1980 WL 120770 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 15, 1980

***1** Mr. James B. Ellisor
Executive Director
State Election Commission
Post Office Box 5987
Columbia, South Carolina 29250

Dear Jim:
I am in receipt of your recent letter. You have requested an opinion as to whether or not a person who was convicted of a disqualifying crime and later had his conviction set aside pursuant to 18 USC § 5021(b) is entitled to register and vote.

Section 5021(b) states that if a youthful offender is placed on probation the court may discharge the youth from probation prior to the entire service of his time and that the discharge '. . . shall automatically set aside the conviction . . ..' The case law is split as to the effect of a conviction being set aside and as to whether or not this would also include expunging the record. See 38 ALR Fed. 470. Federal Youth Corrections Act; United States v. Hall, 452 F.Supp. 1008 (S.D.N.Y. 1971)

The only Fourth Circuit case on point, Cox v. United States, 473 F.2d 334 (4th Cir. 1973), discusses the effect of 18 USC § 5021(b) in dicta as the issue was not directly before the court. The court states that
[t]he Act provides special treatment and rehabilitation measures for youths sentenced under it, and the youth may earn early conditional and unconditional release. Significantly, under § 5021 unconditional release from confinement, parole or probation before expectation of the maximum term operates automatically to vacate the conviction and clear the youth's criminal record. In substantial measure, therefore, the judge, after conviction . . . may extend to the youth an opportunity to gain many of the advantages he would have derived from initial treatment as a juvenile delinquent.

This case is cited in the above-cited ALR Federal Annotation in the category of cases that have held the statute to expunge the record. However, the annotation notes that the court does not directly discuss the effect of setting aside the conviction under 18 USC § 5021 in terms of expunging the record.

I have discussed this question with the Federal Office of Probation for South Carolina and have been informed that they do not consider the effect of 18 USC 5021(b) to be an expungement of the record; merely a setting aside of the conviction.

What effect the setting aside of a conviction under 18 USC § 5021 has is not at all clear. It appears that it would generally not be deemed to set aside the conviction for all purposes; i.e., not for impeachment purposes, United States v. Ashley, 569 F.2d 975 (5th Cir., 1978); or deportation, United States v. Fryer, 402 F.Supp. 831 (D.C. Ohio 1975), but see Mestre Morera v. United States Immigration & Naturalization Service, 462 F.2d 1030 (CA 1 1972); or reporting the offense in credit reports, Fite v. Retail Credit Co., 386 F.Supp. 1045 (D.C. Mont 1975), affd 537 F.2d 384 (CA 9 Mont).

In Tatum v. United States, 310 F.Supp. 854 (D.C.C. 1962) the Court held that the effect of setting aside a conviction under this provision would be to expunge the record; and, that it operated differently from a pardon in that it granted even greater relief than a pardon. Tatum, supra, p. 856, n.2. The setting aside of the conviction is, therefore, not synonymous to a pardon but is a separate procedure.

***2** As the question is not settled and as South Carolina Code of Laws, 1976, Section 7-5-120(5)(b) disenfranchises a person convicted of certain crimes, it would appear that a person in South Carolina who has had his conviction set aside would still be deemed to have been convicted and therefore could not register and vote.

However, it should be cautioned that this opinion cannot be free from doubt until decided definitely by a court of competent jurisdiction.

Very truly yours,

Treva G. Ashworth
Senior Assistant Attorney General

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