STATE OF NEW YORK

8165

IN SENATE

April 13, 2020

Introduced by Sen. MYRIE -- 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 automatic expungement of certain criminal records; and to repeal certain provisions of the criminal procedure law relating thereto

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

Section 1. Section 160.59 of the criminal procedure law is REPEALED and a new section 160.57 is added to read as follows:

§ 160.57 Automatic expungement of certain criminal records.

1. As used in this section, "eligible conviction" shall mean a violation of subdivision one of section one thousand one hundred ninety-two of the vehicle and traffic law or a violation of subdivision two of section 240.37 of the penal law or any crime defined in the laws of this state other than a sex offense defined in article one hundred thirty of the penal law, an offense defined in article two hundred sixty-three of the penal law, a felony offense defined in article one hundred twenty-five of the penal law, a violent felony offense defined in section 70.02 of the penal law, a class A felony offense defined in the penal law, a felony offense defined in article one hundred five of the penal law where the underlying offense is not an eligible offense, an attempt to commit an offense that is not an eligible offense if the attempt is a felony, or an offense for which registration as a sex offender is required pursuant to article 6-C of the correction law. For the purposes of this section, where the individual is convicted of more than one eligible offense, committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter, those offenses shall be considered one eligible offense.

2. For the purposes of subdivision three of this section, an eligible conviction shall be expunged:

(a) When at least three years have passed since the imposition of the sentence on the individual's eligible conviction if the eligible

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

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conviction is for a violation specified in subdivision one of this section or a misdemeanor offense, and the individual:

(i) does not have a criminal charge pending within the state;

(ii) is not currently under the supervision of any probation or parole department; and

(iii) has not been convicted within the state of either: (A) another misdemeanor offense or a violation of subdivision one of section one thousand one hundred ninety-two of the vehicle and traffic law or subdivision two of section 240.37 of the penal law within the preceding three years; or (B) any felony offense within the preceding five years.

(b) When at least five years have passed since the imposition of the sentence on the individual's eligible conviction if the eligible conviction is for a felony offense, and the individual:

(i) does not have a criminal charge pending within the state;

(ii) is not currently under the supervision of any probation or parole department; and

(iii) has not been convicted within the state of either: (A) another felony offense within the preceding five years; or (B) any misdemeanor offense or a violation of subdivision one of section one thousand one hundred ninety-two of the vehicle and traffic law or subdivision two of section 240.37 of the penal law within the preceding three years.

(c) In calculating the time periods under this subdivision, any period of time during which the individual was incarcerated shall be excluded and such time period shall be extended by a period equal to the time served under such incarceration.

3. Where an individual was convicted within the state of an eligible conviction before, on, or after the effective date of this section and the requirements for expungement, as defined in subdivision two of this section, are satisfied, the commissioner of the division of criminal justice services shall immediately notify the clerk of the court where such conviction was rendered and the heads of all appropriate police departments, prosecutors' offices and law enforcement agencies that records of or relating to such action or proceeding be immediately expunged as follows:

(a) every photograph of such person and photographic plate or proof, and all palmprints, fingerprints and retina scans taken or made of such person pursuant to the provisions of this article in regard to the eligible conviction, and all duplicates and copies thereof, except a digital fingerprint image where authorized pursuant to paragraph (e) of this subdivision, shall forthwith be destroyed by the division of criminal justice services and by any police department, prosecutor's office or law enforcement agency having any such photograph, photographic plate or proof, palmprint, fingerprints or retina scans in its possession or under its control;

(b) every police department, prosecutor's office or law enforcement agency, including the division of criminal justice services, which transmitted or otherwise forwarded to any agency of the United States or of any other state or of any other jurisdiction outside the state copies of any such photographs, photographic plates or proofs, palmprints, fingerprints or retina scans shall forthwith formally inform such agency in writing that the matter has been expunged and request in writing that all such copies be destroyed;

(c) every official record and paper and duplicates and copies thereof, including, but not limited to, judgments and orders of a court but not including published court decisions or opinions or published records and published briefs on appeal, relating to the conviction, on file with the

division of criminal justice services or any court, police department, prosecutor's office or law enforcement agency shall be marked as expunged by conspicuously indicating on the face of the record or at the beginning of the digitized file of the record that the record has been designated as expunged. Except as set forth in paragraph (d) of this subdivision, such records and papers shall be marked as expunged and sealed and not be made available to any person or public or private agency, even if the records were previously obtained by such person or public or private agency. Except as set forth in paragraph (d) of this subdivision, and in such instances specifically authorized by law, such records shall not be used to confirm the existence of an expunged conviction, to create any record thereof, or for any other purpose;

(d) records set forth in paragraph (c) of this subdivision shall be made available to the individual or to such individual's attorney, and shall be made available to: (i) the court and the prosecution for charging and sentencing purposes only if the fact of a prior conviction would enhance a penalty or is an element of the offense charged; (ii) the court, the prosecution, and the defense if the individual becomes a witness in a proceeding; (iii) the prosecution and the defense for purposes of meeting the requirements of article two hundred forty-five of this chapter; (iv) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the individual has made application for such a license; or (v) 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; and

(e) where fingerprints subject to the provisions of this section have been received by the division of criminal justice services and have been filed by the division of criminal justice services as digital images, such images may be retained, provided that a fingerprint card of the individual is on file with the division of criminal justice services which was not destroyed pursuant to this section.

4. A conviction which is expunged pursuant to this section is not included within the definition of a conviction for the purposes of any subsequent criminal proceeding, except as specified under subdivision three of this section.

5. In situations where automatic expungement and record destruction is required by subdivisions two and three of this section but has not taken place, or where supporting court records cannot be located or have been destroyed, and an individual or their attorney submits notification of such fact to the division of criminal justice services, as prescribed in subdivision twenty-two of section eight hundred thirty-seven of the executive law, within thirty days of such notice to the division of criminal justice services, the conviction shall be expunged as set forth in subdivision three of this section.

6. No person shall be required or permitted to waive eligibility for expungement pursuant to this section as part of a plea of guilty, sentence or any agreement with the prosecution. Any such waiver shall be deemed void and wholly unenforceable.

7. Expungement as set forth in subdivision three of this section is without prejudice to an individual or their attorney seeking further relief pursuant to section 440.10 of this part. Nothing in this section

shall diminish or abrogate any rights or remedies otherwise available to the individual.

8. Notwithstanding any other provision of law, except as provided in paragraph (d) of subdivision three of this section and paragraph (e) of subdivision four of section eight hundred thirty-seven of the executive law, where automatic expungement of a conviction is required by this section but any court record or any record held by the division of criminal justice services has not yet been updated to reflect the same, the conviction shall be excluded from any written or electronic report run by the division of criminal justice services or office of court administration.

9. All records for a conviction subject to automatic expungement under this section where the conviction was entered on or before the effective date of this section shall be expunged promptly and, in any event, no later than one year after such effective date.

§ 2. Subdivision 45 of section 1.20 of the criminal procedure law, as added by chapter 131 of the laws of 2019, is amended to read as follows:

45. [~~"Expunge"~~] "To 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~~] as set forth in section 160.50 or 160.57 of this title, to destroy, or to mark as expunged, seal and not make available to any person or public or private agency, all records, including all official records and papers, of such arrest, prosecution and disposition. An expunged conviction shall not 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.

§ 3. Section 837 of the executive law is amended by adding a new subdivision 22 to read as follows:

22. Promulgate a standardized form for use by individuals to notify the division of convictions subject to expungement under section 160.57 of the criminal procedure law, but for which the division has not expunged related records.

§ 4. Subdivision 16 of section 296 of the executive law, as amended by section 2 of subpart O of part II of chapter 55 of the laws of 2019, 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 an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 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 160.59 or 160.58 of the criminal procedure law, **or by a conviction which is expunged pursuant to section 160.57 of the criminal procedure law,** in connection with the licensing, housing, employment, including volunteer positions, 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 an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 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 or 160.59 of the criminal procedure law**, or by a conviction which is expunged pursuant to section 160.57 of the criminal procedure law**. An individual required or requested to provide information in violation of this subdivision may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur. 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 **expunged pursuant to section 160.57 of the criminal procedure law, or by a conviction which is** sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. For purposes of this subdivision, an action which has been adjourned in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, shall not be considered a pending action, unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution.

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