

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2508

BY DELEGATE STEELE, PAYNTER, MANDT, WILSON,

FOSTER AND KESSINGER

[Introduced January 17, 2019; Referred
to the Committee on the Judiciary.]

1 A BILL to amend and reenact §62-12-2 of the Code of West Virginia, 1931, as amended, relating
 2 to making certain defendants who have been convicted of two or more prior unrelated
 3 felonies not a part of the same criminal transaction ineligible for probation; and
 4 establishing a procedure.

Be it enacted by the Legislature of West Virginia:

ARTICLE 12. PROBATION AND PAROLE.

§62-12-2. Eligibility for probation.

1 (a) ~~All persons~~ Persons who are found guilty of or plead guilty to any felony, the maximum
 2 penalty for which is less than life imprisonment, and all persons who are found guilty of or plead
 3 guilty to any misdemeanor, shall be eligible for probation, notwithstanding the provisions of §61-
 4 11-18 and §61-11-19 of this code: Provided, That those persons have not been convicted of two
 5 or more unrelated felony offenses, not arising from the same criminal transaction on a prior
 6 occasion in this jurisdiction or any other jurisdiction within the United States.

7 (b) The provisions of §62-12-2(a) of this code to the contrary notwithstanding, any person
 8 who commits or attempts to commit a felony with the use, presentment or brandishing of a firearm
 9 shall be ineligible for probation. Nothing in this section shall apply to an accessory before the fact
 10 or a principal in the second degree who has been convicted as if he or she were a principal in the
 11 first degree if, in the commission of or in the attempted commission of the felony, only the principal
 12 in the first degree used, presented or brandished a firearm.

13 (c)(1) The existence of any fact which would make any person ineligible for probation
 14 under §62-12-2(b) of this code to because of the commission or attempted commission of a felony
 15 with the use, presentment or brandishing of a firearm shall not be applicable unless such fact is
 16 clearly stated and included in the indictment or presentment by which such person is charged and
 17 is either: ~~(i)~~ (A) Found by the court upon a plea of guilty or nolo contendere; or ~~(ii)~~ (B) found by
 18 the jury, if the matter be tried before a jury, upon submitting to such jury a special interrogatory
 19 for such purpose; or ~~(iii)~~ (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 the
25 finding to be made thereon in any case submitted to such jury on or after August 1, of that year
26 or to the requisite findings of the court upon a plea of guilty or in any case tried without a jury:
27 *Provided*, That the state shall give notice in writing of its intent to seek such finding by the jury or
28 court, as the case may be, which notice shall state with particularity the grounds upon which such
29 finding shall be sought as fully as such grounds are otherwise required to be stated in an
30 indictment, unless the grounds therefor are alleged in the indictment or presentment upon which
31 the matter is being tried;

32 (D) Shall not apply with respect to cases not affected by such amendment and in such
33 cases the prior provisions of this section shall apply and be construed without reference to such
34 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) The court, upon sentencing the defendant, shall make inquiry of the officer preparing
39 the pre-sentence investigation report, as to whether the defendant has two or more prior felony
40 convictions, and the defendant shall be afforded the opportunity to confirm or deny the assertion
41 of the officer preparing the report. If the defendant denies the assertion of the officer preparing
42 the report, the state, by its counsel, shall present such evidence to the court as it may have in its
43 possession concerning the prior felony convictions of the defendant, and the defendant shall
44 present such evidence to the court as the defendant may have concerning the prior felony
45 convictions of the defendant. The court, after hearing the evidence of both parties, shall determine

46 by a preponderance of the evidence whether the defendant has been convicted of two or more
47 prior unrelated felonies, not arising from the same criminal transaction on a prior occasion in this
48 jurisdiction or any jurisdiction within the United States. If the defendant confirms the assertion of
49 the officer or be found by the court to have committed two prior unrelated felonies, not arising
50 from the same criminal transaction on a prior occasion in this jurisdiction or any jurisdiction within
51 the United States, the defendant is not eligible for a grant of probation under this article.

52 ~~(d)~~ (e) For the purpose of this section, the term “firearm” shall mean any instrument which
53 will, or is designed to, or may readily be converted to, expel a projectile by the action of an
54 explosive, gunpowder, or any other similar means.

55 ~~(e)~~ (f) In the case of any person who has been found guilty of, or pleaded guilty to, a
56 violation of the provisions of §61-8-12, §61-8B-1 *et seq.*, §61-8C-1 *et seq.* or §61-8D-5 of this
57 code, such person shall only be eligible for probation after undergoing a physical, mental and
58 psychiatric study and diagnosis which shall include an on-going treatment plan requiring active
59 participation in sexual abuse counseling at a mental health facility or through some other
60 approved program: *Provided*, That nothing disclosed by the person during such study or diagnosis
61 shall be made available to any law-enforcement agency, or other party without that person's
62 consent, or admissible in any court of this state, unless such information disclosed shall indicate
63 the intention or plans of the probationer to do harm to any person, animal, institution or property,
64 in which case such information may be released only to such persons as might be necessary for
65 protection of the said person, animal, institution or property.

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

72 ~~(f)~~ (g) Any person who has been convicted of a violation of the provisions of §61-8B-1 *et*
 73 *seq.*, §61-8C-1 *et seq.* §61-8D-5, §61-8D-6, §61-2-14, §61-8-12 or §61-8-13 of this code, or of a
 74 felony violation involving a minor of §61-8-6 or §61-8-7 of this code, or of a similar provision in
 75 another jurisdiction shall be required to be registered upon release on probation. Any person who
 76 has been convicted of an attempt to commit any of the offenses set forth in this subsection shall
 77 also be registered upon release on probation.

78 ~~(g)~~ (h) The probation officer shall within three days of release of the offender, send written
 79 notice to the State Police of the release of the offender. The notice shall include:

80 (1) The full name of the person;

81 (2) The address where the person shall reside;

82 (3) The person's social security number;

83 (4) A recent photograph of the person;

84 (5) A brief description of the crime for which the person was convicted;

85 (6) Fingerprints; and

86 (7) For any person determined to be a sexually violent predator as defined in §15-12-2a
 87 of this code, the notice shall also include:

88 ~~(i)~~ (A) Identifying factors, including physical characteristics;

89 ~~(ii)~~ (B) History of the offense; and

90 ~~(iii)~~ (C) Documentation of any treatment received for the mental abnormality or personality
 91 disorder.

NOTE: The purpose of this bill is to make certain defendants who have been convicted of two or more prior unrelated felonies not a part of the same criminal transaction ineligible for probation. The bill also establishes a procedure.

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