



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Hon. Bert Ford, Administrator  
Texas Liquor Control Board  
Austin, Texas

Dear Sir:

Opinion No. O-1894

Re: The term "convicted of a felony"  
as used in the Texas Liquor Control  
Act has reference to a final con-  
viction.

This will acknowledge receipt of your letter of January 24, 1940, in which you seek an opinion of this department upon the propositions therein stated. We deem it essential to here set out the pertinent parts of your letter. They are:

"A beer retail licensee on December 12, 1939 applied for a beer retail license, which license was issued on December 27, 1939 by the Texas Liquor Control Board. In her application for the license, the licensee represented to the County Judge and to the Texas Liquor Control Board in answer to Question No. 9 therein that the applicant had not been convicted of a felony within two years next preceding the filing of the application.

"Investigation by the Texas Liquor Control Board revealed that the applicant on May 19, 1937 had been convicted in the District Court on a charge of failure to stop and render aid and fined \$500.00, to which action of the District Court an appeal had been filed in the Court of Criminal Appeals on May 29, 1937. On February 16, 1938 the conviction was affirmed by the Court of Criminal Appeals and appellant's motion for rehearing was overruled on March 30, 1938, and a mandate of the Court of Criminal Appeals was issued on April 1, 1938.

Hon. Bert Ford, Page 2

"The licensee has been cited to appear and show cause why the license should not be cancelled for the reason that in her application for a beer retail license dated December 12, 1939 in answer to Question No. 9 the licensee represented that she had not been convicted of a felony within two years next preceding the filing of the application, whereas in truth and in fact the licensee had been convicted as above set out.

"Is the final conviction of the Court of Criminal Appeals, it coming within a two year period next preceding the filing of the application, such a conviction as to warrant the cancellation of the license by the Administrator for the reasons stated?"

You advise that the holder of the retail beer license involved in this inquiry was convicted in the District Court on May 19, 1937. Thereafter, the case was duly appealed, considered and affirmed. After the affirmance, the Court of Criminal Appeals overruled appellant's motion for rehearing and issued its mandate on April 1, 1938.

Article 667-5, Penal Code of Texas 1925, sets out in detail the requisites of the application which shall be filed by a person desiring a retail beer license. Sub-division (1) thereof, under heading "Manufacturer" likewise applicable to a retail beer dealer, provides, among other things, that the applicant show "that he has not been convicted of a felony within two (2) years immediately preceding the filing of such application." As noted from the opinion request, hereinabove quoted, the licensee involved herein made such application on December 12, 1939, and the license was issued by the Board on December 27, 1939, which dates were less than two years after the mandate of the Court of Criminal Appeals. Your opinion request resolves itself into the proposition of whether or not the "conviction" referred to in the application had reference to the judgment and sentence in the trial court or to the date of the final conviction in the appellate court.

Article 828, Code of Criminal Procedure of Texas, 1925, provides:

"The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had, until the judgment of the appellate court is received by the court from which the appeal was taken. In cases where, after notice of appeal has been given, the record or any portion thereof, is lost or destroyed, it may be substituted in the lower court, if said court be then in session; and, when so substituted, the transcript may be prepared and sent up as in other cases. In case the court from which the appeal was taken be not then in session, the appellate court shall postpone the consideration of such appeal until the next term of said court from which said appeal was taken; and the said record shall be substituted at said term as in other cases."

Under such statute, the defendant, possessing the right to have his appeal passed upon by the appellate court, cannot be made to suffer any of the punishment assessed by the trial court until such time as the appellate court has acted. *Ex Parte Brandenburg*, 140 SW 780.

Article 4929 of the Revised Statutes of Missouri, providing that, if the charge against an attorney allege a conviction for an indictable offense, the court shall, on the production of the record of conviction, remove him or suspend him from practice without further trial, does not authorize his suspension pending appeal from the conviction. *State ex rel Iarew vs. Sale* (Sup. Ct. of Mo.), 87 SW 967.

The court, in the case of *People vs. Treadwell*, 5 Pac. 686, in holding that "conviction" as used in a statute providing for disbarment of an attorney meant a "final conviction" and that a disbarment action brought while the conviction was on appeal said:

"It has been frequently held by this court that an appeal from a judgment of the former district court to the supreme court operated as a suspension of the judgment of the lower court

for all purposes, (Knowles v. Inches, 12 Cal. 213; Woodbury v. Bowman, 13 Cal. 635; People v. Frisbie, 26 Cal. 135,) and by parity of reasoning we must hold that an appeal from the judgment of a justice's court to the superior court has the same operation and effect. There is, therefore, no judgment of the justice's court which is now capable of being carried into effect; and it is quite within the range of possibilities that the judgment entered against the defendant and now standing on the justice's docket may be reversed in the higher court.

"In our opinion, there is not such a final conviction against the defendant as the law contemplates to justify his removal; and we think the proceeding to that end has been prematurely commenced."

The Supreme Court of California in the case of In Re Riccardi, 189 Pac. 694, in considering the statute involved in the case next hereinabove cited said:

"In the proceeding for disbarment based upon the record of conviction, the judgment which must be pronounced is one of absolute and final disbarment. This disbarment is not an 'incident' of the conviction of felony or misdemeanor in the sense that such conviction ipso facto removes the attorney from his office, or is a part of the penalty prescribed by the law for the offense of which he was convicted. It is a separate and independent thing (see McKannay v. Horton, supra), and is not in the slightest degree affected by a setting aside or reversal of the judgment of conviction of felony or misdemeanor. So that unless a conviction that has become final was meant, notwithstanding that the judgment is reversed on appeal for substantial reasons, as, for instance, that evidence of guilt of any offense is absolutely wanting, or that the defendant has not been accorded a fair trial

on the merits in the lower court, the judgment of disbarment based solely on the record of conviction still remains, and the attorney can be restored to his office as an attorney and counsellor only in the event that the court that has disbarred him sees fit to grant his application for restoration; something it is certainly not compelled to do solely because of the reversal or setting aside of the judgment of conviction. It will not do, in reply to this, to say that this court would have the power to restore and ought to restore in such a case, if it cannot be compelled to restore. Unless the attorney has the absolute enforceable right to be restored as a consequence of the setting aside or reversal of the judgment of conviction--in other words, unless the restoration ipso facto follows the setting aside or reversal of the judgment of conviction--he is dependent on the exercise in his favor of the discretion of this court, which may or may not be in his favor as he is looked upon as a fit or unfit person to practice law, entirely regardless of the matter of the conviction. Nor will it do to say that the rule that where a judgment is based on a previous judgment, and the previous judgment is reversed or set aside, the second judgment must be set aside, applies here. If the term 'conviction' means, not the final judgment of conviction, but simply the rendition of a verdict of guilty or a plea of guilty, as is the whole contention of those who insist that *People v. Treadwell*, supra, was wrongly decided, the attorney is disbarred solely because of the rendition of the verdict or the plea of guilty, and those facts, viz., such rendition of verdict or plea, remain and constitute the basis of disbarment, whatever be the ultimate result in the case. There seems to us to be no answer to the proposition that the judgment of final disbarment would continue in force, notwithstanding the setting aside or reversal of the judgment pronounced on the conviction of felony or misdemeanor. It is unreasonable to assume that the Legislature intended to provide for

Hon. Bert Ford, Page 6

obtaining this absolute and final disbarment of an attorney, thus permanently depriving him of a valuable property right, solely upon a conviction that is not final, and which in due course of review is subsequently declared invalid, in the absence of some provision for restoration as matter of course upon the conviction being set aside. The statute makes 'the record of conviction' the basis of disbarment and conclusive evidence thereon. These words in this connection imply something other than the mere verdict of a jury, which may be vacated either by the trial court or an appeal, as entirely without support in the evidence. Under our settled practice of many years, they are considered as referring to the judgment pronounced by the trial court upon a conviction, and likewise, under our decisions, the statute is accepted as contemplating a judgment that has become final...."

The Supreme Court of Florida, in the case of In Re Advisory Opinion to the Governor, 78 So. 673, said:

"While an officer may be suspended from office 'for the commission of any felony' the office is not 'deemed vacant' under Section 298 of the General Statutes, except upon 'conviction', and a conviction is not operative while a supersedeas is effective."

Although much authority can be found to the contrary we believe the authorities herein cited represent the great weight of authority in the United States. In view of such holdings, we are of the opinion that "convicted of a felony" as used in the statute here under consideration means a final conviction. Having so concluded, it necessarily follows that the licensee involved herein was convicted as of the date of the issuance of the mandate by the Court of Criminal Appeals.

We next turn our attention to the question of the right of the Board to cancel the license of licensee.

Article 667-19 of the Penal Code provides that

Hon. Bert Ford, Page 7

the Board shall have power and authority to cancel the license of any person authorized to sell beer (after notice and hearing) for the various reasons therein set out. One of the grounds for cancellation, as set forth in subdivision (g) thereof, is the making of any false or untrue statement in his application. We conclude that the licensee was convicted within two years next preceding the making of such application, giving rise to the right of forfeiture of her license.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By *Lloyd Armstrong*  
Lloyd Armstrong  
Assistant

LA:AW

APPROVED FEB 27, 1940

*Gerrald Mann*  
ATTORNEY GENERAL OF TEXAS

APPROVED  
OPINION  
COMMITTEE  
BY *B. W.*  
CHAIRMAN