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SENATE BILL NO. 954

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Senator Norment
on February 9, 2018)

(Patron Prior to Substitute—Senator Norment)

A BILL to amend and reenact §§ 18.2-250.1, 18.2-251, 19.2-392.2, 19.2-392.3, and 19.2-392.4 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 18.2-251.04 and 19.2-387.3, relating to possession of marijuana; first offense; expungement; penalty.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-250.1, 18.2-251, 19.2-392.2, 19.2-392.3, and 19.2-392.4 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 18.2-251.04 and 19.2-387.3 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 is guilty of a misdemeanor and shall be ~~confined in jail not more than 30 days and~~ fined not more than $500~~, either or both~~; any person, upon a second or subsequent conviction of a violation of this section, is guilty of a Class 1 misdemeanor. *A charge of a violation of this section that has been expunged under subdivision A 4 of § 19.2-392.2 shall be deemed a conviction for purposes of prosecuting a person for a second or subsequent violation of this section.*

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.

C. In any prosecution under this section involving marijuana in the form of cannabidiol oil or THC-A oil as those terms are defined in § 54.1-3408.3, it shall be an affirmative defense that the individual possessed such oil pursuant to a valid written certification issued by a practitioner in the course of his professional practice pursuant to § 54.1-3408.3 for treatment or to alleviate the symptoms of (i) the individual's intractable epilepsy or (ii) if such individual is the parent or legal guardian of a minor or of an incapacitated adult as defined in § 18.2-369, such minor's or incapacitated adult's intractable epilepsy. If the individual files the valid written certification with the court at least 10 days prior to trial and causes a copy of such written certification to be delivered to the attorney for the Commonwealth, such written certification shall be prima facie evidence that such oil was possessed pursuant to a valid written certification.

§ 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 *or expunged under subdivision A 4 of § 19.2-392.2*, 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. *Prior to deferring the proceedings under this section and at the time that the case is heard, the attorney for the Commonwealth or law-enforcement officer shall provide to the court, and the court shall review, the criminal history record and any records maintained by the Department of State Police pursuant to § 19.2-387.3 to ensure that the person is eligible for such deferral. The court shall not retain in the case file any such records provided to the court.*

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 (a) to successfully complete treatment or education program or services, (b) 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, (c) to make reasonable efforts to secure and maintain employment, and (d) to comply with a plan of at least 100 hours of community service for a felony and up to 24 hours of community service for a misdemeanor. In addition to any community service required by the court pursuant to clause (d), if the court does not suspend or revoke the accused's license as a term or condition of probation for a violation of § 18.2-250.1, the court shall require the accused to comply with a plan of 50 hours of community service. Such testing shall be conducted by personnel of the supervising probation agency or personnel of any program or agency approved by the supervising probation agency.

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

Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings.

Notwithstanding any other provision of this section, whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction for purposes of §§ 18.2-259.1, 22.1-315, and 46.2-390.1, and the driver's license forfeiture provisions of those sections shall be imposed. However, if the court places an individual on probation upon terms and conditions for a violation of § 18.2-250.1, such action shall not be treated as a conviction for purposes of § 18.2-259.1 or 46.2-390.1, provided that a court (1) may suspend or revoke an individual's driver's license as a term or condition of probation and (2) shall suspend or revoke an individual's driver's license as a term or condition of probation for a period of six months if the violation of § 18.2-250.1 was committed while such person was in operation of a motor vehicle. The provisions of this paragraph shall not be applicable to any offense for which a juvenile has had his license suspended or denied pursuant to § 16.1-278.9 for the same offense.

§ 18.2-251.04. Heroin and Prescription Opioid Epidemic Fund.

There is hereby created in the state treasury a special nonreverting fund to be known as the Heroin and Prescription Opioid Epidemic Fund, referred to in this section as "the Fund." The Fund shall be established on the books of the Comptroller. All moneys received from fees imposed under subsection L of § 19.2-392.2 on orders of expungement entered under subdivision A 4 of § 19.2-392.2 shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year that are not appropriated by the General Assembly shall not revert to the general fund but shall remain in the Fund. All moneys in the Fund shall be subject to annual appropriation by the General Assembly to the Department of Behavioral Health and Developmental Services to be used solely for prevention, treatment, and recovery services relating to the use of heroin and prescription opioid drugs. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Director of the Department of Behavioral Health and Developmental Services.

§ 19.2-387.3. Possession of Marijuana Database.

A. The Department of State Police shall keep and maintain a computerized database of charges of violations of § 18.2-250.1 that have been expunged under subdivision A 4 of § 19.2-392.2 separate and apart from all other records maintained by the Department. The Department of State Police shall make database information available, upon request, to criminal justice agencies, including local law-enforcement agencies and the attorney for the Commonwealth, through the Virginia Criminal Information Network. Database information provided under this section shall be used only for the purposes of the administration of criminal justice. Information in the database may be provided to the defendant for the purposes of determining eligibility for a deferred disposition as provided in § 18.2-251. Information contained in the database shall not constitute a criminal record except as

otherwise specified in the Code.

B. Use of the information contained in the database or received from the database for purposes not authorized by this section is prohibited, and a willful violation of this section with the intent to harass or intimidate another shall be punished as a Class 1 misdemeanor.

C. No liability shall be imposed upon any law-enforcement official or attorney for the Commonwealth who disseminates information or fails to disseminate information in good faith compliance with the requirements of this section, but this provision shall not be construed to grant immunity for gross negligence or willful misconduct.

D. Any record, including records maintained by electronic media, by photographic processes, or paper, in the office of the Department shall be admissible in evidence in any proceeding under §§ 18.2-250.1, 18.2-251, and 19.2-392.2. A copy, a machine-produced transcript, or a photograph of the record or paper attested by the Superintendent or his designee may be admitted as evidence in lieu of the original. In any case in which the records are transmitted by electronic means, a machine imprint of the Superintendent's name purporting to authenticate the record shall be the equivalent of attestation or certification by the Superintendent. Any copy, transcript, photograph, or certification purporting to be sealed or sealed and signed by the Superintendent or his designee or imprinted with the Superintendent's name may be admitted as evidence without any proof of the seal or signature or of the official character of the person whose name is signed thereto. If an issue as to the authenticity of any information transmitted by electronic means is raised, the court shall require that a record attested by the Superintendent or his designee be submitted for admission into evidence.

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

A. If a person is charged with the commission of a crime or any offense defined in Title 18.2~~,~~ ~~and~~ *he may file a petition setting forth the relevant facts and requesting expungement of the police records and court records relating to the charge if:*

1. ~~Is~~ *Such person is* acquitted~~,~~ ~~or~~*;*

2. A nolle prosequi is taken ~~or the~~*;*

3. The charge is otherwise dismissed, including dismissal by accord and satisfaction pursuant to § 19.2-151~~,~~ ~~he may file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the charge~~*; or*

4. The charge is for a first offense violation of § 18.2-250.1 and is deferred and dismissed pursuant to the provisions of § 18.2-251.

B. If any person whose name or other identification has been used without his consent or authorization by another person who has been charged or arrested using such name or identification, he may file a petition with the court disposing of the charge for relief pursuant to this section. Such person shall not be required to pay any fees for the filing of a petition under this subsection. A petition filed under this subsection shall include one complete set of the petitioner's fingerprints obtained from a law-enforcement agency.

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

D. A copy of the petition shall be served on the attorney for the Commonwealth of the city or county in which the petition is filed. The attorney for the Commonwealth may file an objection or answer to the petition or may give written notice to the court that he does not object to the petition within 21 days after it is served on him.

E. The petitioner shall obtain from a law-enforcement agency one complete set of the petitioner's fingerprints and shall provide that agency with a copy of the petition for expungement. The law-enforcement agency shall submit the set of fingerprints to the Central Criminal Records Exchange (CCRE) with a copy of the petition for expungement attached. The CCRE shall forward under seal to the court a copy of the petitioner's criminal history, a copy of the source documents that resulted in the CCRE entry that the petitioner wishes to expunge, and the set of fingerprints. Upon completion of the hearing, the court shall return the fingerprint card to the petitioner. If no hearing was conducted, upon the entry of an order of expungement or an order denying the petition for expungement, the court shall cause the fingerprint card to be destroyed unless, within 30 days of the date of the entry of the order, the petitioner requests the return of the fingerprint card in person from the clerk of the court or provides the clerk of the court a self-addressed, stamped envelope for the return of the fingerprint card.

F. After receiving the criminal history record information from the CCRE, the court shall conduct a hearing on the petition. If the court finds that the continued existence and possible dissemination of

information relating to the arrest *or charge* of the petitioner causes or may cause circumstances ~~which~~ *that* constitute a manifest injustice to the petitioner, it shall enter an order requiring the expungement of the police and court records, including electronic records, relating to the charge. Otherwise, it shall deny the petition. However, if the petitioner has no prior criminal record and the arrest *or charge* was for a misdemeanor violation, the petitioner shall be entitled, in the absence of good cause shown to the contrary by the Commonwealth, to expungement of the police and court records relating to the *arrest or* charge, and the court shall enter an order of expungement. If the attorney for the Commonwealth of the county or city in which the petition is filed (i) gives written notice to the court pursuant to subsection D that he does not object to the petition and (ii) when the charge to be expunged is a felony, stipulates in such written notice that the continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause circumstances which constitute a manifest injustice to the petitioner, the court may enter an order of expungement without conducting a hearing.

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

H. Notwithstanding any other provision of this section, when the charge is dismissed because the court finds that the person arrested or charged is not the person named in the summons, warrant, indictment or presentment, the court dismissing the charge shall, upon motion of the person improperly arrested or charged, enter an order requiring expungement of the police and court records relating to the charge. Such order shall contain a statement that the dismissal and expungement are ordered pursuant to this subsection and shall be accompanied by the complete set of the petitioner's fingerprints filed with his petition. Upon the entry of such order, it shall be treated as provided in subsection K.

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

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

K. Upon the entry of an order of expungement, the clerk of the court shall cause a copy of such order to be forwarded to the Department of State Police, which shall, pursuant to rules and regulations adopted pursuant to § 9.1-134, direct the manner by which the appropriate expungement or removal of such records shall be effected.

K1. Except as otherwise specified in the Code, an order of expungement entered under subdivision A 4 does not constitute a criminal record and need not be reported by the person so arrested or charged in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege. Except as provided in § 19.2-387.3, all index references shall be deleted, and the court and law-enforcement officers and agencies shall reply and the person may reply to any inquiry that no record exists with respect to such person. Records relating to an order of expungement entered under subdivision A 4 shall be retained by the Department of State Police for the purposes specified in § 19.2-387.3.

L. Costs shall be as provided by § 17.1-275, but shall not be recoverable against the Commonwealth. If the court enters an order of expungement, the clerk of the court shall refund to the petitioner such costs paid by the petitioner. *Costs shall not be refunded to the petitioner for an order of expungement entered under subdivision A 4. In addition to the costs provided by § 17.1-275, an additional $300 fee shall be assessed to the petitioner for an order of expungement entered under subdivision A 4, of which $150 shall be paid into the Heroin and Prescription Opioid Epidemic Fund established pursuant to § 18.2-251.04 and $150 shall be paid into the state treasury and credited to the Department of State Police.*

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

§ 19.2-392.3. Disclosure of expunged records.

A. ~~It~~ *Subject to § 19.2-387.3, it* shall be unlawful for any person having or acquiring access to an expunged court or police record to open or review it or to disclose to another person any information from it without an order from the court which ordered the record expunged.

B. Upon a verified petition filed by the attorney for the Commonwealth alleging that the record is needed by a law-enforcement agency for purposes of employment application as an employee of a law-enforcement agency or for a pending criminal investigation and that the investigation will be

jeopardized or that life or property will be endangered without immediate access to the record, the court may enter an ex parte order, without notice to the person, permitting such access. An ex parte order may permit a review of the record, but may not permit a copy to be made of it.

C. Any person who willfully violates this section is guilty of a Class 1 misdemeanor.

§ 19.2-392.4. Prohibited practices by employers, educational institutions, agencies, etc., of state and local governments.

A. An employer or educational institution shall not, in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning any arrest or criminal charge against him that has been expunged. An applicant need not, in answer to any question concerning any arrest or criminal charge that has not resulted in a conviction, include a reference to or information concerning arrests or charges that have been expunged.

B. Agencies, officials, and employees of the state and local governments shall not, in any application, interview, or otherwise, require an applicant for a license, permit, registration, or governmental service to disclose information concerning any arrest or criminal charge against him that has been expunged. An applicant need not, in answer to any question concerning any arrest or criminal charge that has not resulted in a conviction, include a reference to or information concerning *arrests or* charges that have been expunged. Such an application may not be denied solely because of the applicant's refusal to disclose information concerning any arrest or criminal charge against him that has been expunged.

C. A person who willfully violates this section is guilty of a Class 1 misdemeanor for each violation.

2. That the provisions of this act amending §§ 18.2-251 and 19.2-392.2 of the Code of Virginia and creating §§ 18.2-251.04 and 19.2-387.3 of the Code of Virginia shall become effective on January 1, 2019.

3. That the State Board of Behavioral Health and Developmental Services shall promulgate regulations pursuant to § 37.2-203 of the Code of Virginia to implement the provisions of this act by January 1, 2019.

4. That the provisions of this act shall not become effective unless an appropriation effectuating the purposes of this act is included in a general appropriation act passed in 2018 by the General Assembly that becomes law.