

Opinion No. 88-03

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OPINION OF: HAL STRATTON, Attorney General

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TO: Eduardo C. Lucero, Director, New Mexico Parole Board, 1451 St. Michael's Drive, Suite No. 1, Santa Fe, New Mexico 87503

QUESTIONS

Are firearm privileges automatically restored pursuant to Section 31-20-9 NMSA 1978 when a person successfully completes the period of a deferred sentence?

CONCLUSIONS

Yes.

ANALYSIS

The receipt, transportation, or possession of firearms by a person who has been convicted of a felony may subject that person to criminal sanctions under state and federal law. Section 30-7-16 NMSA 1978 (1987 Supp.) provides, in pertinent part:

A. It is unlawful for a felon to receive, transport or possess any firearm or destructive device in the state.

...

C. As used in this section:

...

(2) "felon" means a person who has been convicted in the preceding ten years by a court of the United States or of any state or political subdivision thereof to a sentence of death or one or more years imprisonment and has not been pardoned of the conviction by the appropriate authority;....

Violation of Section 30-7-16 is punishable as a fourth degree felony. Section 30-7-16B.

Title 18 of the United States Code, Section 922(g) makes it a federal offense for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to transport or possess a firearm in interstate or foreign commerce or to receive a firearm that has been transported in interstate or foreign

commerce. Section 921 (20) provides a clarification of the meaning of "conviction" for purposes of federal law:

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Under New Mexico law, after a defendant has been convicted of a crime, the court may, in its discretion, suspend or defer the sentence. Section 31-30-2 NMSA 1978. If the court defers sentencing, no sentence is imposed. *State v. Kenneman*, 98 N.M. 794, 797, 653 P.2d 170, 173 (Ct.App. 1982). "Whenever the period of deferment expires, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime, the court shall enter a dismissal of the criminal charges." Section 31-20-9 NMSA 1978. This section has been interpreted to mean that the right to vote is automatically restored upon successful completion of the period of deferment. See *Att'y Gen. Op. 73-44*. Thus, successful completion of a deferred sentence under New Mexico law would not be considered a "conviction" for purposes of 18 U.S.C. § 922.

The legislative intent underlying Section 30-7-16 is less clear than the congressional intent underlying the federal statute. Section 30-7-16 applies to anyone who has been "convicted ... to a sentence of death or one or more years imprisonment" within the preceding ten years. The precise meaning of the phrase "convicted ... to a sentence" is difficult to ascertain. It appears, however, to require both a conviction and imposition of a sentence. When a defendant receives a deferred sentence, no sentence is imposed. *Kenneman*, 98 N.M. at 797, 653 P.2d at 173.

The language used in Section 30-7-16 may be compared with the language of section 31-18-17 NMSA 1978, the habitual-offender statute. This latter section provides for increased sentences for persons convicted of noncapital felonies who have prior felony convictions. Section 31-18-17 defines "prior felony conviction" in two ways:

- (1) a conviction for a prior felony committed within New Mexico whether within the Criminal code or not; or
- (2) any prior felony for which the person was convicted other than an offense triable by court-martial if:
 - (a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;
 - (b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or

(c) the offense would have been classified as a felony in this state at the time of conviction.

The Supreme Court of New Mexico has held that the use of the word "conviction" by itself does not require that a sentence be imposed to be considered a prior felony conviction for purposes of the habitual offender statute. *Padilla v. State*, 90 N.M. 664, 667, 568 P.2d 190, 192 (1977). By contrast, the legislature required in Section 30-7-16 that a defendant not only be "convicted," but be "convicted ... to a sentence."¹

Penal statutes are to be construed strictly, *State v. Allen*, 77 N.M. 433, 434, 423 P.2d 867, 868 (1967), and any ambiguity is to be construed against the State, *State v. Ortiz*, 78 N.M. 507, 510, 433 P.2d 92, 95 (Ct.App. 1967). At best, the class of persons to whom Section 30-7-16 applies is ambiguous. Applying this rule of statutory construction, we conclude that a defendant who receives a deferred sentence is not subject to the criminal sanctions that Section 30-7-16 imposes.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) It is perhaps significant that Senate Bill 87, 35th Leg., 1st Reg. Sess., which ultimately was enacted and codified as Section 30-7-16, was amended twice before passage. The Senate Judiciary Committee amended the bill to add the words "in the preceding ten years" following the word "convicted" in the section defining felon. The bill was amended further to change the penalty for violation of the act from a third degree felony to a misdemeanor. Both amendments had the effect of narrowing the act's limitations on felons' rights.