

Opinion 14-02

OPINION OF GARY K. KING, Attorney General

March 3, 2014

BY: Mark Reynolds, Assistant Attorney General

TO: The Honorable Gorden E. Eden, Jr., Cabinet Secretary, New Mexico Department of Public Safety, P.O. Box 1628, Santa Fe, NM 87504-1628

QUESTION:

Does a gubernatorial pardon allow a person convicted of a felony to be eligible for a concealed handgun license under New Mexico law?

CONCLUSION:

Yes. If an individual otherwise meets all the requirements of New Mexico's Concealed Handgun Carry Act, a pardoned criminal conviction is not, by itself, sufficient grounds to deny the individual a concealed handgun license.

ANALYSIS:

To be eligible for a concealed handgun license, the New Mexico Concealed Handgun Carry Act requires, among other things, that an applicant "has not been convicted of a felony in New Mexico or any other state or pursuant to the laws of the United States or any other jurisdiction." NMSA 1978, § 29-19-4(A)(5). The Act does not address pardoned convictions and New Mexico courts have not considered the effect of a pardoned conviction on eligibility for a concealed handgun license.

The governor's authority to grant a pardon is vested in Article V, Section 6 of the New Mexico Constitution:

[s]ubject 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.

The New Mexico Supreme Court has found the pardon power to be solely the province of the governor and requires no legislation to be effective:

The power granted is of such a nature as to require no regulation. It is simply a one-man power, depending for its execution upon nothing more than the stroke of the pen of the Governor. Under such circumstances, the constitutional provision is clearly self-executing and requires no Legislature to make it effective.

Ex parte Bustillos, 26 N.M. 449, 466, 194 P. 886, 891 (1920). Gubernatorial pardons must be granted in a manner proscribed by law and the governor may only pardon an individual after an offense has been committed against the state. *City of Clovis v. Hamilton*, 41 N.M. 4, 62 P.2d 1151 (1936). As discussed below, the state constitution permits certain limitations on the effect of pardons. Nevertheless, the governor's power to pardon cannot be subjugated by the legislature or regulated in a way that would impair that power. The authority to issue pardons is "unrestrained by any consideration other than conscience, wisdom, and sense of public duty of the governor." *State v. Mondragon*, 107 N.M. 421, 759 P.2d 1003 (Ct. App.1988) (citing *Bustillos*, 26 N.M. at 459).

New Mexico courts have long recognized that a gubernatorial pardon generally removes "disqualifications or disabilities" that are imposed as a result of a criminal conviction. See *Shankle v. Woodruff*, 64 N.M. 88, 324 P.2d 1017 (1958). Finding that a pardon provides a shield from further punishment related to the conviction, the New Mexico Supreme Court has held that a pardon does not prohibit the underlying facts of the pardoned conviction from being presented and considered during enhanced sentencing proceedings associated with a subsequent crime. *Id.* at 95. In other words, a pardon can offer protection, but it cannot erase the past.

A 1992 Attorney General Opinion reviewed the effect of a pardoned conviction on state licensing of police officers and private investigators. It quoted from the *Shankle* opinion in part:

It is universally established that a pardon exempts the individual from the punishment which the law inflicts for the crime which he has committed; and generally speaking, it also removes any disqualifications or disabilities which would ordinarily have followed from the conviction. To say, however, that the offender is 'a new man,' and 'as innocent as if he had never committed the offense,' is to ignore the difference between the crime and the criminal. A person adjudged guilty of an offense is a convicted criminal, though pardoned....

N.M. Att'y Gen. Op. No. 92-09 (quoting *Shankle*, 64 N.M. at 98).

The 1992 Attorney General Opinion, consistent with the reasoning in *Shankle*, recognized that the pardon power does not preclude legislation that allows state licensing entities to consider the underlying facts and circumstances of a pardoned conviction when deciding whether to grant a license. Such regulation can be accomplished through statutes that require applicants to have "good moral character" or similar qualifications.

While New Mexico courts have not yet expressly addressed the issue, the Attorney General Opinion is consistent with cases from other jurisdictions. For example, the Missouri Court of Appeals has explained:

[A] pardon removes all legal punishment for the offense. Therefore, if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Damiano v. Burge, 481 S.W.2d 562, 564-65 (Mo. Ct. App. 1972) (quoting Professor Samuel Williston, Does a Pardon Blot out Guilt? 28 Harv. L. Rev. 647 (1915)). See also *Hirschberg v. Commodity Futures Trading Comm'n*, 414 F.3d 679 (7th Cir. 2005) (licensing agencies may consider conduct underlying a pardoned conviction so long as the conduct is relevant to the qualifications for the specific license); *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975) (agencies may only consider the underlying facts of the pardoned conviction that are relevant to the individual's qualifications for the licensed position); *Baldi v. Gilchrist*, 204 A.D. 425, 198 N.Y.S. 493 (1923) (holding that a pardoned offense may be used as a basis to deny a license where the licensed occupation requires good moral character); *Stone v. Oklahoma Real Estate Comm'n*, 369 P.2d 642 (Okla. 1962) (upheld a denial of a pardoned broker's license based upon certain moral and character qualification requirements).

Applying the above analysis to the question before us, the New Mexico Concealed Handgun Carry Act qualification requirements do not provide for consideration of anything other than the conviction as a single fact in and of itself. The statute's licensing requirements are very objective, and do not provide for the consideration of the applicant's character, fitness, or any other background factor that might allow a license to be denied on more subjective terms. The concealed handgun licensing qualifications place a blanket prohibition on any felony conviction and other types of convictions while remaining silent on any character or similar requirements. The concealed handgun statute qualifications provide little opportunity to consider applicants' history outside of criminal convictions while at the same time automatically denying a permit to a convicted felon, regardless of severity, history, or other mitigating circumstances. Further, we are not aware of any regulations promulgated under the statute that allow the state licensing entity to consider moral character or fitness requirements in deciding whether to issue a concealed handgun license.¹

Therefore, under the current provisions of the Concealed Handgun Carry Act, a person whose felony conviction has been pardoned by the governor is no longer considered a person "convicted of a felony" for purposes of the Act and, provided the person is otherwise qualified, may obtain a concealed carry license. See also Att'y Gen. Op. No. 92-09 (a person who is pardoned is no longer a convicted felon for purposes of criminal statutes barring a "felon" from receiving, transporting or possessing a firearm).

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[1] We do not opine on whether such regulations would be allowed by or be consistent with the Concealed Handgun Carry Act.