

The State of South Carolina



Office of the Attorney General

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November 18, 1988

The Honorable William L. Ferguson
Solicitor, Sixteenth Judicial Circuit
Post Office Box 726
York, South Carolina 29745

Re: Effect of Pardoned Conviction on Multiple
Offender Acts

Dear Solicitor Ferguson:

You have requested an opinion of this office as to whether a conviction that has been subsequently pardoned by the South Carolina Parole Board may be used as a conviction for enhanced sentences or charges under our various multiple offender statutes. Our legal review reveals that this issue has not been directly addressed by the South Carolina Supreme Court. It is my opinion that a pardoned conviction may be utilized under an enhancement statute for a subsequent crime that the offender has committed.

In South Carolina, a pardon is defined as meaning "an individual is fully pardoned from all the legal consequences of his crime and conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." S.C. CODE ANN. § 24-21-940 (1987 Supp.). It has been declared by the General Assembly that "a pardon shall fully restore all civil rights lost as a result of a conviction which shall include the right to: (1) register to vote; (2) vote; (3)

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serve on a jury; (4) hold public office; (5) testify without having the fact of his conviction introduced for impeachment purposes unless the crime indicates a lack of veracity; (6) not have his testimony excluded in a legal proceeding if convicted of perjury; (7) be licensed for any occupation requiring a license." S.C. CODE ANN. § 24-21-990 (1987 Supp.). See State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (S.C. App. 1985). This office has consistently opined that a pardon is essentially intended to relieve an individual from service of a sentence and to restore the pardonee to certain rights of citizenship. 1980 OP.ATTY.GEN. 110-111; 1959-60 OP.ATTY.GEN. 300. Further, a pardon is not tantamount to an acquittal of the offense charged and the person is still "convicted" of the particular offense. 1980 OP.ATTY.GEN. 110. Simply put, 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. 59 AM.JUR.2d Pardon and Parole § 51. In light of the consistent opinion of our office that even with a pardon the fact of the underlying conviction still exists as a matter of law, we have previously opined that the record of the pardon and conviction should be included in the records maintained by the sheriff's department for criminal history and should not be expunged from the records of the Clerk of Court. 1984 OP.ATTY.GEN. 268; 1980 OP.ATTY.GEN. 110.

Under most authorities, a prior conviction may be used to enhance the penalty on a conviction of another offense even though a pardon was granted as to the prior offense. 24B C.J.S. Criminal Law § 1960(8). Said another way, a pardon of a conviction does not preclude the conviction record from being considered as a prior offense under a statute increasing the punishment for a subsequent offense. Accord Groseclose v. Plummer, 106 F.2d 311 (9th Cir. 1939); Donald v. Jones, 445 F.2d 601 (5th Cir. 1971); People v. Biggs, 71 P.2d 214 (Calif. 1937); State v. Robinson, 251 A.2d 552 (Del. Sup. 1969); State v. Zumwalt, 202 Kan. 595, 451 P.2d 253 (Kan. 1969); Stewart v. Commonwealth, 479 S.W.2d 23, 26 (Ky. 1972) (dictim); State v. Stern, 297 N.W. 321 (Minn. 1941); Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017

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(1958); Jones v. State, 147 S.W.2d 508 (Tex. 1941); Kellogg v. State, 504 P.2d 440 (Okla. Crim. 1972); State ex rel. Ves v. Bomar, 376 S.W.2d 446 (Tenn. 1964); Johnson v. State, 421 So.2d 1307 (Ala. Crim. 1982); Dean v. Skeen, 137 W.Va. 105, 70 S.E.2d 256 (1952); People v. Carlesi, 139 N.Y.S. 309, 312 (App. Div. 1913). Virginia, Ohio, Indiana, Florida, and Nebraska hold a contrary view.

It has been stated in many of the above cited cases that the pardon of a defendant did not "make a new man" of him. It did not "blot out" the fact or the record of his conviction. The pardon merely restored to the defendant his civil rights. If it had been granted before his term of imprisonment had been served, it would also have relieved the defendant of that. But it did not obliterate the record of his conviction or blot out the fact that he had been convicted. It relieved the defendant of the consequences which the law attached to his offense. But the defendant is to be punished now solely in consequence of his second offense. Johnson v. State, supra, 421 So.2d at 1312-1313.

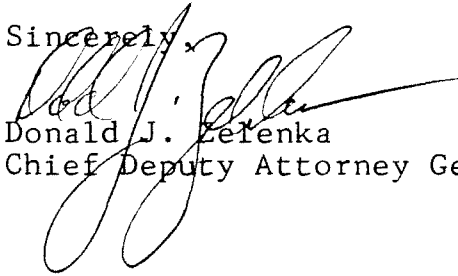
The other view which asserts that a pardon cannot be considered because it blots out guilt and wipes out the offense which is regarded as having never been committed simply does not apply to the treatment a pardon receives in South Carolina. Compare Maisonet v. State, 448 N.E.2d 1052 (Ind. 1983). In South Carolina, by statute, there is a possibility that a pardoned offense may be used to impeach where the crime indicates a lack of veracity. S.C. CODE § 24-21-990(6). Unlike some states, the records are maintained in the criminal history and not obliterated.

In South Carolina, a pardon cannot wipe out the historical fact of the conviction, and as appropriately stated by one court, it involves forgiveness not forgetfulness. Mason v. State, 103 So.2d 337 at 341 (Ala. App. 1956). Therefore, the conviction should be used for enhanced charging and sentencing. Unlike some states, the pardon is not set forth as a statutory affirmative defense to habitual offender statutes. Compare State v. Walker, 432 So.2d 1057 (La. App. 3 Cir. 1983), with State v. Nolan, 503 So.2d 1186 (La. App. 3 Cir. 1983); Havens v. State, 429 N.E.2d 618 (Ind. 1982).

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In conclusion, it is the opinion of this office that any prior conviction, even if a pardon was granted, should be used as a prior offense for charging and sentencing purposes on the current charge. I hope this is responsive to your inquiry. If you have any questions, please contact me.

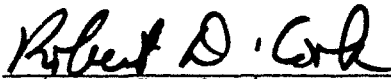
Sincerely,



Donald J. Zelenka
Chief Deputy Attorney General

bbb

APPROVED:



Robert D. Cook
Executive Assistant for Opinions