

Senate Bill No. 526

(By Senators Kessler, Miller, Laird and Yost)

[Introduced February 19, 2015; referred to the Committee on the Judiciary.]

9 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating
10 to expungement of certain criminal convictions generally; permitting expungement of certain
11 felony convictions; establishing amount of time after felony conviction before expungement
12 may be sought; creating exceptions; clarifying retirement or employment benefits lost due
13 to conviction are not reinstated due to expungement; declaring expungement does not
14 preclude person who has received expungement from being subject to sentencing
15 enhancements for second and subsequent violations; declaring information in State Police
16 database sufficient to prove existence of prior convictions; establishing fee to offset State
17 Police costs associated with administering this section and the Criminal Identification
18 Bureau; establishing special revenue account in State Treasury for funds received; and
19 prohibiting expiration of funds.

20 *Be it enacted by the Legislature of West Virginia:*

21 That §61-11-26 of the Code of West Virginia, 1931, as amended, be amended and reenacted

1 to read as follows:

2 **ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.**

3 **§61-11-26. Expungement of certain criminal convictions; procedures; effect.**

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

12 (b) Expungement ~~shall~~ is not be available for any conviction of an offense listed in subsection
13 (i) of this section. The relief afforded by this subsection is only available to persons having no other
14 prior or subsequent convictions other than minor traffic violations at the time the petition is filed:
15 *Provided,* That at the time the petition is filed and during the time the petition is pending, petitioner
16 may not be the subject of an arrest or any other pending criminal proceeding. No person ~~shall be~~ is
17 eligible for expungement pursuant to ~~the provisions of~~ subsection (a) of this section until one year
18 after ~~the conviction,~~ completion of any sentence of incarceration or completion of any period of
19 supervision, whichever is later in time, and in the case of a felony, five years after completion of any
20 sentence of incarceration or probation any period of supervision, whichever is later in time.

21 (c) Each petition to expunge a conviction or convictions pursuant to this section shall be

1 verified under oath and include the following information:

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

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

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

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

9 (5) The statute or statutes and offense or offenses for which petitioner was charged and of
10 which petitioner was convicted;

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

12 (7) Whether there is any current order for restitution, protection, restraining order or other
13 no contact order prohibiting the petitioner from contacting the victims or whether there has ever been
14 a prior order for restitution, protection or restraining order prohibiting the petitioner from contacting
15 the victim. If there is such a current order, petitioner shall attach a copy of that order to his or her
16 petition;

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

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

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

1 (11) Whether petitioner has ever been granted expungement or similar relief regarding a
2 criminal conviction by any court in this state, any other state or by any federal court; and

3 (12) Any supporting documents, sworn statements, affidavits or other information supporting
4 the petition to expunge.

5 (d) A copy of the petition, with any supporting documentation, shall be served by petitioner
6 pursuant to the rules of the trial court upon the Superintendent of the State Police; the prosecuting
7 attorney of the county of conviction; the chief of police or other executive head of the municipal
8 police department wherein the offense was committed; the chief law-enforcement officer of any
9 other law-enforcement agency which participated in the arrest of the petitioner; the superintendent
10 or warden of any institution in which the petitioner was confined; the ~~magistrate court or municipal~~
11 court which disposed of the petitioner's criminal charge; and all other state and local government
12 agencies whose records would be affected by the proposed expungement. The prosecutorial office
13 that had jurisdiction over the offense or offenses for which expungement is sought shall serve by first
14 class mail the petition for expungement, accompanying documentation and any proposed
15 expungement order to any identified victims.

16 (e) Upon receipt of a petition for expungement, the Superintendent of the State Police; the
17 prosecuting attorney of the county of conviction; the chief of police or other executive head of the
18 municipal police department wherein the offense was committed; the chief law-enforcement officer
19 of any other law-enforcement agency which participated in the arrest of the petitioner; the
20 superintendent or warden of any institution in which the petitioner was confined; the ~~magistrate court~~
21 ~~or municipal~~ court which disposed of the petitioner's criminal charge or charges; all other state and

1 local government agencies whose records would be affected by the proposed expungement; and any
2 other interested individual or agency that desires to oppose the expungement shall, within thirty days
3 of receipt of the petition, file a notice of opposition with the court with supporting documentation
4 and sworn statements setting forth the reasons for resisting the petition for expungement. A copy
5 of any notice of opposition with supporting documentation and sworn statements shall be served
6 upon the petitioner in accordance with trial court rules. The petitioner may file a reply no later than
7 ten days after service of any notice of opposition to the petition for expungement.

8 (f) The burden of proof ~~shall be~~ is on the petitioner to prove by clear and convincing evidence
9 that:

10 (1) The conviction or convictions for which expungement is sought are the only convictions
11 against petitioner and that the conviction or convictions are not excluded from expungement by
12 subsection ~~(j)~~ (i) of this section;

13 (2) ~~that~~ The requisite time period has passed since the conviction or convictions or end of the
14 completion of any sentence of incarceration or probation;

15 (3) Petitioner has no criminal charges pending against him or her;

16 (4) The expungement is consistent with the public welfare;

17 (5) Petitioner has, by his or her behavior since the conviction or convictions, evidenced that
18 he or she has been rehabilitated and is law abiding; and

19 (6) Any other matter deemed appropriate or necessary by the court to make a determination
20 regarding the petition for expungement.

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

1 (1) Summarily grant the petition;

2 (2) Set the matter for hearing; or

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

6 (h) If the court sets the matter for hearing, all interested parties who have filed a notice of
7 opposition shall be notified. At the hearing, the court may inquire into the background of the
8 petitioner and shall have access to any reports or records relating to the petitioner that are on file with
9 any law-enforcement authority, the institution of confinement, if any, and parole authority or other
10 agency which was in any way involved with the petitioner's arrest, conviction, sentence and
11 post-conviction supervision, including any record of arrest or conviction in any other state or federal
12 court. The court may hear testimony of witnesses and any other matter the court deems proper and
13 relevant to its determination regarding the petition. The court shall enter an order reflecting its ruling
14 on the petition for expungement with appropriate findings of fact and conclusions of law.

15 (i) No person ~~shall be~~ is eligible for expungement of a conviction and the records associated
16 ~~therewith~~ with the conviction pursuant to ~~the provisions of~~ subsection (a) of this section for:

17 (1) ~~Any violation~~ felony crime of violence against the person or any misdemeanor offense
18 involving the infliction of serious physical injury;

19 (2) Any felony offense when the victim of the crime was a minor; ~~involving the provisions~~

20 (3) Any misdemeanor violation of article eight-b of this chapter where the petitioner was
21 eighteen years old, or older, at the time the violation occurred and the victim was twelve years of

1 age, or younger, at the time the violation occurred; ~~involving the use or exhibition of~~

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

4 (5) Any violation of section twenty-eight, article two of this chapter or of the provisions of
5 subsection (b) or (c), section nine, article two of this chapter where the victim was a spouse, a person
6 with whom the person seeking expungement had a child in common or with whom the person
7 seeking expungement ever cohabitated prior to the offense; ~~any violation of the provisions of section~~
8 ~~twenty-eight of said article; a~~

9 (6) Any conviction for driving under the influence of alcohol or a controlled substances
10 substance; or a

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

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

14 As used in this section, a "felony crime of violence against the person" means those felony
15 offenses set forth in articles two, three-e, eight-b and eight-d, chapter sixty-one of this code and
16 "felony offenses where the victim was a minor" means felony violation of articles eight, eight-a,
17 eight-c and eight-d of this code.

18 (j) If the court grants the petition for expungement, it shall order the sealing of all records in
19 the custody of the court and expungement of any records in the custody of any other agency or
20 official, including law-enforcement records. Every agency with records relating to the arrest, charge
21 or other matters arising out of the arrest or conviction that is ordered to expunge records shall certify

1 to the court within ~~sixty~~ ninety days of the entry of the expungement order that the required
2 expungement has been completed. All orders enforcing the expungement procedure shall also be
3 sealed. For the purposes of this section, "records" do not include the records of the Governor, the
4 Legislature or the Secretary of State that pertain to a grant of pardon. Such records that pertain to
5 a grant of pardon are not subject to an order of expungement. The amendment to this section during
6 the fourth extraordinary session of the Legislature in the year 2009 is not for the purpose of changing
7 existing law, but is intended to clarify the intent of the Legislature as to existing law regarding
8 expungement.

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

13 (l) Inspection of the sealed records in the court's possession may thereafter be permitted by
14 the court only upon a motion by the person who is the subject of the records or upon a petition filed
15 by a prosecuting attorney that inspection and possible use of the records in question are necessary
16 to the investigation or prosecution of a crime in this state or another jurisdiction. If the court finds
17 that the interests of justice will be served by granting a petition to inspect the sealed record, it may
18 be granted.

19 (m) Nothing in this section may be construed to allow a person obtaining relief pursuant to
20 this section to be eligible for any retirement or employment benefit which he or she lost or forfeited
21 due to the conviction or convictions expunged.

1 (n) Notwithstanding the provisions of this section to the contrary, any person who has
2 obtained relief pursuant to the provisions of this section who is subsequently convicted of another
3 offense in a court of this state, another state or the United States shall be subject to any sentencing
4 enhancement based upon having a prior conviction including, but not limited to, the provision of
5 section eighteen, article eleven, chapter sixty-one of this code. Notwithstanding any provisions of
6 law or rule to the contrary, should a person having received relief pursuant to this section be
7 prosecuted or convicted of another offense subsequent to the expungement and thereby subject to
8 a sentencing enhancement the records maintained by the West Virginia State Police pursuant to
9 subsection (o) of this section shall constitute sufficient evidence of the prior conviction.

10 (o) Any court granting relief pursuant to the provisions of this section shall supply a copy of
11 the order of expungement to the West Virginia State Police along with information identifying the
12 petitioner and containing information regarding the offense expunged to be placed in a confidential
13 file accessible by prosecuting attorney and judicial officers for the purpose of ensuring that relief
14 may not be afforded pursuant to this section more than once.

15 (p) In addition to any fees or costs required by this code, any person filing an action pursuant
16 to this section shall pay, upon filing, a fee of \$100, which shall be transferred to the West Virginia
17 State Police to assist in offsetting administrative costs associated with this section and the
18 maintaining of offender registries.

19 (q) There is hereby created in the State Treasury a special revenue account designated the
20 West Virginia State Police Criminal Justice Information Services Fund which shall consist of money
21 deposited into the fund from fees collected under this section and moneys appropriated by the

1 Legislature. Funds appropriated to the West Virginia State Police Criminal Justice Information
2 Services Fund in accordance with this section that remain unallocated or unexpended at the end of
3 a fiscal year do not expire, but remain in the line item to which they were originally appropriated and
4 are available in the next fiscal year to be used for the purposes of operating and maintaining the West
5 Virginia State Police Criminal Identification Bureau and other criminal justice information services
6 registries operated by the State Police.

NOTE: The purpose of this bill is to permit the expungement of certain felony convictions. The bill establishes the amount of time after conviction of a felony before expungement may be sought. The bill creates exceptions. The bill clarifies that retirement or employment benefits lost due to conviction are not reinstated due to expungement. The bill declares that expungement does not preclude a person who has received an expungement from being subject to sentencing enhancements for second and subsequent violations. The bill declares that information in State Police database sufficient to prove existence of prior convictions. The bill establishes a fee to offset State Police costs associated with administering this section and the Criminal Identification Bureau. The bill establishes a special revenue account in the State Treasury for funds received. The bill allows funds to not expire.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.