

OFFICIAL OPINION NO. 05-01, Voting Eligibility of a Convicted Felon

February 7, 2005

The Honorable Pat Haley
State Representative, District 22
766 Utah Avenue NE
Huron, SD 57350

OFFICIAL OPINION NO. 05-01

Voting Eligibility of a Convicted Felon

Dear Representative Haley:

You have requested an opinion from this office regarding the eligibility of a convicted felon to vote. You have asked the following questions:

QUESTIONS:

1. Does SDCL 24-5-2 allow a person convicted of a felony who has served time in and been released from the South Dakota State Penitentiary, to vote?
2. Is a person who received a suspended imposition of sentence or a suspended execution of sentence eligible to vote?
3. How does a person restore voting rights lost due to a felony conviction?

IN RE QUESTION NO. 1:

The voting right of a convicted felon who is sentenced to imprisonment in the state penitentiary is suspended during the term of the imprisonment. SDCL 23A-27-35. However, a convicted felon is not automatically eligible to vote upon his or her release from the state penitentiary. A felon's entire sentence must be discharged before he or she becomes eligible to vote. It is discharge from the sentence, not from the penitentiary, that controls.

SDCL 12-4-18 requires election officials to remove any voter "who receives a felony sentence to the adult state penitentiary system . . ." from the voter registration

records. This removal is based on SDCL 23A-27-35, which suspends the voting right of any person upon a sentence of imprisonment in the state penitentiary for the term of that imprisonment. _

SDCL 24-5-2 addresses an inmate's right to restoration of citizenship, including the right to vote. The right to vote is restored to a penitentiary inmate when he or she is "discharged." Discharge occurs upon completion of the court's sentence less applicable good time as set forth in SDCL 24-5-1. When an inmate's sentence is completed, he or she receives a certificate from the Secretary of Corrections stating that the inmate has been discharged and restored to the "full rights of a citizen." SDCL 24-5-2.

A felon's release from the penitentiary does not mean his or her sentence has been discharged. Many individuals are released from the penitentiary before completion of a sentence under the state's parole statutes. SDCL ch. 24-15. SDCL 24-5-2 recognizes that release from the penitentiary is not discharge from a sentence, providing "if an inmate is on parole at the time the inmate becomes eligible for discharge, the Secretary of Corrections shall issue a like certificate stating that the inmate has been restored to the full rights of a citizen." Therefore, it is clear that release from the penitentiary does not necessarily discharge an inmate from his or her sentence or restore an inmate's rights of citizenship.

Based on each of the provisions set forth above, it is my opinion that final discharge from a felony sentence, which occurs at the end of the Court's sentence less any applicable good time, generally determines when a convicted felon is eligible to vote.

IN RE QUESTION NO. 2:

You have asked whether a person receiving a suspended imposition of sentence or a suspended execution of sentence is eligible to vote.

To answer this question, a distinction must be made between a suspended imposition of sentence and a suspended execution of sentence. A suspended imposition of sentence is a constitutional, statutorily authorized form of judicial clemency, similar to a pardon. S.D. Constitution, Art. V, Sec. 5; SDCL 23A-27-13. A person may receive only one suspended imposition of sentence for a felony charge during his or her lifetime. When an order suspending imposition of sentence is entered under SDCL 23A-27-13, there is no conviction. The court withholds the entry of a judgment of conviction conditioned on the

person satisfying certain conditions. If a person satisfies the conditions of the order suspending imposition of sentence, the criminal matter is closed through the trial court's entry of an order of dismissal and discharge. SDCL 23A-27-14. Under these circumstances, the person has not been convicted of a felony. Since the person has not been convicted of a felony, his or her right to vote is never lost. The recipient of a suspended imposition of sentence may continue to vote even though serving time in jail or the penitentiary was part of the conditions of a suspended imposition of sentence. See also, A.G.O. 93-14.

However, when a suspended execution of a sentence is ordered, a judgment of conviction is entered by the court, and part or all of the court's sentence is suspended upon the person satisfying certain conditions. SDCL 23A-27-18. As such, the person is convicted of a felony and loses his or her right to vote, if the original sentence included serving time in the state penitentiary. SDCL §§ 23A-27-18, 23A-27-18.1, and 12-4-18.

This is the case even if that person never, due to the suspended execution of sentence, serves time in the state penitentiary. SDCL 12-4-18 directs that a voter's name be removed from the voter registration list if the voter has received a felony sentence to the state penitentiary "including a suspended execution of sentence." SDCL 23A-27-35 provides for restoration of that person's rights only "[a]fter a suspension of sentence pursuant to § 23A-27-18, upon the termination of the time of the original sentence"

A person does not lose the right to vote even if convicted of a felony when he or she is sentenced to the county jail. Our statutes require imposition of a sentence in the state penitentiary. As a result, a person who receives a suspended execution of sentence and is issentenced to the "state penitentiary," loses his or her right to vote even if the court allows the person to actually serve his or her penitentiary sentence in the county jail. See SDCL §§ 23A-27-18.1; 23A-27-35. See also, SDCL 12-4-18. It is the original sentence imposed that controls.

IN RE QUESTION NO. 3:

You have also asked how a person can restore voting rights if he or she has been removed from the voter registration system based upon a felony sentence to the state penitentiary. Given the statewide registration file maintained by the Secretary of State, registration is straight forward. This master registration file should already include information regarding the felony conviction, and the date the penitentiary sentence was discharged.

Therefore, when a convicted felon has his or her sentence discharged, the person may then go to any voter registration location and register to vote. SDCL 12-4-5.3 requires the county auditor to review voter registration application information for eligibility. The county auditor will process the registration to determine actual eligibility. If there is a discrepancy concerning voter eligibility due to the felony conviction, the person should present the Department of Corrections' discharge certificate, or, if a suspended execution of sentence with no actual penitentiary incarceration was imposed, the order of discharge entered by the trial court judge. These documents should resolve any discrepancy.

Respectfully submitted,

LAWRENCE E. LONG
ATTORNEY GENERAL

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