



STATE OF INDIANA

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December 10, 2019

OFFICIAL OPINION NO. 2019-6

Major Todd Smith
Chief Counsel
Indiana State Police Legal Department
100 North Senate Avenue
Indianapolis, IN 46204-2259

RE: The Restoration of Firearm Rights under Indiana's Expunction Statutes

Dear Major Smith,

The Office of the Attorney General (OAG) received your request for an official opinion. In your letter, you raised the following issue:

Does an expungement under the Indiana Code restore the rights of an individual to purchase or possess a firearm under the 1968 Gun Control Act [18 U.S.C. §§ 921 *et seq.*]?

BRIEF ANSWER

Yes, because an expunction restores civil rights with no firearm restrictions.¹ Indiana Code § 35-38-9-10(c) specifically provides that an expunction “fully” restores the three core civil rights of a person and allows that person to be able to qualify as a “proper person” to obtain a license to carry a firearm without restriction. Because the Gun Control Act disqualifies convictions for which civil rights have been fully restored and no firearm restriction remains, an expunction of a felony conviction in Indiana renders a person capable of purchasing and possessing a firearm under federal law.

¹ Although both state and federal law refer to the term “expungement,” the grammatically correct term is “expunction.” Use of the term “expunction” is synonymous with the term “expungement.”

ANALYSIS

I. Indiana Law on Expunctions

It is generally unlawful in Indiana for a person to carry a handgun in a vehicle or on their person without a license. *See* Ind. Code § 35-47-2-1.² Several restrictions are in place, however, to prevent a convicted felon from legally possessing a handgun. Indiana Code § 35-47-1-7(2) prevents a convicted felon from being a “proper person” to qualify for a license to carry. Indiana Code § 35-47-2-3(h)(1) and (6) provide that a license to carry a handgun “shall not” be issued to any person who has been convicted of a felony or is prohibited by federal law from possessing or receiving firearms under 18 U.S.C. § 922(g). It is also unlawful to knowingly sell or transfer ownership of a gun to a convicted felon. *See* Ind. Code § 35-47-2-7.

There are two ways to remove a convicted felon’s restriction to legally possess a handgun. Indiana Code § 35-47-2-20(a) provides that a “full pardon” from the governor for a felony (other than an offense against a person under Indiana Code §35-42) “removes any disability,” if fifteen (15) years have lapsed between the offense and the application. That statute also provides for a “conditional pardon,” which would remove the disability to carry a firearm if certain conditions are met. *See* Ind. Code § 35-47-2-20(b); Ind. Code §11-9-2-4. Neither of those provisions are in question here.

The second mechanism to remove a convicted felon’s restriction to be licensed to carry a handgun is through expunction under Indiana Code § 35-38-9 *et seq.* A convicted felon can apply for expunction under Indiana Code § 35-38-9-3 (class D and Level 6 felonies) and Indiana Code § 35-38-9-4 (all other qualifying felonies).³ The effect of expunction is that “the civil rights of a person whose conviction has been expunged shall be fully restored, including the right to vote, to hold public office, to be a proper person under IC 35-47-1-7(2), and to serve as a juror.”⁴ *See* Ind. Code § 35-38-9-10(c). As mentioned above, Indiana Code §35-47-1-7(2) prevents a convicted felon from being a “proper person” to qualify for a license to carry a handgun. If the convicted felon’s conviction is expunged, however, that disability is removed, and the person is then considered a “proper person” so long as they meet the other qualifications in the licensing statute.

The question arises, however, as to whether Indiana Code § 35-47-2-3(h)(1) – which provides that a license to carry a handgun “shall not” be issued to any person who has been

² There are several exceptions to this general rule delineated in this statute that are not relevant to the question presented. Also of note, Indiana Code § 35-47-1-6 defines “handgun.”

³ Subsection (b) of both statutes provide a lengthy list of felonies for which expunction is not available.

⁴ An exception to this provision is that expunction does not restore the right to possess a firearm to a person convicted of domestic violence. *See* Ind. Code § 35-38-9-6(f). That can be achieved by a different mechanism. Additionally, Indiana courts have not determined whether a person convicted of a serious violent felony, *see* Ind. Code § 35-47-4-5, has civil rights fully restored by an expunction.

convicted of a felony – still applies.⁵ The primary goal when construing a statute is to effectuate legislative intent. *Walczak v. Labor Works-Ft. Wayne LLC*, 983 N.E.2d 1146, 1154 (Ind. 2013) (citation omitted). Further, when the legislature enacts a statute, a court presumes that the Legislature is aware of existing statutes in the same area. *Town of Merrillville v. Merrillville Conservancy Dist. By & Through Bd. of Directors*, 649 N.E.2d 645, 649 (Ind. Ct. App. 1995). A court also presumes that the Legislature intended the statutory language to be applied logically and consistently with the statute’s underlying policy and goals, and a court avoids construing a statute so as to create an absurd result. *Walczak*, 983 N.E.2d at 1154 (citations omitted).

Through expunction, the Legislature intended to give individuals who have been convicted of certain crimes a second chance by providing an opportunity for relief from the stigma associated with their criminal convictions. *Key v. State*, 48 N.E.3d 333, 336 (Ind. Ct. App. 2015) (citation omitted). The restoration of the right to qualify as a proper person was specifically added to Indiana Code § 35-38-9-10(c) in 2015; prior versions of that statute had included only the right to vote, to hold public office, and to serve as a juror.⁶ When the legislature enacts an amendatory statute, it is presumed to have intended to change the law. *Town of Merrillville*, 649 N.E.2d at 651 (citation omitted). Here, the Legislature’s intent to restore the qualification as a proper person cannot be more clear; it expressly amended the law to account for the restoration of the status as a proper person with full knowledge of the statutory scheme as a whole.

Finally, it would lead to an absurd result – after the Legislature specifically included a restoration of the right to be a proper person in the expunction statute – to continue to apply the prohibition in Indiana Code § 35-47-2-3(h)(1) for convicted felons. Restoring a convicted felon as a proper person to carry a handgun but then denying them a license because of that same felony conviction violates the underlying policy and goals of the expunction statute. Once a convicted felon’s conviction has been expunged through Indiana Code § 35-38-9-3 or through Indiana Code § 35-38-9-4, Indiana Code § 35-47-2-3(h)(1) no longer applies to prohibit the license to carry a handgun.

II. Application of Federal Law

The Gun Control Act, 18 U.S.C. §§ 921 *et seq.*, makes it unlawful for a person to ship, possess, or receive any firearm or ammunition if the person “has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year...” 18 U.S.C. § 922(g). Under 18 U.S.C. § 921(a)(20), however:

⁵ This statutory prohibition clearly applies in the absence of an expunction or pardon to prohibit a convicted felon from obtaining a license to carry a handgun.

⁶ Please note that restoring the right to be a proper person under Indiana Code § 35-47-1-7(2) does not mean that the person would meet the other requirements in that statute to be a proper person or that the person would meet the other qualifications for a license under Indiana Code §§ 35-47-2-3(f) and (h). Being a “proper person” is merely the threshold requirement.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. *Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter*, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(emphasis added). “[C]ongress intended that courts refer to state law to determine whether an individual should be subject to federal firearms disabilities by virtue of a criminal conviction. If state law has restored civil rights to a felon, without expressly limiting the felon’s firearms privileges, that felon is not subject to federal firearms disabilities.” *United States v. Cassidy*, 899 F.2d 543, 546 (6th Cir. 1990); *see also United States v. Thomas*, 881 F.2d 206, 209 (5th Cir. 1993) (finding that an automatic restoration of civil rights has the same effect as an affirmative act of the state); *United States v. Essick*, 935 F.2d 28, 31 (4th Cir. 1991) (stating that Congress empowered each state to determine if ex-felons would be legally permitted under federal law to possess firearms and that each state is able to carve out exemptions to the general federal proscription against possession of any firearm by any ex-felon).

The plain language of federal law allows for the restoration of federal firearm rights by **one** of three avenues: (1) expunction or the setting aside of a conviction; (2) the restoration of civil rights; or (3) pardon. “Civil rights” are comprised of the right to vote, to hold public office, and to serve on a jury; courts look to the whole of state law to determine if the restoration of civil rights has occurred. *United States v. Metzger*, 3 F.3d 756, 758 (4th Cir. 1993) (citations omitted).

It is the civil rights avenue by which a convicted felon in Indiana can regain his federal firearm rights. In Indiana, a convicted felon’s right to vote is automatically reinstated upon release from incarceration, and he may then serve on a jury. *See* Ind. Code §§ 3-7-13-4, 3-7-13-6 (disenfranchising convicted persons while serving a period of imprisonment); Indiana Jury Rule 5(g) (which connects the right to sit on a jury with the right to vote).⁷ A convicted felon, however, may *not* hold public office. *See* Ind. Code § 3-8-1-5. Thus, an Indiana convicted felon is prohibited in two ways from lawfully purchasing or possessing a firearm under federal law: (1) he does not have his civil rights fully restored under § 921(a)(20) of the Gun Control Act; and (2) he is prohibited under state law by Indiana Code § 35-47-2-3(h)(1) from obtaining a license to carry a firearm.⁸

⁷ *See United States v. Thomas*, 991 F.2d 206, 212-13 (5th Cir. 1993) (finding that an automatic restoration of civil rights is equal to the restoration by affirmative act of the state).

⁸ *See United States v. Erwin*, 902 F.2d 510, 512 (7th Cir. 1990) (finding that Illinois law restored civil rights but prevented a convicted felon from possessing firearms by statute); *Metzger*, 3 F.3d at 759 (finding that Michigan law did not restore civil rights upon release from prison because a convicted felon had barriers to serving on a jury).

The expunction of convictions, however, removes both disabilities under a general statute that restores all civil rights.⁹ See *United States v. McKinley*, 23 F.3d 181, 183 (7th Cir. 1994) (finding that a state must enact a general statute substantially restoring a convicted felon’s civil rights in order to exempt him from prosecution under § 922(g)). Indiana Code § 35-38-9-10(c) is such a statute because it dictates that expungement “fully” restores the right to vote, to hold public office, and to serve on a jury. Thus, the civil right to hold public office is restored upon expunction, which rounds out the three recognized civil rights under federal law. See *Metzger*, 3 F.3d at 758. Thus, Indiana law affords a full restoration of civil rights upon expunction of the felony conviction.

The second question under 18 U.S.C. §921(a)(2) is whether Indiana chooses to restore all civil rights while also restricting firearm rights, which would trigger the “unless” clause in the Gun Control Act:

. . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20). This determination is dictated by federal law. *Caron v. United States*, 524 U.S. 308, 314-15 (1998) (noting that roughly 16 states restore civil rights while maintaining a restriction on firearm rights). Once all civil rights are restored, a state must expressly inform a felon if, under state law, he retains any firearm restrictions; if so, this also means that his federal firearm restriction remains in place. See *Erwin*, 902 F.2d at 513 (stating that upon notification that all civil rights have been restored, a state must “tell the felon point blank that weapons are not kosher”).

As of 2015, when the legislature amended Indiana Code § 35-38-9-10(c) to include the restoration of the right to be a proper person, Indiana law no longer imposes a restriction on firearm rights when a conviction has been expunged.¹⁰ As set forth above, the expunction also removes the disability under Indiana Code § 35-47-2-3(h)(1), and the individual’s state firearm rights are fully restored. Thus, the “unless” clause of 18 U.S.C. § 921(a)(20) is not triggered, and the right of a person to purchase or possess firearms under federal law is restored.

⁹ Expunction of a conviction itself may be inadequate under federal law to restore federal firearm rights because an Indiana expunction does not *completely* remove the effects of the conviction. See *Wyoming, ex rel. Crank v. United States*, 539 F.3d 1236, 1246 (10th Cir. 2008) (finding that an expunction under the Gun Control Act “requires the complete removal of all effects of a prior conviction to constitute either an expungement or a set aside”); *Jennings v. Mukasey*, 511 F.3d 894, 899 (9th Cir. 2007) (same). Like in *Crank* and *Jennings*, Indiana law reserves the right to use the expunged convictions upon a subsequent arrest or conviction for sentencing and as a prior unrelated conviction, see Indiana Code § 35-38-9-10(e), and thus also does not completely remove the effects of a prior conviction upon expunction.

¹⁰ See e.g., *Van Der Hule v. Holder*, 759 F.3d 1043, 1049 (9th Cir. 2014) (restriction on right to possess a concealed weapon following restoration of civil rights triggered the “unless” clause and the prohibition under federal law from possessing a firearm); *Cassidy*, 899 F.2d at 55 (restriction on right to carry a firearm under state law following restoration of civil rights triggered the “unless” clause); *Erwin*, 902 F.2d. at 512 (same).

CONCLUSION

This analysis and conclusion is consistent with that of the Department of Justice/Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) in 2015 after the expunction statute was amended to include the restoration of all three civil rights and the right to be a proper person. The ATF had concluded that while expunction alone was insufficient, the restoration of civil rights pursuant to Indiana Code § 35-38-9-10(c), along with the restoration of the status to be a proper person, by expunction was sufficient to restore federal firearm rights. This conclusion is supported by state and federal law.

Sincerely,

A handwritten signature in black ink, appearing to read "Curtis T. Hill, Jr.", written in a cursive style.

Curtis T. Hill, Jr.
Attorney General

David P. Johnson, Chief Counsel
William H. Anthony, Assistant Chief Counsel
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