BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF REVENUE

In the Matter of	)	
	)	
X J. C III	)	
	)	OAH No. 18-1307-PFD
2018 Permanent Fund Dividend	)	Agency No. 2018-006-6435

DECISION

I. Introduction

X J. C III was denied a 2018 Permanent Fund Dividend (PFD) because the Permanent Fund Dividend Division determined that, during the qualifying year, he had been sentenced for a "conviction" of a felony. After an unsuccessful informal appeal, Mr. C requested a formal hearing. The hearing took place on January 25, 2019, with the record held open for another month for the parties to submit supplemental briefing on the central legal issue.

This case is the first PFD appeal that turns on the legal characteristics of a new type of criminal disposition called a "Suspended Entry of Judgment," or SEJ. The SEJ was created by Alaska's 2016 criminal justice reform bill, SB 91, and then clarified in a 2017 bill, SB 55.

The Division's denial of Mr. C's application is reversed, because the Division has not correctly understood the nature of an SEJ. Mr. C did not lose his PFD eligibility until after the relevant period. This means that although he will lose eligibility for a PFD, it is not the 2018 PFD that he has forfeited.

II. Background

This is a case in which no facts are in dispute, and the basic legal parameters are also undisputed. X C has applied for a 2018 PFD, for which the qualifying year is 2017.[1] His application has been denied for only one reason: the statutory provision that a person is not eligible for a PFD if "during the qualifying year, the individual was sentenced as a result of conviction in this state of a felony."[2]

There is no question that Mr. C received an order placing him on probation in 2017, and that it related to felony conduct. Mr. C contends that this is not a "sentence,"[3] whereas the PFD Division contends that it is.[4] There is a more fundamental question, however, as to whether any

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1 AS 43.23.295(6).
2 AS 43.23.005(d)(1).
3 Ex. 10, p. 7.
4 Formal Hearing Position Statement, p. 4.

sentence that may have been imposed was "as a result of conviction in this state of a felony." This decision will focus on the more basic question, which will wholly dispose of the case. The argument on this point—whether there had been a felony conviction—comes about as follows.

In September of 2016, Mr. C was arrested and charged in City A with several felony counts of misconduct involving a controlled substance.[5] He was released on bail the following month.[6] On January 18, 2017, he returned to court and entered a negotiated guilty plea on one of the felony counts.[7] On March 16, 2017, after a pre-sentence report had been prepared, he returned to court, where Judge V T entered an "Order to Probation on Suspended Entry of Judgment."[8] The other counts were dismissed.[9]

Judge T's order recited that the defendant had "pleaded guilty" and went on to provide:

> Entry of judgment is suspended under AS 12.55.078. The defendant is placed on probation for 2 years subject to the probation conditions below. If probation is successfully completed, the court will not enter a judgment of guilt; the defendant will be discharged; and the proceedings will be dismissed.

The PFD Division regards this as a "conviction," which it says "automatically results" from a guilty plea.[10] Mr. C takes the opposite view.[11]

Although not dispositive of the question, two other pieces of factual background give a more complete picture of the nature of this case. First, during the 2017 hearings, Judge T made remarks that were consistent with the idea that no formal conviction was occurring at that time. For example, he told Mr. C that if he complied with the conditions of probation "you will not have a conviction at all,"[12] but that if he violated probation "I could give you a felony conviction of record" with a "new sentencing."[13]

Second, the SEJ was subsequently revoked. In September 2018, Mr. C admitted to having violated probation and agreed, in the words of his public defender, to "take a conviction" on the felony count that had been the subject of the SEJ.[14] The court accepted this agreement and, on September 19, 2018, Judge T entered "Judgment" reciting that Mr. C was "found guilty"

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5 Ex. 8, pp. 67-76.
6 Ex. 8, pp. 55-57.
7 Jan. 18, 2017 recording.
8 Mar. 16, 2017 recording; Ex. 8, pp. 42-44.
9 Ex. 8, p. 45.
10 Formal Hearing Position Statement, p. 3.
11 Ex. 10, p. 8.
12 Jan. 18, 2017 recording, 4:00-4:25.
13 Jan. 18, 2017 recording, 5:10-5:25.
14 Ex. 8, p. 25.

of the undismissed count from the 2016 prosecution.[15] He then imposed a sentence of 930 days of incarceration with 730 suspended (with credit for time served) as well as three years of probation.[16] Thus, in keeping with Judge T's warning in 2017, Mr. C's probation violation resulted in a "felony conviction of record" and a "new sentencing."

III. An SEJ is Not a Conviction

Prior to the passage of SB 91 in 2016, the common alternative to a conventional criminal disposition was a "Suspended Imposition of Sentence," usually referred to as an SIS. An SIS, as defined in AS 12.55.085, allowed the court to impose a term of probation but otherwise defer sentencing after a defendant was convicted. If the defendant successfully completed the probation, no other sentence would ever be imposed and the conviction itself could be "set aside."[17] There was never any doubt, however, that the SIS process entailed, and came after, an actual conviction of the underlying crime.[18]

The SEJ created by SB 91 involves a different statutory structure. AS 12.55.078 provides that an SEJ is put in place "without imposing or entering a judgment of guilt."[19] If the probation is successfully completed, the statute does not mention the setting aside of a conviction, but instead provides that the court must "discharge the person and dismiss the proceedings."[20] Even though no authority was granted to set aside a conviction, the statute was clarified in 2017 to expressly state that a "person who is discharged under this subsection is not convicted of a crime."[21] This structure, with no "set[ting] aside" of a conviction as with an SIS, suggests that there was no conviction in the first place. If the person violates probation under an SEJ, on the other hand, the court may "enter judgment . . . and pronounce sentence."[22]

The PFD Division's argument in this case is built from a single concept: that a plea of guilty—which Mr. C was required to, and did, make in order to get his SEJ—"is a prerequisite to, and automatically results in, a 'conviction.'"[23] In support, the Division cites the definition of

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15 Ex. 8, pp. 19-22.
16 *Id.*
17 AS 12.55.085(e).
18 *See, e.g., In re L.N.,* OAH No. 14-0851-SNA (Comm'r of Health & Soc. Serv. 2014) (https://aws.state.ak.us/OAH/Decision/Display?rec=6100).
19 AS 12.55.078(a).
20 AS 12.55.078(d).
21 *Id.; see also* Ex. 16, p. 1.
22 AS 12.55.078(e).
23 Formal Hearing Position Statement, p. 3.

"conviction" in Black's Law Dictionary (6th ed.), reprinted at Exhibit 14. Black's contains a variety of glosses of what a conviction is, but the basic definition is as follows:

> In a general sense, the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged. The final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, but does not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

The best reading of this definition is probably that a conviction is ordinarily a *judgment* of guilt, at least in jurisdictions where courts enter judgments. And a judgment is precisely what does not occur when an SEJ is imposed.

That said, the PFD Division's position is not frivolous. In Alaska, the Court of Appeals has noted that "[t]he term 'conviction' does not always denote a formally entered judgment," pointing to circumstances where a jury verdict of guilt—on which judgment has not yet been entered—has been found to fall within the term "conviction."[24] On the other hand, the same court interpreted the word "conviction" in another provision of AS 12.55, the chapter we are dealing with in this case, to mean a formal judgment of conviction.[25]

In Alaska, statutes are interpreted according to their plain meaning and the legislative purpose and intent, with the courts turning increasingly to legislative purpose and intent the more ambiguous they find the plain meaning to be.[26] There are two statutes in play here.

One is the PFD statute, AS 43.23.005(d)(1), that contains the language "as a result of conviction." The word "conviction," as pointed out above, does not have a single meaning. There is little to be gained looking to legislative intent behind that word in the PFD statute, since the concept of an SEJ was not so much as a twinkle in a legislator's eye when AS 43.23.005(d)(1) was first enacted, decades ago.

The second statute in play is AS 12.55.078, and the question is whether the new status it created, an SEJ, was intended to be "a conviction" in *any* sense of the word. The question is not answered directly in the plain language of the new provision, but the legislature's intent is,

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[24] *Kelly v. State*, 663 P.2d 967, 971 (Alaska App. 1983).

[25] *Wells v. State*, 706 P.2d 711, 715 (Alaska App. 1985), explained in *State v. Otness*, 986 P.2d 890, 893 (Alaska App. 1999) (Manheimer, J, concurring). *Cf. Eberhardt v. State,* 275 P.2d 560, 562 (Alaska 2012) (a deferred prosecution order in Washington, sending a DUI defendant to treatment prior to plea, was not a "conviction" because it lacked a "judicial act or judgment determining that a person is guilty").

[26] *E.g., State, Dep't of Commerce, Community & Econ. Dev. v. Alyeska Pipeline Service Co.,* 262 P.3d 593, 597 (Alaska 2011)

fortunately, made very clear by the circumstances surrounding its enactment. OAH appreciates the PFD Division's forthrightness in assembling the legislative history that supplies the answer.[27]

AS 12.55.078 came into being in two stages, first in the original SB 91 in 2016, and then in a revisions and corrections bill, SB 55, in 2017. There is a vast quantity of legislative history for the original SB 91, but section 12.55.078 gets little attention because it was just one provision of a sprawling bill with 193 sections. Nonetheless, the Criminal Justice Commission report that led to SB 91 recommends the creation of the mechanism that became known as the SEJ, and it explicitly refers to that mechanism as "'pre-conviction' probation"[28] Thus, the concept was to create something that stopped proceedings short of a conviction. The Commission felt it was important to avoid the disabilities that a conviction—even one that could be "set aside," as permitted with an SIS—would impose on defendants seeking to rehabilitate themselves.[29]

The SEJ section was a much more significant component of SB 55. That bill made two changes to the language that are particularly relevant to the issue in this case. While those changes became effective after the date of Mr. C's SEJ, the changes were expressly enacted as clarifications, not new law. First, SB 55 added the sentence "A person who is discharged under this section is not convicted of a crime" to subsection (d). Second, it replaced "convicted" with "charged" throughout subsection (f). Both of these were repeatedly described as technical corrections and clarifications to bring the language into better alignment with the intent of SB 91. This entailed a number of reviews of the intent by those presenting the bill, all accepted without challenge by the several committees moving the bill forward prior to its essentially unanimous passage. Below are some examples:

> The suspended entry of judgment is unique in that there is no conviction.[30]
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> * * *
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> The SEJ was intended to . . . allow an individual to legally, factually say . . . that they have not been convicted.[31]
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> * * *

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27 Ex. 16, p. 1.

28 Alaska Criminal Justice Commission, Annual Report to the Alaska State Legislature (Feb. 1, 2016), at 9. The report is among the documents maintained in the legislative history.

29 *Id*.

30 Senate Judiciary Standing Committee, Feb. 15, 2017, at 1:45:55 (testimony of Jordan Shilling, Senate Judiciary Staff).

31 Senate Judiciary Standing Committee, Mar. 20, 2017, at 2:25:00 (testimony of Jordan Shilling, Senate Judiciary Staff).

> [The SEJ] was intended to operate a little bit differently than the SIS in that a defendant who was granted an SEJ would not have a conviction entered in that case, and would therefore be able to avoid some of the consequences resulting from a conviction.[32]

These passages of testimony, and others like them, reinforce the conclusion that the SEJ was designed precisely for the purpose of avoiding a "conviction" and the consequences that a conviction would entail. Of course, a person who later failed to complete what the Criminal Justice Commission called "pre-conviction probation" would, indeed, wind up with a conviction.

This is what happened to Mr. C. He violated his pre-conviction probation, and the result was a judgment of conviction followed by a (new) sentence. But because this occurred in 2018, the PFD from which this conviction and sentencing disqualifies him is the 2019 dividend.

As to Mr. C's 2018 dividend, there was no felony conviction during the qualifying year, nor any prior year. Since there was no conviction, any sentence imposed during that year was not "as a result of conviction." And therefore, even if the 2017 probation order should be characterized as a "sentence," the disqualification in AS 43.23.005(d)(1) does not operate with respect to Mr. C's 2018 PFD because such a disqualification can happen only when the sentence grew out of a conviction.

IV. Conclusion

Because Mr. C was not convicted of a felony until 2018, his 2017 probation order was not "as a result of conviction . . . of a felony." The decision of the Permanent Fund Dividend Division to deny the application of X J. C III for a 2018 Permanent Fund Dividend is REVERSED.

DATED this 26th day of March, 2019.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

[32] House Judiciary Standing Committee, Apr. 13, 2017, at 6:49:30 (testimony of Jordan Shilling, Senate Judiciary Staff).

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 26th day of April, 2019.

By: *Signed*
Signature
Gregory Samorajsk
Name
Deputy Commissioner
Title

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