Opinion No. 58-55

March 17, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Honorable Dan Sosa, Jr., District Attorney, Third Judicial District, Las Cruces, New Mexico

QUESTION

QUESTION

Does a conviction in Federal Court, of a violation of Title 18, U.S.C.A., § 242, constitute a conviction of an ". . . infamous crime . . ." within the meaning of Article VII, Sections 1 and 2, Constitution of New Mexico?

CONCLUSION

No, but see analysis.

OPINION

ANALYSIS

The defendant, in a Federal court, was found guilty of violating Title 18, USCA, § 242, which reads as follows:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $ 1,000 or **Imprisoned not more than one year,** or both June 25, 1958, c. 645, 62 Stat. 696." (Emphasis ours).

The indictment was on two counts. Guilt as to both was duly established. Defendant was sentenced on each count to imprisonment for one year, the sentences to run concurrently. See 188 F, 2d 932. Defendant has now been released from imprisonment, and desires to run for a county office in one of the counties within your district. You inquire as to the legality of this, including appearance on the ballot. To our knowledge, there has been no restoration to ". . . political rights . . .", mentioned in Article VII. § 1.

Now, one qualification for holding office is being a qualified New Mexico elector. Article VII, § 2. Turning to § 1 of said Article, we find the pertinent part provides:

"Every male citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, **persons convicted of a felonious or infamous crime unless restored to political rights,** and Indians not taxed, shall be qualified to vote at all elections for public officers . . ." (Emphasis ours).

Hence, the question is presented as to whether the above recited Federal conviction disqualifies.

In an annotation appearing in (149) A.L.R. 1075, there seems to be doubt as to whether a provision like Article VII, § 1, contemplates conviction in Federal courts or courts of other jurisdictions. See also 175 A.L.R. 784. In other words, some cases hold that conviction in the courts of the disqualifying jurisdiction is all that is contemplated. Manifestly, this was not achieved. However, the majority of the cases hold contra, i.e., conviction in foreign jurisdictions as well as in courts of the domicile are contemplated. Our research discloses no New Mexico case in point.

In 175 A.L.R. 784, there is a decided dispute in authority as to whether the laws of the convicting jurisdiction or the laws of the disqualifying jurisdiction determine whether the offense was sufficient to disqualify. The majority of decisions hold that such question is determined by the laws of the convicting jurisdiction. Of interest, as possible analogy, is Opinion of the Attorney General No. 6013, dated September 8, 1954, wherein this office held, inter alia, that restoration of political rights was to be decided in accordance with the law of the convicting jurisdiction. Again, our research discloses no New Mexico case in point.

Hence, we are faced with two grave legal questions, or doubts, at the outset. First, does the constitutional disqualification contemplate foreign convictions in any event? If so, does the law of the convicting jurisdiction determine whether the offense was sufficient to disqualify? There was no domestic conviction. Furthermore, New Mexico's criminal law does not include a provision like Title 18, U.S.C.A., § 242, supra. As discussed above, the majority decisions on these two points indicate we turn to the Federal law for answers. Admittedly, reliance on so-called "majority rules" leaves much to be desired. But we know of no alternative, under these circumstances. Want of New Mexico decisions, and the public policy against restricting the right to vote and hold office dictate that we proceed with great caution, however.

We must first determine if a Federal felony was involved, since Article VII, § 1, uses the term ". . . felonious . . .". Since under Federal law, offenses which may be punished by death or imprisonment for a term **exceeding** one year are felonies, and other offenses are misdemeanors, Cartwright v. United States, 146 F.2d 133, we hold no felony under Federal law occurred.

Turning to Federal law for a definition of ". . . infamous . . .", we find the authorities do not give a clear-cut definition. Indeed, the term has changed in meaning from time to

time. So, again we are faced with the need for caution. It may very well be that any imprisonment which the Federal statute authorizes to be at "hard labor" is infamous. See Ex parte Wilson, 114 U.S. 417. But the statute under which conviction was achieved in the instant matter does not employ this phrase. We should mention that it is the punishment which **could** be imposed, not which is **actually** imposed, which seems to be determinative. This, however, is academic since the candidate received the maximum sentence.

In the case of United States v. Ilig, 288 F. 939, it was held that since none of the counts in the information charged an offense for which an imprisonment exceeding one year could be imposed, the matter did not involve an infamous crime within the meaning of United States Constitution, Fifth Amendment, calling for presentment or indictment by grand jury for capital or infamous crimes. Research discloses that the Illig case has not been overruled or reversed.

Because of the urgency of this question, i.e., to determine the proper printing of ballots in the forthcoming primary election, our research has necessarily been less than we ordinarily would do. Nevertheless, the lack of New Mexico authority, the public policy against restricting office holding unless the case is clear, and the authorities herein reviewed, compel us to reach a negative conclusion. It is to be hoped that eventually our Supreme Court will clarify the situation.