

1. Deferred Adjudication & federal gun rights - 18 USC 922(g)

Hi all,

I have a client facing a state jail felony criminal mischief. He has a deferred adjudication offer for 3 years.

Upon successful completion of his probationary term, will the now dismissed charge count as a conviction for 922(g) purposes?

Thanks,

Jim Spangler

2. RE: Deferred Adjudication & federal gun rights - 18 USC 922(g)

Under Texas law, he may possess while on deferred. Under 922(g), he may possess after he completes deferred. Tex. Penal Code § 46.04 prohibits those who are finally convicted of a felony from possessing a firearm before the fifth anniversary of release from "confinement" (community supervision, parole, or prison). Those placed on deferred adjudication, however, are not subject to the firearms-possession restrictions of Tex. Penal Code § 46.04 because deferred adjudication is "not deemed a conviction for general purposes." *See Yazdchi v. State*, 428 S.W.3d 831, 838 (Tex. Crim. App. 2014). And, Tex. Penal Code § 46.04 requires a final felony conviction as an element of the offense. *See Cuellar v. State*, 70 S.W.3d 815, 820 (Tex. Crim. App. Feb. 13, 2002). *See also Ramon v. State*, 13-15-00146-CR, 2016 Tex. App. LEXIS 6343, 2016 WL 3364979 (Tex. App. Corpus Christi June 16, 2016) (not designated for publication) (because the defendant was not finally convicted of a felony but was merely on deferred adjudication, he could not have been guilty of felon-in-possession of a firearm under Tex. Penal Code § 46.04, so the officer was mistaken in arresting the defendant based on suspicion of a violation of Tex. Penal Code § 46.04).

Provided there is no finding of family violence in a felony, while a person is on deferred for the felony, he may not under 18 U.S.C. 922(d)(1) possess a firearm because he is considered "under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Once he

completes deferred adjudication, he is no longer "under indictment for" a crime punishable by imprisonment for a term exceeding one year. To determine what is a "conviction" is determined by the law of the jurisdiction in which the proceedings were held, look at 18 U.S.C. 921(a)(20) and 27 CFR 478.11(b):

(b) A person shall not be considered to have been convicted of such an offense for purposes of this part unless:

(1) The person is considered to have been convicted by the jurisdiction in which the proceedings were held; and

(2) The person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(3) In the case of a prosecution for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either (i) The case was tried by a jury, or (ii) The person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

In *United States v. Gispert*, 864 F.Supp 1193 (S.D. Fla. 1994), before being indicted and convicted for a felon being in possession of a firearm under 18 U.S.C. § 921(g)(1): (1) the defendant had pleaded guilty to a Florida felony that did not involve family violence; (2) the state court "withheld adjudication and placed him on probation" (which is the same as our deferred adjudication), (3) he successfully completed the deferred probation, and (4) the Florida court terminated his probation and criminal proceedings **without ever adjudicating him guilty**. Thus, the U.S. District Court found that this was **not** a "conviction" under 18 U.S.C. §921(a)(20) and thus, as a matter of law, he could not have violated 18 U.S.C. §921(g)(1).

And in *United States v. Daugherty*, 264 F.3d 513 (5th Cir. 2001), the defendant was convicted in Texas of delivery of a controlled substance and injury to a child. He received shock probation. He successfully completed shock probation and was discharged. He later was hit with federal felon in possession of a firearm. The 5th Cir. affirmed his conviction for felon-in-possession of a firearm under 18 U.S.C. § 922(g) because although he was discharged from probation, he did not qualify for the "unless" clause of 18 U.S.C. § 921(a)(20). The court noted that **this was a final conviction (as opposed to a deferred adjudication)**, and noted that under *Beecham v. United States*, 511 U.S. 368, 371 (1994), what constitutes a conviction under 18 U.S.C. § 922(g) must be determined per the law of the jurisdiction in which the state proceedings were held. In Texas, a final felony conviction is considered a "conviction" for a felony under 18 U.S.C. § 921(a)(20) but deferred adjudication is not.

Michael Mowla

3. RE: Deferred Adjudication & federal gun rights - 18 USC 922(g)

This is incredibly helpful. Thank you very much.

James Spangler

4. RE: Deferred Adjudication & federal gun rights - 18 USC 922(g)

James,

Although, a person on DADJ is not prohibited from possession of a firearm while on DADJ under Texas law, such possession may be a violation of the conditions of probation imposed by the Court. So make sure you inform your client about this. Just an FYI. Other than that, Mr. Mowla covered everything with great detail and emphasis.

Respectfully,

Moises Flores Jr, *Esq., M.A.*

5. RE: Deferred Adjudication & federal gun rights - 18 USC 922(g)

Mowla recently posted on this subject—go ahead and start saving all of his responses like the rest of us do.

Wayne Ted Wood

6. RE: Deferred Adjudication & federal gun rights - 18 USC 922(g)

I've said this before and I'll say it again: Michael Mowla will surely get a Star in his Crown one Special Day because of his ubiquitous, unselfish and highly-regarded sharing of knowledge, especially with his fellow TCDLA Members in Good Standing but others as well.

J O B W E L L D O N E Brother Mowla!!!

Just sayin . . .

Philip W. "Phil" Moore