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HOUSE BILL NO. 2038

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary
on February 17, 2021)

(Patron Prior to Substitute—Delegate Scott)

A BILL to amend and reenact §§ 19.2-303, 19.2-303.1, and 19.2-306 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 19.2-306.1, relating to probation, revocation, and suspension of sentence; limitations.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-303, 19.2-303.1, and 19.2-306 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 19.2-306.1 as follows:

§ 19.2-303. Suspension or modification of sentence; probation; taking of fingerprints and blood, saliva, or tissue sample as condition of probation.

After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine, including monitoring by a GPS (Global Positioning System) tracking device, or other similar device, or may, as a condition of a suspended sentence, require the defendant to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted, or to perform community service, or both, under terms and conditions which shall be entered in writing by the court. *The court may fix the period of probation for up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned. Any period of supervised probation shall not exceed five years from the release of the defendant from any active period of incarceration. The limitation on the period of probation shall not apply to the extent that an additional period of probation is necessary for the defendant to participate in a court-ordered program.* The defendant may be ordered by the court to pay the cost of the GPS tracking device or other similar device. If, however, the court suspends or modifies any sentence fixed by a jury pursuant to § 19.2-295, the court shall file a statement of the reasons for the suspension or modification in the same manner as the statement required pursuant to subsection B of § 19.2-298.01. The judge, after convicting the defendant of any offense for which a report to the Central Criminal Records Exchange is required in accordance with subsection A of § 19.2-390, shall determine whether a copy of the defendant's fingerprints or fingerprint identification information has been provided by a law-enforcement officer to the clerk of court for each such offense. In any case where fingerprints or fingerprint identification information has not been provided by a law-enforcement officer to the clerk of court, the judge shall require that fingerprints and a photograph be taken by a law-enforcement officer as a condition of probation or of the suspension of the imposition or execution of any sentence for such offense. Such fingerprints shall be submitted to the Central Criminal Records Exchange under the provisions of subsection D of § 19.2-390.

In those courts having electronic access to the Local Inmate Data System (LIDS) within the courtroom, prior to or upon sentencing, the clerk of court shall also determine by reviewing LIDS whether a blood, saliva, or tissue sample has been taken for DNA analysis and submitted to the DNA data bank maintained by the Department of Forensic Science pursuant to Article 1.1 (§ 19.2-310.2 et seq.) of Chapter 18 of this title. In any case in which the clerk has determined that a DNA sample or analysis is not stored in the DNA data bank, or in any case in which electronic access to LIDS is not available in the courtroom, the court shall order that the defendant appear within 30 days before the sheriff or probation officer and allow the sheriff or probation officer to take the required sample. The order shall also require that, if the defendant has not appeared and allowed the sheriff or probation officer to take the required sample by the date stated in the order, then the sheriff or probation officer shall report to the court the defendant's failure to appear and provide the required sample.

After conviction and upon sentencing of an active participant or member of a criminal street gang, the court may, as a condition for suspending the imposition of the sentence in whole or in part or for placing the accused on probation, place reasonable restrictions on those persons with whom the accused may have contact. Such restrictions may include prohibiting the accused from having contact with anyone whom he knows to be a member of a criminal street gang, except that contact with a family or household member, as defined in § 16.1-228, shall be permitted unless expressly prohibited by the court.

~~It~~ Notwithstanding any other provision of law, in any case where a defendant is convicted of a violation of § 18.2-48, 18.2-61, 18.2-63, 18.2-67.1, 18.2-67.2, 18.2-67.3, 18.2-370, or 18.2-370.1, committed on or after July 1, 2006, and some portion of the sentence is suspended, the judge shall order that the period of suspension shall be for a length of time at least equal to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned, and the

60 defendant shall be placed on probation for that period of suspension subject to revocation by the court.
61 The conditions of probation may include such conditions as the court shall determine, including active
62 supervision. Where the conviction is for a violation of clause (iii) of subsection A of § 18.2-61,
63 subdivision A 1 of § 18.2-67.1, or subdivision A 1 of § 18.2-67.2, the court shall order that at least
64 three years of the probation include active supervision of the defendant under a postrelease supervision
65 program operated by the Department of Corrections, and for at least three years of such active
66 supervision, the defendant shall be subject to electronic monitoring by means of a GPS (Global
67 Positioning System) tracking device, or other similar device.

68 If a person is sentenced to jail upon conviction of a misdemeanor or a felony, the court may, at any
69 time before the sentence has been completely served, suspend the unserved portion of any such sentence,
70 place the person on probation ~~for such time as the court shall determine in accordance with the~~
71 ~~provisions of this section~~, or otherwise modify the sentence imposed.

72 If a person has been sentenced for a felony to the Department of Corrections but has not actually
73 been transferred to a receiving unit of the Department, the court which heard the case, if it appears
74 compatible with the public interest and there are circumstances in mitigation of the offense, may, at any
75 time before the person is transferred to the Department, suspend or otherwise modify the unserved
76 portion of such a sentence. The court may place the person on probation ~~for such time as the court shall~~
77 ~~determine in accordance with the provisions of this section~~.

78 **§ 19.2-303.1. Fixing period of suspension of sentence.**

79 In any case where a court suspends the imposition or execution of a sentence, it may fix the period
80 of suspension for a ~~reasonable time, having due regard to the gravity of the offense, without regard up~~
81 ~~to the statutory maximum period for which the defendant might originally have been sentenced to be~~
82 ~~imprisoned~~.

83 **§ 19.2-306. Revocation of suspension of sentence and probation.**

84 A. In any case in which the court has suspended the execution or imposition of sentence, the court
85 may revoke the suspension of sentence for any cause the court deems sufficient that occurred at any
86 time within the probation period, or within the period of suspension fixed by the court. If neither a
87 probation period nor a period of suspension was fixed by the court, then the court may revoke the
88 suspension for any cause the court deems sufficient that occurred within the maximum period for which
89 the defendant might originally have been sentenced to be imprisoned.

90 B. The court may not conduct a hearing to revoke the suspension of sentence unless the court issues
91 process to notify the accused or to compel his appearance before the court within *90 days of receiving*
92 *notice of the alleged violation or within one year after the expiration of the period of probation or the*
93 *period of suspension, whichever is sooner*, or, in the case of a failure to pay restitution, within three
94 years after such expiration. If neither a probation period nor a period of suspension was fixed by the
95 court, then the court shall issue process within ~~one year~~ *six months* after the expiration of the maximum
96 period for which the defendant might originally have been sentenced to be incarcerated. Such notice and
97 service of process may be waived by the defendant, in which case the court may proceed to determine
98 whether the defendant has violated the conditions of suspension.

99 C. If the court, after hearing, finds good cause to believe that the defendant has violated the terms of
100 suspension, then: (i) ~~if the court originally suspended the imposition of sentence, the court shall revoke~~
101 ~~the suspension, and the court may pronounce whatever sentence might have been originally imposed or~~
102 ~~(ii) if the court originally suspended the execution of the sentence, the court shall revoke the suspension~~
103 ~~and the original sentence shall be in full force and effect revoke the suspension and impose a sentence~~
104 ~~in accordance with the provisions of § 19.2-306.1. The court may again suspend all or any part of this~~
105 ~~sentence for a period up to the statutory maximum period for which the defendant might originally have~~
106 ~~been sentenced to be imprisoned, less any time already served, and may place the defendant upon terms~~
107 ~~and conditions or probation. The court shall measure the period of any suspension of sentence from the~~
108 ~~date of the entry of the original sentencing order.~~

109 D. If any court has, after hearing, found no cause to impose a sentence that might have been
110 originally imposed, or to revoke a suspended sentence or probation, then any further hearing to impose a
111 sentence or revoke a suspended sentence or probation, based solely on the alleged violation for which
112 the hearing was held, shall be barred.

113 E. Nothing contained herein shall be construed to deprive any person of his right to appeal in the
114 manner provided by law to the circuit court having criminal jurisdiction from a judgment or order
115 revoking any suspended sentence.

116 **§ 19.2-306.1. Limitation on sentence upon revocation of suspension of sentence; exceptions.**

117 A. For the purposes of this section, "technical violation" means a violation based on the
118 probationer's failure to (i) report any arrest, including traffic tickets, within three days to the probation
119 officer; (ii) maintain regular employment or notify the probation officer of any changes in employment;
120 (iii) report within three days of release from incarceration; (iv) permit the probation officer to visit his
121 home and place of employment; (v) follow the instructions of the probation officer, be truthful and

122 cooperative, and report as instructed; (vi) refrain from the use of alcoholic beverages to the extent that
123 it disrupts or interferes with his employment or orderly conduct; (vii) refrain from the use, possession,
124 or distribution of controlled substances or related paraphernalia; (viii) refrain from the use, ownership,
125 possession, or transportation of a firearm; (ix) gain permission to change his residence or remain in the
126 Commonwealth or other designated area without permission of the probation officer; or (x) maintain
127 contact with the probation officer whereby his whereabouts are no longer known to the probation
128 officer. Multiple technical violations arising from a single course of conduct or a single incident or
129 considered at the same revocation hearing shall not be considered separate technical violations for the
130 purposes of sentencing pursuant to this section.

131 B. If the court finds the basis of a violation of the terms and conditions of a suspended sentence or
132 probation is that the defendant was convicted of a criminal offense that was committed after the date of
133 the suspension, or has violated another condition other than (i) a technical violation or (ii) a good
134 conduct violation that did not result in a criminal conviction, then the court may revoke the suspension
135 and impose or resuspend any or all of that period previously suspended.

136 C. The court shall not impose a sentence of a term of incarceration upon a first technical violation
137 of the terms and conditions of a suspended sentence or probation, and there shall be a presumption
138 against imposing a sentence of a term of incarceration for any second technical violation of the terms
139 and conditions of a suspended sentence or probation. However, if the court finds, by a preponderance of
140 the evidence, that the defendant committed a second technical violation and he cannot be safely diverted
141 from incarceration through less restrictive means, the court may impose not more than 14 days of
142 incarceration for a second technical violation. The court may impose whatever sentence might have been
143 originally imposed for a third or subsequent technical violation. For the purposes of this subsection, a
144 first technical violation based on clause (viii) or (x) of subsection A shall be considered a second
145 technical violation, and any subsequent technical violation also based on clause (viii) or (x) of
146 subsection A shall be considered a third or subsequent technical violation.

147 D. The limitations on sentencing in this section shall not apply to the extent that an additional term
148 of incarceration is necessary to allow a defendant to be evaluated for or to participate in a
149 court-ordered drug, alcohol, or mental health treatment program. In such case, the court shall order the
150 shortest term of incarceration possible to achieve the required evaluation or participation.