Opinion No. 58-06

January 15, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. George H. Franklin (W. P. Kearns, Jr.) Chief, Division of Liquor Control, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

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Is a conviction by a military tribunal for a violation of a military regulation where the sentence is for more than one year's imprisonment in a military disciplinary institution considered a felony under our state criminal statutes?

CONCLUSION

Not necessarily.

OPINION

ANALYSIS

The nature of military offenses is generally considered in 36 Am. Jur. 268, as follows:

"Offenses against the military law may or may not be criminal offenses, depending on whether the acts which constitute a violation of military law are also a violation of the local criminal code. Where the rules and regulations of a military code are merely disciplinary in their nature, designed to secure higher efficiency in the military service. a violation of them does not constitute a 'criminal offense' within the protection and meaning of constitutional provisions requiring presentment or indictment by a grand jury in order to hold to answer for a criminal offense."

and in 15 Am. Jur. 72:

"A single act may constitute a transgression of both civil and military law, and consequently, make the offender amenable to punishment by both civil and military authority."

In People ex rel. Stewart v. Wilson, 13 N.Y.S. 2d 749, the New York Court, in giving consideration to the nature of convictions handed down by a court martial, stated the following:

"The statute (Penal Law, § 1941) directs additional punishment as a second or third offender for a person who has previously been once or twice convicted within this state of a felony, or under the laws of any other state, government or country of a crime which, if committed within this state, would be a felony. Sodomy is a crime in this state. Penal Law, § 690. Appellant urges that a conviction by a court-martial of the United States is not such a conviction as comes within the purview of § 1941 of the Penal Law because in such court there is no indictment, the court is composed of army officers instead of persons skilled in the law and appeals from its determinations are greatly restricted. We see no merit in these contentions. The military courts are lawful tribunals. The previous conviction here was by a court of competent jurisdiction established by the Federal government for a crime which if committed within this state would be a felony. The conviction is no less valid because of differences in procedure."

The statutory provisions of this state wherein are defined and set out the basic penalties for felonies are §§ 40-1-3 and 40-1-5, N.M.S.A.:

"A felony is a public offense punishable by death, or which is, or may be in the discretion of the court, punishable by imprisonment in the penitentiary for more than one (1) year; or a public offense which is expressly declared to be a felony." (As amended L. 1957, Ch. 162, § 1).

and

"When a criminal is found guilty in the district courts of this state of any felony for which no punishment has been prescribed by law, the said criminal shall be punished by a fine of not less than fifty dollars ($ 50.00), or by imprisonment in the penitentiary for not less than three (3) months, or both at the discretion of the court."

Accordingly, it is our opinion that imposition of a sentence of more than one year by a duly a-]pointed court martial is not to be considered a felony per se as contemplated by the language of § 46-5-14 (a) (1). The aforesaid statute disqualifies the following:

"Persons who have been convicted of two (2) separate misdemeanor violations of this act in any calendar year or of any felony, except those persons restored to civil rights."

If, however, the person making application for a liquor license has suffered a conviction for a violation of any of the punitive Articles of War, which articles are also to be found as statutory felonies in New Mexico, then said court martial conviction, in keeping with the Stewart case, supra, shall be considered an absolute prohibition against approving an application for a liquor license or transfer thereof.