

RE: A-4302773 IB

OCTOBER 28, 1953.

MR. A. C. DEVANEY, *Assistant Commissioner,*
Inspections and Examinations Division,
Immigration and Naturalization Service,
United States Department of Justice,
Washington 25, D. C.

FORMAL OPINION—1953. No. 44.

DEAR SIR:

Additional inquiry has been raised of this office with regard to Formal Opinion No. 5 issued under date of February 26, 1953 at your request. The sole question dealt with therein was whether an order expunging record of conviction under R. S. 2:192-15 (now N. J. S. 2A:164-28) is equivalent to a pardon granted by the Governor and whether such an order of expungement would exempt the holder thereof from the additional punishment meted out in this jurisdiction to habitual offenders. The prime question was answered in the negative that such an expungement order does not have the attributes of a full pardon, and we declined to determine the secondary question for, as stated in that formal opinion, it had no application to our habitual offender laws.

We are now confronted with the additional question which seems most pertinent to this issue as to whether a record of conviction once expunged by a court order in the manner provided for by our statute may subsequently be produced to prove the conviction.

It is our opinion and we advise that once a record of conviction is expunged, as provided by N. J. S. 2A:164-28, that it cannot later be introduced to prove the conviction for the reasons which we shall outline herein.

The statute under construction, N. J. S. 2A:164-28, makes provision for the expungement of a criminal record of any person whose sentence was suspended or where a fine of not more than \$1,000 was imposed and where no subsequent conviction had been entered against such individual for a period of 10 years. It is provided in the statute that:

"An order may be granted directing the clerk of such court to expunge from the records all evidence of such conviction and that the person against whom such conviction was entered shall be forthwith thereafter relieved from such disabilities as may have heretofore existed by reason thereof."

There is a limitation upon the scope of the statute in that certain more serious crimes are excluded therefrom and which the Legislature did not intend to come within the purview of the law.

The statute cannot be said to be void for uncertainty for the language is clear and unambiguous. It has no application to prisoners who have been required to serve all or a portion of a sentence in confinement and it applies only to offenses of lesser character because of the exclusion of the enumerated more serious offenses. It cannot be said that the statute usurps the pardoning power which is vested by our Constitution in the Governor, for, as stated in the previous formal opinion, it has not the attributes of a full pardon and the very language of the law will so disclose.

It is stated that :

"A statute is a solemn enactment of the State acting through its Legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the Legislature would do a futile thing." Sutherland "Statutory Construction", Vol. 2, p. 327.

Thus, it must be assumed that the Legislature intended to accomplish the objective which clearly appears from a reading of the law, i.e., expungement of record of conviction in certain cases and under certain circumstances. Since the order of the court requires the clerk to expunge from the records all evidence of such conviction, it becomes apparent that there is no record in such case which might be produced to prove the conviction.

Inferentially at least, our Constitution of 1947, in Art. II, Sec. 7, recognizes the right of the Legislature to restore to convicted persons certain privileges which may have been lost as the result of such conviction, for it is provided therein that:

"The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned *or otherwise restored by law* to the right of suffrage, shall again enjoy that right."

We believe this contemplates that civil disabilities lost by conviction may be restored by legislative enactment and gives further support to the proposition here advanced.

For the reasons stated, it is our opinion that the record of conviction once expunged in accordance with law cannot be produced to prove conviction.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

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