

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 119

BY SENATORS KESSLER, LAIRD AND MILLER

[Introduced January 13, 2016;

Referred to the Committee on the Judiciary.]

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

Be it enacted by the Legislature of West Virginia:

1 That §61-11-26 of the Code of West Virginia, 1931, as amended, be amended and
 2 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 offense or offenses arising from the
 2 same transaction ~~committed while he or she was between the ages of eighteen and twenty-six,~~
 3 ~~inclusive,~~ may, pursuant to ~~the provisions of~~ this section, petition the circuit court in which the
 4 conviction or convictions occurred for expungement of the conviction or convictions and the
 5 records associated therewith with the conviction or convictions. The clerk of the circuit court shall
 6 charge and collect in advance the same fee as is charged for instituting a civil action pursuant to
 7 subdivision (1), subsection (a), section eleven, article one, chapter fifty-nine of this code for a
 8 petition for expungement.

9 (b) Expungement ~~shall~~ is not be available for any conviction of an offense listed in
 10 subsection (i) of this section. The relief afforded by this subsection is only available to persons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 (e) Upon receipt of a petition for expungement, the Superintendent of the State Police; the
57 prosecuting attorney of the county of conviction; the chief of police or other executive head of the
58 municipal police department wherein the offense was committed; the chief law-enforcement
59 officer of any other law-enforcement agency which participated in the arrest of the petitioner; the
60 superintendent or warden of any institution in which the petitioner was confined; the ~~magistrate~~
61 ~~court or municipal~~ court which disposed of the petitioner's criminal charge or charges; all other
62 state and local government agencies whose records would be affected by the proposed

63 expungement; and any other interested individual or agency that desires to oppose the
64 expungement shall, within thirty days of receipt of the petition, file a notice of opposition with the
65 court with supporting documentation and sworn statements setting forth the reasons for resisting
66 the petition for expungement. A copy of any notice of opposition with supporting documentation
67 and sworn statements shall be served upon the petitioner in accordance with trial court rules. The
68 petitioner may file a reply no later than ten days after service of any notice of opposition to the
69 petition for expungement.

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

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

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

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

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

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

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

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

84 (1) Summarily grant the petition;

85 (2) Set the matter for hearing; or

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

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

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

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

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

105 (3) Any misdemeanor violation of article eight-b of this chapter where the petitioner was
106 eighteen years old, or older, at the time the violation occurred and the victim was twelve years of
107 age, or younger, at the time the violation occurred; ~~involving the use or exhibition of~~

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

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

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

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

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

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

124 (j) If the court grants the petition for expungement, it shall order the sealing of all records
125 in the custody of the court and expungement of any records in the custody of any other agency
126 or official, including law-enforcement records. Every agency with records relating to the arrest,
127 charge or other matters arising out of the arrest or conviction that is ordered to expunge records
128 shall certify to the court within ~~sixty~~ ninety days of the entry of the expungement order that the
129 required expungement has been completed. All orders enforcing the expungement procedure
130 shall also be sealed. For the purposes of this section, "records" do not include the records of the
131 Governor, the Legislature or the Secretary of State that pertain to a grant of pardon. Such records
132 that pertain to a grant of pardon are not subject to an order of expungement. The amendment to
133 this section during the fourth extraordinary session of the Legislature in the year 2009 is not for
134 the purpose of changing existing law, but is intended to clarify the intent of the Legislature as to
135 existing law regarding expungement.

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

140 (l) Inspection of the sealed records in the court's possession may thereafter be permitted

141 by the court only upon a motion by the person who is the subject of the records or upon a petition
142 filed by a prosecuting attorney that inspection and possible use of the records in question are
143 necessary to the investigation or prosecution of a crime in this state or another jurisdiction. If the
144 court finds that the interests of justice will be served by granting a petition to inspect the sealed
145 record, it may be granted.

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

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

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

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

167 the maintaining of offender registries.

168 (g) There is hereby created in the State Treasury a special revenue account designated
169 the West Virginia State Police Criminal Justice Information Services Fund which shall consist of
170 money deposited into the fund from fees collected under this section and moneys appropriated
171 by the Legislature. Funds appropriated to the West Virginia State Police Criminal Justice
172 Information Services Fund in accordance with this section that remain unallocated or unexpended
173 at the end of a fiscal year do not expire, but remain in the line item to which they were originally
174 appropriated and are available in the next fiscal year to be used for the purposes of operating and
175 maintaining the West Virginia State Police Criminal Identification Bureau and other criminal justice
176 information services 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.

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