STATE OF NEW YORK

247

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

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, in relation to eligibility for conviction sealing for certain applicants

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, as added by section 48 of part WWW of chapter 59 of the laws of 2017 and paragraph (a) of subdivision 2 and subdivision 11 as amended by chapter 60 of the laws of 2017, is amended to read as follows:

§ 160.59 Sealing of certain convictions.

1. Definitions: As used in this section, the following terms shall have the following meanings:

(a) "Eligible offense" shall mean **a violation of subdivision one of section eleven 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 six-C of the correction law. For the purposes of this section, where the [~~defendant~~] **applicant** 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~~

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

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~~considered one eligible offense~~] charged in more than one count in the same indictment, information or complaint, or where the applicant was convicted of more than one eligible offense charged in multiple indictments, informations or complaints filed in the same court prior to the entry of judgment on any of such indictments, informations or complaints, all such offenses shall be considered one eligible offense.

(b) "Sentencing judge" shall mean the judge who pronounced sentence upon the conviction under consideration, or if that judge is no longer sitting in a court in the jurisdiction in which the conviction was obtained, any other judge who is sitting in the criminal court where the judgment of conviction was entered.

(c) "Prosecutor" shall mean the prosecutor's office that prosecuted the eligible offense.

1-a. The chief administrator of the courts shall, pursuant to section 10.40 of this chapter, prescribe a form application which may be used by a defendant to apply for sealing pursuant to this section. Such form application shall include all the essential elements required by this section to be included in an application for sealing. Nothing in this subdivision shall be read to require a defendant to use such form application to apply for sealing.

2. (a) [~~A defendant~~] An individual who has been convicted of up to [~~two~~] five eligible criminal offenses but not more than [~~one~~] two felony [~~offense~~] offenses may apply to the court in which he or she was convicted of the most serious eligible offense to have such conviction or convictions sealed. If all offenses are offenses with the same classification, the application shall be made to the court in which the [~~defendant~~] applicant was last convicted.

(b) An application shall contain (i) a copy of a certificate of disposition or other similar documentation for any offense for which the [~~defendant~~] applicant has been convicted, or an explanation of why such certificate or other documentation is not available; (ii) a sworn statement of the [~~defendant~~] applicant as to whether he or she has filed, or then intends to file, any application for sealing of any other eligible offense; (iii) a copy of any other such application that has been filed; and (iv) a sworn statement as to the conviction or convictions for which relief is being sought[~~; and (v)~~]. Applicants may submit a sworn statement of the reason or reasons why the court should, in its discretion, grant such sealing, along with any supporting documentation.

(c) A copy of any application for such sealing shall be served upon the [~~district attorney of the county in which the conviction, or, if more than one, the convictions, was or were obtained~~] prosecutor that prosecuted the eligible offense for which a conviction was obtained. The [~~district attorney~~] prosecutor shall notify the court within forty-five days if he or she objects to the application for sealing. Failure to object within this period shall indicate consent to the application.

(d) When such application is filed with the court, it shall be assigned to the sentencing judge unless more than one application is filed in which case the application shall be assigned to the local court, county court or the supreme court of the county in which the criminal court is located, who shall request and receive from the division of criminal justice services a fingerprint based criminal history record of the [~~defendant~~] applicant, including any sealed or suppressed records. The division of criminal justice services also shall 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 infor-

mation from the federal bureau of investigation for this purpose, and to make such information available to the court, which may make this information available to the district attorney and the [~~defendant~~] applicant.

3. The sentencing judge, or local, county or supreme court shall summarily deny the [~~defendant's~~] applicant's application when:

(a) the [~~defendant~~] applicant is required to register as a sex offender pursuant to article six-C of the correction law; or

(b) the [~~defendant~~] applicant has previously obtained sealing of the maximum number of convictions allowable under section 160.58 of [~~the criminal procedure law~~] this article; or

(c) the [~~defendant~~] applicant has previously obtained sealing of the maximum number of convictions allowable under subdivision four of this section; or

(d) the time period specified in subdivision five of this section has not yet been satisfied; or

(e) the [~~defendant~~] applicant has an undisposed arrest or charge pending; or

(f) the [~~defendant~~] applicant was convicted of any crime that is not eligible for sealing under this section after the date of the entry of [~~judgement~~] judgment of the last conviction for which sealing is sought; or

(g) [~~the defendant has failed to provide the court with the required sworn statement of the reasons why the court should grant the relief requested; or~~

~~(h)~~] the [~~defendant~~] applicant has been convicted of [~~two~~] three or more felonies or more than [~~two~~] five crimes.

4. Provided that the application is not summarily denied for the reasons set forth in subdivision three of this section, [~~a defendant~~] an applicant who stands convicted of up to [~~two~~] five eligible criminal offenses[~~,~~] may obtain sealing of violations of subdivision one of section eleven hundred ninety-two of the vehicle and traffic law and subdivision two of section 240.37 of the penal law, and no more than [~~two~~] five eligible offenses but not more than [~~one~~] two felony [~~offense~~] offenses.

5. Any eligible offense may be sealed only after [~~at least ten years have passed since the imposition of the sentence on the defendant's latest conviction or, if the defendant was sentenced to a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation, the defendant's latest release from incarceration. In calculating the ten year period under this subdivision, any period of time the defendant spent incarcerated after the conviction for which the application for sealing is sought, shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.~~]:

(a) at least one year has passed since the date of applicant's latest conviction if the applicant was last convicted of a misdemeanor or violation offense. In calculating this period, any period of time the applicant spent incarcerated for this conviction, including a period of incarceration imposed in conjunction with a sentence of probation, shall be excluded and such one year period shall be extended by a period equal to the time served under such incarceration; or

(b) at least three years have passed since the date of applicant's latest conviction if the applicant was last convicted of a felony offense. In calculating this period, any period of time the applicant spent incarcerated for this conviction, including a period of incarceration imposed in conjunction with a sentence of probation, shall be

excluded and such three year period shall be extended by a period equal to the time served under such incarceration.

6. Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section and that the application is opposed by the [~~district attorney~~] prosecutor, the sentencing judge or local, county or supreme court shall [~~conduct a hearing on the application in order to consider any evidence offered by either party that would aid the sentencing judge in his or her decision whether to seal the records of the defendant's convictions. No hearing is required if the district attorney does not oppose the application~~] inform the applicant of his or her right to supplement their application with additional materials that would aid the sentencing judge in his or her decision or to a hearing on the application in order to consider arguments by either party that would aid the sentencing judge in his or her decision. Once the applicant indicates whether he or she intends to proceed with or without supplementation or a hearing, the sentencing judge or local, county or supreme court, may proceed.

7. [~~In considering any such application, the sentencing judge or county or supreme court shall consider any relevant factors, including but not limited to:~~

~~(a) the amount of time that has elapsed since the defendant's last conviction;~~

~~(b) the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was not an eligible offense;~~

~~(c) the circumstances and seriousness of any other offenses for which the defendant stands convicted;~~

~~(d) the character of the defendant, including any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work, or schooling, and participating in community service or other volunteer programs;~~

~~(e) any statements made by the victim of the offense for which the defendant is seeking relief;~~

~~(f) the impact of sealing the defendant's record upon his or her rehabilitation and upon his or her successful and productive reentry and reintegration into society; and~~

~~(g) the impact of sealing the defendant's record on public safety and upon the public's confidence in and respect for the law~~] Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section, the sentencing judge or local, county or supreme court shall order sealing, unless the prosecutor shows by clear and convincing evidence that exceptional circumstances weigh against such relief. In determining whether exceptional circumstances exist the court shall consider if the sealing would create an unreasonable risk to public safety, balanced against the benefit of sealing the record upon the applicant's successful and productive reentry and reintegration into society.

8. When a sentencing judge or local, county or supreme court orders sealing pursuant to this section, all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, 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, police agency or prosecutor's office shall be sealed and not made available to any person or public or private agency except as provided for in subdivision nine of this section; provided, however, the

division shall retain any fingerprints, palmprints and photographs, or digital images of the same. The clerk of such court shall immediately notify the commissioner of the division of criminal justice services, the heads of all appropriate police departments and other law enforcement agencies, regarding the records that shall be sealed pursuant to this section. The clerk also shall notify any court in which the [~~defendant~~] applicant has stated, pursuant to paragraph (b) of subdivision two of this section, that he or she has filed or intends to file an application for sealing of any other eligible offense.

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

(a) the [~~defendant~~] applicant or the [~~defendant's~~] applicant'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; or

(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; or

(e) the criminal justice information services division of the federal bureau of investigation, for the purposes of responding to queries to the national instant criminal background check system regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 USC 921 (a) (3).

10. [~~A conviction which is sealed pursuant to this section is included within the definition of a conviction for the purposes of any criminal proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged.~~

~~11.~~] No [~~defendant~~] person shall be required or permitted to waive eligibility for sealing pursuant to this section as part of a plea of guilty, sentence or any agreement related to a conviction for an eligible offense and any such waiver shall be deemed void and wholly unenforceable.

11. Denial under this section is without prejudice to subsequent relief under this section.

12. An application under this section, and all pertinent papers and documents, shall be confidential and may not be made available to any person or public or private agency except where specifically authorized by the court.

§ 2. This act shall take effect immediately.