

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Senate Bill 136

BY SENATORS TRUMP, DEEDS, OLIVERIO, STUART,

PHILLIPS, WOODRUM, AND GRADY

[Introduced January 11, 2023]

1 A BILL 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
7 a firearm is not eligible for probation. Nothing in this section may apply to an accessory before
8 the fact or a principal in the second degree who has been convicted as if he or she were a principal
9 in 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
14 fact is clearly stated and included in the indictment or presentment by which that person is charged
15 and is either:

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

17 (B) Found by the jury, if the matter ~~be~~ is tried before a jury, upon submitting to the jury a
18 special interrogatory for ~~such~~ that purpose; or

19 (C) Found by the court, if the matter ~~be~~ 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
23 after 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
26 to the requisite findings of the court upon a plea of guilty or in any case tried without a jury:
27 *Provided*, That the state shall give notice in writing of its intent to seek ~~such~~ that finding by the
28 jury or court, as the case may be, which notice shall state with particularity the grounds upon
29 which the finding is sought as fully as such grounds are otherwise required to be stated in an
30 indictment, unless the grounds therefor are alleged in the indictment or presentment upon which
31 the matter is being tried; and

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

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

38 (d) For the purpose of this section, the term "firearm" means any instrument which will, or
39 is 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 ~~the~~
42 ~~provisions of~~ §61-3C-14b, §61-8-12, ~~the provisions of~~ §61-8A-1 *et seq.*, or ~~the provisions of~~ §61-

43 8B-1 *et seq.*, or §61-8C-1 *et seq.*, of this code, or under the provisions of §61-8D-5 of this code
44 may only be eligible for probation after undergoing a physical, mental, and psychiatric or
45 psychological study and diagnosis which shall include an ongoing treatment plan requiring active
46 participation in sexual abuse counseling at a mental health facility or through some other
47 approved program: *Provided*, That nothing disclosed by the person during ~~such~~ that study or
48 diagnosis may be made available to any law-enforcement agency or other party without that
49 person's consent, or admissible in any court of this state, unless the information disclosed
50 indicates the intention or plans of the probationer to do harm to any person, animal, institution, or
51 property, in which case the information may be released only to ~~such~~ those persons ~~as might be~~
52 necessary for protection of the ~~said~~ person, animal, institution, or property.

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

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

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

- 67 (1) The full name of the person;
- 68 (2) The address where the person shall reside;

- 69 (3) The person's Social Security number;
- 70 (4) A recent photograph of the person;
- 71 (5) A brief description of the crime for which the person was convicted;
- 72 (6) Fingerprints; and
- 73 (7) For any person determined to be a sexually violent predator as defined in §15-12-2a
- 74 of this code, the notice shall also include:
- 75 (i) Identifying factors, including physical characteristics;
- 76 (ii) A history of the offense; and
- 77 (iii) Documentation of any treatment received for the mental abnormality or personality
- 78 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 ~~defined~~
- 9 set forth in section twelve, article eight, chapter sixty-one of this code or article eight-b or eight-d
- 10 §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
- 11 seq. of this code ~~of said chapter~~, against a child, the probationer may not live in the same
- 12 residence as any minor child, nor exercise visitation with any minor child, and may have no contact
- 13 with the victim of the offense: *Provided*, That the probationer may petition the court of the circuit
- 14 in which he or she was convicted for a modification of this term and condition of his or her

15 probation and the burden rests upon the probationer to demonstrate that a modification is in the
16 best interest of the child;

17 (5) That the probationer pay a fee, not to exceed \$20 per month, to defray costs of
18 supervision: *Provided*, That the court conducts a hearing prior to imposition of probation and
19 makes a determination on the record that the offender is able to pay the fee without undue
20 hardship. All moneys collected as fees from probationers pursuant to this subdivision shall be
21 deposited with the circuit clerk who shall, on a monthly basis, remit the moneys collected to the
22 State Treasurer for deposit in the state General Revenue Fund; and

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

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

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

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

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

38 (4) That the probationer, in the discretion of the court, is required to serve a period of
39 confinement in the jail of the county in which he or she was convicted for a period not to exceed
40 one third of the minimum sentence established by law or one third of the least possible period of

41 confinement in an indeterminate sentence, but in no case may the period of confinement exceed
42 six consecutive months. The court may sentence the defendant within the six-month period to
43 intermittent periods of confinement including, but not limited to, weekends or holidays and may
44 grant to the defendant intermittent periods of release in order that he or she may work at his or
45 her employment or for other reasons or purposes as the court may determine appropriate:
46 *Provided*, That the provisions of §62-11A-1 *et seq.* of this code do not apply to intermittent periods
47 of confinement and release except to the extent directed by the court. If a period of confinement
48 is required as a condition of probation, the court shall make special findings that other conditions
49 of probation are inadequate and that a period of confinement is necessary.

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

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

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

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