STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-15

Date issued: May 3, 1988

Requested by: James L. Marion, Clerk
North Dakota Board of Pardons

- QUESTIONS PRESENTED -

I.

Whether the North Dakota Board of Pardons has the authority to reduce an applicant's conviction for a class AA felony to a conviction for a class A felony.

II.

Whether the North Dakota Board of Pardons has the authority to grant a reprieve, commutation, or pardon that would reduce the length of or restrictions placed upon an applicant's sentence below any applicable mandatory sentencing provisions established by the Legislature for the applicant's offense.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the North Dakota Board of Pardons does not have the authority to reduce an applicant's conviction for a class AA felony to a conviction for a class A felony.

II.

It is my further opinion that the North Dakota Board of Pardons has the authority to grant a reprieve, commutation, or pardon that would reduce the length of or restrictions placed upon an applicant's sentence below any applicable mandatory sentencing provisions established by the Legislature for the applicant's offense.

- ANALYSES -

I.

The North Dakota Constitution establishes the North Dakota Board of Pardons and authorizes the Governor, in conjunction with the Board of Pardons, to grant remissions of fines, reprieves,commutations, and pardons after conviction for all offenses except treason and cases of impeachment. The

Legislature is authorized to regulate the procedure governing applications for a remission, pardon, commutation, or reprieve. N.D. Const. art. V, ' 6, provides:

> Section 6. The governor shall have power in conjunction with the board of pardon of which the governor shall be ex officio a member and the other members of which shall consist of the attorney general of the state of North Dakota, the chief justice of the supreme court of the state of North Dakota, and two qualified electors who shall be appointed by the governor, to remit fines and forfeitures, to grant reprieves, commutations and pardons after conviction for all offenses except treason and cases of impeachment; but the legislative assembly may by law regulate the manner in which the remissions of fines, pardons, commutations and reprieves may be applied for. Upon conviction for treason the governor shall have the power to suspend the execution of sentence until the case shall be reported to the legislative assembly at its next regular session, when the legislative assembly shall either pardon or commute the sentence, direct the execution of the sentence or grant further reprieve. The governor shall communicate to the legislative assembly at each regular session each case of remission of fine, reprieve, commutation or pardon granted by the board of pardon, stating the name of the convict, the crime for which he is convicted, the sentence and its date and the date of the remission, commutation, pardon or reprieve, with their reasons for granting the same.

The North Dakota Legislature has implemented the relevant provisions of N.D. Const. art. V, ' 6, in a statute codified at N.D.C.C. ch. 12-55. That chapter provides that "[t]he board of pardons shall have the sole and exclusive power to remit fines and forfeitures and to grant reprieves, commutations, and pardons after conviction for all offenses except treason or in cases of impeachment." N.D.C.C. ' 12-55-05.

Neither the North Dakota Constitution nor the North Dakota Century Code grant the Pardon Board any additional powers or duties, other than those ancillary to the Board's authority to grant remissions of fines, and pardons, commutations, and reprieves of prison sentences. See N.D.C.C. ch. 12-55. The Board of Pardons is, therefore, authorized only to perform the stated functions.

A pardon is defined as "an act of grace proceeding from the power entrusted with the execution of the laws exempting the individual on whom it is bestowed from the punishment that the law inflicts for a crime he has committed." 1985 N.D. Op. Att'y Gen. 158, at 159. N.D.C.C. ' 12-55-11.1 defines a commutation of a sentence as "the change of the punishment to which a person is sentenced to a less severe punishment." The term "reprieve" is not defined in the North Dakota Century Code and has not been defined by either a North Dakota Supreme Court decision or a North Dakota Attorney General's Opinion. However, courts

in other jurisdictions have defined a reprieve as "the withdrawing of a sentence for an interval of time, which operates in delay of execution." Fehl v. Martin, 155 Or. 455, 64 P.2d 631, 632 (1937); see also N.D.C.C. " 12-55-27, 12-55-28; Lime v. Blagg, 345 Mo. 1, 131 S.W.2d 583, 585 (1939); Ex Parte Black, 123 Tex. Crim. 472, 59 S.W.2d 828, 829 (1933).

As these definitions show, the terms pardon, commutation, and reprieve all refer to a change in a person's punishment, not any change in the person's conviction. The North Dakota Board of Pardons is, therefore, authorized to change a person's punishment, but it is not authorized to change the offense for which the person was convicted.

Changing a Pardon Board applicant's conviction from a conviction for a class AA felony to a conviction for a class A felony would require changing the applicant's underlying conviction or, in other words, changing the underlying offense for which the applicant was convicted. The constitution and applicable statutes do not authorize the Board of Pardons to effect this change.

Although there are no North Dakota Supreme Court decisions discussing this issue, this conclusion is supported by an Illinois Supreme Court decision. In People ex rel. Fullenwider v. Jenkins, 322 Ill. 33, 152 N.E. 549 (1926), the Illinois Supreme Court considered the validity of the Illinois governor's "commutation" of a prison sentence from a "life sentence to manslaughter." 152 N.E. at 550. The Illinois Constitution empowers the Illinois governor to grant reprieves, commutations, and pardons after a conviction for all offenses, subject to such procedural regulations as may be established by the legislature. Id. at 551. The Illinois Supreme Court concluded that if the Illinois governor's action in that case was construed as an attempt to change a conviction for murder to a conviction for manslaughter, the governor acted outside his authority. The court wrote:

> The Governor is not vested with authority to convict a person of any crime, or to change the conviction by a court of a person for a crime to a conviction for another crime. . . . If the act of the Governor be construed as intended to commute the punishment of life imprisonment imposed by the court to the punishment imposed by law for manslaughter, it cannot take effect as a commutation . . . .
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> . . . Such attempted commutation was void, because it could not change the character of the crime . . . .

Id.

The reasoning of the Illinois court in Jenkins appears sound and equally applicable to North Dakota law. Under the North Dakota Constitution and the North Dakota Century Code, the Pardon Board is authorized to reduce a person's sentence, but not to reduce the underlying conviction. Therefore, the North

Board of Pardons does not have the authority to reduce an applicant's conviction for a class AA felony to a conviction for class A felony.

II.

The second question presented here is whether the North Dakota Board of Pardons has the authority to grant a reprieve, commutation, or pardon when an applicant to the Board has been convicted of and is serving a sentence for an offense to which mandatory sentencing provisions apply.

The opinion request in this case makes specific reference to N.D.C.C. 12.1-32-02.1, which requires that a court impose a minimum sentence of four years for class A or class B felonies and two years for class C felonies, all without benefit of parole, when it is found that an offender caused or attempted or threatened to cause bodily injury with a dangerous weapon, explosive, or firearm in committing the offense for which the offender was convicted. That statute provides:

> 12.1-32-02.1. Minimum prison terms for armed offenders. Notwithstanding any other provisions of this title, minimum terms of imprisonment shall be imposed upon an offender and served without benefit of parole when, in the course of committing an offense, he inflicts or attempts to inflict bodily injury upon another, or threatens or menaces another with imminent bodily injury with a dangerous weapon, an explosive, or a firearm. Such minimum penalties shall apply only when possession of a dangerous weapon, an explosive, or a firearm has been charged and admitted or found to be true in the manner provided by law, and shall be imposed as follows:
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> 1. If the offense for which the offender is convicted is a class A or class B felony, the court shall impose a minimum sentence of four years' imprisonment.
>
> 2. If the offense for which the offender is convicted is a class C felony, the court shall impose a minimum sentence of two years' imprisonment.
>
> This section applies even when being armed is an element of the offense for which the offender is convicted.

N.D.C.C. ' 12.1-32-02.1.

Under the circumstances stated in N.D.C.C. ' 12.1-32-02.1, a sentencing court must impose the mandatory minimum sentence after conviction, but that statute does not place any restriction on the Board of Pardons' authority to grant a pardon, reprieve, or commutation after sentencing.

N.D.C.C. ' 12.1-32-01(1) also appears relevant to this question. That statute provides a maximum penalty of life imprisonment for conviction of a class AA felony and further provides that "a person found guilty of a class AA felony shall not be eligible to have his sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after his admission to the penitentiary." N.D.C.C. ' 12.1-32-01(1), thus, restricts the authority of the Parole Board to consider the parole of a person convicted of a class AA felony; the Parole Board may not consider paroling that person for thirty years, less good time served.

However, the Parole Board and the Board of Pardons are separate entities under North Dakota law. See N.D.C.C. chs. 12-55, 12-59. There is nothing in N.D.C.C. ' 12.1-32-01(1) that restricts the power of the Board of Pardons to consider a commutation, pardon, or reprieve of a sentence imposed in a class AA felony case.

These laws, therefore, do not restrict the Pardon Board's authority to grant a reprieve, commutation, or pardon even when the offender in question was convicted of an offense that carries a mandatory sentencing component.

Finally, the constitutionality of the cited mandatory sentencing statutes would be questionable if those statutes were construed to restrict the authority of the Board of Pardons to grant commutations, pardons, and reprieves.

In a Louisiana decision, State ex rel. Milby v. State, 471 So.2d 1000 (La. Ct. App. 1985) ("Milby"), a Louisiana court held that while the legislature has the authority to set mandatory sentences, the legislature may not infringe on the executive power by requiring the executive branch to commute sentences within legislatively imposed restrictions. Under the Louisiana Constitution, the governor, upon recommendation of the board of pardons, has the authority to commute sentences. Id. at 1001 n.2. The offender in Milby had been convicted of second degree murder and was sentenced, as required by statute, to life imprisonment without the possibility of parole, probation, or suspension for 40 years. Id. at 1001. The board of pardons and the governor ordered the commutation of the offender's sentence to a 21-year sentence. The commutation order did not state whether the offender was eligible for parole. Id.

The Louisiana court first found that the commutation order restored the offender's right to apply for parole benefits if the order could lawfully do so. Id. at 1002. The state argued that the governor did not have the authority in the commutation process to restore parole benefits that the legislature had removed in its sentencing statutes. The Louisiana Court of Appeals disagreed, writing:

> [T]he legislature may set mandatory sentences. It may require the sentencing judge to impose mandatory sentences within

> constitutional constraints. But, it cannot infringe on the executive power to commute sentences by requiring the Governor to commute with those restrictions.

Id. at 1002-03 (footnote omitted). The Louisiana court concluded that the governor's commutation order in Milby was valid, although that order did not comply with the statutory mandatory sentence requirements, because the legislature could not constitutionally restrict the executive's power to grant pardons, reprieves, and commutations.

Because of the similarity in the North Dakota and Louisiana constitutional provisions, the constitutionality of the North Dakota mandatory sentencing statutes would be in question if they were construed to restrict the authority granted the Board of Pardons by the North Dakota Constitution. That construction should, therefore, be avoided. See Jensen v. State, 373 N.W.2d 894, 899 (N.D. 1985); In Interest of Kupperion, 331 N.W.2d 22, 25 (N.D. 1983).

In conclusion, existing North Dakota law does not restrict the Pardon Board's authority to grant a pardon, commutation, or reprieve of a sentence, even if the applicant has been convicted of an offense to which a mandatory sentence applies. Although the Pardon Board may choose to commute the sentence within the legislatively set restrictions, it is not required to do so.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question is decided by the courts.

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