Weapon possession, nolo contendere plea

Number: AGO 2012-29

Date: September 20, 2012

Subject:
Weapon possession, nolo contendere plea

Major General Emmett R. Titshaw, Jr.
Florida National Guard
Office of the Adjutant General
Post Office Box 1008
St. Augustine, Florida 32085-1008

RE: FIREARMS--WEAPONS--CRIMES--DOMESTIC VIOLENCE--plea of *nolo contendere* with adjudication withheld as conviction for barring possession of a firearm. ss. 790.06, 790.065, and 790.233, Fla. Stat.

Dear Major General Titshaw:

You have asked this office to comment on the following question:

Does a plea of *nolo contendere* to a misdemeanor charge of domestic violence with adjudication of guilt withheld and a term of probation imposed constitute a conviction for purposes of barring an individual from possessing a firearm or weapon pursuant to 18 United States Code section 922(g)(9)?

In sum:

An individual who has entered a plea of *nolo contendere* to a misdemeanor charge for domestic violence, with adjudication of guilt withheld and a term of probation imposed, would not be considered "convicted" for the purpose of permanently barring such individual from possessing a firearm pursuant to 18 United States Code section 922(g)(9).

You indicate that under 18 United States Code section 922(g)(9), the "Lautenberg Amendment," an individual who is "convicted" of a misdemeanor crime involving domestic violence is precluded from carrying or possessing a firearm.[1] Your letter states that in determining whether a "conviction" is a qualifying Lautenberg conviction, the controlling law is that of the state in which the proceedings for the domestic violence charge were held.

The pertinent provision in 18 United States Code section 922, states that it is unlawful for any person "who has been *convicted* in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[2] (e.s.) As you have noted, and the federal act appears to indicate, the determination of whether an individual has been "convicted" of a

misdemeanor crime of domestic violence for purposes of the act is made by the laws of the jurisdiction in which the proceedings were held.[3]

In Florida, the term "conviction" is generally recognized as a "determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court."[4] An adjudication of guilt following a plea of no contest also qualifies as a "conviction."[5] A no contest plea followed by withholding of adjudication of guilt, however, is not generally considered a conviction. In *Garron v. State*,[6] the Supreme Court of Florida concluded there was no conviction or guilty plea where a defendant had pled no contest and adjudication of guilt was withheld, stating:

"A nolo plea means 'no contest,' not 'I confess.' It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea."[7]

It has been recognized that the term "conviction" used in Florida law is "a 'chameleon-like' term that has drawn its meaning from the particular *statutory context* in which the term is used."[8] (e.s.) As a result, there have been departures from the general rule of no conviction when there is a *nolo contendere* plea with adjudication of guilt withheld. For instance, in *Montgomery v. State*,[9] the Supreme Court of Florida found that an individual is considered "convicted" when he or she enters a *nolo contendere* plea and adjudication of guilt is withheld, in the context of determining whether an individual has a prior conviction for sentencing guidelines purposes. For sentencing purposes, the *Montgomery* Court noted that Chapter 921, Florida Statutes, for purposes of the sentencing statute, defines "conviction" as "*a determination of guilt* that is the result of a plea or a trial, *regardless of whether adjudication is withheld.*"[10] (e.s.) The Court further noted that the Florida Rules of Criminal Procedure, used to implement the sentencing guidelines, define "conviction" as "*a determination of guilt* resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended."[11] (e.s.) Following the plain language of the statute, the Court concluded that a no contest plea is a conviction, regardless of adjudication being withheld, for sentencing guideline purposes.[12]

It should be recognized, however, that the *Montgomery* Court did not overrule *Garron*, but rather acknowledged that the Legislature had created an exception to the general rule in Florida and made a *nolo contendere* plea with adjudication of guilt withheld a conviction for purposes of sentencing matters. No such similar definition or language recognizing a *nolo contendere* plea with adjudication of guilt withheld as a conviction is found in the statutes relating to misdemeanor domestic violence. Clearly, had the Legislature wished to make the entry of a *nolo contendere* plea with adjudication of guilt withheld tantamount to a conviction in such matters, it could easily have done so.[13]

Absent statutory language which treats a *nolo contendere* plea with adjudication of guilt withheld in a proceeding for a misdemeanor crime of domestic violence as a "conviction," I cannot say that Florida law makes such a situation a "conviction" for purposes of permanently barring possession of a firearm under the federal law at issue here. Had the Legislature so intended, it could easily have defined "conviction" for purposes of a misdemeanor domestic violence charge to include withheld adjudications.

Accordingly, it is my opinion that Florida law does not treat a plea of *nolo contendere* to a

misdemeanor charge for domestic violence with adjudication of guilt withheld and a term of probation imposed as a "conviction" which would permanently bar an individual from possessing a firearm pursuant to 18 United States Code section 922(g)(9).

Sincerely,

Pam Bondi
Attorney General

PB/tals

---

[1] Your question is prompted by a situation in which a member of the Florida National Guard entered a plea of *nolo contendere* to misdemeanor battery under s. 784.03, Fla. Stat., and the court withheld adjudication and placed the service member on probation for 12 months. In this instance, the guard member was charged in Flagler County and the victim was the member's child.

[2] *See* 18 U.S.C.A. s. 922(g)(9). See also 18 U.S.C.A. s. 922(d)(9), making it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person "has been convicted in any court of a misdemeanor crime of domestic violence."

[3] *See* 18 U.S.C.A. s. 921(a)(20). *See United States v. Willis*, 106 F.3d 966 (11th Cir. 1997) (Federal law states that "conviction" with the meaning of s. 922[g][1] to be determined in accordance with the law of the jurisdiction in which the proceedings are held, citing 18 U.S.C. s. 921[a][20]).

[4] *See State v. Gazda*, 257 So. 2d 242, 243-44 (Fla. 1971).

[5] *Raydo v. State*, 696 So. 2d 1225 (Fla. 1st DCA 1997), *approved in part and quashed in part*, 713 So. 2d 996 (Fla. 1998).

[6] 528 So. 2d 353 (Fla. 1988).

[7] *Id.* at 360.

[8] *See Raulerson v. State*, 763 So. 2d 285, 291 (Fla. 2000), citing *State v. Keirn*, 720 So. 2d 1085, 1086 (Fla. 4th DCA, 1998).

[9] 897 So. 2d 1282 (Fla. 2005). In *Montgomery*, the Court approved the appellate court's decision and disapproved a line of cases in which it was held that a no contest plea followed by a withhold of adjudication is not a "conviction" for sentencing purposes. *See Negron v. State*, 799 So. 2d 1126 (Fla. 5th DCA 2001); *Batchelor v. State*, 729 So. 2d 956 (Fla. 1st DCA 1999); *State v. Freeman*, 775 So. 2d 344 (Fla. 2d DCA 2000); and *Garron v. State*, 528 So. 2d 353 (Fla. 1988).

[10] *See* s. 921.0021(2), Fla. Stat. (2002).

[11] 897 So. 2d at 1284. *See* Fla. R. Crim. P. 3.701(d)(2).

[12] The *Montgomery* Court found that its conclusion was consistent with the legislative intent of s. 921.0021(2), Fla. Stat., as expressed by the statute's plain language that a "conviction" is a "determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." 897 So. 2d at 1285.

[13] *Cf.* s. 784.03, Fla. Stat., providing that a person with a prior conviction for battery who commits a second or subsequent battery commits a felony of the third degree and defining "conviction" as "a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered;" s. 775.13(1), Fla. Stat., defining "convicted" as "a determination of guilt which is the result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld" for purposes of registration of convicted felons; s. 517.161(1)(j), Fla. Stat., allowing denial of registration of a securities dealer who "[h]as been convicted of, or has entered a plea of guilty or nolo contendere to, regardless of whether adjudication was withheld, a crime against the laws of this state or any other state or of the United States or of any other country or government which relates to registration as a dealer, investment adviser, issuer of securities, associated person, or branch office; which relates to the application for such registration;" and s. 458.331(1)(c), Fla. Stat., stating as a grounds for denial of a medical license or disciplinary action, "[b]eing convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine."