

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 547

(By Senators Wills, Klempa, Stollings and
Kessler (Mr. President))

[Originating in the Committee on the Judiciary;
reported February 22, 2012.]

A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating to the expungement of certain criminal convictions generally; permitting expungement of certain felony convictions; establishing the amount of time after conviction of a felony before expungement may be sought; and creating exceptions.

Be it enacted by the Legislature of West Virginia:

That §61-11-26 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

§61-11-26. Expungement of certain criminal convictions; procedures; effect.

1 (a) Any person convicted of a misdemeanor or felony
2 offense or offenses arising from the same transaction com-
3 mitted ~~while he or she was between the ages of eighteen and~~
4 ~~twenty-six, inclusive,~~ may, pursuant to ~~the provisions of this~~
5 section, petition the circuit court in which the conviction or
6 convictions occurred for expungement of the conviction or
7 convictions and the records associated therewith. The clerk
8 of the circuit court shall charge and collect in advance the
9 same fee as is charged for instituting a civil action pursuant
10 to subdivision (1), subsection (a), section eleven, article one,
11 chapter fifty-nine of this code for a petition for expunge-
12 ment.

13 (b) Expungement shall not be available for any convic-
14 tion of an offense listed in subsection (i) of this section. The
15 relief afforded by this subsection is only available to persons
16 having no other prior or subsequent convictions other than
17 minor traffic violations at the time the petition is filed:
18 *Provided*, That at the time the petition is filed and during the
19 time the petition is pending, petitioner may not be the
20 subject of an arrest or any other pending criminal proceed-

21 ing. No person shall be eligible for expungement pursuant to
22 ~~the provisions of subsection (a) of this section until one year~~
23 ~~after the conviction, completion of any sentence of incarceration~~
24 ~~tion or probation~~ completion of any period of supervision,
25 whichever is later in time, and in the case of a felony, three
26 years after completion of any sentence of incarceration or
27 any period of supervision, whichever is later in time.

28 (c) Each petition to expunge a conviction or convictions
29 pursuant to this section shall be verified under oath and
30 include the following information:

31 (1) Petitioner's current name and all other legal names or
32 aliases by which petitioner has been known at any time;

33 (2) All of petitioner's addresses from the date of the
34 offense or alleged offense in connection with which an
35 expungement order is sought to date of the petition;

36 (3) Petitioner's date of birth and Social Security number;

37 (4) Petitioner's date of arrest, the court of jurisdiction
38 and criminal complaint, indictment, summons or case
39 number;

40 (5) The statute or statutes and offense or offenses for
41 which petitioner was charged and of which petitioner was
42 convicted;

43 (6) The names of any victim or victims, or that there were
44 no identifiable victims;

45 (7) Whether there is any current order for restitution,
46 protection, restraining order or other no contact order
47 prohibiting the petitioner from contacting the victims or
48 whether there has ever been a prior order for restitution,
49 protection or restraining order prohibiting the petitioner
50 from contacting the victim. If there is such a current order,
51 petitioner shall attach a copy of that order to his or her
52 petition;

53 (8) The court's disposition of the matter and punishment
54 imposed, if any;

55 (9) Why expungement is sought, such as, but not limited
56 to, employment or licensure purposes, and why it should be
57 granted;

58 (10) The steps the petitioner has taken since the time of
59 the offenses toward personal rehabilitation, including
60 treatment, work or other personal history that demonstrates
61 rehabilitation;

62 (11) Whether petitioner has ever been granted expunge-
63 ment or similar relief regarding a criminal conviction by any

64 court in this state, any other state or by any federal court;
65 and

66 (12) Any supporting documents, sworn statements,
67 affidavits or other information supporting the petition to
68 expunge.

69 (d) A copy of the petition, with any supporting documen-
70 tation, shall be served by petitioner pursuant to the rules of
71 the trial court upon the Superintendent of the State Police;
72 the prosecuting attorney of the county of conviction; the
73 chief of police or other executive head of the municipal
74 police department wherein the offense was committed; the
75 chief law-enforcement officer of any other law-enforcement
76 agency which participated in the arrest of the petitioner; the
77 superintendent or warden of any institution in which the
78 petitioner was confined; the ~~magistrate court or municipal~~
79 court which disposed of the petitioner's criminal charge; and
80 all other state and local government agencies whose records
81 would be affected by the proposed expungement. The
82 prosecutorial office that had jurisdiction over the offense or
83 offenses for which expungement is sought shall serve by first
84 class mail the petition for expungement, accompanying

85 documentation and any proposed expungement order to any
86 identified victims.

87 (e) Upon receipt of a petition for expungement, the
88 Superintendent of the State Police; the prosecuting attorney
89 of the county of conviction; the chief of police or other
90 executive head of the municipal police department wherein
91 the offense was committed; the chief law-enforcement officer
92 of any other law-enforcement agency which participated in
93 the arrest of the petitioner; the superintendent or warden of
94 any institution in which the petitioner was confined; the
95 ~~magistrate court or municipal~~ court which disposed of the
96 petitioner's criminal charge or charges; all other state and
97 local government agencies whose records would be affected
98 by the proposed expungement and any other interested
99 individual or agency that desires to oppose the expungement
100 shall, within thirty days of receipt of the petition, file a
101 notice of opposition with the court with supporting docu-
102 mentation and sworn statements setting forth the reasons for
103 resisting the petition for expungement. A copy of any notice
104 of opposition with supporting documentation and sworn
105 statements shall be served upon the petitioner in accordance

106 with trial court rules. The petitioner may file a reply no later
107 than ten days after service of any notice of opposition to the
108 petition for expungement.

109 (f) The burden of proof shall be on the petitioner to prove
110 by clear and convincing evidence that: (1) The conviction or
111 convictions for which expungement is sought are the only
112 convictions against petitioner and that the conviction or
113 convictions are not excluded from expungement by subsec-
114 tion ~~(j)~~ (i) of this section; (2) that the requisite time period
115 has passed since the conviction or convictions or end of the
116 completion of any sentence of incarceration or probation; (3)
117 petitioner has no criminal charges pending against him or
118 her; (4) the expungement is consistent with the public
119 welfare; (5) petitioner has, by his or her behavior since the
120 conviction or convictions, evidenced that he or she has been
121 rehabilitated and is law abiding; and (6) any other matter
122 deemed appropriate or necessary by the court to make a
123 determination regarding the petition for expungement.

124 (g) Within sixty days of the filing of a petition for
125 expungement the circuit court shall:

126 (1) Summarily grant the petition;

127 (2) Set the matter for hearing; or

128 (3) Summarily deny the petition if the court determines
129 that the petition is insufficient or, based upon supporting
130 documentation and sworn statements filed in opposition to
131 the petition, the court determines that the petitioner, as a
132 matter of law, is not entitled to expungement.

133 (h) If the court sets the matter for hearing, all interested
134 parties who have filed a notice of opposition shall be noti-
135 fied. At the hearing, the court may inquire into the back-
136 ground of the petitioner and shall have access to any reports
137 or records relating to the petitioner that are on file with any
138 law-enforcement authority, the institution of confinement,
139 if any, and parole authority or other agency which was in
140 any way involved with the petitioner's arrest, conviction,
141 sentence and post-conviction supervision, including any
142 record of arrest or conviction in any other state or federal
143 court. The court may hear testimony of witnesses and any
144 other matter the court deems proper and relevant to its
145 determination regarding the petition. The court shall enter
146 an order reflecting its ruling on the petition for expungement
147 with appropriate findings of fact and conclusions of law.

148 ~~(i) No person shall be eligible for expungement of a~~
149 ~~conviction and the records associated therewith pursuant to~~
150 ~~the provisions of subsection (a) of this section for involving~~
151 ~~the use or exhibition of a deadly weapon or dangerous~~
152 ~~instrument, of the provisions of subsection (b) or (c), section~~
153 ~~nine, article two of this chapter where the victim was a~~
154 ~~spouse, a person with whom the person seeking expungement~~
155 ~~had a child in common or with whom the person seeking~~
156 ~~expungement ever cohabitated prior to the offense, any~~
157 ~~violation of the provisions of section twenty-eight of said~~
158 ~~article, any conviction for driving under the influence of~~
159 ~~alcohol, controlled substances or a conviction for a violation~~
160 ~~of section three, article four, chapter seventeen-b of this code~~
161 ~~or section nineteen, article eight of this chapter.~~

162 (i) No person is eligible for expungement of a conviction
163 and the records associated there with pursuant to subsection
164 (a) of this section for:

165 (1) Any felony crime of violence against the person or any
166 misdemeanor offense involving the intentional infliction of
167 physical injury;

168 (2) Any felony offense when the victim of the crime was
169 a minor;

170 (3) Any misdemeanor violation of the provisions of article
171 eight-b of this chapter when the petitioner was eighteen
172 years of age or older and the victim was twelve years of age
173 or younger at the time the violation occurred;

174 (4) Any offense where the petitioner used or exhibited a
175 deadly weapon or dangerous instrument;

176 (5) Any violation of section twenty-eight , article two of
177 this chapter or subsections (b) or (c), section nine, article two
178 of this chapter where the victim was spouse, a person seeking
179 expungement had a child in common or with whom the
180 person seeking expungement ever cohabited prior to the
181 offense prior to the offense.

182 (6) Any conviction for driving under the influence of
183 alcohol or a controlled substance;

184 (7) Any conviction for a violation of section three, article
185 four, chapter seventeen-b of this code; and

186 (8) Any violation of section nineteen, article eight of this
187 chapter.

188 As used in this section a “felony crime of violence against
189 the person” means those felony offenses set forth in articles
190 two, three-e, eight-b, eight-d, chapter sixty-one of this code

191 and “felony offenses where the victim was a minor” means
192 felony violation of articles eight, eight-a, eight-c and eight-d.

193 (j) If the court grants the petition for expungement, it
194 shall order the sealing of all records in the custody of the
195 court and expungement of any records in the custody of any
196 other agency or official, including law-enforcement records.
197 Every agency with records relating to the arrest, charge or
198 other matters arising out of the arrest or conviction that is
199 ordered to expunge records shall certify to the court within
200 sixty days of the entry of the expungement order that the
201 required expungement has been completed. All orders
202 enforcing the expungement procedure shall also be sealed.
203 For the purposes of this section, “records” do not include the
204 records of the Governor, the Legislature or the Secretary of
205 State that pertain to a grant of pardon. Such records that
206 pertain to a grant of pardon are not subject to an order of
207 expungement. The amendment to this section during the
208 fourth extraordinary session of the Legislature in the year
209 2009 is not for the purpose of changing existing law, but is
210 intended to clarify the intent of the Legislature as to existing
211 law regarding expungement.

212 (k) Upon expungement, the proceedings in the matter
213 shall be deemed never to have occurred. The court and other
214 agencies shall reply to any inquiry that no record exists on
215 the matter. The person whose record is expunged shall not
216 have to disclose the fact of the record or any matter relating
217 thereto on an application for employment, credit or other
218 type of application.

219 (l) Inspection of the sealed records in the court's posses-
220 sion may thereafter be permitted by the court only upon a
221 motion by the person who is the subject of the records or
222 upon a petition filed by a prosecuting attorney that inspec-
223 tion and possible use of the records in question are necessary
224 to the investigation or prosecution of a crime in this state or
225 another jurisdiction. If the court finds that the interests of
226 justice will be served by granting a petition to inspect the
227 sealed record, it may be granted.