

Virginia State Crime Commission

Expungement of Criminal Conviction Records

2009

EXPUNGEMENT OF CRIMINAL CONVICTION RECORDS

During the 2009 Regular Session of the Virginia General Assembly, Senator Donald A. McEachin introduced Senate Bill 1289, which would have allowed, for the first time in Virginia, certain defendants convicted of a crime to have their records expunged after five years from the date of conviction. The bill was referred to the Senate Courts of Justice Committee, where it was passed by unanimously. The subject matter of Senate Bill 1289 was referred to the Crime Commission for study.

STATUTORY PROVISIONS

The procedure for the expungement of criminal records in Virginia is governed by Virginia Code §§ 19.2-392.1 and 19.2-392.2. These Code sections were originally enacted in 1977, and have remained essentially unchanged since that time. Virginia Code § 19.2-392.1 provides the “statement of policy” concerning expungements in Virginia:

The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education and to obtain credit. It further finds that the police and court records of those of its citizens who have been absolutely pardoned for crimes for which they have been unjustly convicted can also be a hindrance. This chapter is intended to protect such persons from the unwarranted damage which may occur as a result of being arrested and convicted.

Virginia Code § 19.2-392.2 further clarifies this general policy statement, specifically limiting the expungement process to cases where the defendant was acquitted, the charge was *nolle prosequied*, the charge was dismissed, including dismissals involving an accord and satisfaction, the defendant received an absolute pardon from the governor, or the charge was dismissed pursuant to a writ of actual innocence.

A person seeking the expungement of their criminal charge must file a petition with the circuit court of the county or city where the charge was disposed of or dismissed. A copy of the petition must be served on the Common-

wealth's Attorney for that jurisdiction. In addition, the petitioner must contact a law enforcement agency and arrange for a copy of his criminal record to be sent to the court where the petition is pending. At the hearing on the petition, the circuit court must find 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.” It should be noted that the Commonwealth's Attorney is free to argue against the petition, even if the charge was dismissed in one of the ways that would qualify for the expungement. If the circuit court makes a determination that the petitioner has met his burden of proof, it shall order that all police and court records, including all electronic records, relating to the charge be expunged. Either the petitioner or the Commonwealth's Attorney may appeal the decision of the circuit court up to the Supreme Court of Virginia.

There are three circumstances in which the circuit court must grant the expungement to the petitioner. One is in instances of mistaken identity, when the petitioner was arrested even though another person was the subject of the arrest warrant. The second is when the petitioner has been granted an absolute pardon by the Governor. The third is when the petitioner has been granted a writ of actual innocence. Also, in instances where the petitioner has no prior criminal record and the arrest was for a misdemeanor violation, there is a statutory presumption that the expungement should be granted, “in the absence of good cause shown to the contrary by the Commonwealth.”

There are no provisions for an expungement in cases where the petitioner was found guilty of the crime. By statute, an expungement is also not available to anyone who receives a “first offender” disposition in a domestic assault case, even if the charge is then dismissed at a later date. Any expungement order that is entered where either the court or the parties failed to strictly comply with the procedures set forth by statute, or where the order itself is contrary to law, is voidable upon motion and notice made within three years after the order was signed.

CASE LAW

The Supreme Court of Virginia has ruled repeatedly that not only is expungement not

available to those who were found guilty of the offense, it is only available to those who are actually innocent. Therefore, an expungement is not available to a petitioner who had his drug possession charge dismissed under a "first offender" disposition, where he originally plead guilty, successfully completed probation, and then had the charge dismissed. In Gregg v. Commonwealth, the Supreme Court held "the expungement statute applies to innocent persons, not those who are guilty. Under the first offender statute, probation and ultimate dismissal is conditioned on a plea of guilty or a finding of guilt...One who is guilty cannot occupy the status of innocent." The Supreme Court has also ruled that expungement is not available to anyone who plead "no contest" in a criminal case, if the trial court then accepted the plea and found there was sufficient evidence to support a conviction. Lastly, an expungement is not available to anyone who accepted a deferred disposition in his criminal case. Some circuit courts have even refused to expunge a criminal charge that is otherwise eligible for expungement, if the petitioner has a previous conviction for a different offense.

POLICY CONSIDERATIONS RAISED BY SENATE BILL 1289

Senate Bill 1289 would expand the expungement process in Virginia to include certain criminal convictions, including drug convictions. Because the policy in Virginia over the past thirty-two years has been to restrict expungements to those who were actually innocent of the crime with which they were charged, Senate Bill 1289 would be a radical departure.

One of the main policy concerns with allowing the expungement of drug convictions, and other crimes which have "first offender" dispositions available, is that repeat criminals might obtain multiple instances of lenient treatment and never receive a permanent conviction. Unless a database of expungement records is readily available to law enforcement or prosecutors, a prosecuting jurisdiction could be completely unaware that the defendant had previously been convicted of the same offense in another jurisdiction, received a dismissal pursuant to a "first offender" program, and then had his record expunged.

Currently, though, there is no readily available database of expungement records in the Commonwealth. On the contrary, when a circuit court grants an expungement, it sends a copy of its order to the Virginia State Police. They, in turn, follow regulations to attempt to ensure that the record being expunged is removed from all databases, both state and federal. Once the record has been expunged, access to both it and the order of expungement are extremely restricted; the State Police, which keep these sealed records, will never open them, even for an internal inspection, unless they receive a court order issued by the circuit court that originally granted the expungement.

Therefore, if Virginia changed its expungement policy, yet wished to prevent the possibility of having some criminal defendants take advantage of the system by receiving multiple "first offender" dispositions or unfairly lenient sentences, it would have to direct the State Police to modify the handling of expunged records. While this is possible, decisions would have to be made by the legislature as to who would have access to these "semi-sealed" files, and what process would be used to obtain them. Would only prosecutors have access, or also law enforcement? Would access be granted, or a copy of the sealed record be delivered to the requester, only after the State Police had received a letter? Or, should some sort of court order be required? Or, would some type of computer network system, similar to the VCIN system, be feasible? Depending upon the options chosen, there could be a substantial fiscal impact on the Commonwealth.

CONCLUSION

At its December 15th meeting, the Crime Commission was presented with a draft bill to allow certain criminal convictions to be expunged, based upon Senate Bill 1289. No formal recommendation was made by the Commission.