

No. 72810-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

XHAVIER TERRY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in its calculation of Xhavier Terry's offender score.

2. The court erred in entering sentencing finding of fact 1.

3. The court erred in entering sentencing finding of fact 2.

4. The court erred in entering sentencing finding of fact 3.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

An out-of-state conviction may only be included in an offender score calculation if it is comparable to a Washington felony offense.

Where it is broader than any Washington felony, did the trial court err in finding Mr. Terry's Texas juvenile adjudication for aggravated assault, committed when he was just 10 years old, was legally and factually comparable to three Washington offenses?

C. STATEMENT OF THE CASE

Mr. Terry pleaded guilty to the offense of unlawful possession of a firearm. CP 48-64.

Over Mr. Terry's objection the sentencing court found Mr. Terry's Texas juvenile adjudication, committed when he was just 10 years old, for aggravated assault was legally and factually comparable

to the Washington offenses of second degree assault, felony harassment, and second degree unlawful possession of a firearm.

D. ARGUMENT

The sentencing court erroneously included Mr. Terry’s Texas adjudication, committed when he was just 10 years-old, in his offender score for the current offense.

“Fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks minimum indicia of reliability, or is unsupported in the record.” *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999).

Thus, the State bears the burden of proving criminal history, including comparability of out-of-state convictions, as a matter of due process.

U.S. Const. amend. XIV; *State v. Hunley*, 175 Wn.2d 901, 917, 287 P.3d 584 (2012).

The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3). Only foreign convictions for crimes that are comparable

to a Washington felony may be included in the offender score. *State v. Thomas*, 135 Wn. App. 474, 477, 144 P.3d 1178 (2006).

A court must first compare the elements of the foreign conviction to Washington statutes. *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). While a court may then look to the facts underlying the foreign conviction to determine what the underlying charge was, this is not an effort to determine from those facts what Washington offense they might support. *Lavery* cautioned:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

154 Wn.2d at 258. The Court explained further:

In applying [the Sixth Amendment], we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. All a sentencing court needs to do is find that the prior conviction exists. No additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence. While this is also true of foreign crimes that are identical on their face, it is not true for foreign crimes that are *not* facially identical. In essence, such crimes are *different* crimes.

Id. at 256-57 (internal citations omitted) (emphases in original).

Here, the sentencing court found Mr. Terry's juvenile adjudication was comparable to three separate felonies in Washington. The State argued and the court found the Texas assault charge was legally and factually comparable to the Washington offenses of second degree assault, felony harassment, and second degree unlawful possession of a firearm. The court's conclusions are incorrect.

- a. The Texas offenses are not legally comparable to any Washington felony.

Texas's assault statute provides in pertinent part:

- (a) A person commits an offense if the person:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
 - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
 - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Tex. Penal Code Ann. § 22.01. The crime of aggravated assault is defined as:

- (a) A person commits an offense if the person commits assault as defined in § 22.01 and the person:
 - (1) causes serious bodily injury to another, including the person's spouse; or
 - (2) uses or exhibits a deadly weapon during the commission of the assault. . . .

Tex. Penal Code Ann. § 22.02.

Assault in Washington requires an intentional act. Assault has three common-law definitions which each require an intentional act. *State v. Smith*, 159 Wn.2d 778, 781, 154 P.3d 873 (2007). A “specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element” of assault. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). The Texas statute permits something less than intent, as it permits merely “knowing” conduct as a basis for conviction. Therefore, the Texas statute applies to broader range of conduct than any Washington assault. Where the Washington offense has a narrow *mens rea* than the foreign offense, the foreign offense is not legally comparable. *Lavery*, 154 Wn.2d at 256 (because second degree robbery in Washington requires specific intent while federal bank robbery is a general intent, the federal offense is not comparable).

The Texas offense is broader than Washington’s harassment statute as well. First, the Texas statute includes assaultive conduct as a basis of conviction while RCW 9A.46.020 does not. Second, a threat to cause bodily injury is not a felony in Washington, but rather a misdemeanor. That does not change even if a person is armed with a firearm during the commission of that misdemeanor. Instead,

harassment is only a felony when the threat is a threat to kill, a repeat offense against the same victim, or is made against a criminal-justice participant in certain circumstances. RCW 9A.46.020(2)(b). This distinction is important as a misdemeanor conviction for harassment would not count in Mr. Terry's offender score for this offense, thus if the Texas offense is only comparable to a misdemeanor it cannot count in the offender score either. Here, even ignoring the broader assaultive conduct included in the Texas statute, the Texas statute is at best comparable to the misdemeanor offense of harassment. That, however, does not permit its inclusion in the offender score calculation.

Moreover, even if the Texas offense were legally comparable to felony harassment that offense is only a Class C felony. RCW 9A.46.020(2). A Class C felony may only be included if the court finds that following the person's release from custody on that offense he did not spend five years in the community without committing another offense that led to a conviction. RCW 9.94A.525(2)(c). Mr. Terry's next criminal offense did not occur for nearly 8 years. The State did not offer any proof of any offense leading to conviction in that intervening period. Thus, the State did not meet its burden of proving RCW

9.94A.525(2) permitted inclusion of that prior offense in the offender score. *Hunley*, 175 Wn.2d at 175.

Finally, the court found the Texas aggravated assault statute is legally comparable to the Washington offense of second degree unlawful possession of a firearm. The aggravated assault statute has two alternatives (1) causing serious bodily injury to a person; or (2) using or exhibiting a deadly weapon during the commission of the assault. RCW 9.41.040, by contrast, does not allow a conviction for assaultive conduct. Moreover, while the Texas statute includes any deadly weapon, the Washington statute requires possession of a firearm. Finally, knowing possession is an essential element of the offense of second degree unlawful possession of a firearm under RCW 9.41.042(2)(a). *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). However, the Texas statute permits conviction based upon mere exhibition. Thus, the Texas assault statute is not legally comparable to second degree unlawful possession

In any event, and as set forth above, even if the offense were comparable to the Class C felony of unlawful possession the State did not meet its burden of proving RCW 9.94A.525(2) permitted inclusion of that prior offense in the offender score. *Hunley*, 175 Wn.2d at 175.

Finally, although the court did not include it in Mr. Terry's offender score, the documents submitted by the State also included information regarding a Texas offense of carrying a weapon in a prohibited area. This offense is not comparable to any Washington felony, and specifically is not comparable to second degree unlawful possession under RCW 9.41.040. The Texas weapon statute provides:

(a) A person commits an offense if the person intentionally, knowingly, or recklessly possesses or goes with a firearm, illegal knife, club, or prohibited weapon listed in Section 46.05(a):

(1) on the physical premises of a school or educational institution, any grounds or building on which an activity sponsored by a school or educational institution is being conducted, or a passenger transportation vehicle of a school or educational institution, whether the school or educational institution is public or private, unless pursuant to written regulations or written authorization of the institution

Tex. Penal Code Ann. § 46.03.

As stated above, knowledge is an essential element of the offense of second degree unlawful possession of a firearm under RCW 9.41.042(2)(a). *Williams*, 158 Wn.2d at 908. As is clear from the Texas statute, that offense may be proven upon merely recklessly possessing or "going with" a weapon into a prohibited area. Moreover, the Texas statute broadly criminalizes carrying a litany of weapons beyond a firearm. By contrast, RCW 9.41.040 applies only to firearms. Because

the Texas statute employs a lower *mens rea* and applies to a broader definition of weapons, the statute is broader than any Washington offense. Thus, the Texas offense is not legally comparable. Finally, because unlawful possession is only a Class C felony in Washington, the State's failure to prove any new offenses in the eight-year period between that offense and Mr. Terry's next offense, precludes its inclusion in his offender score. RCW 9.94A.525(2).

The Texas offenses are not legally comparable to any Washington offense. The court's conclusion to the contrary is plainly erroneous.

b. The State did not prove the Texas offenses are factually comparable to any Washington offense.

In performing the factual prong a court may only consider facts that were admitted, stipulated to, or proved beyond a reasonable doubt in the foreign proceeding. *Lavery*, 154 Wn.2d at 258. This limitation helps ensure a judicial determination of facts does not violate the Sixth Amendment. *State v. Olsen*, 180 Wn.2d 468, 477, 325 P.3d 187, cert. denied, 135 S. Ct. 287 (2014). Here, the sentencing court did not heed that limitation.

The court's findings state: "These findings are supported solely by the Texas charging documentation [and] J&S, but in addition it is

also supported by the Texas presentence report.” CP 25. Presumably the court was referring to the “Petition RE Child Engaged in Delinquent Conduct,” “Predisposition Report,” and “Order of Adjudication and Judgment of Deposition with no Placement.” Supp. CP __, Sub No. 17. There is no evidence Mr. Terry ever admitted or stipulated to the factual statements contained in the petition or predisposition report. At best, each is a second-hand report of the allegations none of which was completed under oath. There is none in the Texas adjudication order that indicates the Texas court considered the factual statement in the petition and the predisposition report as evidence, much less found those allegations proved beyond reasonable doubt. Thus, the sentencing court could not consider the facts alleged in either the petition or predisposition report. *Lavery*, 154 Wn.2d at 258.

The sum of the factual findings contained in the adjudication order provide:

THE COURT FINDS that **XHAVIER TERRY** is a child who is **10** years of age, who was born **NOVEMBER 16, 1993**, who has not reached his eighteenth birthday, who resides in Dallas County, Texas and stands charged in the State’s Petition of being a Child Engaged in Delinquent Conduct.

THE COURT FURTHER FINDS from the evidence beyond reasonable doubt that the Respondent Child did commit the following offense(s): **AGGRAVATED**

**ASSAULT, SECTION 22.02 OF THE TEXAS PENAL
CODE ON MARCH 22, 2004 SAID COMPLAINANT
BEING APRIL QUIGLEY AND UNLAWFUL
CARRYING WEAPONS PROHIBITED, SECTION
46.03 OF THE TEXAS PENAL CODE ON MARCH
22, 2004 SAID COMPLAINANT BEING WALLACE
ELEMENTARY SCHOOL,**

Supp. CP __, Sub No. 17. Obviously there is no finding beyond a reasonable doubt of an intentional assault, of a knowing possession of a firearm, of a threat to kill, or of any other element of the offenses of second degree assault, felony harassment or unlawful possession of a firearm. Because the order does not set forth any facts found beyond a reasonable the sentencing court could not rely upon the order to determine the Texas offense were comparable. *Lavery*, 154 Wn.2d at 258

E. CONCLUSION

The court erred in including the Texas offense in Mr. Terry's offender score.

Respectfully submitted this 5th day of March 2015.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant