

Opinion No. 100**Elections — Electors —
Felony Conviction in Federal Court,
Grounds for Disqualification
of Right to Vote**

HELD: Section 23-302, R.C.M., 1947, disqualifies an elector from voting if the elector has been convicted of a felony in a federal court and has not been pardoned.

December 12, 1956

Mr. Stanley Nees, Chairman
Board of County Commissioners
Roosevelt County
Wolf Point, Montana

Dear Mr. Nees:

You have asked my official opinion on the following question:

Is a person who has been convicted of a felony in federal court, and who has not obtained a pardon or who has not had his or her civil rights restored, eligible to vote in the State of Montana?

In support of this question you have presented a certified copy of a judgment and commitment which shows on its face that "X" was, on the 9th day of April, 1953, found guilty of violating Title 18, Section 111, of the United States Code, and received a sentence in the United

States District Court for the District of Montana, Havre Division, before the Honorable W. D. Murray, of sixty days imprisonment, the execution of which was suspended and the defendant placed on one year's probation.

Section 23-302, R.C.M., 1947, states in part that:

" . . . No person convicted of felony has the right to vote unless he has been pardoned. . . . "

The problem you present resolves itself into two questions: First, was "X" convicted of a felony; Secondly, if "X" was convicted of a felony, does such conviction, under the federal jurisdiction, disqualify "X" from voting under Montana law?

In answering the first question we find that Title 18, Section 111 of the U.S.C. under which "X" was convicted provides:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both. . . . "

Title 18, Section 1, of the U.S.C., states in part that:

"Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony. . . . "

Under federal law Title 18, Section 111, is a felony and therefore anyone convicted of a violation of that section is convicted of a felony regardless of the sentence actually imposed.

Next we must consider whether a felony conviction in federal court works a forfeiture of voting privileges under Section 23-302, supra. To date there have been no cases reaching our Montana Supreme Court in which a Montana resident's

right to vote has been challenged on the basis of a felony conviction in a foreign jurisdiction. However, in the case entitled State ex rel. Anderson v. Fousek, 91 Mont. 448, 8 Pac. (2d) 791, the same basic problem was considered. In that case the mayor of Great Falls, Montana, Albert J. Fousek, contended that the position on the Great Falls police force held by A. L. Anderson was vacant inasmuch as Anderson had been found guilty of violating the National Prohibition Act and had received a fine of one hundred dollars. Violations of the National Prohibition Act carried a maximum sentence in excess of one year. Montana law, then and now, provides that public officers convicted of a felony forfeit their right to hold office. In holding that the federal conviction was applicable in Montana and that Anderson, by conviction had forfeited his position on the police department, our State Supreme Court said:

" . . . The character of an offense, i.e., whether a felony or a misdemeanor, must be determined by the laws of the jurisdiction where the crime was committed. (State ex rel. Beckman v. Bowman, 38 Ohio App. 237, 175 N.E. 891)."

"The crime for which relator stand convicted is a felony in the jurisdiction where committed, and we cannot regard it otherwise. Under the plain provisions of section 511 the office of relator became vacant upon his conviction, unless, as relator contends, section 511 has to do only with felonies or other crimes under our state laws, and does not cover felonies under the federal laws.

"This same contention was advanced in the case of In re Peters, 73 Mont. 284, 235 Pac. 772, 774, which was a disbarment proceeding under a statute very similar to section 511, and it was there held that the state statute, section 8961, authorizing the suspension of an attorney upon 'conviction of a felony or misdemeanor involving moral turpitude,' required the suspension of an attorney when the conviction was in the federal

court. That case is determinative of the question against the contention of the relator.

"While there is some conflict in the authorities, the overwhelming weight of authority sustains this view. . . ." (Citing cases)

The test to be applied in determining whether a crime is a felony under the federal law is the punishment which may be inflicted, and not what was actually imposed.

This question has been considered in previous official opinions of the Attorney General beginning with an opinion in Volume 2, p. 352 where it was held that:

" . . . a person convicted of a felony under the laws of the United States cannot vote in the state of Montana until he has been pardoned by the president."

In Volume 14 of the Reports and Official Opinions of the Attorney General, page 266, it was held that:

"A conviction for felony in the federal court works a forfeiture of the right of franchise. County clerk is required to cancel registry card of any person convicted of a felony in the federal court upon the production of a certified copy of judgment of conviction."

This opinion specifically overrules Opinion No. 491, in Volume 15, and Opinion No. 111, in Volume 18, of the Reports and Official Opinions of the Attorney General. This action is taken primarily on the basis of the express statements of the State Supreme Court in the case entitled *State ex rel. Anderson v. Fousek*, supra.

It is therefore my opinion that Section 23-302, R.C.M., 1947, disqualifies an elector from voting if the elector has been convicted of a felony in federal court and has not been pardoned.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.