

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

Senate Bill 491

BY SENATORS BOSO AND CLINE

[Originating in the Committee on the Judiciary;

Reported on February 20, 2018]

1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating
2 to distribution of portions of the filing fee charged for the expungement of certain criminal
3 convictions upon proper petition.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

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

1 (a) Any person convicted of a misdemeanor offense or offenses arising from the same
2 transaction committed while he or she was between the ages of 18 and 26, inclusive, may,
3 pursuant to the provisions of this section, petition the circuit court in which the conviction or
4 convictions occurred for expungement of the conviction or convictions and the records associated
5 therewith. The clerk of the circuit court shall charge and collect in advance the same fee as is
6 charged for instituting a civil action pursuant to §59-1-11(a)(1) of this code for a petition for
7 expungement.

8 (b) Expungement shall not be available for any conviction of an offense listed in §61-11-
9 26(i) of this code. The relief afforded by this subsection is only available to persons having no
10 other prior or subsequent convictions other than minor traffic violations at the time the petition is
11 filed: *Provided*, That at the time the petition is filed and during the time the petition is pending,
12 petitioner may not be the subject of an arrest or any other pending criminal proceeding. No person
13 ~~shall~~ may be eligible for expungement pursuant to the provisions of §61-11-26(a) of this code until
14 one year after the conviction, completion of any sentence of incarceration or probation, whichever
15 is later in time.

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

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

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

22 (3) Petitioner's date of birth and social security number;

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

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

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

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

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

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

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

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

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

42 (d) A copy of the petition, with any supporting documentation, shall be served by petitioner
43 pursuant to the rules of the trial court upon the Superintendent of the State Police; the prosecuting
44 attorney of the county of conviction; the chief of police or other executive head of the municipal
45 police department wherein the offense was committed; the chief law-enforcement officer of any

46 other law-enforcement agency which participated in the arrest of the petitioner; the superintendent
47 or warden of any institution in which the petitioner was confined; the magistrate court or municipal
48 court which disposed of the petitioner's criminal charge; and all other state and local government
49 agencies whose records would be affected by the proposed expungement. The prosecutorial
50 office that had jurisdiction over the offense or offenses for which expungement is sought shall
51 serve by first class mail the petition for expungement, accompanying documentation, and any
52 proposed expungement order to any identified victims.

53 (e) Upon receipt of a petition for expungement, the Superintendent of the State Police; the
54 prosecuting attorney of the county of conviction; the chief of police or other executive head of the
55 municipal police department wherein the offense was committed; the chief law-enforcement
56 officer of any other law-enforcement agency which participated in the arrest of the petitioner; the
57 superintendent or warden of any institution in which the petitioner was confined; the magistrate
58 court or municipal court which disposed of the petitioner's criminal charge; all other state and local
59 government agencies whose records would be affected by the proposed expungement and any
60 other interested individual or agency that desires to oppose the expungement shall, within 30
61 days of receipt of the petition, file a notice of opposition with the court with supporting
62 documentation and sworn statements setting forth the reasons for resisting the petition for
63 expungement. A copy of any notice of opposition with supporting documentation and sworn
64 statements shall be served upon the petitioner in accordance with trial court rules. The petitioner
65 may file a reply no later than 10 days after service of any notice of opposition to the petition for
66 expungement.

67 (f) The burden of proof shall be on the petitioner to prove by clear and convincing evidence
68 that: (1) The conviction or convictions for which expungement is sought are the only convictions
69 against petitioner and that the conviction or convictions are not excluded from expungement by
70 §61-11-26(j) of this code; (2) that the requisite time period has passed since the conviction or
71 convictions or end of the completion of any sentence of incarceration or probation; (3) petitioner

72 has no criminal charges pending against him or her; (4) the expungement is consistent with the
73 public welfare; (5) petitioner has, by his or her behavior since the conviction or convictions,
74 evidenced that he or she has been rehabilitated and is law-abiding; and (6) any other matter
75 deemed appropriate or necessary by the court to make a determination regarding the petition for
76 expungement.

77 (g) Within 60 days of the filing of a petition for expungement the circuit court shall:

78 (1) Summarily grant the petition;

79 (2) Set the matter for hearing; or

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

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

93 (i) No person ~~shall~~ may be eligible for expungement of a conviction and the records
94 associated therewith pursuant to the provisions of §61-11-26(a) of this code for any violation
95 involving the infliction of serious physical injury; involving the provisions of §61-8B-1 *et seq.* of
96 this code where the petitioner was 18 years old, or older, at the time the violation occurred and
97 the victim was 12 years of age, or younger, at the time the violation occurred; involving the use

98 or exhibition of a deadly weapon or dangerous instrument; of the provisions of §61-2-9(b) or §61-
99 2-9(c) of this code where the victim was a spouse, a person with whom the person seeking
100 expungement had a child in common, or with whom the person seeking expungement ever
101 cohabitated prior to the offense; any violation of the provisions of §61-2-28 of this code; a
102 conviction for driving under the influence of alcohol, controlled substances, or a conviction for a
103 violation of §17B-4-3 of this code or §61-8-19 of this code.

104 (j) If the court grants the petition for expungement, it shall order the sealing of all records
105 in the custody of the court and expungement of any records in the custody of any other agency
106 or official, including law-enforcement records. Every agency with records relating to the arrest,
107 charge, or other matters arising out of the arrest or conviction that is ordered to expunge records
108 shall certify to the court within 60 days of the entry of the expungement order that the required
109 expungement has been completed. All orders enforcing the expungement procedure shall also
110 be sealed. For the purposes of this section, "records" do not include the records of the Governor,
111 the Legislature, or the Secretary of State that pertain to a grant of pardon. Such records that
112 pertain to a grant of pardon are not subject to an order of expungement. The amendment to this
113 section during the fourth extraordinary session of the Legislature in the year 2009 is not for the
114 purpose of changing existing law, but is intended to clarify the intent of the Legislature as to
115 existing law regarding expungement.

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

121 (l) Inspection of the sealed records in the court's possession may thereafter be permitted
122 by the court only upon a motion by the person who is the subject of the records or upon a petition
123 filed by a prosecuting attorney that inspection and possible use of the records in question are

124 necessary to the investigation or prosecution of a crime in this state or another jurisdiction. If the
125 court finds that the interests of justice will be served by granting a petition to inspect the sealed
126 record, it may be granted.

127 (m) Notwithstanding any provision of this code to the contrary, portions of the fee collected
128 pursuant to §61-11-26(a) of this code are specifically dedicated as follows:

129 (1) Ninety dollars shall be deposited in the special revenue account designated the West
130 Virginia State Police Criminal History Account within the Office of the State Treasurer;

131 (2) Forty dollars shall be deposited in the special revenue account designated the Fund
132 for Civil Legal Services for Low Income Persons;

133 (3) Twenty dollars shall be deposited in the special revenue account designated the
134 Courthouse Facilities Improvement Fund; and

135 (4) Twenty dollars shall be deposited in the special revenue account designated the
136 Domestic Violence Legal Services Fund within the Office of the State Treasurer.