CONVICTS: Citizenship not lost by conviction subsequently held void.

July 7, 1941

7-17

FILED
15

Honorable Patrick J. Cavanaugh
Assistant Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

Under date of June 27, 1941, you wrote this office requesting an opinion as follows:

> "At the request of a certain individual in the City of St. Louis, I am writing you asking you for an opinion relative to this individual's status.
>
> "On March 19th, 1925 this man was arrested in St. Louis, and taken back to St. Genevieve, Missouri charged with burglary in the second degree and larceny. He at that time was about 20 years of age, and he informs me that the Prosecuting Attorney there assured him that if he would plead guilty and save the State time and trouble that he would give him a small sentence, that is, two years. Instead of that however, it develops that after pleading guilty, his punishment was assessed at seven years for burglary and five years for larceny, a total of twelve years. Following this, he engaged counsel, sued out a writ of error to the Supreme Court to the Circuit Court of St. Genevieve County. Upon the matter being heard by the Supreme Court the judgment of the Circuit Court of St. Genevieve County

> was reversed, and following that no further action was taken by the Prosecuting officials of that County against this defendant. During the time that this matter was pending before the Supreme Court, this defendant was unable to make bond, and as a result he served more than eighteen months in the Penitentiary pending a hearing on his appeal in the Supreme Court.
>
> "The point in question is this: With the facts that have been related to you, is this man's status that of an ex-convict?"

In response to a letter from this office requesting additional information, under date of July 1, 1941, you furnished us with the additional information that the person was Thomas E. Jordan, and that the case was No. 27515, decided at the October term, 1926, of the Supreme Court. This case is reported in 289 S. W. 540, and was reversed and remanded, and the last paragraph is herein set out:

> "The information does not state whether the Grass & Greminger Mercantile Company was a copartnership or a corporation or the trade-name of an individual. Plaintiff in error assigns this as a fatal defect. The state concedes error, citing State v. Hurt (Mo. Sup.) 285 S. W. 976; State v. Henschel, 250 Mo. 263, 269, 157 S. W. 311; and State v. Jones, 168 Mo. 398, 68 S. W. 506. These and other cases hold that the information is fatally defective for the reason indicated and that the defect may be raised for the first time in this court.
>
> "The judgment is accordingly reversed, and the cause remanded."

Section 4561, Article V of Chapter 31, R. S. Missouri, 1939, relates to the disqualifications of persons convicted of burglary and larceny and certain other offenses. This section is as follows:

> "Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years: Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."
> (Underscoring ours)

There is an additional section of the statutes relating generally to persons sentenced to the penitentiary. This is Section 9225, Article I of Chapter 48, R. S. Missouri, 1939. However, as this section deals generally with the subject and section 4561 deals specifically with the subject of the offense involved in your opinion request, this last section is not set out.

In the early case of Ritter v. The Democratic Press Company, 68 Mo. 458, the Supreme Court had before it the question of the competency of a witness who had been convicted of a felony by the trial court, but whose appeal is pending at the time he was offered as a witness. The court said, at l. c. 460:

"One of the principal grounds of complaint here is that Saunders, one of the co-defendants of plaintiff in the former action, was not allowed to testify. He had been indicted for obtaining money under false pretenses, and had been convicted by a jury, but had appealed to this court and obtained a supersedeas. He was brought to court, on the trial, by the sheriff, and offered as a witness, but the court excluded him. Our statute (Wag. St. 67, p. 465) provides that 'every person who shall be convicted of arson, burglary, robbery or larceny in any degree in this chapter specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter shall be incompetent to be sworn as a witness, &c.' Section 47 provides that 'every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any othe r false pretense, obtain the signature of any person to any written instrument or obtain from any person any money, &c. shall, upon the conviction thereof, be punished in the same manner and to the same extent as for feloniously stealing the money, &c.' The only question is whether Saunders, sentenced as he had been to the penitentiary, though he had appealed to this court, where the judgment was reversed, was at the time he was offered as a witness, a competent one. We think the circuit court properly excluded him. He was convicted of a crime which disqualified him as a witness, and the subsequent reversal of that judgment by this court, could not be anticipated by the circuit court." (Underscoring ours)

In the case of Scott v. American Express Co., decided by the Springfield Court of Appeals, 233 S. W. 492, the question was presented to the court as to the effect of the death of one who had been convicted by the trial court during the pendency of an appeal. This was a case involving the payment of a reward. At pages 492-493, the court said:

> "If the appeal of Buntyn and his death pending that appeal to the Supreme Court abated the proceedings in such a sense as to take away from the verdict of the jury and the sentence of the trial court thereon their character as a conviction of Buntyn under the terms of the offer of reward, then plaintiff's cause of action never accrued, and the judgment should have gone for defendant in this case. In civil actions, the judgment of the trial court remains in force as a valid judgment, though its enforcement may be suspended by giving bond, and the death of a party pending an appeal does not ordinarily abate or destroy the cause of action. In criminal cases, however, the death of the defendant pending an appeal from a judgment of conviction abates the prosecution or cause of action entirely. Town of Carrolltown v. Rhomberg, 78 Mo. 547; State v. Perrine, 56 Mo. 602.
>
> "Buntyn's death pending his appeal from a judgment of conviction against him abated the prosecution and cause of action against him for the alleged crime of which he had been convicted in the trial court, and for that reason, plaintiff's cause of action never finally accrued. The offer of the reward and plaintiff's services in procuring the arrest and conviction of Buntyn constituted a contract which is to be construed by the

same rules as any other contract. Hoggard v. Dickerson, 180 Mo. App. 70, 165 S. W. 1135."

And further, on page 493:

"The Supreme Court of Kentucky held in Stone v. Wickliffe, 106 Ky. 252, 50 S. W. 44, that liability on an offer of reward for arrest and conviction did not attach until after the affirmance of the judgment by the Supreme Court. The party claiming the reward in that case brought suit while the appeal in the criminal case was pending, and the court held he could not recover, for the reason that there had been no final conviction such as to make the party offering the reward liable therefor. In the case of Baker v. M. W. A., 140 Mo. App. 619, 121 S. W. 794, an insurance policy had been issued on the life of Baker, who was a member of the fraternal order, and this policy, as well as the by-laws of the order, provided that any member and policy holder who should be convicted for felony should be automatically expelled, and his policy become null and void. Baker, who was a member and policy holder, was convicted of a felony, and appealed to the Supreme Court of this state, and pending that appeal he died. The widow, who was the beneficiary in the policy, brought suit, and the defense was made that Baker had been convicted of a felony, and for that reason, his policy had been annulled. The St. Louis Court of Appeals, held, however, that the conviction was not final, and that the policy must be paid. These cases uphold appellant's contention in this case, and we think rightly so."

This case was later before the Supreme Court upon a writ of certiorari and the judgment of the Springfield Court of Appeals was upheld.

In the case of State ex rel. Scott v. Cox, 243 S. W. 144, at l. c. 146, the Supreme Court used the following language:

> "It will be observed that we did not attempt to define the word 'convicted' as used in the statute to which reference is made in the opinion. We assumed that it meant an adjudication of guilt, a judgment based on a plea of guilty, or a verdict of guilty; and we further assumed that upon the pronouncement of such judgment the civil disabilities imposed by the statute immediately followed as an inevitable sequence. What we did decide was that such a judgment remains in full force and effect, notwithstanding an appeal and a supersedeas bond, unless and until it is set aside or reversed by the appellate court. We are unable to see anything in the decision with which that of the Court of Appeals under review is in conflict. Assuming that it contains an implied adjudication of 'convicted' as used in the statute to which reference is made, still the word 'convicted' or 'conviction,' when used in a statute or contract, may have any one of several meanings, dependent upon the context, the subject-matter, and the purpose to be effected. In these respects the statute involved in that case and the contract of reward in this have nothing in common. The ruling in the former case cannot, therefore, be said to be upon a state of facts similar to that upon which the ruling under consideration was made. Putting aside, however, a mere superficial view

> of the facts and looking to the underlying principles of law that were accepted as controlling in each of the two decisions we find that the rulings were these: In the Ritter Case we held that judgments of circuit courts in this state remain in force and effect, notwithstanding an appeal and supersedeas bond, unless and until reversed by the appellate court; and in this connection it should be noted that we have also held that a judgment upon reversal becomes not only non-existent, but as though it had never been. Hanser v. Bieber, 271 Mo. 326, 341, 197 S. W. 68. In the case under review the Court of Appeals ruled, following our decisions in State v. Perrins, 56 Mo. 602, and Carrollton v. Rhomberg, 78 Mo. 547, and that of the St. Louis Court of Appeals in Baker v. Modern Woodmen, 140 Mo. App. 619, 121 S. W. 794, that the death of a defendant in a criminal case, pending an appeal, with supersedeas, from a judgment of conviction, abates the proceeding, overthrows and destroys the cause of action, so that the judgment becomes not only nonexistent, but as though it had never been. There is no conflict. This assignment is therefore ruled against relator." (Underscoring ours)

A New York Case, People v. Van Zile, 141 N. Y. S. 168, seems to have presented a similar question for determination. We also quote from that case, at l. c. 169-170:

> "The reversal of a judgment places the parties where they were before the commencement of the action. Hayden v. Florence Sewing Machine Co., 54 N. Y. 221; People v. McLaughlin, 150 N. Y. 365, at page 376, 44 N. E. 1017. The judgment of

conviction against the defendant for the crime of abortion some 20 years ago having been set aside by the Court of Appeals, there was no conviction against him, and he was justified in answering, as he did, that he had never been, convicted of a crime. The word 'conviction' in the question means conviction pursuant to law, not illegal conviction. I think it was prejudicial error for the court to allow the district attorney to show that the accused at one time had been illegally and wrongfully convicted of crime. This former conviction (?) could not have been proved in the ordinary way of introducing in evidence a certificate of conviction of defendant. The clerk of the court could have issued no such certificate, because of the fact that the conviction had been annulled.

"But it is urged that defendant opened the door to his evidence by reason of his being examined in his own behalf as a witness, and being asked and answering in the negative the question:

"'Have you ever been convicted of a crime, Doctor?'

"The argument advanced being that:

"'Past acts cannot be obliterated, but the legal effect of them can be.'

"The quotation just made is from the opinion in the case of People v. Price, 53 Hun, 185, 6 N. Y. Supp. 833. In that case it was held that the penalty for a second offense, prescribed by section 688 of the old Penal Code, could not be defeated by showing that defendant was pardoned after such previous conviction. The

essential difference between a pardon and a reversal of judgment is that a pardon is not inconsistent with a conviction in fact and in law; whereas a reversal of a judgment of conviction is not only inconsistent with the conviction, but absolutely nullifies it, and places the accused in the position where he was before the trial, clothed with the presumption of innocence. And so in the case of People v. Carlesi, 154 App. Div. 481, 139 N. Y. Supp. 309, the court said:

"'(The Pardon) did not obliterate the record of his conviction, or blot out the fact that he had been convicted.'

"Of course not, because the pardon did not import, as the reversal did, nullification of the judgment of conviction."

CONCLUSION.

Under the statement of the facts contained in your two letters, it is the opinion of this Department that by entering a plea of guilty to an indictment or information, which was subsequently held invalid, and no further proceeding had in the matter, that the person referred to in your letters did not lose his citizenship.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

WOJ/rv