STATE OF NEW YORK

6579--A

2019-2020 Regular Sessions

IN SENATE

June 16, 2019

Introduced by Sens. BAILEY, MYRIE -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the penal law and the criminal procedure law, in relation to vacating records for certain proceedings; and to amend the public health law, in relation to the definition of smoking

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

Section 1. Section 221.05 of the penal law, as added by chapter 360 of the laws of 1977, is amended to read as follows:

§ 221.05 Unlawful possession of marihuana **in the second degree**.

A person is guilty of unlawful possession of marihuana **in the second degree** when he knowingly and unlawfully possesses marihuana.

Unlawful possession of marihuana **in the second degree** is a violation punishable only by a fine of not more than [~~one hundred~~] **fifty** dollars. [~~However, where the defendant has previously been convicted of an offense defined in this article or article 220 of this chapter, committed within the three years immediately preceding such violation, it shall be punishable (a) only by a fine of not more than two hundred dollars, if the defendant was previously convicted of one such offense committed during such period, and (b) by a fine of not more than two hundred fifty dollars or a term of imprisonment not in excess of fifteen days or both, if the defendant was previously convicted of two such offenses committed during such period.~~]

§ 2. Section 221.10 of the penal law, as amended by chapter 265 of the laws of 1979 and subdivision 2 as amended by chapter 75 of the laws of 1995, is amended to read as follows:

§ 221.10 [~~Criminal~~] **Unlawful** possession of marihuana in the [~~fifth~~] **first** degree.

A person is guilty of [~~criminal~~] **unlawful** possession of marihuana in the [~~fifth~~] **first** degree when he knowingly and unlawfully possesses[~~:~~

~~1. marihuana in a public place, as defined in section 240.00 of this chapter, and such marihuana is burning or open to public view; or~~

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

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~~2.~~] one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than [~~twenty-five grams~~] **one ounce**.

[~~Criminal~~] **Unlawful** possession of marihuana in the [~~fifth~~] **first** degree is a [~~class B misdemeanor~~] **violation punishable only by a fine of not more than two hundred dollars**.

§ 3. Subparagraph (ii) of paragraph (i) and paragraph (j) of subdivision 1 of section 440.10 of the criminal procedure law, subparagraph (ii) of paragraph (i) as amended by section 3 of part OO of chapter 55 of the laws of 2019, paragraph (j) as amended by section 2 of part MMM of chapter 59 of the laws of 2019, are amended and a new paragraph (k) is added to read as follows:

(ii) official documentation of the defendant's status as a victim of trafficking, compelling prostitution or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking, compelling prostitution or trafficking in persons, but shall not be required for granting a motion under this paragraph; [~~or~~]

(j) The judgment is a conviction for a class A or unclassified misdemeanor entered prior to the effective date of this paragraph and satisfies the ground prescribed in paragraph (h) of this subdivision. There shall be a rebuttable presumption that a conviction by plea to such an offense was not knowing, voluntary and intelligent, based on ongoing collateral consequences, including potential or actual immigration consequences, and there shall be a rebuttable presumption that a conviction by verdict constitutes cruel and unusual punishment under section five of article one of the state constitution based on such consequences[~~.~~]**; or**

(k) The judgment occurred prior to the effective date of this paragraph and is a conviction for an offense as defined by section 221.05 or 221.10 of the penal law as in effect prior to the effective date of this paragraph in which case the court shall grant the motion.

§ 4. Subdivision 6 of section 440.10 of the criminal procedure law, as added by chapter 332 of the laws of 2010, is amended to read as follows:

6. If the court grants a motion under paragraph (i) **or paragraph (k)** of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances.

§ 5. Paragraph (k) of subdivision 3 of section 160.50 of the criminal procedure law, as added by chapter 835 of the laws of 1977 and as relettered by chapter 192 of the laws of 1980, is amended to read as follows:

(k) [~~(i)~~] The accusatory instrument alleged a violation of [~~article two hundred twenty or section 240.36 of the penal law, prior to the taking effect of article two hundred twenty-one of the penal law, or a violation of article two hundred twenty-one of the penal law; (ii) the sole controlled substance involved is marijuana; (iii) the conviction was only for a violation or violations; and (iv) at least three years have passed since the offense occurred.~~]**:**

(i) article two hundred twenty or section 240.36 of the penal law prior to the effective date of article two hundred twenty-one of the penal law, and the sole controlled substance involved was marihuana and the conviction was only for a violation or violations; or

(ii) section 221.05 or 221.10 of the penal law prior to the effective date of the chapter of laws of two thousand nineteen that amended this section; or

(iii) section 221.05 or 221.10 of the penal law.

No defendant shall be required or permitted to waive eligibility for sealing pursuant to this paragraph as part of a plea of guilty, sentence or any agreement related to a conviction for a violation of section 221.05 or section 221.10 of the penal law and any such waiver shall be deemed void and wholly unenforceable.

§ 6. Section 1.20 of the criminal procedure law is amended by adding a new subdivision 45 to read as follows:

45. "Expunge" means, where an arrest and any enforcement activity connected with that arrest, including prosecution and any disposition in any New York state court, is deemed a nullity and the accused is restored, in contemplation of the law, to the status such individual occupied before the arrest, prosecution and/or disposition; that records of such arrest, prosecution and/or disposition shall be marked as expunged or shall be destroyed as set forth in section 160.50 of this chapter. Neither the arrest nor prosecution and/or disposition, if any, of a matter deemed a nullity shall operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest, prosecution and/or disposition of such a matter.

§ 7. Section 160.50 of the criminal procedure law is amended by adding a new subdivision 5 to read as follows:

5. (a) Expungement of certain marihuana-related records. Where an accusatory instrument alleged an offense described in paragraph (k) of subdivision three of this section, such count or counts of the accusatory instrument in such criminal action or proceeding shall, on the effective date of this paragraph, in accordance with the provisions of this paragraph, be vacated and dismissed, and all records of such count or counts and, in the absence of any other valid count or counts, all records of such action or proceeding shall be expunged, as described in subdivision forty-five of section 1.20 of this chapter, and the matter shall be considered terminated in favor of the accused and deemed a nullity, having been rendered by this paragraph legally invalid.

(b) Duties of certain state officials and law enforcement agencies. Commencing upon the effective date of this paragraph:

(i) the chief administrator of the courts shall promptly notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies of all counts that have been vacated and dismissed pursuant to paragraph (a) of this subdivision and that, in the absence of any other valid count or counts, all records of such action or proceeding shall be expunged and the matter shall be considered terminated in favor of the accused and deemed a nullity, having been rendered legally invalid. Upon receipt of notification of such vacatur, dismissal and expungement, all records relating to such count or counts, or the criminal action or proceeding, as the case may be, shall be marked as expunged by conspicuously indicating on the face of the record and on each page or at the beginning of the digitized file of the record that the record has been designated as expunged. Upon the written request of the individual whose case has been expunged or their designated agent, such records shall be destroyed. Such records and papers shall not be made available to any

person, except the individual whose case has been expunged or such person's designated agent; and

(ii) where automatic vacatur, dismissal, and expungement, including record destruction if requested, is required by this subdivision but any record of the court system in this state has not yet been updated to reflect same (A) notwithstanding any other provision of law except as provided in paragraph (d) of subdivision one of this section and paragraph (e) of subdivision four of section eight hundred thirty-seven of the executive law: (1) when the division of criminal justice services conducts a search of its criminal history records, maintained pursuant to subdivision six of section eight hundred thirty-seven of the executive law, and returns a report thereon, all references to a conviction for an offense described in paragraph (k) of subdivision three of this section shall be excluded from such report; and (2) the chief administrator of the courts shall develop and promulgate rules as may be necessary to ensure that no written or electronic report of a criminal history record search conducted by the office of court administration contains information relating to a conviction for an offense described in paragraph (k) of subdivision three of this section; and (B) where court records relevant to such matter cannot be located or have been destroyed, and a person or the person's attorney presents to an appropriate court employee a fingerprint record of the New York state division of criminal justice services, or a copy of a court disposition record or other relevant court record, which indicates that a criminal action or proceeding against such person was terminated by conviction of an offense described in paragraph (k) of subdivision three of this section, then promptly, and in any event within thirty days after such notice to such court employee, the chief administrator of the courts or his or her designee shall assure that such vacatur, dismissal, and expungement, including record destruction if requested, have been completed in accordance with subparagraph (i) of this paragraph.

(c) Vacatur, dismissal and expungement as set forth in this subdivision is without prejudice to any person or such person's attorney seeking further relief pursuant to article four hundred forty of this chapter or any other law. Nothing in this section is intended or shall be interpreted to diminish or abrogate any right or remedy otherwise available to any person.

(d) The office of court administration, in conjunction with the division of criminal justice services, shall develop an affirmative information campaign and widely disseminate to the public, through its website, public service announcements and other means, in multiple languages and through multiple outlets, information concerning the expungement, vacatur and resentencing of marihuana convictions established by the chapter of the laws of two thousand nineteen that added this paragraph, including, but not limited to, the automatic expungement of certain past convictions, the means by which an individual may file a motion for vacatur, dismissal and expungement of certain past convictions, and the impact of such changes on such person's criminal history records.

§ 8. Subdivision 8 of section 1399-n of the public health law, as amended by chapter 13 of the laws of 2003, is amended to read as follows:

8. "Smoking" means the burning of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco or marihuana as defined in section thirty-three hundred two of this chapter.

§ 9. This act shall take effect on the thirtieth day after it shall have become a law.