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#93031

DATE: April 22, 1993

SUBJECT: Disenfranchisement Based on Conviction of a Felony.

REQUESTED BY: Senator Kate Witek
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion concerning the constitutionality of LB 76, a bill proposing to amend the state's election laws. The particular provision you refer to is subsection (2) of § 72, which would require court clerks to prepare a monthly abstract of each "final judgment served by the clerk convicting an elector of a felony", and forward the same to the election commissioner or county clerk of the elector's county of residence. You ask whether, pursuant to the proposed legislation, a person convicted of a felony would be qualified to vote, and, if so, whether a person would be disqualified from voting immediately upon a judgment of conviction and imposition of sentence, or if disqualification would not occur until after an appeal of a judgment of conviction or sentence was decided.

Neb. Const. art. VI, § 2, provides: "No person shall be qualified to vote who is non compos mentis, or who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights." (Emphasis added). Presently, Nebraska's election laws contain a provision mirroring this constitutional language. Neb. Rev. Stat. § 32-1048 (1988).

In a previous opinion, this office addressed the meaning of language contained in various constitutional provisions disqualifying persons "convicted of [a] felony" from being electors (Neb. Const. art. VI, §2) or disqualifying persons from holding public office upon "conviction of a felony" (Neb. Const. art. III, § 23 (repealed, 1972); Neb. Const. art. XV, § 2). 1957-58 Rep. Att'y Gen. 367 (Opinion No. 217, dated March 21, 1958). In this opinion, we noted that

> the meaning of the term "convicted" or "conviction" depends upon the exact wording of the statutory or constitutional provision in which the term appears, and upon the type of situation to which the particular law applies; that is, whether it relates to the imposition of enhanced penalties for successive law violations, to disqualification or loss of a license for engaging in a trade or profession or for operating a motor vehicle, to a final order upon which appeal or error may be based, to the imposition of sentence, as well as to the loss of civil rights.

Id. at 369.

In *State ex rel. Hunter v. Jurgensen,* 135 Neb. 136, 280 N.W. 886 (1938), *cert. denied* 307 U.S. 643 (1939), the Court addressed whether the office of lieutenant governor was vacated under Neb. Const. art. III, § 23, by conviction of the holder of the office of a felony. The lieutenant governor had been found guilty, and, after a motion for new trial was denied, the court "entered its judgment in the case and sentenced him to imprisonment." *Id.* at 137, 280 N.W. at 887. The defendant prosecuted an error proceeding in the Nebraska Supreme Court. The Attorney General instituted a quo warranto action challenging the lieutenant governor's right to continue holding office, seeking a determination that the lieutenant governor's felony conviction created a vacancy in the office under Article III, § 23. The issue presented was whether "the verdict of the jury and the order, judgment and sentence of the district court, from which verdict respondent ha[d] prosecuted a proceeding in error, [constituted] a "conviction of a felony" within the meaning of section 23, art. III of the Constitution of Nebraska?" *Id.* at 138, 280 N.W. at 887.

The Court concluded that respondent's office became vacant on the date of the district court's order of judgment and the imposition of sentence. The Court held that

> where a plea or verdict of guilty has been entered and the trial court has entered its judgment and sentenced the accused, there has been a conviction within the

> meaning of the term as used in the Constitution or statute providing that a public office shall become vacant upon conviction of a felony, and that such vacancy occurred notwithstanding the fact that a proceeding in error was taken or pending from such conviction.

Id. at 139, 280 N.W. at 888.

While the *Jurgensen* case dealt with the meaning of the language creating a vacancy in public office following "conviction of a felony" under former Article III, § 23, it is of assistance in construing the provision of Article VI, § 2, disqualifying persons from voting who have been "convicted of. . . [a] felony." Given the similarity between the language of these constitutional provisions, it appears that our Court, if asked to address the question, would likely conclude that one is "convicted of a felony" under Article VI, § 2, following the entry of a judgment of conviction of an offense constituting a felony and imposition of sentence, and that the prosecuting of an appeal would not prevent or suspend the disqualification from voting mandated by this constitutional provision.

This conclusion is in accord with the view of a majority of jurisdictions which have construed constitutional or statutory provisions requiring the disqualification of an elector or public officeholder as a result of a criminal "conviction" to apply immediately following entry of judgment and sentence, even though an appeal has been taken. *See, e.g., Campbell v. State,* 300 Ark. 570, 781 S.W.2d 14 (1989); *State ex inf. Peach v. Goins,* 575 S.W.2d 175 (Mo. 1978); *State ex rel. Chavez v. Evans,* 79 N.M. 578, 446 P.2d 445 (1968); *State ex rel. Olson v. Langer,* 65 N.D. 68, 256 N.W. 377 (1934). There is, however, authority to the contrary, holding that provisions disenfranchising persons "adjudged guilty" of or convicted of a felony require a "final adjudication" or a "final conviction", and that the pendency of appeal proceedings precludes such disqualification from voting from taking effect. *See, e.g., Hayes v. Williams,* 341 F. Supp. 182 (S.D. Tex. 1972); *State ex rel. Heartsill v. County Election Board,* 326 P.2d 782 (Okla. 1958).

With respect to your specific questions, it is clear that a person "who has been convicted of. . .[a] felony" is disqualified from voting under the plain language of Article VI, § 2. Furthermore, while it is not entirely clear, it appears that, based on the interpretation of similar language by the Nebraska Supreme Court in the *Jurgensen* case, the Court would likely conclude that a person is "convicted" within the meaning Article VI, § 2, following the entry of judgment and sentencing, and, as such, the

disqualification from voting provided would attach at this time, without regard to whether an appeal were taken.

Section 72 of LB 76 proposes to amend Nebraska's election statutes to provide, in part: "No person shall be qualified to vote or to register to vote who is non compos mentis or who has been finally convicted of treason or felony under the laws of the state or of the United States unless restored to civil rights. . . ." LB 76, § 72(1) (Emphasis added). This section further provides that "[t]he clerk of any court in which a person is convicted of a felony shall prepare an abstract each month of each final judgment served by the clerk convicting an elector of a felony", and that the clerk must file the abstract with the election commissioner or county clerk of the elector's county of residence within a specified time. LB 76, § 72(2) (Emphasis added).

To the extent that subsection (1) of § 72 uses the phrase "finally convicted" of a felony to determine when disenfranchisement occurs, this may contravene the provisions of Article VI, § 2, which requires disqualification from voting of a person "convicted" of a felony. The term "final conviction" has been construed to mean a conviction for which the defendant has exhausted all appellate remedies or as to which the time for appeal has expired. ***State v. Lynn,*** 5 Ohio St. 2d 106, 214 N.E.2d 226 (1966). ***See also Cunningham v. State,*** 815 S.W.2d 313 (Tex. Ct. App. 1991) (Conviction from which appeal has been taken is not "final conviction" for purposes of enhancement until conviction is affirmee by appellate court and that court's mandate of affirmance becomes final); ***Hayes v. Williams,*** 341 F. Supp. 182 (S.D. Tex. 1972); ***State ex rel. Heartsill v. County Election Board,*** 326 P.2d 782 (Okla. 1958). As noted previously, we believe that the Nebraska Supreme Court would, based on the ***Jurgensen*** case, construe the phrase "convicted of. . . [a] felony" in Article VI, § 2, to relate to the entry of judgment and sentence, without regard to whether an appeal is taken. Thus, if the term "finally convicted" is intended to require that disqualification from voting does not attach to one convicted of a felony until after the time for appeal has expired or an appeal has been decided, this would be contrary to the language of Article VI, § 2, and would therefore be unconstitutional.

In addition, subsection (2) of § 72 requires court clerks to prepare an abstract of each "final judgment. . .convicting an elector of a felony", and to file the same with the election commissioner or county clerk of the elector's county of residence. In the criminal context, the meaning of the phrase "final judgment" is susceptible to different interpretations. "Final judgment" in a criminal case, after entry of which the time for appeal begins to run, is the sentencing of the defendant. ***People v. Stewart,*** 79

Ill. Dec. 123, 101 Ill. 2d 470, 463 N.E.2d 677 (1984); *In re Zach*, 61 N.J. Super. 591, 161 A.2d 745 (1960). In certain contexts, however, a "final judgment" does not occur until all avenues of direct appeal are exhausted. *Maryland State Bar Ass'n, Inc. v. Kerr*, 272 Md. 687, 326 A.2d 180 (1974) (A "final judgment" for purposes of rule authorizing final judgment of conviction of a crime to be conclusive proof of guilt for disciplinary proceedings is one that exists when all avenues of direct appeal from a judgment of conviction and sentence are no longer open); *State v. McCluney*, 280 N.C. 404, 185 S.E.2d 870 (1972) (Judgment is not final, within doctrine that when a criminal statute is expressly and unqualifiedly repealed after crime has been committed but before "final judgment" no punishment can be imposed, as long as case is pending on appeal). In this context, it appears that the term "final judgment" should be construed in its generally accepted sense, that being the time of sentencing of a defendant. If so construed, this provision of LB 76 would not be contrary to Article VI, § 2.

In conclusion, it is our opinion that the portion of subsection (1) of § 72 of LB 76 providing that a person "finally convicted" of a felony is disqualified to vote may run afoul of Neb. Const. art. VI, § 2, as it may be construed to suspend disenfranchisement until after an appeal of a conviction or sentence is exhausted. Based on the *Jurgensen* case, it appears that Article VI, § 2, would be construed by our supreme court to require that one is "convicted of. . . [a] felony" within the meaning of this constitutional provision following a judgment of conviction and imposition of sentence, without regard to the taking of an appeal. To the extent the language of § 72(1) of the bill may conflict with this interpretation, it would be unconstitutional. The portion of subsection (2) of § 72 of LB 76 referring to a "final judgment. . .convicting an elector of a felony" would not necessarily run afoul of Article VI, § 2, provided it is interpreted to refer to the entry of judgment and imposition of sentence. If it is interpreted to suspend the time for the taking effect of disqualification from voting of a person convicted of a felony until after the time for appeal has expired or an appeal is taken and decided, however, this portion of the bill may also run afoul of Article VI, § 2. Either potential defect could easily be cured by the adoption of language mirroring the constitutional provision, as is presently contained in Neb. Rev. Stat. § 32-1048 (1988), or other clarifying language.

Very truly yours,

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cc: Patrick O'Donnell
Clerk of Legislature

7-636-7.20

APPROVED BY:

DON STENBERG, Attorney General