

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

Originating

Senate Bill 726

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LINDSAY, MAYNARD, PHILLIPS, ROMANO, RUCKER, SMITH,
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[Originating in the Committee on the Judiciary;
reported on February 28, 2022]

1 A BILL to amend and reenact §61-11-22 and §61-11-22a of the Code of West Virginia, 1931, as
2 amended, all relating generally to pretrial diversion agreements and deferred prosecution
3 agreements; listing offenses for which pretrial diversion prohibited; listing offenses where
4 defendant is authorized under certain circumstances and with certain limitations; and
5 setting out procedures for deferred prosecutions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

§61-11-22. Pretrial diversion agreements; conditions; drug court programs.

1 (a) A prosecuting attorney of any county of this state or a person acting as a special
2 prosecutor may enter into a pretrial diversion agreement with a person under investigation or
3 charged with an offense against the State of West Virginia, when he or she considers it to be in
4 the interests of justice. The agreement is to be in writing and is to be executed in the presence of
5 the person's attorney, unless the person has executed a waiver of counsel.

6 (b) Any agreement entered into pursuant to the provisions of subsection (a) of this section
7 may not exceed 24 months in duration. The duration of the agreement must be specified in the
8 agreement. The terms of any agreement entered into pursuant to the provisions of this section
9 may include conditions similar to those set forth in §62-12-9 of this code relating to conditions of
10 probation. The agreement may require supervision by a probation officer of the circuit court, with
11 the consent of the court. An agreement entered into pursuant to this section must include a
12 provision that the applicable statute of limitations be tolled for the period of the agreement.

13 (c) A person who has entered into an agreement for pretrial diversion with a prosecuting
14 attorney and who has successfully complied with the terms of the agreement is not subject to
15 prosecution for the offense or offenses described in the agreement or for the underlying conduct
16 or transaction constituting the offense or offenses described in the agreement, unless the
17 agreement includes a provision that upon compliance the person agrees to plead guilty or nolo

18 contendere to a specific related offense, with or without a specific sentencing recommendation
19 by the prosecuting attorney.

20 (d) No person charged with a violation of the provisions of §17C-5-2 of this code may
21 participate in a pretrial diversion program: *Provided*, That a court may defer proceedings in
22 accordance with §17C-5-2b of this code. ~~No person charged with a violation of the provisions of~~
23 ~~section twenty-eight, article two of this chapter may participate in a pretrial diversion program~~
24 ~~unless the program is part of a community corrections program approved pursuant to the~~
25 ~~provisions of article eleven-c, chapter sixty-two of this code. No person indicted for a felony crime~~
26 ~~of violence against the person where the alleged victim is a family or household member as~~
27 ~~defined in section two hundred three, article twenty-seven, chapter forty-eight of this code or~~
28 ~~indicted for a violation of the provisions of sections three, four or seven, article eight-b of this~~
29 ~~chapter is eligible to participate in a pretrial diversion program. No defendant charged with a~~
30 ~~violation of the provisions of section twenty-eight, article two of this chapter or subsections (b) or~~
31 ~~(c), section nine, article two of this chapter where the alleged victim is a family or household~~
32 ~~member is eligible for pretrial diversion programs if he or she has a prior conviction for the offense~~
33 ~~charged or if he or she has previously been granted a period of pretrial diversion pursuant to this~~
34 ~~section for the offense charged. Notwithstanding any provision of this code to the contrary,~~
35 ~~defendants charged with violations of the provisions of section twenty-eight, article two, chapter~~
36 ~~sixty-one of this code or the provisions of subsection (b) or (c), section nine, article two of said~~
37 ~~chapter where the alleged victim is a family or household member as defined by the provisions of~~
38 ~~section two hundred three, article twenty-seven, chapter forty-eight of this code are ineligible for~~
39 ~~participation in a pretrial diversion program before July 1, 2002, and before the community~~
40 ~~corrections subcommittee of the Governor's Committee on Crime, Delinquency and Correction~~
41 ~~established pursuant to the provisions of section two, article eleven-c, chapter sixty-two of this~~
42 ~~code, in consultation with the working group of the subcommittee, has approved guidelines for a~~
43 ~~safe and effective program for diverting defendants charged with domestic violence.~~

44 ~~(e) The provisions of section twenty five of this article are inapplicable to defendants~~
45 ~~participating in pretrial diversion programs who are charged with a violation of the provisions of~~
46 ~~section twenty eight, article two, chapter sixty one of this code. The community corrections~~
47 ~~subcommittee of the Governor's Committee on Crime, Delinquency and Correction established~~
48 ~~pursuant to the provisions of section two, article eleven c, chapter sixty two of this code shall,~~
49 ~~upon approving any program of pretrial diversion for persons charged with violations of the~~
50 ~~provisions of section twenty eight, article two, chapter sixty one of this code, establish and~~
51 ~~maintain a central registry of the participants in the programs which may be accessed by judicial~~
52 ~~officers and court personnel.~~

53 (e) No person is eligible for pretrial diversion programs if charged with:

54 (1) A felony crime of violence against the person where the alleged victim is a family or
55 household member as defined in §48-27-203 of this code;

56 (2) A violation of §61-8-12 of this code or a felony violation of the provisions of §61-8B-1
57 et seq., §61-8C-1 et seq., and §61-8D-1 et seq. of this code;

58 (3) A violation of §61-2-9a(a) of this code;

59 (4) A violation of §61-2-9d of this code;

60 (5) A violation of § 61-2-28 of this code; or

61 (6) A violation of §61-2-9 of this code where the alleged victim is a family or household
62 member as defined in §48-27-203 of this code.

§61-11-22a. Deferred adjudication.

1 (a) Upon the entry of a guilty plea to a felony or misdemeanor before a circuit or magistrate
2 court of this state entered in compliance with the provisions of Rule 11 of the West Virginia Rules
3 of Criminal Procedure 44 or Rule 10 of the West Virginia Rules of Criminal Procedure for
4 Magistrate Courts and applicable judicial decisions, the court may, upon motion, defer acceptance
5 of the guilty plea and defer further adjudication thereon and release the defendant upon such
6 terms and conditions as the court deems just and necessary. Terms and conditions may include,

7 but are not limited to, periods of incarceration, drug and alcohol treatment, counseling and
8 participation in programs offered under ~~articles eleven a, eleven b and eleven c, chapter sixty-~~
9 ~~two~~ §62-11A-1 *et seq.*, §62-11B-1 *et seq.*, and §61-11C-1 of this code.

10 (b) If the offense to which the plea of guilty is entered is a felony, the circuit court may
11 defer adjudication for a period not to exceed three years. If the offense to which the plea of guilty
12 is entered is a misdemeanor, the court may defer adjudication for a period not to exceed two
13 years.

14 (c) A person is ineligible for a deferred adjudication program if he or she is charged with;

15 (1) A felony crime of violence against the person where the alleged victim is a family or
16 household member as defined in §48-27-203 of this code;

17 (2) A violation of §61-8-12 of this code or a felony violation of the provisions of §61-8B-1
18 *et seq.*, §61-8C-1 *et seq.*, and §61-8D-1 *et seq.* of this code;

19 (3) A violation of §61-2-9a(a) of this code;

20 (4) A violation of §61-2-9d of this code;

21 (5) A violation of §61-2-28(c) of this code; or

22 (6) A violation of §61-2-9(a) and §61-2-9(d) of this code where the alleged victim is a family
23 or household member as defined in §48-27-203 of this code.

24 (7) A violation of §61-2-9(b) or §61-2-9(c) of this code or §61-2-28(a) or §61-2-28(b) of this
25 code where a weapon was used in the commission of the crime, the defendant has a prior
26 conviction of any of the offenses listed in subsection (c) of this section, the defendant has a prior
27 felony conviction, or the defendant has previously entered into a prior pre-trial diversion or
28 deferred adjudication of crimes where the alleged victim is a family or household member as
29 defined in §48-27-203 of this code.

30 (d) A person charged under §61-2-9a or §61-2-9d of this code, or §61-2-9(a), or §61-2-
31 9(d) of this code who has not previously been convicted of any of the offenses set forth in
32 subsection (c) of this section, who has no prior felony conviction, and who has not previously

33 entered into a prior pre-trial diversion or deferred adjudication of crimes where the alleged victim
34 is a family or household member as defined in §48-27-203 of this code, is eligible to participate
35 in a deferred adjudication program: *Provided*, That the person is not eligible for dismissal upon
36 successful completion of the deferred period.

37 (e)(1) A person charged with a violation of §61-2-28(a) or §61-2-28(b) of this code or a
38 violation of §61-2-9(b) or §61-2-9(c) of this code where the alleged victim is a family or household
39 member as defined in §48-27-203 is eligible for deferred adjudication if agreed to by the state and
40 the defendant;

41 (2) In addition to terms and conditions authorized in subsection (a) of this section, a person
42 participating in a deferred adjudication program pursuant to this subsection may be required to
43 participate in compliance hearings and batterer intervention programs licensed under §48-26-402
44 of this code;

45 (3) Notwithstanding the provisions of subsection (b) of this section, a deferral under this
46 subsection shall be for a period of not less than 18 months nor more than three years; and

47 (4) A person may not participate in more than one deferred adjudication pursuant to this
48 subsection.

49 ~~e)~~ (f) If the defendant complies with the court-imposed terms and conditions he or she
50 shall be permitted to withdraw his or her plea of guilty and the matter dismissed or, as may be
51 agreed upon by the court and the parties, enter a plea of guilty or no contest to a lesser offense.

52 ~~(d)~~ (g) In the event the defendant is alleged to have violated the terms and conditions
53 imposed upon him or her by the court during the period of deferral the prosecuting attorney may
54 file a motion to accept the defendant's plea of guilty and, following notice, a hearing shall be held
55 on the matter.

56 ~~(e)~~ (h) In the event the court determines that there is reasonable cause to believe that the
57 defendant violated the terms and conditions imposed at the time the plea was entered, the court
58 may accept the defendant's plea to the original offense and impose a sentence in the court's

59 discretion in accordance with the statutory penalty of the offense to which the plea of guilty was
60 entered or impose such other terms and conditions as the court deems appropriate.

61 ~~(f)~~ (i) The procedures set forth in this section are separate and distinct from that set forth
62 in Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure. ~~11(a)(2).~~