

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

ENROLLED

Senate Bill 136

By Senators Trump, Deeds, Oliverio, Stuart, Phillips,
Woodrum, and Grady

[Passed March 02, 2023; in effect 90 days from
passage]

1 AN ACT to amend and reenact §62-12-2 and §62-12-9 of the Code of West Virginia, 1931, as
2 amended, all relating generally to judicial treatment of sex offenses; requiring persons
3 convicted of certain offenses to undergo psychological or psychiatric testing and have a
4 treatment plan to be eligible for probation; and expanding the list of offenses for which a
5 defendant has been convicted which precludes the defendant from residing with minor
6 children or having any contact with the victims.

Be it enacted by the Legislature of West Virginia:

ARTICLE 12. PROBATION AND PAROLE.

§62-12-2. Eligibility for probation.

1 (a) All persons who are found guilty of or plead guilty to any felony, the maximum penalty
2 for which is less than life imprisonment, and all persons who are found guilty of or plead guilty to
3 any misdemeanor are eligible for probation, notwithstanding the provisions of §61-11-18 and §61-
4 11-19 of this code.

5 (b) The provisions of subsection (a) of this section to the contrary notwithstanding, any
6 person who commits or attempts to commit a felony with the use, presentment, or brandishing of a
7 firearm is not eligible for probation. Nothing in this section may apply to an accessory before the
8 fact or a principal in the second degree who has been convicted as if he or she were a principal in
9 the first degree if, in the commission of or in the attempted commission of the felony, only the
10 principal in the first degree used, presented, or brandished a firearm.

11 (c)(1) The existence of any fact which would make any person ineligible for probation
12 under subsection (b) of this section because of the commission or attempted commission of a
13 felony with the use, presentment, or brandishing of a firearm may not be applicable unless the fact
14 is clearly stated and included in the indictment or presentment by which that person is charged and
15 is either:

16 (A) Found by the court upon a plea of guilty or nolo contendere;

17 (B) Found by the jury, if the matter is tried before a jury, upon submitting to the jury a special

18 interrogatory for that purpose; or

19 (C) Found by the court, if the matter is tried by the court, without a jury.

20 (2) The amendments to this subsection adopted in the year 1981:

21 (A) Apply to all applicable offenses occurring on or after August 1 of that year;

22 (B) Apply with respect to the contents of any indictment or presentment returned on or after
23 August 1 of that year irrespective of when the offense occurred;

24 (C) Apply with respect to the submission of a special interrogatory to the jury and the
25 finding to be made thereon in any case submitted to the jury on or after August 1 of that year or to
26 the requisite findings of the court upon a plea of guilty or in any case tried without a jury: *Provided,*
27 That the state shall give notice in writing of its intent to seek that finding by the jury or court, as the
28 case may be, which notice shall state with particularity the grounds upon which the finding is
29 sought as fully as such grounds are otherwise required to be stated in an indictment, unless the
30 grounds therefor are alleged in the indictment or presentment upon which the matter is being tried;
31 and

32 (D) May not apply with respect to cases not affected by the amendment and in those cases
33 the prior provisions of this section shall apply and be construed without reference to the
34 amendment.

35 Insofar as the amendments relate to mandatory sentences without probation, all matters
36 requiring that sentence shall be proved beyond a reasonable doubt in all cases tried by the jury or
37 the court.

38 (d) For the purpose of this section, the term "firearm" means any instrument which will, or is
39 designed to, or may readily be converted to, expel a projectile by the action of an explosive,
40 gunpowder, or any other similar means.

41 (e) Any person who has been found guilty of, or pleaded guilty to, a violation of §61-3C-
42 14b, §61-8-12, §61-8A-1 *et seq.*, §61-8B-1 *et seq.*, §61-8C-1 *et seq.*, or §61-8D-5 of this code
43 may only be eligible for probation after undergoing a physical, mental, and psychiatric or

44 psychological study and diagnosis which shall include an ongoing treatment plan requiring active
45 participation in sexual abuse counseling at a mental health facility or through some other approved
46 program: *Provided*, That nothing disclosed by the person during that study or diagnosis may be
47 made available to any law-enforcement agency or other party without that person's consent, or
48 admissible in any court of this state, unless the information disclosed indicates the intention or
49 plans of the probationer to do harm to any person, animal, institution, or property, in which case the
50 information may be released only to those persons necessary for protection of the person, animal,
51 institution, or property.

52 Within 90 days of the effective date of this section as amended and reenacted during the
53 first extraordinary session of the Legislature, 2006, the Secretary of the Department of Health and
54 Human Resources shall propose rules and emergency rules for legislative approval in accordance
55 with §29A-3-1 *et seq.* of this code, establishing qualifications for sex offender treatment programs
56 and counselors based on accepted treatment protocols among licensed mental health
57 professionals.

58 (f) Any person who has been convicted of a violation of §61-8B-1 *et seq.*, §61-8C-1 *et seq.*,
59 §61-8D-5, §61-8D-6, §61-2-14, §61-8-12, and §61-8-13 of this code, or of a felony violation
60 involving a minor of §61-8-6 or §61-8-7 of this code, or of a similar provision in another jurisdiction,
61 shall register upon release on probation. Any person who has been convicted of an attempt to
62 commit any of the offenses set forth in this subsection shall also be registered upon release on
63 probation.

64 (g) The probation officer shall within three days of release of the offender send written
65 notice to the State Police of the release of the offender. The notice shall include:

- 66 (1) The full name of the person;
- 67 (2) The address where the person shall reside;
- 68 (3) The person's Social Security number;
- 69 (4) A recent photograph of the person;

- 70 (5) A brief description of the crime for which the person was convicted;
- 71 (6) Fingerprints; and
- 72 (7) For any person determined to be a sexually violent predator as defined in §15-12-2a of
- 73 this code, the notice shall also include:
- 74 (i) Identifying factors, including physical characteristics;
- 75 (ii) A history of the offense; and
- 76 (iii) Documentation of any treatment received for the mental abnormality or personality
- 77 disorder.

§62-12-9. Conditions of release on probation.

- 1 (a) Release on probation is conditioned upon the following:
- 2 (1) That the probationer may not, during the term of his or her probation, violate any
- 3 criminal law of this or any other state or of the United States;
- 4 (2) That the probationer may not, during the term of his or her probation, leave the state
- 5 without the consent of the court which placed him or her on probation;
- 6 (3) That the probationer complies with the conditions prescribed by the court for his or her
- 7 supervision by the probation officer;
- 8 (4) That in every case in which the probationer has been convicted of an offense set forth in
- 9 §61-3C-14b, §61-8-12, §61-8A-1 *et seq.*, §61-8B-1 *et seq.*, §61-8C-1 *et seq.*, and §61-8D-1 *et*
- 10 *seq.* of this code against a child, the probationer may not live in the same residence as any minor
- 11 child, nor exercise visitation with any minor child, and may have no contact with the victim of the
- 12 offense: *Provided*, That the probationer may petition the court of the circuit in which he or she was
- 13 convicted for a modification of this term and condition of his or her probation and the burden rests
- 14 upon the probationer to demonstrate that a modification is in the best interest of the child;
- 15 (5) That the probationer pay a fee, not to exceed \$20 per month, to defray costs of
- 16 supervision: *Provided*, That the court conducts a hearing prior to imposition of probation and
- 17 makes a determination on the record that the offender is able to pay the fee without undue

18 hardship. All moneys collected as fees from probationers pursuant to this subdivision shall be
19 deposited with the circuit clerk who shall, on a monthly basis, remit the moneys collected to the
20 State Treasurer for deposit in the state General Revenue Fund; and

21 (6) That the probationer is required to pay the fee described in §62-11C-4 of this code:
22 *Provided*, That the court conducts a hearing prior to imposition of probation and makes a
23 determination on the record that the offender is able to pay the fee without undue hardship.

24 (b) In addition, the court may impose, subject to modification at any time, any other
25 conditions which it may determine advisable, including, but not limited to, any of the following:

26 (1) That the probationer make restitution or reparation, in whole or in part, immediately or
27 within the period of probation, to any party injured by the crime for which he or she has been
28 convicted: *Provided*, That the court conducts a hearing prior to imposition of probation and makes
29 a determination on the record that the offender is able to pay restitution without undue hardship;

30 (2) That the probationer pays any fine assessed and the costs of the proceeding in
31 installments directed by the court: *Provided*, That the court conduct a hearing prior to imposition of
32 probation and makes a determination on the record that the offender is able to pay the costs
33 without undue hardship;

34 (3) That the probationer makes contributions from his or her earnings, in sums directed by
35 the court, for the support of his or her dependents; and

36 (4) That the probationer, in the discretion of the court, is required to serve a period of
37 confinement in the jail of the county in which he or she was convicted for a period not to exceed
38 one third of the minimum sentence established by law or one third of the least possible period of
39 confinement in an indeterminate sentence, but in no case may the period of confinement exceed
40 six consecutive months. The court may sentence the defendant within the six-month period to
41 intermittent periods of confinement including, but not limited to, weekends or holidays and may
42 grant to the defendant intermittent periods of release in order that he or she may work at his or her
43 employment or for other reasons or purposes as the court may determine appropriate: *Provided*,

44 That the provisions of §62-11A-1 *et seq.* of this code do not apply to intermittent periods of
45 confinement and release except to the extent directed by the court. If a period of confinement is
46 required as a condition of probation, the court shall make special findings that other conditions of
47 probation are inadequate and that a period of confinement is necessary.

48 (c) Circuit courts may impose, as a condition of probation, participation in a day report
49 center.

50 (1) To be eligible, the probationer shall be identified as moderate to high risk of reoffending
51 and moderate to high criminogenic need, as determined by the standardized risk and needs
52 assessment adopted by the Supreme Court of Appeals of West Virginia under §62-12-6(d) of this
53 code, and applied by a probation officer or day report staff. In eligible cases, circuit courts may
54 impose a term of up to one year: *Provided*, That notwithstanding the results of the standardized
55 risk and needs assessment, a judge may impose, as a term of probation, participation in a day
56 report center program upon making specific written findings of fact as to the reason for departing
57 from the requirements of this subdivision.

58 (2) The day report center staff shall determine which services a person receives based on
59 the results of the standardized risk and needs assessment and taking into consideration the other
60 conditions of probation set by the court.

61 (d) For the purposes of this article, "day report center" means a court-operated or court-
62 approved facility where persons ordered to serve a sentence in this type of facility are required to
63 report under the terms and conditions set by the court for purposes which include, but are not
64 limited to, counseling, employment training, alcohol or drug testing, or other medical testing.