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Opinion Committee



STATE OF TEXAS  
OFFICE OF THE GOVERNOR  
November 20, 1995

GEORGE W. BUSH  
GOVERNOR

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OPEN RECORDS DIVISION

**RQ-260**

The Honorable Dan Morales  
Attorney General  
State of Texas  
Opinions Committee  
William P. Clements, Jr., Building  
15th and Lavaca, 12th Floor  
Austin, Texas 78701

FILE # ML-37276-95  
ID. # 37276

RE: Opinion Request

Dear General Morales:

The Governor has asked me to seek your opinion on the following matters. You recently opined in DM-349 (May 31, 1995), that, if a person successfully completes probation, pursuant to deferred adjudication granted under Art. 42.12, Sec. 5(c) of the Texas Code of Criminal Procedure, and in whose case "*the judge [has] dismissed the proceedings against the defendant and discharge[d] him,*" then that person is not eligible to apply to the Texas Board of Pardons and Paroles for a pardon because he/she has not forfeited any civil rights.

As a result of your opinion, we have a question regarding two other circumstances. One involves a "regular" probation and the other involves a "shock" probation. The question with regard to both is whether there exists a pardonable conviction.

Texas Code of Criminal Procedure Article 42.12, Sec. 20 provides:

Sec. 20. (a) At any time, after the defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less, the period of community supervision may be reduced or terminated by the judge. Upon the satisfactory fulfillment of the conditions of community supervision, and the expiration of the period of community supervision, the judge, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the community supervision period and shall discharge the defendant. If the judge discharges the defendant

nder this section, *the judge may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty*, except that: (1) proof of the conviction or plea of guilty shall be made known to the judge should the defendant again be convicted of any criminal offense; and (2) if the defendant is an applicant for a license or is a licensee under Chapter 42, Human Resources Code, the Texas Department of Human Services may consider the fact that the defendant previously has received community supervision under this article in issuing, renewing, denying, or revoking a license under that chapter.

It appears from a plain reading of the statute that, if the judge sets aside the verdict and dismisses the indictment, in accordance with this apparently discretionary provision, then no conviction exists except for the purposes of the enumerated exceptions. In the instant case, the judge did take the discretionary action as shown in the attached *Order Setting Aside Judgment of Conviction, Dismissing the Indictment, and Discharging Defendant from Probation*. Given these facts, is there a pardonable conviction?

Should you conclude that a person subject to the situation presented above is not eligible for a pardon, because there is no pardonable conviction, then please consider the following case in which a "shock" probation was given. We have attached a memo "to File" supplied to us from a federal governmental agency which states that a District Criminal Judge had indicated that no difference exists between "regular" probation and "shock" probation received after being exposed to incarceration at what was then the Texas Department of Corrections. Another letter from that same agency concludes that a person discharged from probation, pursuant to then Section 7 of Art. 42.12, does not stand convicted for the agency's purposes, pursuant to that agency's interpretation of Texas law. In this case, however, the document entitled Certification of Proceedings only bears the notation *Probation Set Aside and Dismissed on 3-15-84*. This notation seems ambiguous. Is "Set Aside and Dismissed" intended to modify Probation; or did the writer intend that the Probation be "Set Aside" and that the indictment be "Dismissed?" We assume that this notation is subject to interpretation by the Board of Pardons and Paroles or the Governor; however it would be helpful to have clarification by the court. Thus, if the Governor or the Board determines that the order is so ambiguous that the Court's intention cannot be determined, has the court lost its jurisdiction to clarify its intention by some modified order?

The Honorable Dan Morales  
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We note that earlier Attorney General opinions, namely 1993-DM-210, 1990-JM-1237, 1980-MW-148, 1970-M-640, deal with the conviction question, but in terms of qualification for certain licenses; we believe those opinions to be contradictory. Your opinion DM-210 appears to recognize that, when a verdict is set aside and an indictment dismissed, there is no underlying conviction for any purpose except for the specific exceptions enumerated in the statute. The opinion does not, however, specifically state that the earlier opinions are overruled and because the earlier opinions come to contrary conclusions, we believe that more guidance is necessary.

Should you have any questions, please contact me at 463-1788.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pete Wassdorf". The signature is written in black ink and is positioned above the typed name and title.

PETE WASSDORF  
Deputy General Counsel

cc: Victor Rodriguez  
Joe Allbaugh  
Drew Durham

FAX TRANSMISSION COVER SHEET  
TEXAS DEPARTMENT OF PUBLIC SAFETY  
LEGAL SERVICES



DATE: 01-03-96 NUMBER OF PAGES: 6 (including cover)

TO: NAME: Honorable Dan Morales

DEPARTMENT: Opinion Committee

FAX: 472-6538

FROM: NAME: David M. Douglas (by las)

FAX: (512)424-5716 (TexAn 225-5716)

PHONE: (512)424-2892 (TexAn 225-2892)

COMMENTS: \_\_\_\_\_  
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THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE, AND, AS SUCH, IT IS CONFIDENTIAL, INTENDED ONLY FOR THE USE OF THE INTENDED RECIPIENT. ONLY THE INTENDED RECIPIENT OR HIS AGENT SHOULD BE GIVEN ACCESS TO THIS COMMUNICATION. YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED, UNLESS DIRECTED BY THIS OFFICE. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY CALL THIS OFFICE SO THAT WE CAN MAKE ARRANGEMENTS TO HAVE THE MATERIALS RETURNED TO US AT OUR COST.

THANK YOU,  
LEGAL SERVICES



REGIONAL COUNSEL

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
OFFICE OF CHIEF COUNSEL  
ROOM 701, 1114 COMMERCE STREET  
DALLAS, TEXAS 75242  
June 17, 1988



MEMORANDUM TO: File

FROM: Regional Counsel

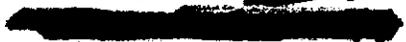
SUBJECT: "Shock Probation"

On June 16, 1988, this writer received an inquiry from Special Agent [REDACTED], Austin, Texas, as to whether a Texas defendant who has received so-called "shock probation" would be subject to federal firearms disabilities of conviction.

Section 3e of Article 42.12, Texas Code of Criminal Procedure, provides that for certain felony violations where the defendant has been sentenced to confinement in the Texas Department of Corrections the court may, after the expiration of a stated time period, suspend further execution of the sentence and place the defendant on probation "under the terms and conditions of this article." (Section 3h of Article 42.12 contains a similar procedure which is applicable to male defendants between the ages of 17 and 26 years of age).

This writer advised Agent Appelt it appears that a defendant who receives "shock probation" is in the same position as one who receives non-deferred or "straight" probation pursuant to Sections 3 and 3a of Article 42.12 and who is subsequently discharged from probation under Section 7 of said Article 42.12. In brief, during the period of time the defendant is actually on "shock probation" he stands as "convicted" for purposes of the federal firearms laws. Once he has been discharged from probation pursuant to Section 7, however, he no longer stands as "convicted" for federal firearms purposes.

On June 16, 1988, this writer contacted Dallas County Criminal District Judge Richard Mays who concurred in the foregoing evaluation and analysis of "shock probation." Judge Mays stated that a "shock probation" defendant is treated exactly the same as any defendant who is initially placed on "straight" or "regular" probation.



Noted: [REDACTED]





REGIONAL COUNSEL

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
OFFICE OF CHIEF COUNSEL  
ROOM 701, 1114 COMMERCE STREET  
DALLAS, TEXAS 75242

December 1, 1988

REFER TO

[REDACTED]

[REDACTED]

Dear [REDACTED]

Your mother, [REDACTED], has recently contacted this office and requested our opinion as to whether you are presently under any federal firearms disabilities of conviction pursuant to the Gun Control Act of 1968 as amended. The documents she submitted therewith indicate that on [REDACTED] in the Criminal District Court Number Four of Tarrant County, Texas, Cause No. [REDACTED] you were sentenced to confinement in the Texas Department of Corrections for a period of two years relative to your conviction for the felony offense of delivery of a controlled substance. On [REDACTED] the court granted you what is commonly referred to as "shock" probation pursuant to Section 3E of Article 42.12, Texas Code of Criminal Procedure, whereby the balance of your sentence was suspended and you were placed on probation for a period of two years. On or about [REDACTED] the court granted your motion to set aside your probation and to dismiss your case.

Pursuant to Title 18, United States Code, Section 922(g)(1), it is unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, to ship, transport, possess or receive firearms. Title 18, United States Code, Section 921(a)(20) provides that what constitutes a conviction of such a crime shall be determined in accordance with the laws of the jurisdiction in which the proceedings were held. It also provides that any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored, shall not be considered a conviction for purposes of the federal firearms laws unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

Section 7 of Article 42.12 of the Texas Code of Criminal Procedure provides, in part, that:

"Upon the satisfactory fulfillment of the

[REDACTED]

conditions of probation, and the expiration of the period of probation, the court, by order duly entered...shall discharge the defendant...may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted..."

As indicated above, the court placed you on "shock" probation on March 9, 1983. It is our opinion that an individual who has been sentenced to confinement in the Texas Department of Corrections and who subsequently has had his sentence suspended and has been placed on "shock" probation pursuant to the aforementioned Section 3E of Article 42.12, stands in the same position as a person who is initially placed on probation pursuant to the provisions of Sections 3 and 3a of Article 42.12, Texas Code of Criminal Procedure. In other words, a "shock" probation defendant is treated exactly the same as a "straight" or "regular" probation defendant.

It is also the opinion of the Bureau that a person who has been discharged from probation pursuant to the aforementioned Section 7 of Article 42.12, does not stand as "convicted" for purposes of the federal firearms laws due to the provision of Section 7 which states that such person "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted."

Although not specifically stated in the document granting your motion to set aside your probation, it appears that your discharge from probation was, in fact, pursuant to the provisions of Section 7 of Article 42.12, Texas Code of Criminal Procedure. Based solely upon the information which has been provided to us relative to the proceedings in Cause No. [REDACTED] it is our opinion that you are presently under no federal firearms disabilities and are thus not prohibited from shipping, transporting, receiving or possessing a firearm. With regard to Question 8b of the ATF Form 4473, since you are not considered to be a convicted felon for purposes of the federal firearms laws you may answer "no" to the question of whether you have ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.

  
We hope this letter has been responsive to your inquiry. If you have any questions with regard to this matter, please contact Attorney  of this office at the above address. His telephone number is .

Sincerely yours,

  
Regional Counsel



REGIONAL COUNSEL

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
OFFICE OF CHIEF COUNSEL  
ROOM 701, 1114 COMMERCE STREET  
DALLAS, TEXAS 75242  
June 17, 1988



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FROM: Regional Counsel

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Noted: [REDACTED]

