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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

April 22, 2002

John W. Tate, General Counsel
Lexington County Sheriff's Department
P.O. Box 639
Lexington, South Carolina 29071

Re: Request for Opinion Regarding Pardons and Sex Offender Registry

Dear Mr. Tate:

You have requested an opinion from this Office "as to the impact of a pardon upon an individual required to register as a sex offender." Specifically, you state: "in light of the recent Court of Appeals Opinion in Brunson v. Stewart should the Sheriff require an individual currently registering as required by law to continue to register after receiving a pardon."

You have indicated that two Lexington County residents who have received pardons are currently required to register as sex offenders. You have attached a copy of a Certificate of Pardon for each individual as well as a letter from one requesting that "you remove [the offender's] name from the sex offender registry."

While your query specifically relates to an offender's continuing duty to register after receiving a pardon, at least one of the offenders is requesting that her name be removed from the registry. Given this request, this opinion will also address the effect of a pardon on the maintenance of registry information following an offender's pardon.

Law/Analysis

The question posed requires the interpretation and reconciliation of two statutory schemes. The primary goal of statutory interpretation is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the legislation. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). Remedial statutes, the purpose of which is to promote public safety and welfare are to be given a more liberal construction in order to effectuate their purpose. S.C. Op. Atty. Gen. No. 83-96, see also McKenzie v. People's Baking Co., 205 S.C. 149, 21 S.E.2d 154 (1944); and, S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 241

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S.E.2d 563 (1978). Penal statutes, however, are to be strictly construed against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

The requirement to register

S.C. Code Ann. §23-3-430 provides in pertinent part that "[a]ny person, regardless of age, residing in the State of South Carolina who ... has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to [a prescribed sex offense] ... shall be required to register pursuant to the provisions of [S.C. Code Ann.§23-3-400 *et seq.* (Sex Offender Registry)]. The statutes also provide for criminal penalties in the event that an offender fails to register or registers with false information. See S.C. Code Ann. §23-3-470 & 475.

S.C. Code Ann. §24-21-940(A) defines "pardon" to mean "an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." Also, S.C. Code Ann. §24-21-1000 provides that "... a certificate of pardon shall be issued by the [Probation, Parole, and Pardon Services Board] stating that the individual is absolved from all legal consequences of his crime and conviction, and that all of his civil rights are restored."

Reviewing the language of Section 23-3-430, it appears that our General Assembly intended the application of the Sex Offender Registry to be quite broad. The Section requires *"[a]ny person ..."* who "*... has been convicted ...*" of a sex offense listed in Sections 23-3-430(C) & (D) to register. Additionally, Section 23-3-460 provides that "[a]ny person required to register under this article shall be required to register annually for life." The statutes related to the sex offender registry contain no express exception for persons who have been pardoned. Section 23-3-460 contains no express relief from the requirement to register "annually for life" for those sex offenders who may receive pardons at some point during their lives. Further, even though a pardoned offender has his civil rights restored and is relieved from the direct and collateral consequences of his conviction, a pardon does not change the fact that he "has been convicted."

Section 23-3-430(E) may also give some insight into legislative intent in this matter. That Section provides that "SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in Section 23-3-430(C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered." While not necessarily related to an offender's continuing obligation to register, it seems as though, had the General Assembly intended to relieve a pardoned offender from this requirement, they would have also provided for the removal of the offender's name and other information from the registry upon receipt of a pardon.

Moreover, in Section 23-3-400, the General Assembly provided that the express purpose of the sex offender registry is "... to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens." This purpose would indicate the sex offender registry laws to be remedial in nature, with public safety as their goal. A liberal reading to effectuate that goal would seem to support the inclusion of offenders receiving pardons within the requirements of Section 23-3-430.

Further, in interpreting the general effect of pardons, this Office has consistently opined that "a pardon connotes forgiveness, not forgetfulness, and therefore presupposes guilt of the offense charged, since, if there was no guilt, there is no reason for forgiveness." See OP. ATTY. GEN. Dated April 23, 1996. We have also opined that "even with a pardon the fact of the underlying conviction still exists as a matter of law ..." Id. Applying this logic to the current question, our Opinion would certainly be that a pardoned sex offender, even though "forgiven," would remain under the obligation to register as a sex offender absent any legislative directive to the contrary.

South Carolina's pardon laws, however, have recently been evaluated by our appellate courts. In State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000), our Supreme Court considered the question of whether a pardoned offense could be used to enhance the sentence for a subsequent offense. In holding that the pardoned offense could not be used to enhance, the Court rejected "the theory that a pardon involves forgiveness, but not forgetfulness" and that "a pardon forgives the punishment for a crime, but does not forget or obliterate the act of the commission of the crime." 340 S.C. at 344, 531 S.E.2d at 924. The Court noted that a pardon relieves an offender of all the legal consequences of his crime and conviction, direct and collateral and that the "better way to approach this question is to ask whether enhancement of a subsequent sentence is a collateral legal consequence of the pardoned conviction." Id. The Court concluded that had the General Assembly intended for a pardoned offense to be used for enhancement, specific language should have been included in the relevant statute as it "was enacted subsequent to the pardon statutes." Id. The Court also found that to construe "the term 'any conviction' to include a pardoned conviction is inconsistent with strict construction." Id.

In Brunson v. Stewart, 345 S.C. 283, 547 S.E.2d 504 (Ct. App. 2001), the Court of Appeals considered the question of whether a pardoned offense could be used to deny an individual possession of a pistol pursuant to S.C. Code Ann. §16-23-30. Section 16-23-30 prohibits possession of a pistol by "*[a]ny person who has been convicted* of a crime of violence..." (Emphasis added). Relying on Baucom, the Court of Appeals held that to deny Brunson possession of a pistol pursuant to §16-23-30, "constituted an impermissible collateral legal consequence of his pardoned conviction for a violent crime, in contravention of the pardon statutes." 345 S.C. at 287, 547 S.E.2d at 506.

While not completely free from doubt, given the holdings in Baucom and Brunson, it seems unlikely that our Courts would find a pardoned offender to be included in the requirements

of Section 23-3-430. The registration requirement of the sex offender registry would surely be considered a collateral consequence of a conviction. See Shankle v. State, 59 S.W.3d 756 (Tx. Ct.App. 2001) (Requirement that defendant register as a sex offender is collateral consequence of his conviction). Further, even though the sex offender registry may have an overall remedial purpose, the sex offender registry also contains penal provisions. At least with regard to the application of those penal provisions, a strict construction of the statute would be in order. Such a construction would most likely lead a reviewing court applying Baucom and Brunson to resolve any doubt in favor of the offender and hold that such offender is not required to register. Our General Assembly could certainly clarify the situation through additional legislation. As both the Baucom and Brunson Courts noted, the General Assembly has "expressly address[ed] pardons in situations where the legislature does not wish them to have full effect." 345 S.C. at 287, 547 S.E.2d at 506.

Removing offender/s name from the registry

Finding that a pardoned offender is relieved from the registration requirements of Section 23-3-430 does not necessarily mean that the offender's existing information contained in the registry is subject to removal. To the contrary, as mentioned above, the General Assembly has specifically addressed this situation in Section 23-3-430(E). Only those offenders who have had their convictions reversed, overturned, or vacated on appeal are entitled to have their name and other information removed from the sex offender registry. When the General Assembly has enumerated particular things in a statute, such excludes the idea of including others. ("expressio unius est exclusio alterius") Pa. Nat. Mut. Cas. Ins. V. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). Accordingly, it is my opinion that the pardon of an offender would not require removal of his information from the sex offender registry.

The strict construction requirements applicable to the penal provisions of the registry are inapplicable here. As held in McKenzie v. Peoples Baking Co., 205 S.C. 154, 205 S.E.2d 154 (1944), "[a] statute may be both remedial and penal ... [i]n construing such a statute, the courts should construe that [portion] that applies to the enforcement of the remedy liberally ... [and] ... [i]n the enforcement of the penalty, a strict construction should be given ... [t]he remedy must not be destroyed by the penalty." It seems logical that maintaining the pardoned offender's information on the sex offender registry would advance the general goal of promoting the "state's fundamental right to provide for the public health, welfare, and safety of its citizens." There is a clear distinction between the affirmative requirement that a pardoned offender register annually, with criminal consequences should the offender fail to do so, and maintaining legitimately gathered public information.

Conclusion

Based on the foregoing, it is my opinion that a South Carolina court would most likely conclude that a pardoned sex offender would be relieved of his requirement to register pursuant

to S.C. Code Ann. §23-3-400 *et seq*. It is further my opinion that the pardoning of such an offender would not, however, require the removal of his name and other information from the sex offender registry.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

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