

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

Senate Bill 17

SENATORS TRUMP AND BOSO, *original sponsors*

[Originating in the Committee on the Judiciary;

reported on January 16, 2019]

1 A BILL to amend and reenact §62-12-2 of the Code of West Virginia, 1931, as amended, relating
2 to eligibility for probation generally; adding the option of a psychological study and
3 diagnosis to the studies and treatment required for a person to be eligible for probation
4 upon conviction of certain sexually related offenses; and adding offenses involving
5 preparation, distribution, or exhibition of obscene matter to minors to the list of offenses
6 for which such examinations are required for probation eligibility.

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 ~~shall be~~ are eligible for probation, notwithstanding the provisions of §61-11-18
4 and §61-11-19 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 ~~shall be ineligible~~ is not eligible for probation. Nothing in this section ~~shall~~ may apply to
8 an accessory before the fact or a principal in the second degree who has been convicted as if he
9 or she were a principal in the first degree if, in the commission of or in the attempted commission
10 of the felony, only the 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 ~~shall~~ may not be applicable unless
14 ~~such~~ the fact is clearly stated and included in the indictment or presentment by which ~~such~~ that
15 person is charged 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 tried before a jury, upon submitting to ~~such~~ the jury
18 a special interrogatory for such purpose; or

19 (C) Found by the court, if the matter be tried by the court, without a jury.

20 (2) The amendments to this subsection adopted in the year 1981:

21 (A) ~~Shall~~ Apply to all applicable offenses occurring on or after August 1 of that year;

22 (B) ~~Shall~~ Apply with respect to the contents of any indictment or presentment returned on
23 or after August 1 of that year irrespective of when the offense occurred;

24 (C) ~~Shall~~ Apply with respect to the submission of a special interrogatory to the jury and
25 the finding to be made thereon in any case submitted to ~~such~~ the jury on or after August 1 of that
26 year or to the requisite findings of the court upon a plea of guilty or in any case tried without a
27 jury: *Provided*, That the state shall give notice in writing of its intent to seek such finding by the
28 jury or court, as the case may be, which notice shall state with particularity the grounds upon
29 which ~~such~~ the finding ~~shall be~~ is sought as fully as such grounds are otherwise required to be
30 stated in an indictment, unless the grounds therefor are alleged in the indictment or presentment
31 upon which the matter is being tried;

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

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

38 (d) For the purpose of this section, the term "firearm" ~~shall~~ means any instrument which
39 will, or is designed to, or may readily be converted to, expel a projectile by the action of an
40 explosive, gunpowder, or any other similar means.

41 (e) ~~In the case of~~ Any person who has been found guilty of, or pleaded guilty to, a violation
42 of the provisions of §61-8-12 of this code, the provisions of §61-8A-1 et seq. of this code, the

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

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

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

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

68 (1) The full name of the person;

- 69 (2) The address where the person shall reside;
- 70 (3) The person's social security number;
- 71 (4) A recent photograph of the person;
- 72 (5) A brief description of the crime for which the person was convicted;
- 73 (6) Fingerprints; and
- 74 (7) For any person determined to be a sexually violent predator as defined in §15-12-2a
- 75 of this code, the notice shall also include:
- 76 (i) Identifying factors, including physical characteristics;
- 77 (ii) History of the offense; and
- 78 (iii) Documentation of any treatment received for the mental abnormality or personality
- 79 disorder.