Opinion No. 76-31

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BY: OPINION OF TONEY ANAYA, Attorney General

TO: George Maloof, Chairman, New Mexico State Racing Commission, State Fairgrounds, P. O. Box 8576, Station C, Albuquerque, N.M. 87108

QUESTIONS

Questions

1. Whether a person who has been convicted of a violation of 18 U.S.C. 201(f) is thereby rendered ineligible to retain a license to conduct a horse race meet by virtue of the restrictions specified in § 60-6-2.3(B)(1), NMSA, 1953 Comp.

2. Whether a person who has been convicted of a violation of 18 U.S.C. 201(f) may thereby be declared ineligible to retain a license to conduct a horse race meet by virtue of the general restrictions set forth in § 60-6-2.3 (A).

Conclusions

1. No.

2. Yes.

OPINION

*{*108}* Analysis

I

Section 60-6-2.3(B)(1), NMSA, 1953 Comp., automatically disqualifies a person from being considered for a license from the Racing Commission if he or she:

(1) has been convicted in any jurisdiction of an offense which would be a felony under the laws of this state, unless sufficient evidence of rehabilitation has been presented to the racing commission.

The question involves a person convicted of bribery under a federal statute, 18 U.S.C. 201(f) which reads:

(f) whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any

official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . . Shall be fined not more than $ 10,000 or imprisoned for not more than two years, or both.

This same individual was indicted yet acquitted for violating 18 U.S.C. 201(b):

(b) whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, **with intent:**

(1) **to influence** any official act; or

(2) **to influence** such public official *{*109}* or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) **to induce** such official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty. . . .

Shall be fined no more than $ 20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office or honor, trust, or profit under the United States. (Emphasis added.)

The relevant New Mexico statute defining bribery, § 40A-24-1, NMSA, 1953 Comp., provides:

Bribery of a public officer or public employee consists of any person giving or offering to give, directly or indirectly, anything of value to any public officer or public employee, **with intent to induce or influence** such public officer or public employee to:

(1) give or render any official opinion, judgment or decree;

(2) be more favorable to one party than to the other in any cause, action, suit, election, appointment, matter or thing pending or to be brought before such person;

(3) procure him to vote or withhold his vote on any question, matter or proceeding which is then or may thereafter be pending, and which may by law come or be brought before him in his official capacity;

(4) execute any of the powers in him vested;

(5) perform any public duty otherwise than as required by law, or to delay in or omit to perform any public duty required of him by law, whoever commits bribery of public officer or public employee is guilty of a third degree felony. (Emphasis added.)

The question is whether a conviction of the offense described in 18 U.S.C. 201(f), "would be a felony" under New Mexico Law, § 40A-24-1.

The two statutes are similar in many ways. Both pertain to bribery. The federal criminal statutes include 18 U.S.C. 201(f) within the general section entitled "Bribery of Public Officials and Witnesses," 18 U.S.C. 201. The offense described in 18 U.S.C. 201 (f) has been characterized by various federal courts as a form of bribery. **E.g., Alessio v. United States,** 528 F.2d 1079 (9th Cir. 1976), **cert. denied,** U.S. (June 21, 1976), stay denied (June 24, 1976 Rehnquist J.). Therefore, if we were free to adopt as our own, the broad **federal** characterization of the crime, we might conclude that bribery under 18 U.S.C. 201(f) was sufficiently similar to New Mexico's definition to trigger the automatic licensee disqualification set forth in § 60-6-2.3(B)(1), **supra.**

However, as a general rule, courts are reluctant to accept general classifications given by courts of foreign jurisdictions. Even where state statutes broadly disqualify licensees because of **any** extraterritorial felony, the majority rule is that courts will make their own examination of the essential elements of that foreign crime to determine its resemblance, *{*110}* under local law, to a felony or misdemeanor. **E.g., In re Donegan,** 26 N.E.2d 260 (N.Y. 1940); **Ex Parte Biggs,** 97 P. 713 (Ore. 1908); **DuVall v. Bd. of Medical Examiners,** 66 P.2d 1026 (Ariz. 1937); Annot., **Conviction as Disqualification,** 175 A.L.R. 785 (1948); Note, **The Collateral Consequences of a Criminal Conviction,** 23 Vand. L. Rev. 929, 963 (1970).

New Mexico law appears to require this same exacting analysis of the foreign statute. Although New Mexico courts have not interpreted the precise disqualifying language of § 60-6-2.3 (B)(1), the New Mexico Supreme Court has had occasion to construe similar language in the Habitual Offender Act which requires that more severe sentences be imposed upon persons previously convicted under foreign laws "of a crime or crimes which if committed in this state would be a felony." § 40A-29-5, NMSA, 1953 Comp. Under that Act the New Mexico Supreme Court has refused to consider prior felony convictions in federal court for interstate transport of stolen vehicles where New Mexico had no such crime. **State v. Knight,** 75 N.M. 197 (1965). Where the foreign offense does fall within a general category which is cognizable under state law (**e.g.,** bribery), it may nonetheless be a defense to show that that foreign statute does not carry with it "all the essentials of the crime in New Mexico." **Dicta, State v. Lott,** 73 N.M. 280, 286 (1963).

Courts of other jurisdictions have interpreted disqualification statutes similar to § 60-6-2.3 (B) (1) to require this kind of close scrutiny of the foreign conviction. **E.g., In re Weathers,** 31 So. 2d 543 (Fla. 1947); compare **State ex rel. Munch v. Davis,** 196 So. 491 (Fla. 1940); **In re Ankalis,** 103 P.2d 715 (Ore. 1940); **Browning v. State,** 165 N.E. 566 (Ohio 1929); **State ex rel. Arpagaus v. Todd,** 29 N.W.2d 810 (Minn. 1947). See generally, Annot., **Conviction as a Disqualification,** 175 A.L.R. 784 (1948); Annot., **Physicians - Disciplinary Action,** 12 A.L.R.3d 1214 (1967). The leading case of **Tonis v. Board of Regents,** 67 N.E.2d 245 (N.Y. 1946), provides the closest analogy to the present issue. **Tonis, supra,** involved a doctor who was convicted in federal court of

violating a portion of the Internal Revenue Code which prohibited the unauthorized sale of narcotics. On state proceedings for automatic revocation of the doctor's license to practice medicine, the Court scrutinized the federal statute and the facts of the case, and the Court concluded that although the doctor had unlawfully prescribed narcotics, he had not actually participated in their sale. Although sale and prescription were synonymous under the federal act, state law classified unlawful prescription as a misdemeanor, and therefore the doctor could not be automatically suspended under state law for having committed an offense "which if committed within the State of New York would constitute a felony under the laws thereof."

For these reasons we cannot accept on faith the general classification given 18 U.S.C. 201(f) by the federal courts. Rather, we must analyze the "essential elements" of the New Mexico bribery statute and determine whether those same elements are present in the federal offense.

While no court had directly compared 18 U.S.C. 201(f) with New Mexico's 40A-24-1, **supra,** several courts have compared that federal statute with 18 U.S.C. (201(b) which, for all practical purposes, is the federal analogue *{*111}* of New Mexico's bribery statute. These courts conclude that the sole distinction between the two federal statutes, and therefore between 18 U.S.C. 201(f) and § 40A-24-1, **supra,** is the element of specific intent. **United States v. Irwin,** 354 F.2d 192 (2nd Cir. 1965); **United States v. Glazer,** 129 F. Supp. 285 (D. Del. 1955). Proof of an offer of money to a public official or employee is, alone, sufficient for a conviction under 18 U.S.C. 201(f). Under 28 U.S.C. 201(b), however, that offer must be accompanied by the specific intent "to influence or to induce" conduct on the part of that employee. **United States v. Kenner,** 354 F.2d 780 (2d Cir. 1965), cert. denied 86 S. Ct. 1223 (1966). Based on this distinction, federal courts have classified 18 U.S.C. 201 (f) as a "lesser but included offense" of 18 U.S.C. 201(b). **United States v. Umans,** 368 F.2d 725 (2nd Cir. 1966).

In New Mexico specific intent is incorporated into a crime with the use of the words "with intent to. . . ." **State v. Ramirez,** 84 N.M. 166, 167 (Ct. App. 1972) (Sutin, J., specially concurring).

Specific intent is the gist of the crime when it is made an ingredient of a statutory offense. **State v. Ramirez, supra,** at 167. (Sutin, J., specially concurring).

As the "gist" of the crime, specific intent must be pled in the criminal information, supported by independent proof at trial, and the jury must be so instructed. **State v. Trujillo,** 54 N.M. 307 (1950); **State v. Hatley,** 72 N.M. 377 (1963); 22 C.J.S. **Criminal Law** § 32.

New Mexico's bribery statute, § 40A-24-1, requires proof of an offer of money "with intent to induce or influence . . . ." This is the language of specific intent, and therefore that intent is an "essential element" of a conviction under New Mexico law. This is consistent with the majority rule for bribery statutes of other states which requires a specific or a "corrupt" intent to influence. See cases cited 12 Am. Jur. 2d 752, **Bribery.**

Absent this "essential element" of the New Mexico crime, 18 U.S.C. 201(f) is not an offense "which would be a felony under the laws of this state," and, therefore, the licensee would not be automatically disqualified pursuant to § 60-6-2.3(B)(1).

II

While the licensee's conviction under 18 U.S.C. 201(f) does not automatically bar him from holding a license under the standard set forth in 60-6-2.3(B)(1), he is nevertheless subject to Commission scrutiny under the general standard stated in § 60-6-2.3(A) that:

A. A license to conduct a horse racing meet in this state may be issued by the racing commission to any person whom the commission determines to be a qualified applicant. Such qualification **shall** be decided by the commission **after due consideration** for the **proper protection of the public health, safety, morals, good order and the general welfare of the inhabitants of the state.** The burden of proving his qualifications to receive **and hold** a license to conduct a horse racing meet shall be at all times on the applicant **or licensee.** The racing commission may establish by regulation such qualifications for licenses to conduct horse race meets as it deems to be in the public interest. (emphasis added.)

The Commission's duty of inquiry under 60-6-2.3 (A) is the *{*112}* same for licensees as for applicants. The statute places "on the applicant or **licensee"** the burden of proving his qualifications "to receive and **hold** a license". The preceding sentence of the statute required that the licensee's qualifications " **shall** be decided by the Commission", and in New Mexico use of the word "shall" imposes a mandatory duty which is not subject to discretionary waiver. **Application of Sedillo,** 66 N.M. 267 (1959); **State v. Bonner,** 86 N.M. 314 (Ct. App. 1974). Taken together, these two portions of § 60-6-2.3(A) direct the Commission to undertake a continuing review of the licensee's qualifications in the interest of protecting the public welfare.

Where, as here, the Commission has previously exercised its discretion by granting the license followed by intermittent and informal review of the licensee's qualifications, the Commission would not be estopped from undertaking a subsequent reassessment of those qualifications, and the Commission could exercise its police powers to revoke that license if it determined that the facts justified such action. **Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control,** 371 P.2d 758 (Cal. 1962); **Greater Kampeska Radio Corp. v. FCC,** 108 F.2d 5 (D.C. Cir. 1939); **Norton v. O'Connell,** 122 N.Y.S. 2d 520 (Sup. Ct. 1953). See generally Davis, **Administrative Law** Sec. 18.09 (1958). Commission reevaluation is particularly warranted where, as here, some change in circumstances may impair the licensee's capacity to conform to the statutory standard. See **Hurwitz v. Caputa,** 207 N.Y.S. 2d 153 (Sup. Ct. 1960); **Rommell v. Walsh,** 16 A. 2d. 483 (Conn. 1940).

As the Commission has been previously advised by representatives of this office, this review is best conducted at a hearing where the Commission can fully explore all the facts and their implications on the ". . . general welfare" of the state. Cf., **State Racing**

Commission v. McManus ___. A hearing would also give the Commission the benefit of the views of public officials and other appropriate parties who share with the Commission the overall responsibility of protecting the "public health, safety, morals, good order and the general welfare" of New Mexico's inhabitants.

The general standard set forth in § 60-6-2.3(A) leaves the Commission broad discretion to determine what facts are relevant to the licensee's qualifications. The racing industry is closely supervised because of its high risk to the public welfare, and therefore, the New Mexico Supreme Court has recognized the need for broad investigative authority in the Commission to consider all aspects of a licensee's qualifications. **Ross v. State Racing Commission, 64** N.M. 478 (1958). These extensive investigative powers include the right to consider all criminal convictions of the licensee including misdemeanors and extraterritorial felonies not recognized under state law. **State ex rel. Ore. Bar Ass'n v. Prendergast,** 164 P. 1178, 1179 (Ore. 1917); **Erdman v. Bd. of Regents,** 261 N.Y.S. 2d 634 (Sup. Ct. 1965); **Hughes v. State Board of Health,** 159 S.W.2d 277 (Mo. 1942).

In this respect, the two statutes, § 60-6-2.3(A) and § 60-6-2.3(B) (1), differ in their scope of review. Under (B) proof of conviction alone automatically disqualifies the licensee, and therefore, the legislature has limited the review under that section to the most serious offenses. Under (A) however, the Commission is directed *{*113}* to the facts and circumstances underlying the conviction which the Commission must weigh and balance against other mitigating factors. For example, conviction of a mere misdemeanor, particularly one which does not involve a breach of trust, might not represent to the Commission a sufficient threat to the "general welfare" to warrant disqualification. See Note, **The Collateral Consequences of a Criminal Conviction,** 23 Vand. L. Rev. 929, 1155 - 1159, 1233-1241 (1970); Cf., Criminal Offender Employment Act, §§ 41-24-1, et seq., NMSA, 1953 Comp. Evidence of a felony, on the other hand, has been regarded by appellate courts as almost "conclusive evidence" of a licensee's lack of moral qualifications, particularly where the class of crime relates to the very evil which the licensing act seeks to avoid. **State ex rel. Ore. Bar Ass'n v. Prendergast, supra; In re Berardi,** 129 A. 2d 705 (N.J. 1957). This appears to be the rule in New Mexico where the Supreme Court has given great weight to felony convictions as justification for license revocation. **In re Morris,** 74 N.M. 679 (1967) the Court stated at 683:

While not prepared to declare that in every case where a felony has been committed by a [licensee] disciplinary action is justified or required, . . . we must concede that we have difficulty in imagining what kind of felony could be considered as not being 'contrary to honesty, justice, or good morals.'

As this office has previously stated, the Commission would be acting within its authority if they decided, in the exercise of its discretion, to revoke the license in question on the basis of this particular felony conviction and the underlying circumstances. "The procurement of public officials", has been described by federal courts interpreting 18 U.S.C. 201 (f), as "fatally destructive to good government . . . [and to] the integrity,

fairness and impartiality of the administration of law." **United States v. Irwin, supra,** at 196. The licensee's conviction of this crime was affirmed on appeal on the basis of evidence which "overwhelmingly support[ed]" the verdict, **United States v. Alessio, supra,** and stay of sentence has been denied by the United States Supreme Court. Prior conduct of this nature could be interpreted by the Commission, after consideration of all relevant facts, to be inconsistent with the proper protection of the ". . . safety, morals, good order, and . . . general welfare" of the New Mexico public, and this conclusion would be supported by law. See **Trimble v. Texas State Bd.,** 483 S.W.2d 275 (Tex. 1972) (bribery offer sufficient basis for license revocation).