Opinion No. 73-44

May 23, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

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QUESTIONS

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1. Where a defendant has pleaded guilty or nolo contendere to a felony charge, or has been convicted thereof after trial, is his right to vote suspended,

(a) if sentence is deferred, during the period of such deferment?

(b) if sentence is suspended, during the period of such suspension?

(c) while an appeal of the conviction is pending?

2. If the answers to Questions 1 (a), (b) and (c) are affirmative,

(a) how is the elective franchise restored?

(b) what are the duties of the district court clerk with regard to certification of conviction to the county clerk and cancelling same after the period of suspension or deferment or a reversal of conviction on appeal?

3. What is the definition of "idiots" and "insane persons" under Article VII, Section 1, New Mexico Constitution, and "legal insanity" as used in Sections 3-4-22 and 3-4-24, N.M.S.A., 1953 Comp., (Repl. Vol. 1)?

CONCLUSION

1. (a). Yes.

(b). Yes.

(c). Yes.

2. (a). See analysis.

(b). See analysis.

3. See analysis.

OPINION

*{*85}* **ANALYSIS**

The New Mexico Constitution, Article VII, Section 1, denies the elective franchise to "idiots, insane persons, and persons convicted of a felonious or infamous crime unless restored to political rights." This clause is fraught with undefined terms: "idiots," "insane persons," "convicted," "felonious or infamous crime," and "political rights." As we shall see later, statutory law has done little to define these terms or to establish procedures for determining when a person is disfranchised.

Despite our conclusions that persons under suspended or deferred sentences, or whose convictions are on appeal, are disfranchised, we would like to say that we agree with this statement from **Harrison v. Laveen,** 67 Ariz. 337, 198 P.2d 456, 459 (1948):

"In a democracy suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded. To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality."

It may come as a shock to some to learn that voting rights can be forfeited for the theft of an automobile hubcap, since Section 64-9-4, N.M.S.A., 1953 Comp., makes it a fourth degree felony (1 to 5 years and/or $ 5,000 fine) to "steal any automobile tire, part, accessory, equipment or tool," or for stealing a lamb or kid worth perhaps $ 10.00, since Section 40A-16-1, N.M.S.A., 1953 Comp., makes larceny of livestock a third degree felony (2 to 10 years and/or $ 5,000 fine) regardless of its value.

At the threshold we are met by questions of whether constitutional or statutory provisions such as New Mexico's, barring convicted felons from voting, are in violation of the federal constitution. These questions were raised anew by **Ramirez v. Brown,** 107 Cal. Rptr. 137, 507 P.2d 1345, decided March 30, 1973, which held that constitutional and statutory provisions such as ours violated the 14th Amendment of the federal constitution, but only as applied to "all ex-felons whose terms of incarceration and parole have expired." However, on May 7, 1973, the Supreme Court of the United States affirmed, without opinion, **Fincher v. Scott,** 352 F. Supp. 117 (D.C.M.D.N.C., 1973), in which a three judge court upheld North Carolina's constitutional and statutory exclusions of convicted felons from the elective franchise. **Fincher v. Scott,** 41 U.S. Law Week 3590. This was consistent with **Gray v. Sanders,** 372 U.S. 368, 33 S. Ct. 801, 9 L. Ed. 2d 821 (1963), and **Lassiter v. Northampton County Bd. of Elections,** 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959), which contained **dicta** to the effect that the states could, within limits, specify the qualifications of voters in both state and federal elections and could take into consideration such factors as "previous criminal record." It thus appears that there is no federal constitutional impediment, **Ramirez** to the contrary notwithstanding. However, it should be noted that **Ramirez** is limited to the facts of that case, that is, to ex-felons whose sentences had been served. It left

untouched **Stephens v. Toomey,** 51 Cal. 2d 864, 338 P.2d 182 (1959), which held that a person on probation under a **suspended** sentence could not register to vote. An opposite result was reached with regard to a **deferred** sentence in **Truchon v. Toomey,** 116 Cal. App. 2d 736, 254 P.2d 638, 36 A.L.R.2d 1230 (1953), where the period of probation had expired, the defendant had been allowed to withdraw his guilty plea, and the charges had been dismissed.

The difference, of course, lies in when the "conviction" takes place. Surprisingly few courts have had to answer this question in its present context, and those that have are almost unanimously against the position taken in this opinion. See Annot., 36 A.L.R.2d 1238 and later case service. However, in view of **State ex rel. Chavez v. Evans,** 79 N.M. 578, 446 P.2d 445 (1968), we are compelled to reach the conclusions we have.

Chavez did not involve the elective *{*86}* franchise directly, but only as it concerned the right to seek election to public office. New Mexico Constitution, Article VII, Section 2 (A), which establishes qualifications to hold public office, specifies that such an officeholder must be "qualified elector" of the state. After dealing with other questions, including whether a felony conviction under federal law disqualified a person from voting and therefore from holding public office, the Supreme Court held that the pendency of an appeal from such a conviction did not suspend the operation of the disqualifying constitutional provision. The "conviction" meant by the constitution, the court held, occurred at the trial court level and was not held in abeyance "pending final determination by a court of last resort."

In two cases, **State v. Larranaga,** 77 N.M. 528, 424 P.2d 804 (1967), and **State v. Silva,** 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967), our appellate courts held that "conviction" under the habitual criminal statute is the finding of guilt and has nothing to do with the sentence. In **Larranaga,** the Supreme Court said:

"We are not inclined to follow the reasoning of the cases which have adopted the view that a conviction followed by a suspended sentence does not have the essential finality necessary to enhance the penalty under habitual criminal acts." 77 N.M. at p. 530.

And in **Silva,** where it is not clear what type of sentence had been imposed in the earlier proceeding, the Court of Appeals said:

"Defendant apparently takes the position that the imposition of sentence constitutes a conviction, or at least is an essential element of conviction. Conviction means the establishment of guilt by a plea of guilty, by a verdict of the jury in a jury case, or by a finding of the court in a non-jury case. The imposition of sentence is not an element of the conviction, but is rather a declaration of the consequences of the conviction." 78 N.M. at p. 290.

While the foregoing quotations might seem at first glance to be dispositive of the meaning of "conviction," some courts have given different meanings to this word as used in different statutes, it being a matter of legislative intent (or that of the people if it

is in the constitution). **People v. Weinburger,** 21 A.D.2d 353, 251 N.Y.S.2d 790 (1964). There would be a more compelling reason to deny a felon the right to hold public office than to vote, for instance. But in New Mexico, as in some other states, these two rights are tied together because one qualification for holding public office is being a qualified elector.

The restoration of "political rights" mentioned in Article VII, Section 1, **supra,** no doubt refers to the powers of executive clemency granted to the governor by Article V, Section 6, New Mexico Constitution, which, however, does not specify that a pardon has that effect, providing simply:

"Subject to such regulations as may be prescribed by law, the governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment."

This provision is self-executing and may not be restricted by the Legislature, so the latter's regulatory power is not as broad as it might appear. **Ex Parte Bustillos,** 26 N.M. 449, 194 P.2d 886 (1920). However, to implement Article V, Section 6, and Article VII, Section 1, the Legislature has passed Section 40A-29-14, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), which provides in part:

"A. Any person who has been convicted of a felony shall not be permitted to vote in any election held pursuant to the laws of the state or any subdivision thereof, nor shall such person be permitted to hold any office or public trust for the state or any subdivision thereof.

B. When any convict shall pass the entire period of his sentence within the penitentiary, he shall be entitled to a certificate thereof by the superintendent of the penitentiary; or if such person shall complete the period of his sentence while on parole, he shall be entitled to a certificate thereof by the director of parole.

C. The disability imposed by this section may only be removed by the governor. Upon presentation to the governor of a certificate evidencing the *{*87}* completion of an individual's sentence, the governor may, in his discretion, grant to such individual a pardon or a certificate restoring such person to full rights of citizenship."

The last sentence of the foregoing quotation spells out the effect of a pardon as "restoring . . . full rights of citizenship," which of course include voting and holding public office. For the bearing of this section on criminal conviction in other jurisdictions, see Opinion of the Attorney General No. 70-85, issued November 5, 1970.

Section 3-4-25(B), N.M.S.A., 1953 Comp. (Repl. Vol. 1), requires the district court clerk to "file with the clerk of the county wherein the convicted felon is registered a certificate of the fact," so that his registration to vote may be cancelled. This apparently places on the district court clerk the duty of ascertaining whether the convicted felon is registered, and, if so, in which county. Logically, if not legally, if the felon is not registered but is a

resident of New Mexico the certificate should be sent to his county of residence on the theory that if he should try to register it would be in his county of residence. Of course, since residence can be changed readily, such certification may not prevent registration by a felon. (Actually, we have had personal knowledge of instances in which convicted felons registered and voted, in ignorance of their disqualification, and even were drawn for jury duty, since the list of voters is the source of prospective jurors.) The district court clerk has other problems in this connection, including whether a certificate should be sent out on a person who has been given a suspended or deferred sentence (to which the answer is affirmative in view of what has already been said) and whether, when the period of suspension or deferment has expired, a notice to this effect should be sent to the same county clerk, since the statutes are silent on this point.

The statutes on deferred and suspended sentences clearly contemplate a different procedure for restoration of the franchise to persons under deferred and suspended sentences; Sections 40A-29-21 and 40A-29-22, N.M.S.A., 1953 Comp., as amended, which are both parts of Laws 1963, ch. 303:

"40A-29-21. Effect of termination of period of suspension without revocation of order. -- Whenever the period of suspension expires without revocation of the order, 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. He shall thereupon be entitled to a certificate from the court so reciting such facts, and upon presenting the same to the governor, the defendant may, in the discretion of the governor, be granted a pardon or a certificate restoring such person to full rights of citizenship."

"40A-29-22. Completion of total term of deferment. -- 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."

It is thus apparent that a person seeking restoration of franchise after a suspended sentence must go to the Governor for relief, but that a dismissal order under Section 40A-29-22 is intended to restore the right to vote automatically. As a practical matter, since no duty is placed on the court clerk to retract the certificate of conviction, the individual concerned in most cases will have to take the initiative by securing a certified copy of the order of dismissal, presenting it to the county clerk, and requesting to be allowed to re-register. Of course, the order of dismissal could direct the court clerk to cancel the certificate of conviction and notify the county clerk to this effect.

The procedure for restoration of the elective franchise to persons who have served all or part of their sentences in the penitentiary is set forth in Section 40A-29-14, **supra.**

Although Section 40A-29-14 provides for restoration of "full rights of citizenship" by executive clemency, this apparently has no bearing on the right to engage in at least thirty-five licensed occupations in New Mexico. Some licensing statutes provide for mandatory denial or revocation of a license for conviction of a felony; others for any

crime involving moral turpitude; others for unprofessional conduct, etc. There is no provision *{*88}* for restoration of a license revoked on such grounds, or to remove the bar to granting a license in the first instance. The 31st Legislature, 1st Session, which recently adjourned, addressed itself to this problem by passing House Bill 520, the purpose of which was stated therein as follows:

"The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employments should be removed to make rehabilitation feasible."

The Governor, while expressing agreement with this purpose, vetoed the bill as "blind legislation" which might have unforeseen effects. It is apparent that the legislature, if it desires to pursue this matter further, will have to undertake section-by-section amendments of the many licensing statutes rather than utilizing the "blanket" approach.

The problems with regard to "idiots" and "insane persons" are complicated by the dearth of definitions in Article VII, Section 1, New Mexico Constitution, **supra,** and in the statutes. These terms have many meanings, depending on the context in which they are used. By actual count, there are at least thirty-three sections of the statutes which use the words "insane," "insane persons," or "insanity," and three which mention "idiots," (not counting many others using words of similar import) yet the only definition of any of these terms is in Section 21-6-13, N.M.S.A., 1953 Comp., pertaining to suits against insane or incompetent persons, which provides in part,

"The term 'insane persons', as used in this act, shall include idiots, lunatics, and persons of unsound mind, and incapable of managing their own affairs."

This definition, of course, has no application to the subject at hand, and it runs counter to the usual definitions which separate idiots from insane persons, on the basis that the former are so from birth and the latter become so later. This distinction is well stated in **Baker v. Keller,** 14 Ohio Misc. 139, 237 N.E.2d 628, 638 (1968):

"From my review of legal literature going back to 1800 it seems apparent that the common definition of the word 'idiot,' as understood in 1851 when our present constitution was in the main adopted, meant that it refers to a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. I am unable to find anything indicating any real change in this definition to this date . . .

"The words 'insane person', however, most commonly then as well as now, refer to a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life."

In Arizona, where the constitution denied the elective franchise to "persons under guardianship, non compos mentis, and insane," the court in **Porter v. Hall,** 34 Ariz. 303,

271 P. 411 (1928), decided that the exclusion applied to all persons who were not **sui juris,** that is, who are considered to be incapable of managing their own affairs and therefore cannot be trusted to make laws for others.

This approach seems to be contemplated by Section 34-2-15, N.M.S.A., 1953 Comp. (Laws of 1953, ch. 182, § 15) which gives a mentally ill person, hospitalized in the state hospital by court order or voluntarily, all civil rights, including the right to vote "unless he has been adjudicated incompetent and has not been restored to legal capacity," and unless "the head of the hospital determines it is necessary for the medical welfare of the patient to impose restrictions." However, under Section 3-4-24, N.M.S.A., 1953 Comp. (Laws of 1969, ch. 240, § 82), a person's voting registration may be cancelled if "the district court determines that a mentally ill person is insane as that term is used in the Constitution of New Mexico."

The problem is further complicated by the definition in Section 32-2-1, N.M.S.A., 1953 Comp. (Laws of 1935, ch. 60, § 1) of an incompetent person as being one

". . . who, though **not insane,** is by reason of mental disability or habitual drunkenness, incapable of properly *{*89}* caring for himself or managing his property; . . ." (Emphasis supplied.)

Though an incompetent person may not be insane, an insane person is obviously incompetent, a fact which is recognized by Section 32-2-3, N.M.S.A., 1953 Comp., as amended by Laws of 1957, ch. 176, § 2, which provides for appointment of a guardian of the estate of a person who has been adjudged insane, without further hearing on competence.

A person who has been hospitalized by court order as being mentally ill, under Section 34-2-5, N.M.S.A., 1953 Comp., as amended by Laws 1971, ch. 69, may be discharged by the hospital under Section 34-2-10, N.M.S.A., 1953 Comp., (Laws of 1953, ch. 182, § 10) without further court order, whenever the head of the hospital

". . . determines that the conditions justifying involuntary hospitalization no longer obtain . . ."

This determination and discharge does not automatically make the person **sui juris** again. Section 32-4-9, N.M.S.A., 1953 Comp. (Laws of 1935, ch. 60, § 8) provides for a judicial re-determination of sanity or competence:

"Any person who has been adjudged incompetent or insane may, at any time, apply in person or by attorney to the court which so adjudged him, and the court shall inquire into the fact of such person's insanity or incompetency and may make such finding as it may deem proper. If the court, after such inquiry, shall deem such person sane and competent, any guardianship of such person or his estate shall thereby be terminated."

Although, strictly speaking, Section 3-4-24, **supra,** applies only to cancellation of affidavits of registration, we believe that a board of registration, or the county clerk, could safely deny the right to register in the first instance if a "certification of legal insanity" has been issued by the district court and filed with the county clerk as therein provided.

Considering Sections 3-4-24 and 34-2-15 together, we conclude that, in committing a mentally ill person to the state hospital under Section 34-2-5, the district court should make a determination as to whether or not the person is incompetent within the meaning of Section 32-2-1 or "legally insane" within the meaning of Section 3-4-24 and Article VII, Section 1, New Mexico Constitution. As we have seen, there is very little difference in the meaning of incompetence and legal insanity for this purpose, under the common law definition of "insane person" quoted from **Baker v. Keller, supra.** It is the common law definition as of the time of the adoption of the New Mexico Constitution in 1911 that counts. While the court in **Baker** traced the definition back to 1851, it found no substantial change from then until the date of the opinion in 1968.

Similarly, in an incompetency proceeding involving a person who, as said in **Baker,** "has been without understanding from his nativity," the court could make a finding of idiocy within the meaning of Article VII, Section 1. However, there is no provision in the statutes for certifying such a finding to the county clerk, or of a finding of incompetence, for that matter.

A constitutional amendment proposed by the 1973 legislature, House Joint Resolution 31, would substitute "mentally deficient persons" for "idiots" in Article VII, Section 1, **supra.** If this amendment should be adopted by the electorate, there would be no need for a finding of idiocy in an incompetency proceeding, as mentioned above, but it might be desirable for the court to make a finding of mental deficiency. The latter term is defined in Article II (g) of the Interstate Compact of Mental Health, of which New Mexico is a member, Section 34-5-1, N.M.S.A., 1953 Comp., as enacted by Laws of 1969, ch. 118, § 1, and, since this definition is intertwined with that of mental illness, they are both given below:

"(f) 'mental illness' means mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community;

(g) 'mental deficiency' means mental deficiency as defined by appropriate clinical authorities to such extent that a person so afflicted is incapable of managing himself and his affairs, but shall not include mental illness; . . ."

This definition, while it may be satisfactory for the purpose of the Interstate Compact ("the proper and expeditious *{*90}* treatment of the mentally ill and mentally deficient"), leaves much to be desired from a legal, constitutional viewpoint, especially since it adopts the definition of unspecified "appropriate clinical authorities." However, the concept of such a person's being "incapable of managing himself and his affairs" is

compatible with the definition of incompetency in Section 32-2-1, **supra.** It would, of course, be preferable for Article VII, Section 1, **supra,** to define its own terms.

Care must be exercised not to disfranchise persons who are merely enfeebled by old age or physical infirmities. McCrary on Elections, 4th Ed., p. 82. **State ex rel. Melvin v. Sweeney,** 154 Ohio St. 223, 94 N.E.2d 785, 789. For this reason not every person who is adjudged incompetent should be denied the right to vote. Constitutionally (at present), disfranchisement does not occur unless there is also a finding of idiocy or insanity.

It does not follow that in every instance there must be a court finding of idiocy or insanity before election officials may refuse the right to vote. Assuming that a person has registered to vote and his registration has not been cancelled by the board of registration under Sections 3-4-22 and 3-4-24, **supra,** and that when he presents himself to vote he requests assistance as provided by Sections 3-12-29 through 3-12-34, N.M.S.A., 1953 Comp. (Laws of 1940, ch. 240, §§ 265 through 270), do the election officials have any discretion to refuse to permit him to vote if he obviously is unable to do so? The statutes do not provide for this, but we think there is implied authority to refuse the franchise if the individual, even with assistance, is unable to inform the assisting official of the way he wants to cast his ballot. This, of course, is an extreme case and is not likely to happen.

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