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HOUSE BILL NO. 1463

Offered January 12, 2011

Prefiled December 2, 2010

A BILL to amend and reenact §§ 18.2-250.1, 18.2-251, and 19.2-392.2 of the Code of Virginia, relating to expungement of marijuana conviction and deferred and dismissed drug charges.

Patron—Ware, O.

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-250.1, 18.2-251, and 19.2-392.2 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-250.1. Possession of marijuana unlawful.

A. It is unlawful for any person knowingly or intentionally to possess marijuana unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§ 54.1-3400 et seq.).

Upon the prosecution of a person for violation of this section, ownership or occupancy of the premises or vehicle upon or in which marijuana was found shall not create a presumption that such person either knowingly or intentionally possessed such marijuana.

Any person who violates this section ~~shall be~~ is guilty of a misdemeanor, and ~~shall be confined~~ *punished by confinement* in jail for not more than ~~thirty~~ 30 days and a fine of not more than \$500, either or both; any person, upon a second or subsequent conviction of a violation of this section, ~~shall be~~ is guilty of a Class 1 misdemeanor. *A conviction under this section is eligible for expungement pursuant to § 19.2-392.2.*

B. The provisions of this section shall not apply to members of state, federal, county, city or town law-enforcement agencies, jail officers, or correctional officers, as defined in § 53.1-1, certified as handlers of dogs trained in the detection of controlled substances when possession of marijuana is necessary for the performance of their duties.

§ 18.2-251. Persons charged with first offense may be placed on probation; conditions; substance abuse screening, assessment treatment and education programs or services; drug tests; costs and fees; violations; discharge.

Whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250 or to possession of marijuana under § 18.2-250.1, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions.

As a term or condition, the court shall require the accused to undergo a substance abuse assessment pursuant to § 18.2-251.01 or 19.2-299.2, as appropriate, and enter treatment and/or education program or services, if available, such as, in the opinion of the court, may be best suited to the needs of the accused based upon consideration of the substance abuse assessment. The program or services may be located in the judicial district in which the charge is brought or in any other judicial district as the court may provide. The services shall be provided by (i) a program licensed by the Department of Behavioral Health and Developmental Services, by a similar program which is made available through the Department of Corrections, (ii) a local community-based probation services agency established pursuant to § 9.1-174, or (iii) an ASAP program certified by the Commission on VASAP.

The court shall require the person entering such program under the provisions of this section to pay all or part of the costs of the program, including the costs of the screening, assessment, testing, and treatment, based upon the accused's ability to pay unless the person is determined by the court to be indigent.

As a condition of probation, the court shall require the accused (i) to successfully complete treatment or education program or services, (ii) to remain drug and alcohol free during the period of probation and submit to such tests during that period as may be necessary and appropriate to determine if the accused is drug and alcohol free, (iii) to make reasonable efforts to secure and maintain employment, and (iv) to comply with a plan of at least 100 hours of community service for a felony and up to 24 hours of

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59 community service for a misdemeanor. Such testing shall be conducted by personnel of the supervising
60 probation agency or personnel of any program or agency approved by the supervising probation agency.

61 The court shall, unless done at arrest, order the accused to report to the original arresting
62 law-enforcement agency to submit to fingerprinting.

63 Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as
64 otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person
65 and dismiss the proceedings against him. Discharge and dismissal under this section shall be without
66 adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent
67 proceedings. *Discharge and dismissal under this section shall also be eligible for expungement pursuant*
68 *to § 19.2-392.2.*

69 Notwithstanding any other provision of this section, whenever a court places an individual on
70 probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction
71 for purposes of §§ 18.2-259.1, 22.1-315 and 46.2-390.1, and the driver's license forfeiture provisions of
72 those sections shall be imposed. The provisions of this paragraph shall not be applicable to any offense
73 for which a juvenile has had his license suspended or denied pursuant to § 16.1-278.9 for the same
74 offense.

75 § 19.2-392.2. Expungement of police and court records.

76 A. If a person is charged with the commission of a crime or any offense defined in Title 18.2, and

77 1. Is acquitted, or

78 2. A nolle prosequi is taken or the charge is otherwise dismissed, including dismissal by accord and
79 satisfaction pursuant to § 19.2-151, he may file a petition setting forth the relevant facts and requesting
80 expungement of the police records and the court records relating to the charge.

81 *Al. Any person who (i) was convicted of a violation of § 18.2-250.1 or (ii) has had a charge of*
82 *possession of marijuana in violation of § 18.2-250.1 discharged and dismissed, or a drug charge*
83 *discharged and dismissed, in accordance with the provisions of § 18.2-251, more than five years prior*
84 *to his petition for expungement, may file a petition setting forth the relevant facts and requesting*
85 *expungement of the police records and the court records relating to the charge, or the charge and*
86 *conviction. The Department of Criminal Justice Services shall maintain a record of an expungement*
87 *under this subsection, to be made available to any attorney for the Commonwealth upon request.*

88 B. If any person whose name or other identification has been used without his consent or
89 authorization by another person who has been charged or arrested using such name or identification, he
90 may file a petition with the court disposing of the charge for relief pursuant to this section. Such person
91 shall not be required to pay any fees for the filing of a petition under this subsection.

92 C. The petition with a copy of the warrant or indictment if reasonably available shall be filed in the
93 circuit court of the county or city in which the case was disposed of by acquittal or being otherwise
94 dismissed and shall contain, except where not reasonably available, the date of arrest and the name of
95 the arresting agency. Where this information is not reasonably available, the petition shall state the
96 reason for such unavailability. The petition shall further state the specific criminal charge to be
97 expunged, the date of final disposition of the charge as set forth in the petition, the petitioner's date of
98 birth, and the full name used by the petitioner at the time of arrest.

99 D. A copy of the petition shall be served on the attorney for the Commonwealth of the city or
100 county in which the petition is filed. The attorney for the Commonwealth may file an objection or
101 answer to the petition within 21 days after it is served on him.

102 E. The petitioner shall obtain from a law-enforcement agency one complete set of the petitioner's
103 fingerprints and shall provide that agency with a copy of the petition for expungement. The
104 law-enforcement agency shall submit the set of fingerprints to the Central Criminal Records Exchange
105 (CCRE) with a copy of the petition for expungement attached. The CCRE shall forward under seal to
106 the court a copy of the petitioner's criminal history, a copy of the source documents that resulted in the
107 CCRE entry that the petitioner wishes to expunge, and the set of fingerprints. Upon completion of the
108 hearing, the court shall return the fingerprint card to the petitioner.

109 F. After receiving the criminal history record information from the CCRE, the court shall conduct a
110 hearing on the petition. If the court finds that the continued existence and possible dissemination of
111 information relating to the arrest of the petitioner causes or may cause circumstances which constitute a
112 manifest injustice to the petitioner, it shall enter an order requiring the expungement of the police and
113 court records, including electronic records, relating to the charge *and communicate the order to the*
114 *Department of Criminal Justice Services.* Otherwise, it shall deny the petition. However, if the petitioner
115 has no prior criminal record and the arrest was for a misdemeanor violation, the petitioner shall be
116 entitled, in the absence of good cause shown to the contrary by the Commonwealth, to expungement of
117 the police and court records relating to the charge, and the court shall enter an order of expungement.

118 G. The Commonwealth shall be made party defendant to the proceeding. Any party aggrieved by the
119 decision of the court may appeal, as provided by law in civil cases.

120 H. Notwithstanding any other provision of this section, when the charge is dismissed because the

121 court finds that the person arrested or charged is not the person named in the summons, warrant,
122 indictment or presentment, the court dismissing the charge shall, upon motion of the person improperly
123 arrested or charged, enter an order requiring expungement of the police and court records relating to the
124 charge. Such order shall contain a statement that the dismissal and expungement are ordered pursuant to
125 this subsection. Upon the entry of such order, it shall be treated as provided in subsection K hereof.

126 I. Notwithstanding any other provision of this section, when a person has been granted an absolute
127 pardon for the commission of a crime that he did not commit, he may file in the circuit court of the
128 county or city in which the conviction occurred a petition setting forth the relevant facts and requesting
129 expungement of the police records and the court records relating to the charge and conviction, and the
130 court shall enter an order requiring expungement of the police and court records relating to the charge
131 and conviction. Such order shall contain a statement that the expungement is ordered pursuant to this
132 subsection. Upon the entry of such order, it shall be treated as provided in subsection K hereof.

133 J. Upon receiving a copy of a writ vacating a conviction pursuant to § 19.2-327.5 or 19.2-327.13, the
134 court shall enter an order requiring expungement of the police and court records relating to the charge
135 and conviction. Such order shall contain a statement that the expungement is ordered pursuant to this
136 subsection. Upon the entry of the order, it shall be treated as provided in subsection K hereof.

137 K. Upon the entry of an order of expungement, the clerk of the court shall cause a copy of such
138 order to be forwarded to the Department of State Police, which shall, pursuant to rules and regulations
139 adopted pursuant to § 9.1-134, direct the manner by which the appropriate expungement or removal of
140 such records shall be effected. *Any person whose criminal record is expunged of any charge or*
141 *conviction may lawfully reply to any inquiry regarding his criminal record that he has not been charged*
142 *with or convicted of the criminal offense that was the subject of the expungement.*

143 L. Costs shall be as provided by § 17.1-275, but shall not be recoverable against the Commonwealth.

144 M. Any order entered where (i) the court or parties failed to strictly comply with the procedures set
145 forth in this section or (ii) the court enters an order of expungement contrary to law, shall be voidable
146 upon motion and notice made within three years of the entry of such order.