guilty; or (3) acceptance of a plea of guilty.

Texas CCP 42.12 § (5)(a) provides

...when 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. ...³

³ CCP 42.12 § (5)(c) also provides that the court shall dismiss the proceedings and discharge the defendant at the conclusion of the period of community supervision, so long as the defendant has not violated the terms of his community supervision.

CCP 42.12 § (5)(a). Under CCP 42.12 § (5), it is clear that, in order for the court to order a deferred adjudication, the defendant must first plead guilty or nolo contendere. Under CCP 42.12 § (5), it is also clear that, in order for the court to order a deferred adjudication, the court must find sufficient evidence exists to find the defendant guilty. For these reasons, a deferred adjudication meets the definition of a “conviction” under RCW 9.94A.030(9) because it requires a “finding of guilty.” Lastly, under CCP 42.12 § (5), it is clear that, in order for the court to find that a deferred adjudication is warranted, the court must, necessarily, “accept” the defendant’s plea of guilty. Therefore, a deferred adjudication also meets the definition of a “conviction” under RCW 9.94A.030(9) because it requires “acceptance of a plea of guilty.” It is not determinative that the Texas court withholds “entering an adjudication of guilt” when it orders a deferred adjudication, because RCW 9.94A.030(9) does not require that the court “enter an adjudication of guilt” in order for a conviction to occur.

In the instant case, the record demonstrates that the Travis County district court complied with the requirements of CCP 42.12 § (5) when it ordered deferred adjudications in cause numbers D1DC08302304-I and D1DC08302238. Specifically, in both cases, the deferred adjudication orders stated that the defendant pled guilty to the charged offenses and they stated that the court, having heard the argument of both sides, “found

sufficient evidence to find the defendant guilty” of the charged offenses. (CP 46, 56).

In addition, the record demonstrates that the defendant pled guilty in both cases pursuant to a constitutionally valid plea and pursuant to the requirements of Washington Superior Court Criminal Rule (“CrR”) 4.2(d). *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 206, 622 P.2d 360 (1980) (stating that a plea must be knowing, intelligent, and voluntary in order for it to be constitutionally valid); CrR 4.2(d) (stating that a plea must be made voluntarily and the court must find that there is a factual basis for the plea). In his Plea of Guilty for cause number D1DC08302304-I and cause number D1DC08302238, the defendant acknowledged the offenses with which he was charged; he acknowledged the State’s plea bargain; he acknowledged the maximum term of confinement, fine, and sentence that he faced; he stated that he understood the nature of the charges against him; he stated that he fully understood the consequences of his plea; and he stated that his plea was entered freely and voluntarily. (CP 42-44, 52-54). Furthermore, in his Plea of Guilty for both cause numbers, the defendant “confess[ed] and admit[ted] that [he] committed each and every element of the charged offense or the reduced offense now charged.” (CP 44, 54 at sec. 4, sub-sec 1). Also, in both cases, the court stated in its deferred adjudication orders that it expressly found there was a factual

basis for each plea. (CP 46, 56). In addition, even though CCP 42.12 § (5) permits a “nolo contendere” plea, there is no evidence from this record that the defendant entered into a nolo contendere plea in either case.

The defendant’s two Texas deferred adjudications qualified as convictions under RCW 9.94A.030(9) because they required a finding of guilty. In the alternative, the defendant’s deferred adjudications qualified as convictions under RCW 9.94A.030(9) because they required an acceptance of a valid plea of guilty. Therefore, the trial court properly counted the defendant’s deferred adjudications when calculating his offender score.

- b. *Counting a deferred adjudication as a prior conviction is not in conflict with the prior decisions of this Court.*

In *Morley*, when one defendant was found guilty by a military judge in a court martial and another defendant pleaded guilty to the crimes for which he was court-martialed, the defendants claimed that their court martials could not be considered “convictions” under RCW 9.94A.030(9) because they were not adjudged guilty “pursuant to Title 10.” 134 Wn.2d at 595, 598-99. The Court found that the definition of “conviction” under RCW 9.94A.030(9) was “plain and unambiguous on its face.” *Morley*, at 596. However, the Court also found that it would “effectively result in all out-of-state convictions being excluded from consideration under the

SRA” if all out-of-state convictions were required to comply with Washington criminal procedure, under Title 10. *Id.*, at 597-98. Consequently, the Court found that the reference to Title 10 under RCW 9.94A.030(9) should apply only to in-state convictions. *Id.*, at 598. The Court went on to hold that the defendants’ court martials qualified as convictions under RCW 9.94A.030(9). *Id.*, at 598-99.

Morley is instructive here because the Court made it clear that it is irrelevant whether a foreign jurisdiction follows different criminal procedures and it is irrelevant whether a foreign jurisdiction permits dispositions that are not available in Washington. Rather, *Morley* stands for the proposition that, so long as the defendant enters a valid plea of guilty in the foreign jurisdiction to a crime that is comparable to a felony offense in Washington, his foreign offense can qualify as a “conviction” under RCW 9.94A.030(9).

That said, there is nothing in the Court’s opinion in *Morley* that specifically refers to deferred adjudications in Texas, or to deferred adjudications in any other jurisdiction. Further, there is nothing in the Court’s opinion that calls into question the trial court’s decision to count the defendant’s two deferred adjudications as convictions, when

calculating his offender score. Consequently, *Morely* is instructive, but not in conflict with this case.

In *Wiley*, the Court held that, when the elements of a crime have changed since a defendant's prior conviction for that crime, the prior classification of the crime is used to calculate the defendant's offender score, unless the legislature has reclassified the crime to a lower level of punishment. 124 Wn.2d at 685-86. The Court's holding in *Wiley* is not instructive in this case and it is in no way in conflict with this case.

- c. *Counting a deferred adjudication as a prior conviction is consistent with the purposes of the Sentencing Reform Act.*

In *Morley*, the Court noted that the legislature intended for out-of-state convictions to be included when calculating a defendant's offender score under the SRA. *Morley*, at 597. Indeed, the SRA makes it clear that out-of-state convictions are to be included when calculating a defendant's offender score, so long as the convictions are comparable to felony offenses in Washington and so long as they have not "washed-out." RCW 9.94A.030(11), .525(3).

In *In re Pers. Restraint of Carrier*, the Court stated that, when determining whether an out-of-state conviction should be included in an offender score, "the SRA focusses on the initial finding of guilt, not what occurs later." 173 Wn.2d 791, 802, 272 P.3d 209 (2012). In support of

this position, the Court cited to multiple cases in which the courts held that a pre-SRA conviction that resulted in a deferred or suspended sentence qualified as a “conviction” under the SRA, even if a sentence was never imposed. *Carrier*, 173 Wn.2d at 801, citing *State v. Whitaker*, 112 Wn.2d 341, 346, 771 P.2d 332 (1989); *State v. Partida*, 51 Wn. App. 760, 762, 756 P.2d 743 (1988) (finding defendant “stands convicted” and does not qualify as a first-time offender under the SRA, even though charges were dismissed after he completed probation); *State v. Harper*, 50 Wn. App. 578, 580, 749 P.2d 722 (1988) (finding defendant’s deferred sentence, wherein only probation was imposed, qualified as prior conviction under the SRA because the SRA focuses on the fact and nature of prior conviction, not on the type of sentence imposed).

In *Carrier*, the Court also explained that the legislature amended the definition of “conviction,” under the SRA, in 1986 to reflect its focus on the initial finding of guilt. *Carrier*, 173 Wn.2d at 802. Whereas the original definition stated that a conviction is “an adjudication of guilt pursuant to Titles 10 or 13 RCW,” the amended definition stated that a conviction is “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.”⁴ *Id.*, at 802, *citing* LAWS OF 1986, ch. 257 § 17(6).

Carrier is instructive in this case. Here, the defendant pled guilty in Travis County, Texas, to two separate offenses and under two separate cause numbers. What occurred or what did not occur after the defendant pled guilty is of no moment under the SRA. Rather, the defendant “stands convicted” for the purposes of the SRA because he pled guilty to the offenses for which the court ordered deferred adjudications.

- d. *Counting a deferred adjudication as a prior conviction is consistent with the law of other jurisdictions, including Texas.*

In a number of cases, the courts have held that a deferred adjudication, entered pursuant to Texas CCP 42.12 § (5), should be counted as a prior conviction. For example, in *Matter of Punu*, the respondent entered a plea of nolo contendere in Harris County, Texas, to a charge of attempted murder, after which the trial judge deferred adjudication and placed the respondent on probation. 22 I&N Dec. 224, 225 (BIA 1998). On review, the Board of Immigration Appeals held that the defendant’s deferred adjudication qualified as a conviction for an

⁴ Similarly, in *State v. Crisler*, the Court of Appeals recognized that RCW 9.94A.030(9) is a statute that specifically makes a plea of guilty constitute a conviction. 73 Wn. App. 219, 222, 868 P.2d 204 (1994).

aggravated felony under the Illegal Immigration Reform and Immigrant Responsibility Act (“the Act”). *Punu*, at 228-229. The Board reasoned that probation constituted a form of punishment under the Act. *Punu*, at 228. The Board also reasoned that, although the Texas deferred adjudication statute allowed for the possibility that an offense may be dismissed if certain circumstances occur, this possibility did not undermine the fact that, for the time being, the offense remained “a conviction.” *Id.*

Similarly, in *State v. Macias*, the Court of Appeals of Kansas held that deferred adjudications in Texas qualify as convictions for the purposes of Kansas’s sentencing guidelines. 30 Kan. App. 2d 79, 39 P.3d 85(2002). The court reasoned that a deferred adjudication should qualify as a conviction for the purposes of calculating a defendant’s criminal history score because “what matters...is whether the foreign state concluded the defendant did the crimes, not whether he or she ultimately had to do the time.” *Macias*, 30 Kan. App. at 83 (stating “[n]o matter what lenience another state may wish to show, once we are satisfied that a defendant's factual guilt was established in a foreign state, that prior crime will count in Kansas”).

In addition, in *Cuellar v. Texas*, the Court of Appeals for the Fourth District of San Antonio held that the defendant was a “convicted felon” for the purposes of the Texas’s felon in possession of a firearm statute when the defendant’s prior conviction resulted in a deferred adjudication, even though the defendant’s deferred adjudication was set aside before he was arrested for being a felon in possession of a firearm. 40 S.W.3d 724 (2001). The court noted that the definition of a “conviction” under the felon in possession of a firearm statute included an order of deferred adjudication, “whether or not the imposition of the sentence is subsequently probated...” *Cuellar*, at 727. The court found that this definition of a conviction was consistent with the legislature’s intent, who “for obvious reasons...may wish to keep concealed handguns out of the hands of persons who have been convicted of a felony, even if those persons satisfactorily complete community service.” *Id.*

Each of these cases demonstrates that a deferred adjudication involves an initial finding of guilt. Each of these cases also demonstrates that a deferred adjudication warrants more severe punishment in future matters because of the initial finding of guilt. These cases universally support a finding that a deferred adjudication is a conviction, which may be properly counted against the defendant for the purposes of calculating his offender score.

D. CONCLUSION

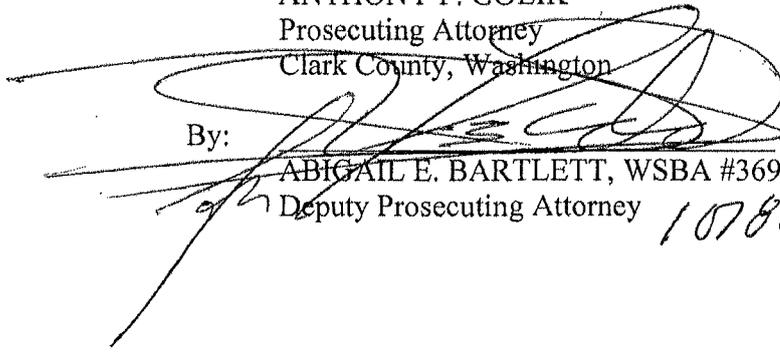
For each of the foregoing reasons, for the reasons stated in the brief the Respondent submitted to the Court of Appeals, and for the reasons stated in the opinion of the Court of Appeals, Division II, the defendant's sentence should be affirmed.

DATED this 18^R day of May, 2012.

Respectfully submitted:

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JOHN GEORGE COOPER,
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Supreme Court No. 86733-0

Court of Appeals No. 40833-3-II
Clark Co. No. 09-1-01247-4

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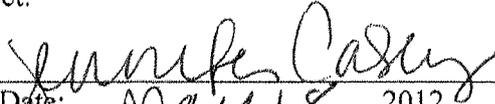
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TO: Ronald Carpenter, Clerk Washington State Supreme Court At: Supreme@courts.wa.gov	David L Donnan Attorney at Law Washington Appellate Project At: David@washapp.org
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DOCUMENTS: Supplemental Brief of Respondent

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


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Place: Vancouver, Washington.

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Dear Clerk:

Attached please find the *Supplemental Brief of Respondent*. Please accept this document for e-filing. Counsel for Petitioner is being served via copy of this email message. If you need anything further to process this request, please contact me.

Sincerely,

Jennifer Casey
Clark County Prosecutor's Office
Appeals/Public Disclosure
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