STATE OF NEW YORK

653

2017-2018 Regular Sessions

IN SENATE

January 4, 2017

Introduced by Sen. BOYLE -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law and the executive law, in relation to permitting the sealing of records of certain nonviolent misdemeanor or non-sexual misdemeanor offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "second chance for ex-offenders act".

§ 2. The criminal procedure law is amended by adding a new section 160.65 to read as follows:

§ 160.65 Conditional sealing of certain offenses.

1. For the purposes of this section, the term "eligible offense" shall be: (a) a misdemeanor offense defined in the penal law, provided that an eligible offense shall not mean a misdemeanor offense defined in article one hundred twenty except assault in the third degree as defined by section 120.00, unless committed in the course of a domestic violence incident, one hundred twenty-one, one hundred thirty, one hundred thirty-five, one hundred fifty, two hundred thirty-five, two hundred forty-five, two hundred sixty, two hundred sixty-three, two hundred sixty-five or article four hundred of the penal law. An eligible offense shall also not include any one or more of the following: criminal solicitation in the fourth degree as defined by subdivision two of section 100.05; conspiracy in the fifth degree as defined in section 105.05, punishment as defined in subdivision seven of section 110.05, criminal facilitation in the fourth degree as defined by section 115.00, criminal obstruction of breathing or blood circulation as defined in section 121.11, issuing abortional articles as defined in section 125.60, criminal mischief in the fourth degree as defined in section 145.00, criminal tampering in the second degree as defined in section 145.15, tampering with a consumer product in the second degree as defined in section 145.40, welfare

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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fraud in the fifth degree as defined in section 158.05, criminal use of a public benefit card in the second degree as defined in section 158.30, unlawful use of a credit card, debit card or public benefit card as defined in section 165.17, fraudulent obtaining a signature as defined in section 165.20, fraudulently accosting as defined in section 165.30, forgery in the third degree as defined in section 170.05, criminal possession of an anti-security item as defined in section 170.47, falsifying business records in the second degree as defined in section 175.05, tampering with public records in the second degree as defined in section 175.20, offering a false instrument for filing in the second degree as defined in section 175.30, issuing a false financial statement as defined in section 175.45, insurance fraud in the fifth degree as defined in section 176.10, health care fraud in the fifth degree as defined in section 177.05, commercial bribing in the second degree as defined in section 180.00, commercial bribe receiving in the second degree as defined in section 180.05, rent gouging in the third degree as defined in section 180.55, rent gouging in the second degree as defined in section 180.56, fraud in insolvency as defined in section 185.00, fraud involving a security interest as defined in section 185.05, fraudulent disposition of mortgaged property as defined in section 185.10, fraudulent disposition of property subject to a conditional sale contract as defined in section 185.15, residential mortgage fraud in the fifth degree as defined in section 187.05, issuing a bad check as defined in section 190.05, criminal sale of a police uniform as defined in section 190.27, misconduct by corporate official as defined in section 190.35, making a false statement of credit terms as defined in section 190.55, scheme to defraud in the second degree as defined in section 190.60, scheme to defraud the state by unlawfully selling prescriptions as defined in section 190.70, criminal use of an access device in the second degree as defined in section 190.75, identity theft in the third degree as defined in section 190.78, unlawful possession of a skimmer device in the second degree as defined in section 190.85, official misconduct as defined in section 195.00, killing or injuring a police animal as defined in section 195.06, refusing to aid a peace or police officer as defined in section 195.10, harming an animal trained to aid a person with a disability in the second degree as defined in section 195.11, harming an animal trained to aid a person with a disability in the first degree as defined in section 195.12, escape in the third degree as defined in section 205.05, absconding from temporary release in the second degree as defined in section 205.16, absconding from a furlough program as defined in section 205.18, promoting prison contraband in the second degree as defined in section 205.20, hindering prosecution in the third degree as defined in section 205.55, making an apparently false sworn statement in the second degree as defined in section 210.35, making a punishable false written statement as defined in section 210.45, tampering with a witness in the forth degree as defined in section 215.10, criminal contempt in the second degree as defined in section 215.50, criminal possession of methamphetamine manufacturing material in the second degree as defined in section 220.70, promoting prostitution in the fourth degree as defined in section 230.20, riot in the second degree as defined in section 240.05, inciting to riot as defined in section 240.08, disruption or disturbance of a religious service, funeral, burial or memorial service as defined in section 240.21, harassment in the first degree as defined in section 240.25, criminal nuisance in the second degree as defined by section 240.45, disseminating a false registered sex offender notice as defined

in section 240.48, criminal interference with health care services or religious worship in the second degree as defined in section 240.70, interference, harassment or intimidation of a service animal as defined in section 242.05, harming a service animal in the second degree as defined in section 242.10, dissemination of an unlawful surveillance image in the second degree as defined in section 250.55, non-support of a child in the second degree as defined in section 260.05, misrepresentation by a child day care provider as defined in section 260.31, unlawful fleeing a police officer in a motor vehicle in the third degree as defined in section 270.25 or any specified offense subject to the provision relating to hate crimes as defined in section 485.05 of the penal law. Additionally, an eligible offense shall not include criminal solicitation, conspiracy, attempt, or criminal facilitation to commit any violent felony offense as defined in section 70.02 of the penal law, or any sex offense as defined under subdivision two of section one hundred sixty-eight-a of the correction law. "Eligible offense" shall also include reckless driving, as defined by section twelve hundred twelve of the vehicle and traffic law;

(b) any non-criminal offense; or

(c) any youthful offender adjudication.

2. A person having a conviction for no more than three offenses, who does not stand convicted of any felony, and who is not required to maintain registration under article six-C of the correction law, may petition the court which issued the conviction to conditionally seal up to three eligible offenses when:

(a) at least five years have passed since the completion of a sentence on an eligible offense; and

(b) such person has not been convicted of a penal law offense during the last seven years and is not the subject of an undisposed arrest.

3. The petition authorized by this section shall be filed in the court of record that imposed the sentence upon petitioner for the eligible offense. On the defendant's motion, the court which imposed the sentence for the eligible offense may order that the official records and papers relating to the arrest, prosecution and conviction records for the matter which they disposed of be conditionally sealed. Any sealing ordered pursuant to this section shall also render the associated arrest a nullity. Prior to sealing any arrest records, prosecutions, or convictions:

(a) the sentencing court must request and receive from the division of criminal justice services or the federal bureau of investigation a fingerprint based criminal history record of the defendant, including any sealed or suppressed information. The division of criminal justice services shall also include a criminal history report, if any, from the federal bureau of investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the federal bureau of investigation for this purpose. The parties shall be permitted to examine these records;

(b) the defendant or court must identify the eligible offense or offenses for which relief may be granted;

(c) the court must receive documentation that the sentence imposed on the eligible offense or eligible offenses has been completed, or if no such documentation is reasonably available, a sworn affidavit that the sentences imposed on the prior offenses have been completed;

(d) the defendant must pay a two hundred dollar filing fee. The filing fee may be waived in cases of indigence as determined by the presiding judge.

4. At the request of the defendant or the district attorney the court may conduct a hearing to consider and review any relevant evidence offered by either party that would aid the court in its decision whether to seal the records of the defendant's arrests, prosecutions and convictions. In making such a determination, the court shall consider any relevant factors, including but not limited to:

(a) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions;

(b) the character of the defendant, including what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, school, or other personal history that demonstrates rehabilitation;

(c) the defendant's criminal history;

(d) the defendant's civic service record;

(e) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety; and

(f) any statements made by the victim of the offense where there is in fact a victim of the crime.

5. A decision granting or denying a motion under this section shall be made in writing and shall state the reasons for the court's ruling, unless the court grants the motion without objection or written response by the prosecutor, in which case the court may issue an order without a written decision. If sealing is denied, the applicant may appeal the decision in accordance with subdivision six of this section, or the applicant may reapply after three years.

6. Either party may appeal as of right from the court's order. The appealing party must serve notice of appeal upon the court and the opposing party within thirty days of the issuance of the court order. If the order is appealed by the prosecutor, such notice of appeal shall be deemed a stay of the order to seal the records. The prosecutor shall perfect the appeal within sixty days, or the sealing order shall immediately take effect unless the court grants an extension of the time to perfect the appeal upon good cause shown by the prosecutor. The appeal shall be taken to the same court to which the appeal of the original conviction could have been brought. The standard of review at the intermediary appellate court shall be abuse of discretion. The decision of an intermediary appellate court shall be appealable to the court of appeals upon leave of the court.

7. When a court orders sealing pursuant to this section, all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency; provided, however, the division shall retain any fingerprints, palmprints, photographs, or digital images of the same.

8. When the court orders sealing pursuant to this section, the clerk of such court shall immediately notify the commissioner of the division of criminal justice services and the defendant regarding the records that shall be sealed pursuant to this section.

9. Records sealed pursuant to this subdivision shall be made available to:

(a) the defendant or the defendant's designated agent;

(b) qualified agencies, as defined in subdivision nine of section eight hundred thirty-five of the executive law, and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties except that records may not be used solely for litigation purposes;

(c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or

(d) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto.

10. The court shall not seal the defendant's record pursuant to this section while any charged offense is pending.

11. If, subsequent to the sealing of records pursuant to this subdivision, a person who is the subject of such records is found guilty of any misdemeanor or felony offense, such records shall be unsealed immediately and remain unsealed.

12. The right to make an application under this section may not be waived at the time a guilty plea is entered on any case in New York state.

§ 3. Subdivision 16 of section 296 of the executive law, as separately amended by section 3 of part N and section 14 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.65 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.65 of the criminal procedure law. The provisions of this subdivision shall not apply to the

licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law**, or by a conviction which is sealed pursuant to section 160.65 of the criminal procedure law**.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all convictions occurring prior to, on, and after such date.