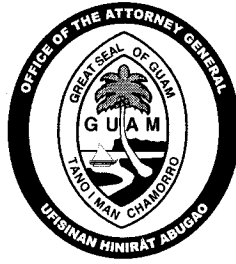


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December 15, 2010

LEGAL MEMORANDUM

Ref: AG 10-0794

TO: Chief of Police, Guam Police Department

FROM: Attorney General *J.W. 12/27/10*

SUBJECT: *Effect of a Pardon and Licensing of Gun*

This office has been asked if the Guam Police Department is required to issue a gun permit to a person convicted of a felony but then pardoned by the Governor. The following facts were reported to this office. A person received a pardon from the Governor in 1984 after being convicted of felony attempt to evade and defeat tax under Guam Territorial Income Tax Code §7201 in 1975. Since the time the person received the pardon, he has received at least one gun permit; however when he attempted to renew the permit recently, he was informed by someone at the Guam Police Department that his pardon from the Governor does not restore his right to possess firearms on Guam.

DISCUSSION

48 USCA §1422 outlines the powers of the Governor and provides in part that “he may grant pardons and reprieves and remit fines and forfeitures for offenses against local laws.” It does not, however, state the consequences of such a pardon.

1. Guam Code Annotated - Provisions which Refer to a Pardon

The Guam Code Annotated outlines the effect of a pardon in only a few provisions, however it does not specifically state whether a pardon will allow the issuance of a gun permit to a person who has been pardoned. The code provisions which address the effect of a pardon are as follows:

Peace Officer

4 GCA §4302.1 addressed the effect of a pardon on becoming a police officer. It provides in part that “no person *shall* be employed as a peace officer...who has previously been convicted of a felony in any civilian or military court, a crime involving moral turpitude, a crime of domestic or family violence, regardless of whether he was pardoned *or* commuted by *I Maga'lahaen Guahan* regarding such a conviction.

Legislature

48 USCA §1423f outlines the qualifications of Legislators and provides in part that “no person shall sit in the legislature... who has been convicted of a felony or a crime involving moral turpitude and who has not received a pardon restoring his civil rights.”

Sentence Enhancement

9 GCA §80.44 defines a previous conviction for the purposes of enhancing a sentence. Section 80.44(b) provides in part:

an adjudication by a court of competent jurisdiction that defendant committed a crime constitutes a conviction for purposes of §§80.38, 80.40 or 80.44 although the sentence or execution thereof was suspended, provided that the time to appeal has expired and that the defendant was not pardoned *on the ground of innocence*.¹

(Emphasis added)

As such, if the basis of the pardon was other than on the ground of innocence, the prior conviction could still be used for purposes of enhancing a sentence.

Serving as Juror

7 GCA §22105 outlines the grounds for disqualifying a prospective juror. Specifically §22105(6) provides that a prospective juror is disqualified to serve if he has been convicted of a felony in a state, territorial or federal court and has not been pardoned.²

Candidate Reports

4 GCA §13103 outlines the requirement for filing certain reports with the Election Commission. It provides in part that each candidate who is not an official *shall* file with the Election Commission on the date he files for candidacy, a written report itemizing any and all felony convictions, whether public or under seal, that have not been dismissed upon successful appeal, vacated by a court, *or* cleared by a grant

¹ It should be noted that in *People v. Muritok*, 2003 Guam 21, 9 GCA §80.38, the enhanced sentencing statute, was declared unconstitutional. The Court held that §80.38, which gave the Court authority to enhance a sentence after the Court made a finding of fact on the record, beyond a reasonable doubt that there were facts present to enhance a sentence, violated the doctrine announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the U.S. Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi* at 490.

² This provision should be contrasted with 9 GCA §82.20. Section 82.20 provides:

§ 82.20. Jury or Voting Disqualification for Duration of Sentence Only.

Notwithstanding any other provision of law, a person who is convicted of a crime shall be disqualified:

(a) from voting in a primary or general election if and only so long as he is committed under a sentence of imprisonment; and

(b) from serving as a juror until he has satisfied his sentence.

SOURCE: See Guam § 673; M.P.C. § 306.3; N.J. § 2C:51-3.

COMMENT: Section 82.20 follows Penal Code § 673 and expands upon it in Subsection (b). While a person is prohibited from voting only while he is actually in prison, that same person is disqualified from serving as a juror for as long as any part of his sentence remains, including probation, suspended sentence, or parole.

Thus, a person convicted of a crime may not vote until he is released from prison. On the other hand, he is disqualified from sitting on a jury until he has fully completed his sentence. However, if the person was convicted of a felony, in accordance with 7 GCA §22105(6) he would continue to be prohibited from serving on a jury unless he was pardoned. Thus, a felon’s civil rights are not fully restored unless he received a pardon and can sit on a jury.

of executive pardon. Thus, a pardon for a felony conviction excludes it from the requirement that it be reported for the purposes of this provision.

Registering as Sex Offender

9 GCA §89.03 required certain persons who have been convicted in Guam of certain sex offenses to register on a Sex Offender listing. 9 GCA §89.03(b)(2)(B) specifically excludes from the registration requirement persons who were pardoned by *I Maga 'lahen Guahan*.

The provisions outlined above are the only provisions in the Guam Code Annotated that outline the effect of a pardon on certain rights or privileges.

2. Legal Disqualification or Disability

9 GCA §82.10 outlines the basis for legal disqualification or disability. It provides in part:

§ 82.10. Basis for Legal Disqualification or Disability.

(a) No person shall suffer any legal disqualification or disability because of his conviction of a crime or his sentence on such conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is:

- (1) necessarily incident to execution of the sentence of the court;
- (2) provided by this Title;
- (3) provided by a statute other than this Title, when the conviction is of a crime defined by such statute; or
- (4) provided by the order or regulation of an agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.

Under (1) an example of a privilege incident to the sentence of the court would be the prohibition of voting while serving in prison. It would also include serving as a juror until the person has completed his sentence. However, if a person was convicted of a felony, the disability would remain until he received a pardon, thus making him eligible to sit on a jury.

Under (2) such an example of this type of disqualification would be those disqualifications found in 9 GCA §82.20. As discussed below, the prohibition of a convicted felon receiving a gun permit under 10 GCA §60108(b)(1) may fall under this disqualification.

Under (3), such a disqualification would include a penalty for an offense defined by an underlying statute found outside of Title 9 of the Guam Code Annotated.

Under (4) this provision would be one in which a regulation which relates to the competency of an individual to exercise a right or privilege would be affected. Such examples would be holding public office; or a regulation which prohibits a convict from receiving a liquor license.

3. Local and Federal Statute for Authority to Carry or Possess a Gun

A person may lawfully own or carry a firearm provided he has received an Identification Card from the Guam Police Department. Under 10 GCA §60108, there are certain restrictions placed upon the types of persons to whom an ID card may be issued in order to lawfully possess, use, or carry a concealed firearm. One such restriction is placed upon a person who has been convicted of a felony. 10 GCA §60108(b)(1) provides that no person shall be issued an identification card who has been convicted by any court of the

United States, a state, territory, possession, trust territory or political subdivision thereof of any felony. The statute does not provide, however that a person may receive an ID card to lawfully carry a gun if he has been pardoned for a felony.

Guam's gun provision should be compared with the federal gun provision which allows federally convicted felons to carry a gun if they have received a pardon for such crime. 18 USCA §922(g)(1) generally prohibits one who has been convicted of a crime punishable by imprisonment for a term exceeding one year from possessing a gun. The term "crime punishable by imprisonment for a term exceeding one year" is defined as follows:

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

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.

18 U.S.C.A. § 921(20).

Thus, under federal statute, one who has been convicted of a crime punishable by a period of imprisonment for a term exceeding one year may be able to carry a gun if (1) he has been pardoned or (2) had his civil rights³ restored, unless the pardon or restoration of civil rights expressly provides that the person may not possess or receive firearms.

In contrast to the federal statute, Guam's statutory provision for the issuance of a firearms identification card makes no mention of the effect of a pardon on the privilege or right to receive a firearm ID card. In general, government agencies have only the powers expressly given to them by the legislature, or those powers that may be necessarily implied in order to carry out their statutory duties. In other words:

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.

Ada v. Guam Telephone Authority, 1999 Guam 10 at *3.

³ The three "core" civil rights are the right to vote; the right to serve on a jury; and the right to hold public office. *U.S. v. Gomez*, 911 F.2d 219 (9th Cir. 1990); *McGrath v. US*, 60 F3d 1005 (2nd Cir. 1995); *U.S. v. Woodall*, 120 F.3d 880 (8th Cir. 1997).

The Guam Legislature has expressly prohibited the Guam Police Department from granting an ID card to a convicted felon. There is no provision that further qualifies this prohibition, such as allowing a pardoned convicted felon to receive a firearm ID card. Because the provision at issue specifically prohibits a convicted felon from receiving a firearm ID, the provision of 9 GCA § 82.10, entitled *Basis for Legal Disqualification or Disability*, would not expunge this particular disability. In other words, under 9 GCA §82.10(a)(3), the felony conviction outlined in 10 GCA §60108 would be “provided by a statute other than this Title, when the conviction is of a crime defined by such statute.”

Such a reading is not contrary to case law, which recognizes that there may be certain circumstances where statutory prohibitions may continue to prohibit certain classes of people from possessing guns. The recent Supreme Court decision *District of Columbia v. Heller*, 128 S.Ct.2783 (2008), which held unconstitutional a statute that banned handgun possession in the home, noted there are some prohibitions that are permitted under the Second Amendment. The Court stated:

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller at 2816-2817.

Thus, it remains constitutionally permissible to prohibit gun ownership to certain persons.

4. 9 GCA §82.10 Basis for Legal Disqualification or Disability

9 GCA §82.10 states that there shall be no legal disqualification or disability because of a conviction unless the disqualification or disability involves the deprivation of a right or privilege that meets four enumerated conditions stated in the statute. Whether the prohibition of 10 GCA §60108(b)(1) against a felon from carrying a firearm is a “penalty” or “disability” within the meaning 9 GCA §82.10, was similarly addressed by the state of California in *People v. Bell*, 778 P.2d 129 (Cal.1989).

In *Bell* the court had to determine whether the defendant violated a California statute which prohibited a convicted felon from possessing a gun. The defendant previously had received a felony conviction while he was a minor, however under California law he was honorably discharged from the Youth Authority on the prior manslaughter commitment. The defendant argued that because he was honorably discharged, he could not be considered a convicted felon for purposes of the statute which prohibited a convicted felon from possessing a gun. The Court undertook a lengthy analysis stating:

We undertake a similar analysis here. “Penal Code, section 12021, is part of the legislative scheme originally promulgated in 1917 (Stats.1917, ch. 145, p. 221, § 1.) and commonly known as the Dangerous Weapons Control Act.... The clear intent of the Legislature in adopting the weapons control act was to limit as far as possible the use of instruments commonly associated with criminal activity [citation] and, specifically, ‘to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence.’ (*People v. Scott*, 24 Cal.2d 774, 782 [151 P.2d 517].)” (*People v. Washington* (1965) 237 Cal.App.2d 59, 66, 46 Cal.Rptr. 545.) The law presumes the danger is greater when the person possessing the concealable firearm has previously been convicted of felony, and the presumption is not impermissible. (*People v. Dubose* (1974) 42 Cal.App.3d 847, 849-850, 117 Cal.Rptr. 235.) It is evident that “the almost frivolous ‘burden’ suffered by a convicted felon denied the ‘right’ to carry a

concealable weapon” (id. at p. 850, 117 Cal.Rptr. 235) pales in comparison with the true disability suffered, for example, by the narcotic addict in *Navarro*, supra, 7 Cal.3d 248, 102 Cal.Rptr. 137, 497 P.2d 481, who was denied the opportunity for treatment in the addict rehabilitation program. More important, while that treatment is consistent with and supportive of the remedial purposes of the Youth Authority law, the same could not be said of a decision to permit youthful ex-felons to carry concealed firearms. We conclude that the prohibition of section 12021 is not one of the penalties or disabilities released by honorable discharge from the Youth Authority, and hence that defendant's conviction of violating that statute is valid.

We find support for our conclusion in the legislation governing the pardon of adult ex-felons. (§ 4852.01 et seq.) After release from prison, successful completion of parole, and a lengthy additional period of rehabilitation in this state during which the ex-felon must “live an honest and upright life,” “conduct himself with sobriety and industry,” and “exhibit a good moral character” (§4852.05), he may petition the superior court for a certificate of rehabilitation (§4852.07). If, after investigation by law enforcement authorities and a thorough hearing into the matter, the court finds that the petitioner has demonstrated “his rehabilitation and his fitness to exercise all of the civil and political rights of citizenship,” it will issue a certificate of rehabilitation recommending that the Governor grant a full pardon. (§4852.13.) But even though such a pardon entitles the ex-felon thereafter to exercise all civil and political rights and privileges, specifically including the right to own or possess any lawful firearm (§ 4852.17), the legislation expressly declares that “this right shall not be restored, and Sections 12001 and 12021 of the Penal Code shall apply, if the person was ever convicted of a felony involving the use of a dangerous weapon.” (Ibid.; see also § 4852 [pardon of prison inmates].)

In short, the Legislature has determined that any adult convicted of a dangerous-weapon felony should be forever subject to the bar of section 12021, regardless of how complete his rehabilitation. Even the Governor, vested with the pardoning power by the Constitution (art. V, § 8), cannot restore such person's privilege to carry a concealable firearm. The implications for the case at bar are clear: because the prerequisites for an honorable discharge from the Youth Authority-i.e., “a good record on parole” (Welf. & Inst.Code, § 1772)-are much less stringent than the requirements for obtaining a full gubernatorial pardon, we cannot believe the Legislature intends such a discharge to grant a benefit that it expressly denies to a pardon.

People v. Bell at 153-154.

Similar reasoning applies to this case. The Legislature could have specifically stated that a person who received a pardon could be permitted to receive a firearm ID card, however it did not. Instead, it chose to prohibit any person who was convicted of any felony from receiving a firearm ID card, as a pardon does not necessarily erase the fact of a felony conviction.

Several cases have recognized that a pardon does not erase the fact of a conviction. The essence of a pardon is forgiveness of a penalty due to the conviction. It does not necessarily erase the guilt or the conviction of the crime. *Chacon v. U.S.*, 48 F3d 508 (D.C. Cir. 1995). The fact of conviction remains and a record of that fact may be used as evidence notwithstanding a subsequent pardon. *U.S. ex rel. Cannon v. Maroney*, 255 F. Supp. 235 (W.D. Pa. 1966); *People v. Mendez*, 286 Cal. Rptr. 216 (Cal. App. 1991). As such, regardless of a pardon, the applicant in this particular case remains a convicted felon and as such, under Guam law, is not permitted to receive a firearm identification card.

Conclusion

The pardon granted by the Governor does not erase the fact of a conviction. In this case, despite the pardon, the applicant remains a convicted felon. Since 10 GCA §60108 prohibits the issuance of an identification card to any person who has been convicted of a felony, and the statute does not mention any effect of a pardon by the Governor, GPD is not permitted to issue a firearm identification card to the applicant, a convicted felon.



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