

HOUSE BILL No. 5393

December 30, 2003, Introduced by Reps. Waters, Richardville, Phillips, McConico, Daniels and Hardman and referred to the Committee on Criminal Justice.

A bill to amend 1965 PA 213, entitled

"An act to provide for setting aside the conviction in certain criminal cases; to provide for the effect of such action; to provide for the retention of certain nonpublic records and their use; to prescribe the powers and duties of certain public agencies and officers; and to prescribe penalties,"

by amending sections 1, 2, and 3 (MCL 780.621, 780.622, and 780.623), section 1 as amended by 2002 PA 472 and sections 2 and 3 as amended by 1994 PA 294, and by adding section 1b.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. (1) Except as provided in subsection (2), a person
2 who is convicted of not more than 1 offense may file an
3 application with the convicting court for the entry of an order
4 setting aside the conviction.

5 (2) A person shall not apply to have set aside, and a judge
6 shall not set aside, a conviction for a felony for which the
7 maximum punishment is life imprisonment or an attempt to commit a

1 felony for which the maximum punishment is life imprisonment, a
2 conviction for a violation or attempted violation of section
3 520c, 520d, or 520g of the Michigan penal code, 1931 PA 328, MCL
4 750.520c, 750.520d, and 750.520g, or a conviction for a traffic
5 offense.

6 (3) ~~An~~ **Except as provided in section 1b, an** application
7 shall not be filed until at least 5 years following imposition of
8 the sentence for the conviction that the applicant seeks to set
9 aside or 5 years following completion of any term of imprisonment
10 for that conviction, whichever occurs later.

11 (4) The application is invalid unless it contains the
12 following information and is signed under oath by the person
13 whose conviction is to be set aside:

14 (a) The full name and current address of the applicant.

15 (b) A certified record of the conviction that is to be set
16 aside.

17 (c) A statement that the applicant has not been convicted of
18 an offense other than the one sought to be set aside as a result
19 of this application.

20 (d) A statement as to whether the applicant has previously
21 filed an application to set aside this or any other conviction
22 and, if so, the disposition of the application.

23 (e) A statement as to whether the applicant has any other
24 criminal charge pending against him or her in any court in the
25 United States or in any other country.

26 (f) A consent to the use of the nonpublic record created
27 under section 3 to the extent authorized by section 3.

1 (5) The applicant shall submit a copy of the application and
2 2 complete sets of fingerprints to the department of state
3 police. The department of state police shall compare those
4 fingerprints with the records of the department, including the
5 nonpublic record created under section 3, and shall forward a
6 complete set of fingerprints to the federal bureau of
7 investigation for a comparison with the records available to that
8 agency. The department of state police shall report to the court
9 in which the application is filed the information contained in
10 the department's records with respect to any pending charges
11 against the applicant, any record of conviction of the applicant,
12 and the setting aside of any conviction of the applicant and
13 shall report to the court any similar information obtained from
14 the federal bureau of investigation. The court shall not act
15 upon the application until the department of state police reports
16 the information required by this subsection to the court.

17 (6) The copy of the application submitted to the department
18 of state police under subsection (5) shall be accompanied by a
19 fee of \$50.00 payable to the state of Michigan which shall be
20 used by the department of state police to defray the expenses
21 incurred in processing the application.

22 (7) A copy of the application shall be served upon the
23 attorney general and upon the office of the prosecuting attorney
24 who prosecuted the crime, and an opportunity shall be given to
25 the attorney general and to the prosecuting attorney to contest
26 the application. If the conviction was for an assaultive crime
27 or a serious misdemeanor, the prosecuting attorney shall notify

1 the victim of the assaultive crime or serious misdemeanor of the
2 application pursuant to section 22a or 77a of the crime victim's
3 rights act, 1985 PA 87, MCL 780.772a and 780.827a. The notice
4 shall be by first-class mail to the victim's last known address.
5 The victim has the right to appear at any proceeding under this
6 act concerning that conviction and to make a written or oral
7 statement.

8 (8) Upon the hearing of the application the court may require
9 the filing of affidavits and the taking of proofs as it considers
10 proper.

11 (9) If the court determines that the circumstances and
12 behavior of the applicant from the date of the applicant's
13 conviction to the filing of the application warrant setting aside
14 the conviction and that setting aside the conviction is
15 consistent with the public welfare, the court may enter an order
16 setting aside the conviction. The setting aside of a conviction
17 under this act is a privilege and conditional and is not a
18 right.

19 (10) As used in this section:

20 (a) "Assaultive crime" means that term as defined in section
21 9a of chapter X of the code of criminal procedure, 1927 PA 175,
22 MCL 770.9a.

23 (b) "Serious misdemeanor" means that term as defined in
24 section 61 of the crime victim's rights act, 1985 PA 87, MCL
25 780.811.

26 (c) "Victim" means that term as defined in section 2 of the
27 crime victim's rights act, 1985 PA 87, MCL 780.752.

1 Sec. 1b. (1) An individual who is convicted of any crime
2 that may be set aside under this act and who has successfully
3 completed all terms of probation imposed by the court for that
4 conviction or who has been discharged from parole, but who is
5 prohibited from having his or her conviction set aside under
6 section 1(3), may apply at any time under this section to have
7 his or her conviction conditionally set aside.

8 (2) If a person applies under this section to have his or her
9 conviction conditionally set aside, the court shall follow the
10 procedures otherwise specified in this act for setting aside a
11 conviction, except as follows:

12 (a) If the court determines the individual is eligible to
13 have his or her conviction set aside, the court shall issue an
14 order conditionally setting aside the conviction for a period of
15 4 years. The court shall retain jurisdiction of the case during
16 that 4-year period.

17 (b) If the individual commits any misdemeanor or felony in
18 this state or elsewhere during the 4-year period specified in
19 subdivision (a), the court shall dismiss the petition to set
20 aside the conviction and order the individual permanently
21 ineligible to have that conviction set aside.

22 (c) If the individual does not commit any misdemeanor or
23 felony in this state or elsewhere during the 4-year period
24 specified in subdivision (a), the court shall order the
25 conviction set aside as otherwise provided under this act.

26 (3) A conviction that is temporarily set aside under this
27 section is considered for all other purposes of this act to be

1 **set aside during that 4-year period.**

2 Sec. 2. (1) Upon the entry of an order pursuant to section
3 **1 or section 1b**, the applicant, for purposes of the law, shall be
4 considered not to have been previously convicted, except as
5 provided in this section and section 3.

6 (2) The applicant is not entitled to the remission of any
7 fine, costs, or other money paid as a consequence of a conviction
8 that is set aside.

9 (3) If the conviction set aside pursuant to this act is for a
10 listed offense as defined in section 2 of the sex offenders
11 registration act, **1994 PA 295, MCL 28.722**, the applicant is
12 considered to have been convicted of that offense for purposes of
13 the sex offenders registration act, **1994 PA 295, MCL 28.721 to**
14 **28.732**.

15 (4) This act does not affect the right of the applicant to
16 rely upon the conviction to bar subsequent proceedings for the
17 same offense.

18 (5) This act does not affect the right of a victim of a crime
19 to prosecute or defend a civil action for damages.

20 (6) This act does not create a right to commence an action
21 for damages for incarceration under the sentence that the
22 applicant served before the conviction is set aside pursuant to
23 this act.

24 **(7) This section does not apply to a conviction for which the**
25 **petition is dismissed under section 1b(2)(b).**

26 Sec. 3. (1) Upon the entry of an order pursuant to section
27 **1 or section 1b**, the court shall send a copy of the order to the

1 arresting agency and the department of state police.

2 (2) The department of state police shall retain a nonpublic
3 record of the order setting aside a conviction and of the record
4 of the arrest, fingerprints, conviction, and sentence of the
5 applicant in the case to which the order applies. Except as
6 provided in subsection (3), this nonpublic record shall be made
7 available only to a court of competent jurisdiction, an agency of
8 the judicial branch of state government, a law enforcement
9 agency, a prosecuting attorney, the attorney general, or the
10 governor upon request and only for the following purposes:

11 (a) Consideration in a licensing function conducted by an
12 agency of the judicial branch of state government.

13 (b) To show that a person who has filed an application to set
14 aside a conviction has previously had a conviction set aside
15 pursuant to this act.

16 (c) The court's consideration in determining the sentence to
17 be imposed upon conviction for a subsequent offense that is
18 punishable as a felony or by imprisonment for more than 1 year.

19 (d) Consideration by the governor if a person whose
20 conviction has been set aside applies for a pardon for another
21 offense.

22 (e) Consideration by a law enforcement agency if a person
23 whose conviction has been set aside applies for employment with
24 the law enforcement agency.

25 (f) Consideration by a court, law enforcement agency,
26 prosecuting attorney, or the attorney general in determining
27 whether an individual required to be registered under the sex

1 offenders registration act, **1994 PA 295, MCL 28.721 to 28.732,**
2 has violated that act ~~—~~ or for use in a prosecution for
3 violating that act.

4 (3) A copy of the nonpublic record created under subsection
5 (2) shall be provided to the person whose conviction is set aside
6 under this act upon payment of a fee determined and charged by
7 the department of state police in the same manner as the fee
8 prescribed in section 4 of the freedom of information act, ~~Act~~
9 ~~No. 442 of the Public Acts of 1976, being section 15.234 of the~~
10 ~~Michigan Compiled Laws— 1976 PA 442, MCL 15.234.~~

11 (4) The nonpublic record maintained under subsection (2) is
12 exempt from disclosure under the freedom of information act, ~~Act~~
13 ~~No. 442 of the Public Acts of 1976, being sections 15.231 to~~
14 ~~15.246 of the Michigan Compiled Laws— 1976 PA 442, MCL 15.231 to~~
15 ~~15.246.~~

16 (5) Except as provided in subsection (2), a person, other
17 than the applicant, who knows or should have known that a
18 conviction was set aside under this section and who divulges,
19 uses, or publishes information concerning a conviction set aside
20 under this section is guilty of a misdemeanor punishable by
21 imprisonment for not more than 90 days or a fine of not more than
22 \$500.00, or both.