

N.D.A.G. Letter to Holmberg (Dec. 11, 1991)

December 11, 1991

Senator Ray Holmberg
621 High Plains Court
Grand Forks, ND 58201

Dear Senator Holmberg:

Thank you for your December 4, 1991, letter in which you have asked whether a deferred imposition of sentence is considered a "conviction" under state law.

Courts in North Dakota have been authorized, since 1947, to defer imposition of a sentence which would otherwise be imposed upon a criminal offender after a plea or finding of guilt. When imposition of sentence is deferred, no sentence has been imposed against the offender. The offender will be placed on probation subject to certain conditions. If the offender completes the probationary period without committing a violation of the probation conditions, the offender is permitted to seek withdrawal of the adjudication of guilt and the court may then dismiss the criminal action originally brought against that offender. N.D.C.C. § 12.1-32-02(4) authorizes a court to defer imposition of sentence and N.D.C.C. § 12.1-32-07.1(2) sets forth the procedure for setting aside the adjudication of guilt and subsequent dismissal of the action against the offender. If the offender does violate conditions of the probation, the probation may be revoked and the offender may then be sentenced.

The term "convicted" is generally understood and defined to mean that a person has been found or proven to be guilty of an offense. The AMERICAN HERITAGE DICTIONARY of the English Language, 292 (New College Ed. 1981). However, North Dakota law distinguishes the generic terms "conviction" or "convicted" from a "judgment of conviction."

North Dakota Rule of Criminal Procedure 32(b) sets forth the requirements for a "judgment of conviction." This "judgment of conviction" must set forth the plea, the verdict, and the adjudication of sentence. Based upon the language of Rule 32(b), a judgment of conviction requires a sentence. Applying a general view of this rule and the procedural aspects of a deferred imposition of sentence, it could be concluded that, generally, an offender who receives a deferred imposition of sentence has not had a judgment of conviction entered against that offender and, therefore, has not been convicted of an offense.

However, many other North Dakota Century Code provisions may treat an offender as a person who has a conviction of an offense for the purposes set forth in each specific statute even though the offender received a deferred imposition of sentence. What follows are examples of North Dakota statutory provisions which would treat a deferred imposition

of sentence as a conviction. I have not listed all such statutory provisions but have discussed several of these provisions as examples of instances in which the receipt of a deferred imposition of sentence may, in these specific instances, be a "conviction" or which may have other adverse impacts upon an offender regardless of disposition of a criminal action.

N.D.C.C. § 12.1-32-02(4) permits the pleading and proving of a "prior conviction for which imposition of sentence is deferred" in a subsequent prosecution for any other offense as though probation had not been granted or the information or indictment had not been dismissed after the successful completion of probation. In other words, the earlier adjudication of guilt could be used as a conviction for sentencing or other purposes should the offender be charged or convicted of a later offense even though the offender may have received a deferred imposition of sentence for the earlier crime.

N.D.C.C. § 62.1-02-01, which prohibits the possession of firearms by persons convicted of certain offenses, defines a "conviction" as a "determination by a jury or court that a person committed one of the above-mentioned crimes even though the court . . . deferred imposition of sentence in accordance with subsection 4 of section 12.1-32-02." Once a person has been adjudicated guilty of an offense which would prohibit that person from possessing a firearm, that adjudication of guilt would be a "conviction" under this section regardless of the actual sentence, or lack of sentence, received by that offender.

N.D.C.C. § 53-06.1-06(8), regulating those persons who can engage in gaming activities, prohibits persons who have "pled guilty to or been found guilty of a felony" from selling or distributing equipment or conducting or assisting in games of chance for at least a five year period. The fact that a person was adjudicated guilty of a felony offense would prevent that person from engaging in gaming activities regardless of whether that person received a deferred imposition of sentence.

N.D.C.C. § 39-06-30 defines the term "conviction" for purposes of the motor vehicle law as found in N.D.C.C. tit. 39. This section provides that a conviction includes those instances when imposition of sentence is deferred under N.D.C.C. § 12.1-32-02(4). For purposes of the motor vehicle law, a person has been convicted of an offense even if the person has received a deferred imposition of sentence.

N.D.C.C. § 12-60-16.6(2), which regulates the dissemination of criminal history record information, treats an adjudication of guilt, for purposes of that chapter, as a conviction notwithstanding any disposition following a deferred imposition of sentence.

Occupational and licensing board statutes may also treat adjudications of guilt or the commission of a criminal offense as grounds for a licensing prohibition even though an applicant or license holder may have received a deferred imposition of sentence. Although some occupational and licensing boards may require an actual conviction of an offense (see, N.D.C.C. § 43-29-15(10) regarding veterinarians), other boards deem it sufficient to prevent licensure if the applicant or license holder has been determined to be "guilty of an offense determined by the board to have a direct bearing on the person's ability to serve

the public as a cosmetologist." (N.D.C.C. § 43-11-31(2)), has "committed an offense determined by the board to have a direct bearing upon a holder's ability to serve the public as an optometrist" (N.D.C.C. § 43-13-22(1), or has been "found guilty by a court of competent jurisdiction" of a felony or other listed offenses (N.D.C.C. § 43-15-10(1)(k), Pharmacists).

Although receipt of a deferred imposition of sentence may not generally be a "conviction" under North Dakota law, specific North Dakota statutes may treat the adjudication of guilt, regardless of the sentence, or lack of sentence received, as a "conviction." It is impossible for me to make a singular statement that a person who has been determined guilty of an offense and who receives a deferred imposition of sentence has no "conviction" of a crime. A person may very well have a "conviction" of a crime based upon language set forth in these and other specific statutes. As an example, if a person has received a deferred imposition of sentence after adjudication for a burglary offense, that person could generally state that he or she has not been convicted of a crime since no sentence has been passed. However, that same person would be considered to have a conviction of a crime if that person desired to possess or have in his or her control a firearm. In addition, if that person would make application for an occupational license, the language of the specific licensing statute may bar that person from receipt of a license regardless of the actual sentence, or lack of sentence, received after the adjudication of guilt. Also, a person who has been adjudicated guilty of a traffic offense under North Dakota law will be considered to have a "conviction" of that offense even if the person received a deferred imposition of sentence.

Whether a person has, in fact, a "conviction" of an offense after a deferred imposition of sentence has been received will be dependent upon specific statutory language which may be applicable to a person who seeks certain benefits or who may be subject to certain liabilities. In addition, other states and the federal government may, by statute or rule, consider a deferred imposition of sentence as equivalent to a conviction under that government's law regardless of the treatment it may be afforded under North Dakota law.

As I have stated, an adjudication of guilt is generally not a "conviction" if the offender has been granted a deferred imposition of sentence. However, several exceptions to this general rule may be present in specific statutory provisions of this and other states as well as the federal government.

Sincerely,

Nicholas J. Spaeth

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