IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,240

EX PARTE KEVIN DEWAYNE FLOWERS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 78743-A IN THE CRIMINAL DISTRICT COURT FROM JEFFERSON COUNTY

***Per curiam*.**

OPINION

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of aggravated assault and sentenced to thirty (30) years' imprisonment. The Ninth Court of Appeals affirmed his conviction. *Flowers v. State*, No. 09-02-348-CR, (Tex. App. – Beaumont, 2004, no pet.) (not designated for publication).

Applicant alleges *inter alia* that the State used a conviction with a probated sentence to enhance punishment to the habitual offender punishment range under TEX. PEN. CODE, § 12.42 (d).

The trial court has entered findings of fact and conclusions of law recommending that relief

be granted. We agree. The record reflects that the State used a conviction with a probated sentence to enhance punishment to the habitual offender punishment range under TEX. PEN. CODE, § 12.42 (d). Applicant did not have another prior felony conviction which the State could have used to properly enhance punishment when he committed the challenged offense. Applicant is entitled to a new punishment trial.

Relief is granted in part. The judgment in Cause No. 78743-A in the Criminal District Court of Jefferson County is set aside and Applicant is remanded to the custody of the Sheriff of Jefferson County so that a new punishment trial can be conducted.

All other relief is denied.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice–Correctional Institutions Division and Pardons and Paroles Division.

Delivered: October 21, 2009

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