

**N.D.A.G. Letter to Marion (Dec. 16, 1986)**

December 16, 1986

Mr. James L. Marion  
Chief Parole Officer  
North Dakota Department of  
Parole and Probation  
P.O. Box 5521  
Bismarck ND 58502-5521

Dear Mr. Marion:

Thank you for your letter dated December 4, 1986. You have inquired as to the effect which the Firearms Owners Protection Act will have upon N.D.C.C. Ch. 62.1-02 with relation to the persons you and your agents supervise.

The Firearms Owners Protection Act, which became effective on November 15, 1986, substantially changed the federal law which prohibits convicted felons from receiving, transporting, or possessing firearms. Under this new law, whether or not a person is considered to be a convicted felon will be determined by state law.

This federal law looks to the final result of a sentence in the determination as to whether or not a person remains a convicted felon.

Under N.D.C.C. Ch. 12-53, a defendant may receive a deferred imposition of sentence. Although sentence has not been imposed, the determination of the defendant's guilt which led to the deferred imposition of sentence would continue to be considered to be a conviction of that offense. This intent is evidenced by N.D.C.C. §12-53-19 which provides:

12-53-19. PRIOR CONVICTION MAY BE PLEADED AND PROVED IN SUBSEQUENT PROSECUTION. In any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or information or indictment dismissed.

Whether or not the defendant has successfully completed the deferred imposition of sentence and the action has been dismissed, I would construe the defendant to have been "convicted" of a felony offense which would impose the disabilities pertaining to the possession of firearms under the federal law.

A different conclusion is reached with the conditional discharge provision for first-time drug possession under N.D.C.C. §19-03.1-30. This provision operates in much the same manner as a deferred imposition of sentence. Once the terms and conditions of the probation imposed pursuant to this section have been fulfilled, the court is required to

discharge the defendant and dismiss the proceeding against him. However, statute specifically provides that discharge and dismissal under this section "shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . ." Once the probationary period has been completed, a person who has received the conditional discharge for a first-time drug possession offense will not be subject to the federal firearms disabilities.

A third North Dakota state law provision also has relevance to the federal law. N.D.C.C. §12.1-32-02(9) provides:

9. A person convicted of a felony who is sentenced to imprisonment for not more than one year shall be deemed to have been convicted of a misdemeanor upon successful completion of the term of imprisonment.

Until such time as such person has completed his term of imprisonment, that person will be deemed to have been convicted of a felony and will be subject to the federal firearms restrictions. However, once that term of imprisonment has been successfully completed, the defendant will then be deemed to have been convicted of a misdemeanor which may end the federal firearms disabilities.

Although the new federal firearms law looks primarily to the final result of the sentence, North Dakota statutory provisions pertaining to the possession of weapons looks at the defendant in a somewhat different manner. N.D.C.C. §62.1-02-01 specifically defines a "conviction" for purposes of that section. This definition provides:

For the purposes of this section, "conviction" means determination by a jury or court that a person committed one of the above-mentioned crimes even though the court suspended or deferred imposition of sentence in accordance with sections 12-53-13 through 12-53-19 or placed the defendant on probation.

As you can see, the North Dakota Legislature is not concerned with the final result of the sentence but, rather, the actual determination of guilt regardless of the sentence given. The determination that a person committed one of the crimes outlined in N.D.C.C. §62.1-02-01 prevents such person from possessing a firearm without reference to the actual sentence received. In other words, if a person has been charged with a felony and it has been determined that such person committed the offense charged, that person cannot possess firearms for the time periods as set forth in N.D.C.C. §62.1-02-01. By limiting this definition of "conviction" to N.D.C.C. §62.1-02-01, the North Dakota Legislature has evidenced a clear intent that a person who has been convicted of a felony offense should be barred from possessing a firearm for a period of five or ten years, as the case may be, regardless of the actual sentence imposed.

Since the federal and state statutory provisions are independent and involve separate crimes, the federal law amendments will not supersede the North Dakota state law. North Dakota clearly has the authority to regulate within its borders the possession and control of firearms by persons who have been determined to have committed a felony offense.

Although you have no statutory requirement that you do so, you may desire to inform the persons you supervise of the provisions of N.D.C.C. Ch. 62.1-02. In addition, the ability of a person you supervise to possess a firearm may also be restricted by the terms or conditions of an order of probation by the sentencing court.

I trust that this letter has adequately responded to the questions presented in your letter to me. If I can be of further assistance to you, please do not hesitate to contact me at your convenience.

Sincerely,

Nicholas J. Spaeth

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