IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-85,447-01

Ex parte JEREMY WADE PUE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. CR2008-214-1 IN THE 207TH DISTRICT COURT COMAL COUNTY

KELLER, P.J., filed a concurring opinion in which KEASLER, J. joined.

I agree with the Court, for the reasons stated in its opinion, that Texas law should control when determining the finality of a foreign conviction.[1] I also agree with Judge Yeary that we should not grant relief on an "illegal sentence" claim of the sort before us without first addressing the propriety of doing so. But Applicant has also raised ineffective assistance-of-counsel claims for failing to research the finality of his second California conviction, and I believe that these claims have merit. My research convinces me that the second California conviction was not final under

[1] The foreign conviction at issue is from California, and the irony is not lost on me that California uses its own law to determine the status of a foreign conviction for enhancement purposes. *See People v. Laino*, 32 Cal. 4th 878, 882, 87 P.3d 27, 28 (2004).

settled California law or settled Texas law. Because the conviction was not final regardless of what law applies, and because Applicant has no other prior convictions (aside from the two in California), I would hold that counsel was deficient for failing to challenge the use of this conviction for enhancement purposes, and Applicant was prejudiced because his thirty-year sentence exceeds the maximum punishment allowed for his offense.[2]

Applicant was punished as a habitual offender under the 2008 version of Penal Code § 12.42(d). That statute explicitly required that the prior felony convictions be final:

> Except as provided by Subsection (c)(2), if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been *finally* convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by imprisonment in the institutional division of the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years.[3]

The State's contention that California law did not require a conviction to be final to be usable for enhancement purposes is beside the point. Finality still had to be determined because § 12.42(d) demanded it.[4]

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[2] Given the circumstances, I would hold that there is no conceivable strategy for failing to challenge the prior conviction, and so, there is no need to remand for factual development.

[3] TEX. PENAL CODE § 12.42(d) (West 2008) (emphasis added).

[4] If § 12.42(d) did not explicitly require finality, the State's argument might be tenable. For enhancement purposes, the word "conviction" has, by caselaw, different meanings in Texas and California. Under California caselaw, "conviction" means any finding of guilt. *Laino*, 32 Cal. 4th at 895-96, 87 P.3d at 38 ("[F]or purposes of a prior conviction statute, a conviction occurs at the time of entry of the guilty plea. . . . [U]nder the three strikes law, when guilt is established, either by plea or verdict, the defendant stands convicted and thereafter has a prior conviction."). As a result, a conviction does not have to be "final" to be usable for enhancement purposes in California. *See id.* Under Texas caselaw in the enhancement context, "conviction" means a final judgment imposing sentence unless the statute at issue provides otherwise. *See Jordan v. State*, 36 S.W.3d 871, 873-74 & nn.9-12 (Tex. Crim. App. 2001) (citing cases saying that a judgment must be final to be a

Under Texas law, a conviction is not final for enhancement purposes when the imposition of sentence is suspended and the defendant is placed on probation.[5] The same is and was true of convictions in California, as that State's high court explained in *People v. Howard*: "When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation. The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.'"[6]

Counsel did not need to try to determine whether *Murchison* or *Howard* controlled because under either case—and therefore under either Texas or California law—Applicant's second prior California conviction was not final.[7] I would grant relief on Applicant's ineffective assistance claim.

I therefore concur in the Court's judgment.

"conviction" for enhancement purposes even when finality is not explicitly required by the statutory language); *infra* at n.5; TEX. PENAL CODE § 12.42(c)(2), (g)(1) (West 2008) (explicitly allowing a judgment granting probation or deferred adjudication to be used for enhancement). If we were faced with a Texas enhancement statute that used the word "conviction" without mentioning finality, one could at least colorably argue that the word "conviction" must carry the meaning assigned to it by the state in which the "conviction" occurs, so that a "conviction" in Texas would have to be final but a "conviction" in California would not. But because § 12.42(d) explicitly required the defendant to be "finally convicted," whatever meaning "conviction" might have, that conviction must be final.

[5] *Ex parte Murchison*, 560 S.W.2d 654, 656 (Tex. Crim. App. 1978).

[6] 16 Cal. 4th 1081, 1087, 946 P.2d 828, 832 (1997) (citations omitted). *See also People v. Scott*, 58 Cal. 4th 1415, 1423, 324 P.3d 827, 832 (2014) (discussing *Howard*).

[7] At this juncture, I need not resolve whether the ineffectiveness was the fault of trial counsel or appellate counsel (or both). A challenge to the usability of the second California conviction was not raised on appeal, so appellate counsel was ineffective unless excused by a default by trial counsel, in which case trial counsel would be ineffective. And while the Court suggests that California law is complicated, a finding of deficient performance can be made on the basis of the plain language of a statute. *Ex parte Welch*, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998). § 12.42(d) unambiguously required that the prior convictions be final, and the prior convictions were non-final under both California and Texas law.

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