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Criminal Law - Habitual Offender Statute - Effect of Unconditional Pardon on Prior Conviction

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RECENT CASES

CRIMINAL LAW—HABITUAL OFFENDER STATUTE—EFFECT OF UNCONDITIONAL PARDON ON PRIOR CONVICTION.—Defendant was convicted of breaking and entering and was sentenced to one year imprisonment. Judgment was set aside and defendant resentenced to twenty years imprisonment under an habitual offender statute. On appeal, the Supreme Court of Florida reversed the judgment and *held* that since the offender had received a full and unconditional pardon from a prior felony conviction, it could not be counted as a prior conviction under the provisions of the Florida habitual offender statute.[1] *Fields v. State,* 85 So. 2d 609 (Fla. 1956).

It appears that a majority of courts hold that a pardon from a prior conviction does not exempt an accused from increased punishment under habitual offender statutes.[2] The reasoning of these courts is based on the idea that the increased sentence for a second, third or fourth conviction is not added punishment for the prior crime or crimes, but rather, the prior conviction is only an element in determining the amount of increased punishment for the present offense.[3] These courts hold, in effect, that an unconditional pardon does not remove all remaining consequences of a prior conviction.[4]

The minority view, holding that an unconditional pardon removes all such consequences, is shared by Florida and a few other states.[5] One reason for the division of authority is the judicial construction of the word "pardon".[6] The minority jurisdictions appear to follow an early decision of the United States Supreme Court, which viewed a pardon as a removal of all guilt,". . . so that in the eyes of the law the offender is as innocent as if he had never committed the offense."[7]

It seems that the holdings of the minority jurisdictions are predicated upon an intent to prevent increased subsequent sentences where the prior conviction has been removed by a pardon for *innocence.*[8] Therefore, no rational rule stating the effect of a pardon can be made without distinguishing clearly between pardons granted for innocence and pardons granted for other reasons.[9] Where a pardon was granted because of after-discovered innocence, it is arguable that since the party was mistakenly convicted he should not suffer futher consequences from that conviction. Normally, if a man is innocent of the offense charged, his remedy is found in the courts.[10] Occasionally, however, use of the executive pardon may be necessary to exonerate one who was

1. Fla Statutes §775.09 (1953).
2. State v. Webb, 36 N.D. 235, 244, 162 N.W. 358, 360 (1917) (dictum); Dean v. Skeen, 137 W. Va. 105, 70 S.E.2d 256, 258, (1952) (dictum).
3. People v. Brophy, 287 N.Y. 132, 38 N.E.2d 468 (1941); People v. Carlesi 233 U.S. 51, 34 S. Ct. 576 (1941) (dictum); State v. Webb, 36 N.D. 235, 244, 162 N.W. 358 360 (1917) (dictum).
4. People V. Biggs, 9 Cal.2d 508, 71 P.2d 214 (1937); Dean v. Skeen, 137 W.Va. 105, 70 S.E.2d 256 (1952).
5. Kelley v. State, 204 Ind. 612, 85 N.E.2d 453 (1933); State v. Lee, 171 La. 744, 132 So. 219 (1931).
6. Dean v. Skeen, 137 W. Va. 105, 70 S.E.2d 256, 259 (1952) (dictum).
7. *Ex parte* Garland, 71 U.S. (4 Wall) 33 (1866). But see Williston, *Does a Pardon Blot Out Guilt?,* 28 Harv. L. Rev. 647 (1915).
8. Williston, 28 Harv. L. Rev. 647, 661 ("The fact that a pardon may infrequently be the only redress which is open to an innocent man operates as an injustice to the innocent, but, as has been said, probably exerts a retroactive influence towards continuance of the notion that a pardon makes a convict into a man of good character.").
9. 88 U. Pa. L. Rev. 177 (1939).
10. E.g., Fla. Statutes § 924.01 (1953); N.D. Rev. Code § 29-2402 (Supp. 1953).

wrongfully convicted.[11] At least two states have expressly provided by statute that previous conviction will not be considered if pardon was granted for reasons of innocence.[12]

It is unjust to give a pardon granted for innocence the same limited application as is now generally given to pardons granted for other reasons. There is no logical reason why pardons granted for innocence should not conclusively prevent consideration of the pardoned conviction in an attempt to apply an habitual offender statute. Recognizing that the executive and judicial power of a state should be separated as much as possible, exercise of the pardoning power for reasons of innocence may be criticizable as an executive review of a judicial decision.[13] The principle of separation of powers could be better adhered to by instituting an extraordinary judicial remedy which would only lie whenever such evidence is discovered as would presently result in a pardon for innocence. If such a remedy were available and made exclusive, all subsequently granted pardons would be granted for reasons other than innocence. Where that is true, there appears to be no valid reason why pardoned convictions should be considered in applying habitual offender statutes. It is submitted, that if the pardon in the instant case was granted solely on the basis of innocence, the decision of the court is correct.

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EVIDENCE—PRIVILEGED COMMUNICATION BETWEEN ATTORNEY AND CLIENT—ATTORNEY PRACTING IN STATE OTHER THAN ONE WHERE LICENSED.—In a discovery proceeding,[1] plaintiff moved under Rule 34, Federal Rules of Civil Procedure[2] for an order requiring the defendant to produce various documents relating to prior patent litigation. The defendant excepted, contending that certain of the documents were privileged as communications with its attorney. The plaintiff contested the privileged status of the documents on the grounds that defendant's counsel was not licensed to practice in New York where the communications and litigation took place. It was conceded that counsel was a member of the District of Columbia and Pennsylvania Bars. The court *held* that a lawyer regularly employed by a corporation as legal counsel who actively participates in litigation qualifies as an "attorney" within the rule of privileged communication between attorney and client, though he is not licensed to practice in the state. *Georgia-Pacific Plywood Co. v. U.S. Plywood Corp.*, 18 F.R.D. 463 (S.D. N.Y. 1956).

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11. 28 Harv. L. Rev. 647, 659 (1915).
12. Iowa Code § 747 (1950); N. Y. Code of Crim. Proc. § 697 (1953).
13. The Federalist No. 47 at 373 (Hamilton ed. 1885) (Madison).

1. See Sunderland, *Discovery Before Trial Under the New Federal Rules*. 15 Tenn. L. Rev. 737 (1939).

2. Fed. R. Civ. P. 34, "Discovery And Production of Documents And Things For Inspection, Copying, or Photographing. Upon motion of any party showing good cause therefore and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, book accounts, letters, photographs, objects or tangible things, *not privileged*, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, Custody, or control; . . . The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just." (Italics added)