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OPINION	:	No. 80-226
	:	
of	:	<u>July 9, 1980</u>
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SUBJECT: ELIGIBILITY REQUIREMENTS FOR PEACE OFFICER—A person who has been convicted of a felony in federal court whose conviction has been set aside pursuant to 18 United States Code section 5021 is not eligible for employment as a California peace officer.

The Honorable Pearl S. West, Director, Department of the Youth Authority, has asked for an opinion on the following question:

Is a person who has been convicted of a felony in federal court eligible for employment as a California peace officer if his conviction has been set aside pursuant to 18 United States Code section 5021?

CONCLUSION

A person who has been convicted of a felony in federal court whose Conviction has been set aside pursuant to 18 United States Code section 5021 is not eligible for employment as a California peace officer.

ANALYSIS

The Federal Youth Corrections Act (18 U.S.C. § 5005 *et seq.*) was adopted in 1950 partly on the basis of the California Youth Authority experience with youthful offenders. (See 1950 U.S. Congressional and Administrative News, pp. 3983, 3989; see also *People v. Navarro* (1972) 7 Cal. 3d 248, 279.) The act provides a system for sentencing and treatment of persons under the age of 22 years at the time of conviction of a federal offense. The act provides for the issuance of an order setting aside the conviction automatically upon the unconditional discharge of a “youth offender” before the expiration of his sentence or probation. (18 U.S.C. § 5021.)¹

The “setting aside” provision of section 5021 has been construed by federal courts to remove all taint of the conviction. (*Doe v. Webster* (D.C. Cir. 1979) 606 F.2d 1226; *United States v. Doe* (6th Cir. 1977) 556 F.2d 391; *United States v. Fryer* (6th Cir. 1977) 45 F.2d 11; *Mestre Morera v. United States Immigration & Naturalization Service* (1st Cir. 1972) 462 F.2d 1030; *United States v. Hall* (S.D. N.Y. 1977) 452 F. Supp. 1008.) In *Doe v. Webster, supra*, the court held that the automatic “setting aside” of a conviction pursuant to section 5021 entitled the youth offender to have records of such convictions expunged. However, other federal courts have held that the setting aside of a conviction under that section does not entitle a youth offender to expungement of the record. (*United States v. Doe, supra*; *United States v. McMains* (8th Cir. 1976) 540 F.2d 387; *Fire v. Retail Credit Co.* (D.C., Mont. 1975) 386 F. Supp. 1045, *affd.* (9th Cir. 1976) 537 F.2d 384; *United States v. Hall, supra*.) In *People v. Navarro, supra*, 7 Cal. 3d at page 279, the state Supreme Court in referring to the setting aside provision of section 5021 stated: “‘This expunges’ the conviction.”

The question presented for analysis concerns the legal effect of the setting aside of a federal conviction pursuant to 18 United States Code section 5021 for purposes of the state’s statutory ban on the employment of ex-felons as peace officers set forth in Government Code section 1029. That section provides in pertinent part:

¹ 18 United States Code section 5021 provides:

“(a) Upon the unconditional discharge by the Commission of committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender, certificate to that effect.

“(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.”

“(a) Except as provided in subdivision (b), any person who has been convicted of a felony in this state or any other state, or who has been convicted of any offense in any other state which would have been a felony if committed in this state, is disqualified from holding office or being employed as a peace officer of the state, county, city, city and county or other political subdivision, whether with or without compensation, and is disqualified from any office or employment by the state, county, city, city and county or other political subdivision, whether with or without compensation, which confers upon the holder or employee the powers and duties of a peace officer.

“(b) Any person who has been convicted of a felony, other than a felony punishable by death, in this state or any other state, or who has been convicted of any offense in any other state which would have been a felony, other than a felony punishable by death, if committed in this state, and who demonstrates the ability to assist persons in programs of rehabilitation may hold office and be employed as a parole officer of the Department of Corrections or the Department of the Youth Authority if he has been granted a full and unconditional pardon for the felony or offense of which he was convicted. Notwithstanding any other provision of law, the Department of Corrections or the Department of the Youth Authority may refuse to employ any such person as a parole officer regardless of his qualifications.”

It should be noted that the section applies to “any person who has been convicted of a felony in this state or any other state, or who has been convicted of any offense in any other state which would have been a felony if committed in this state” The language does not expressly refer to a federal felony offense. However, a federal felony may be committed in this state or in another state. In 57 Ops. Cal. Atty. Gen. 374, 380–382 (1974) we discussed the question of whether a conviction within the meaning of former article XX, section 11 of the California Constitution² and Government Code sections 1021, 770 subdivision (h), and 3000, which deal with disqualification of a public officer convicted of a felony or certain other crimes, includes a federal conviction. Noting that the reference in those provisions did not refer to any particular place of the occurrence of trial or conviction, we concluded that they did apply to federal felonies. In the case of the language of Government Code section 1029, while reference is made to convictions in this and other states, there is no suggestion that the reference was intended to limit the applicability of this section to convictions of felonies in violation of state law rather than federal law. (*Cf.* Code of Civ. Proc., § 1908; *Martin v. Martin* (1970) 2 Cal. 3d 752, 761.)

² See now article VII, section 8 of the California Constitution.

In this respect we note that title 11 of California Administrative Code, section 1002 promulgated by the Commission on Peace Officer Standards and Training provides as a minimum standard for employment of a peace officer that the officer “[n]ot have been convicted of a felony in this state or any other state or in any federal jurisdiction, or of any offense in any other state or in any federal jurisdiction, which would have been a felony if committed in this state.” Great weight is to be accorded the contemporaneous administrative construction of a statute by the agency charged with its enforcement and interpretation. (*People v. Ruster* (1976) 16 Cal. 3d 690, 697, fn. 3.) Accordingly, we conclude that the reference to a felony conviction in Government Code section 1029 applies to a federal felony conviction and the restriction on employment as a peace officer in Government Code section 1029 applies to a person convicted of a federal felony.

The pertinent question is whether a conviction set aside pursuant to 18 United States Code section 5021 is a “conviction” for purposes of Government Code section 1029. To answer it, we must consider two underlying questions. The first is whether the state Legislature intended Government Code section 1029 to apply to a person whose conviction was set aside pursuant to 18 United States Code section 5021. The second is whether the state has the power to recognize a federal conviction which has been set aside pursuant to that statute for the purposes of section 1029 of the Government Code.

The key to understanding the legislative intent behind section 1029 with respect to a conviction set aside pursuant to a statute such as 18 United States Code section 5021 is found in the similar provisions of California law regarding the “youthful offenders.”

Welfare and Institutions Code section 1772 provides:

“Every person honorably discharged from control by the Youthful Offender Parole Board who has not, during the period of control by the authority been placed by the authority in a state prison shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, and every person discharged may petition the court which committed him or her, and the court may upon such petition set aside the verdict of guilty and dismiss the accusation or information against the petitioner who shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, including, but not limited to, any disqualification for any employment or occupational license, or both, created by any other provision of law. However, such a person shall not be eligible for appointment as a peace officer employer by any public agency, other than the Department of the Youth Authority., if his or her appointment would otherwise be prohibited by Section 1029 of the Government Code.

“Every person discharged from control by the Youthful Offender Parole Board shall be informed of this privilege in writing at the time of discharge. ‘Honorably discharged’ as used in this section means and includes every person whose discharge is based upon a good record on parole.”

A similar provision is contained in Welfare and Institutions Code section 1179 with respect to institutions for delinquents operated by the Youth Authority. That section provides:

“All persons honorably dismissed from any such school and all persons who are retained at any such school for the full period of their respective commitments shall thereafter be released from all penalties or disabilities resulting from the offenses for which they were committed, including, but not limited to any disqualification for any employment or occupational license, or both, created by any other provision of law. However, such a person shall not be eligible for appointment as a peace officer employed by any public agency, other than the Department of the Youth Authority, if his appointment would otherwise be prohibited by Section 1029 of the Government Code. Upon the final discharge or dismissal of any such persons, the Youth Authority shall immediately certify such discharge or dismissal in writing, and shall transmit the certificate to the court by which the person was committed. The court shall thereupon dismiss the accusation and the action pending against such person.”

Both sections 1179 and 1772 were amended in 1976 to include the reference with respect to eligibility for employment as a peace officer. (Stats. 1976, ch. 1272, §§ 1, 2.) Prior to those amendments, the Supreme Court in *People v. Navarro*, *supra*, 7 Cal. 3d at page 278 had noted that “[t]he Legislature has not defined what ‘penalties and disabilities’ it intended to release pursuant to the expungement provisions of section 1179 and 1172.” The court did note in that case that the Legislature “has modified the mandatory exclusions applicable to persons convicted of felony convictions . . . in section 1029 of the Government Code.” (*Id.*)

In an unpublished opinion, I.L. 75–99, dated May 16, 1975, we concluded:

“The fact that the Legislature has specifically required a pardon for peace officer status in spite of the fact that a person may otherwise have been released from penalties and disabilities pursuant to Welfare and Institutions Code section 1772 presumes that the effect of the law did not affect the necessary requisites to obtain peace officer status.”

As just noted, the very next year the Legislature amended section 1772 and section 1179 to clearly define the extent of the release from all penalties and disabilities with regard to eligibility to be a peace officer.

Thus, in Government Code section 1029 the Legislature has generally prohibited a person who has been convicted of a felony from being a peace officer. It has made an express but limited exception for a youthful offender who has had his conviction set aside pursuant to Welfare and Institutions Code section 1179 or 1772. It appears clear that in the absence of an express exception, a conviction which has been set aside pursuant to a youthful offender expungement statute is still a conviction within the meaning of Government Code section 1029. Therefore, we conclude that the Legislature intended a conviction set aside pursuant to 18 United States Code section 5021 to be a conviction within the meaning of Government Code section 1029.

It appears that the Legislature intended that in the absence of full and unconditional pardon, a person who has a felony conviction set aside pursuant to section 5021, would not be eligible to be a peace officer because of the ineligibility provision of Government Code section 1029.

We must next consider whether the state has the power to recognize a conviction which has been set aside pursuant to a federal statute for purposes of determining the eligibility of a peace officer. “It is not to be presumed that the Legislature would deliberately enact a statute prohibited by the constitution. Whenever statutes conflict, with constitutional provisions, the latter must prevail.” (*People v. Navarro, supra*, 7 Cal. 3d at p. 260.) Thus, we must examine whether the ineligibility provision of Government Code section 1029 may be applied to a person whose conviction has been set aside pursuant to 18 United States Code section 5021.

Our first consideration is whether the supremacy clause of the United States Constitution requires the state to ignore the fact of a federal conviction where the conviction has been set aside pursuant to 18 United States Code section 5021. The supremacy clause, article VI, section 2 of the United States Constitution, provides:

“This constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or the laws of any state to the contrary notwithstanding.”

Besides *People v. Navarro, supra*, 7 Cal. 3d 248 we have found only two California cases which have considered provisions of 18 United States Code section 5021. In *People v. Loomis* (1965) 231 Cal. App. 2d 594, the defendant appealed a conviction of violation

of Penal Code section 12021 (ex-felon with a gun). He contended that since the federal conviction which formed the basis of the violation of Penal Code section 12021 was set aside pursuant to 18 United States Code section 5021, the California court was without jurisdiction to consider the federal conviction as anything but nonexistent. The court, however, noted that the federal conviction was set aside subsequent to the date that appellant committed the violation of Penal Code section 12021. The court concluded that “[h]is discharge from his federal Conviction cannot operate to relieve him of the California offense committed by him before the date of his discharge.” (231 Cal. App. 2d at p. 597.) Thus, the court in *Loomis* was not faced with the issue of recognition of a federal conviction after it has been set aside pursuant to section 5021.

In *People v. Robinson* (1969) 1 Cal. App. 3d 555, 558, the defendant argued that the trial court erred in admitting evidence of a prior conviction which had been set aside pursuant to section 5021. The court noted that while defendant’s position was persuasive, there was no case authority, federal or state, which supported it. However, the court found it unnecessary to resolve the issue by finding that, assuming arguendo, that the trial court did err, the error was clearly harmless in view of the facts of the particular case.

The only other California authority we have found with regard to 18 United States Code section 5021 is a footnote in our own opinion, 56 Ops. Cal. Atty. Gen. 138, 140 (1973) (fn. 5) in which we stated that by virtue of title 18, United States Code section 5024, a state would be required to recognize expungement of a youth offender’s conviction pursuant to 18 United States Code section 5021. Section 5024 merely provides:

“This chapter shall apply in the states of the United States and in the District of Columbia.”

Both the language of that section and its legislative history clearly demonstrate that it only sets forth the geographic areas of federal jurisdiction where the Federal Youth Corrections Act is applicable. (See, e.g., Amendment, dated April 8, 1952, ch. 163, § 2, 66 Stat. 45 (extending the federal Youth Corrections Act to the District of Columbia); see also 1952 U.S. Code Congressional Administrative News, p. 1379). It was not the intent of Congress by enacting section 5024 to mandate that federal procedure with regard to youth offenders be engrafted upon the states. Thus, footnote 5 of our opinion, 56 Ops. Cal. Atty. Gen. 138, *supra*, is clearly erroneous to the extent it asserts that section 5024 mandates the state to recognize the expungement of the youth offender’s conviction and it is disapproved.

We have found no direct authority with regard to the issue whether California is required to recognize the “nonexistence” of a federal conviction which was expunged pursuant to 18 United States Code section 5021 by virtue of the supremacy clause. In 56 Ops. Cal. Atty. Gen. 138, *supra*, we concluded that this state need not recognize a

presidential pardon other than one based upon a determination of innocence for purposes of the prohibition from possessing a concealable firearm. (Pen. Code, § 12021.) The basic rationale for this conclusion was that a pardon does not blot out the fact that the person was convicted. (See *People v. Dutton* (1937) 9 Cal. 2d 505; *People v. Biggs* (1937) 9 Cal. 2d 508; *People v. Jesse* (1979) 98 Cal. App. 3d 814, 818; but see *People v. Terry* (1964) 61 Cal. 2d 137, cert. den. 379 U.S. 866.)

In *Carlesi v. New York* (1914) 233 U.S. 51, the Supreme Court held that the state could take into consideration a prior federal offense which was pardoned if recognition of the offense did not in any way result in “a punishment for the prior crime but was simply an exercise by the state of a local power within its exclusive cognizance.” (233 U.S. at p. 57.) In *Gross Gold v. Supreme Court of Illinois* (7th Cir. 1977) 557 F.2d 122, 125, the court held that a presidential pardon for a mail fraud conviction, did not wipe out the moral turpitude inherent in the factual predicate supporting the conviction so as to require the state bar to ignore the fact of the conviction for purposes of disciplinary proceedings against an attorney who was so convicted.

We recognize that an expungement pursuant to 18 United States Code section 5021 appears to provide greater relief than would a presidential pardon for the same offense. (*United States v. Tatum* (D.C. Cir. 1072) 310 F.2d 854, 856, fn. 2.) Nevertheless, we see neither congressional intent nor constitutional authority which would require the state to recognize the “nonexistence” of a conviction set aside pursuant to section 5021 for purposes of Government Code section 1029.

In *Hetherington v. State Personnel Board* (1978) 82 Cal. App. 3d 582, the court held Government Code section 1029 to be constitutional, rejecting the contention that it violated the equal protection clauses of the United States and California Constitutions by discriminating against ex-felons. The court is so holding, noted that the purpose of the statute “is to assure, insofar as possible, the good character and integrity of peace officers and to avoid the appearance to members of the public that the persons holding public positions having the status of peace officers may be untrustworthy.” (82 Cal. App. 3d at p. 590; *Cf. DeVea v. Braisted* (1960) 363 U.S. 144, 158–159.)

The court further stated:

“In California, our courts have recognized the special position of peace officers in society, with emphasis on public trust and confidence. Thus, in *McCain v. Sheridan* (1958) 160 Cal. App. 2d 174, 177 it was said with reference to members of the police force, in general, ‘they can perform their duties only if they merit the trust and confidence of the mass of law-abiding citizens. Whatever weakens that trust tends to destroy our system of law

enforcement.” (Id.)

We view the eligibility requirements of section 1029 as not a punishment, but a legitimate exercise of the state police power in the area of qualifications of persons holding the “special position” of peace officer for the state. See *Carlesi v. New York*, *supra*, 233 U.S. 51.) We see no intent on the part of Congress in establishing the expungement relief in is United States Code section 5021 to regulate the policy considerations which a state has adopted in determining who shall be eligible to be peace officers.

Indeed, in view of the reservation of powers provisions of the Tenth Amendment of the United States Constitution³ it is questionable whether Congress has the power to regulate the state’s conditions of eligibility for its own peace officer, in *National League of Cities v. Usury* (1976) 426 U.S. 833, the court in holding invalid certain provisions of the Fair Labor Standards Act which extended the act’s minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions, held that the Tenth Amendment prohibited Congress from exercising its power to regulate commerce so as to force directly upon the state its choices as to how essential decisions regarding the conduct of integral government functions are to be made. In so holding, the court found that Congress could not withdraw from the state the authority to make fundamental employment decisions with regard to the carrying out of its basic function of furnishing public services, including police protection. (426 U.S. at p. 833.) Clearly, the determination of qualifications for peace officers falls within such state authority. (See *Foley v. Connelie* (1978) 435 U.S. 291, 297.) Thus, it is our view, in regard to Government Code section 1029, that the state is not required to ignore the fact of a federal conviction which has been set aside pursuant to title 18, United States Code section 5021.

The fact that the state, for the purpose of Government Code section 1029, is not precluded by virtue of the supremacy clause from recognizing a federal conviction which has been set aside pursuant to 18 United States Code section 5021, does not establish that the state may constitutionally bar persons who have had their convictions so set aside from being eligible from being peace officers. The Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution guarantee persons equal protection of the laws. The Tenth Amendment’s reservation of power to the states, can in no way legitimize state conduct which violates the Fourteenth Amendment. (*Milleken v. Bradley* (1977) 433 U.S. 267, 291.)

³ The Tenth Amendment provides: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.”

Traditionally, the constitutional right of equal protection of laws requires that state action in creating classifications bear some rational relationship to a legitimate governmental purpose. (*Hardy v. Stumpf* (1978) 21 Cal. 3d 1, 7.) If a law regulates a “fundamental interest,” (such as freedom from confinement or the right of procreation) or affects a “suspect class” of persons, (such as a class based upon race, alienage, or creed), the state must establish a compelling state interest justifying the regulation. (*Id.*) In *Hetherington v. State Personnel Board*, *supra*, 82 Cal. App. 3d 582, the court found Government Code section 1029 did not regulate a “fundamental interest” or affect a “suspect class” and, thus, applied the traditional rational relationship test to the issue of whether that section unlawfully discriminated against ex-felons. It found that the section did not.

It could be argued, however, that it violates the concept of equal protection of laws to bestow a certain limited eligibility for the position of peace officer to state “youthful offenders” who have had their state convictions set aside pursuant to Welfare and Institutions Code sections 1179 or 1772, but not to afford the same eligibility to federal “youth offenders” who have had their convictions set aside pursuant to 18 United States Code section 5021. Such an argument is unpersuasive. It is well established “that the Legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach.” (*Miller v. Wilson* (1914) 236 U.S. 373, 384–385; see also *Board of Education v. Watson* (1966) 63 Cal. 2d 829.) As we have already indicated, the underlying purpose of Government Code section 1029 is to assure the good character and integrity of peace officers and to avoid any appearance to members of the public that persons holding public positions having the status of peace officers may be untrustworthy. (*Hetherington v. State Personnel Board*, *supra*, 82 Cal. App. 3d 582.)

Clearly there is a rational basis for the exceptions to Government Code section 1029 found in Welfare and Institutions Code sections 1179 and 1772. The exceptions merely authorize a youthful offender whose conviction has been set aside pursuant to sections 1179 or 1772 to be eligible to be appointed a peace officer employed by the Department of the Youth Authority. The rational basis for these exceptions is the apparent determination by the Legislature that a person who has been rehabilitated by virtue of a Youth Authority program could be a valuable asset as a peace officer employee to the Youth Authority. The Legislature could have concluded that the value of such a person to the rehabilitation programs of the Youth Authority clearly would outweigh any possible public concern with regard to person’s trustworthiness.

However, a person who has had his conviction set aside pursuant to 18 United States Code section 5021 is clearly in a different position than the person who has had his conviction set aside pursuant to Welfare and Institutions Code section 1179 or 1772. The significant difference is the federal youth offender has not necessarily been subject to a

period of rehabilitation in the custody of the Youth Authority. Thus, such person would not have had the same experience that the state youthful offender has had.

The Legislature was undoubtedly aware, in providing for the limited exception to the eligibility requirements of Government Code section 1029 with respect to youthful offenders, of the rehabilitation programs provided by the Youth Authority. It was also undoubtedly aware of the needs of the Youth Authority with respect to employment of persons formerly committed to its custody. It is clearly not irrational for the Legislature to omit from the limited exception in this regard, persons who have had convictions set aside pursuant to 18 United States Code section 5021.

Thus, it is our conclusion, that a person convicted of a felony in federal court who has had his conviction set aside pursuant to 18 United States Code section 5021 is not eligible for employment as a peace officer.
