Opinion No. 68-98

October 1, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Ernestine D. Evans Secretary, State of New Mexico Santa Fe, New Mexico

QUESTION

FACTS

The People's Constitutional Party has filed a list of candidates for state offices for the 1968 General Election. Reies Lopez Tijerina was named as that Party's candidate for the office of Governor. Mr. Tijerina was found guilty and a judgment was rendered in the United States District Court, District of New Mexico, of assaulting a federal officer in violation of 18 U.S.C., § 111. Such violation carries with it a fine of not more than Five Thousand Dollars ($ 5,000), or imprisonment for not more than three (3) years. It is classified as a felony, 18 U.S.C., § 1. Mr. Tijerina has filed an appeal to the conviction but the determination on appeal has not been made.

QUESTION

In view of the above facts, is Reies Lopez Tijerina eligible to run for the office of Governor of the State of New Mexico if otherwise qualified?

ANSWER

No.

OPINION

*{*153}* **ANALYSIS**

The applicable constitutional provision is New Mexico Constitution Art. VII, § 2(A), which provides:

Every citizen of the United States who is a legal resident of the state and is a **qualified elector** therein, shall be qualified to hold any elective public office except as otherwise provided in this Constitution. (Emphasis added)

Section 3-1-1, N.M.S.A., 1953 Compilation, defines a "qualified elector" for purposes of the Election Code. In such definition "persons convicted of a felonious or infamous crime" are excluded "unless restored to political rights."

In addition. Section 5-1-2, N.M.S.A., 1953 Compilation, provides:

No person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights, shall be qualified to be elected or appointed to any public office in this state.

Both the above statutes use the term "convicted". In light of the fact that Mr. Tijerina is in the process of appealing the judgment, the question as to whether he has been "convicted" arises. Numerous cases indicate that a person is convicted when a verdict of guilty has been returned. See **Gutierrez v. Immigration and Naturalization Service,** 323 F.2d 593 (9th Cir. 1963), cert. den. 377 U.S. 910, 84 S. Ct. 1171, 12 L. Ed. 2d 179 (1964), and **Attorney General ex rel. O'Hara v. Montgomery,** 275 Mich. 504, 267 N.W. 550 (1936). Other cases have required both a verdict of guilt and a judgment by the court. See **Commonwealth ex rel. McClenachen v. Reading,** 336 Pa. 165, 6 A.2d 776 (1939). Frequently, the meaning of the term depends upon the statute within which it is found. See **Summerour v. Cartrett,** 200 Ga. 31, 136 S.E.2d 724 (1964), **People v. Weinberger,** 251 N.Y.S.2d 790 (1964).

In an overwhelming majority of cases involving the interpretation of the word "convicted" in statutes similar to Section 5-1-2, N.M.S.A., 1953 Compilation, courts have determined that a judgment on a *{*154}* verdict of guilty is a conviction and the fact that an appeal is pending does not affect that interpretation. There are three main reasons generally given for this interpretation. First, after a verdict of guilty and a judgment the presumption of innocence which up until that point had existed in favor of the defendant no longer prevails, but, on the contrary, the law from that time on presumes the defendant to be guilty. Second, a person subject to a judgment on a verdict of guilty is subject to restraints which would prevent him from regularly performing the duties of public office. Third, it is against the public interest to have in public office a person who is presumed by law to be guilty of a felony. The purpose of the statute is to protect public interest, not to punish the person who is disqualified from seeking public office; therefore, the right of appeal, as a protection against punishment, does not affect the term "convicted" as contemplated by this type statute. See **State ex rel. DeConcini v. Sullivan,** 66 Ariz. 348, 188 P.2d 592 (1948); **State ex rel. Hunter v. Jurgensen,** 135 Neb. 136, 280 N.W. 886 (1938). cert. den. 307 U.S. 643, 83 L.ED. 1523, 59 S. Ct. 1047 (1939); **McKanna v. Horton,** 151 Cal. 711, 91 Pac. 598 (1907), and **Attorney General ex rel. O'Hara v. Montgomery,** supra.

The fact that Mr. Tijerina was convicted in a Federal Court does not prevent application of either applicable statute. **(Crampton v. O'Mara,** 193 Ind. 551, 139 N.E. 360, writ of error dismissed, 267 U.S. 575, 69 L. Ed. 795, 45 S. Ct. 230 (1925).

By: Larry N. Smith

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