



**THE ATTORNEY GENERAL
OF TEXAS**

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**CRAWFORD C. MARTIN
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May 22, 1970

Hon. Edgar A. Wallace
County Attorney
of Kerr County, Texas
Chas. Schreiner Bank Bldg.
Kerrville, Texas 78028

Opinion No. M-639

RE: May a defendant who pleads guilty to a misdemeanor charge, and who received a probated sentence within the immediately preceding five years, receive a probated sentence for the present offense?

Dear Mr. Wallace:

This is in response to your inquiry requesting the opinion of this office as to whether a County Judge may grant misdemeanor probation to a defendant who has received probation during the five year period immediately preceding his current conviction.

Apparently the confusion arises from the change in Article 42.13, Section 3, Texas Code of Criminal Procedure as was amended in 1967.

Prior to the 1967 amendment, the Code of Criminal Procedure stated, inter alia, that eligibility for misdemeanor probation should be based upon [Section 3(a) (2)]:

"(2) he has never before been convicted in this or another jurisdiction of a felony or of a misdemeanor for which the maximum permissible punishment is be confinement in jail or exceeds a \$200 fine"

and Section 3(a) (3):

"(3) he has not been granted probation nor been under probation under this Act or any other Act in the preceding five years;" (Emphasis added.)

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The 1967 amendment eliminated Section 3(a) (2) above but reincorporated Section 3(a) (3) above as Section 3(a) (2) of the amended Act.

Section 3(b) of the amended Act contains the new provision:

" * * * The Court may grant the defendant probation regardless of the recommendation of the jury or the prior conviction of the defendant. * * *" (Emphasis added.)

But, both the original and the amended Act require under Section 3(c) that the defendant's application must show whether he has any prior convictions and must affirmatively show that he has not been granted probation in the preceding five years.

From the standpoint of statutory construction we must assume that the Legislature had a purpose in leaving the required disclosure of prior convictions in Section 3(c), even though such prior convictions in and of themselves are no longer a bar to probation. The evident purpose of such information is to enable the Judge to effectively exercise his discretion in granting or withholding probation with such pertinent facts before him.

The fact that the Legislature specifically retained as a condition of granting probation that the defendant has not been granted probation nor been under probation during the preceding five years clearly shows that it was the legislative intent that a person not be eligible for misdemeanor probation for five years after he has completed a prior probationary period.

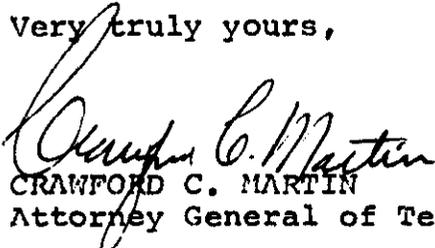
It is therefore the opinion of this office that the County Judge is not authorized to grant misdemeanor probation to a person who has received any type of probation until five years have expired after the completion of such prior probationary term.

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S U M M A R Y

The County Judge is not authorized to grant misdemeanor probation to a person who has received any type of probation until five years have expired after the completion of such prior probationary term.

Very truly yours,


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Attorney General of Texas

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