

B-Engrossed
Senate Bill 908

Ordered by the House May 21
Including Senate Amendments dated April 23 and House Amendments
dated May 21

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Removes prohibition of filing motion to set aside conviction for person committing single violation within previous 10 years.

Describes when person moving court for entry of order setting aside conviction has not complied with or performed sentence of court. Prohibits person revoked from probation from moving for entry of order setting aside conviction for 10 years after revocation.

Authorizes motion to set aside conviction for possession of controlled substance constituting Class B felony. Prohibits motion to set aside conviction for assault of child 10 years of age or younger.

A BILL FOR AN ACT

1
2 Relating to order setting aside conviction; amending ORS 137.225.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 137.225 is amended to read:

5 137.225. (1)(a) **Except as provided in paragraph (c) of this subsection**, at any time after the
6 lapse of three years from the date of pronouncement of judgment, any defendant who has fully
7 complied with and performed the sentence of the court and whose conviction is described in sub-
8 section (5) of this section by motion may apply to the court where the conviction was entered for
9 entry of an order setting aside the conviction[; *or*]. **A person who is still under supervision, or**
10 **who is still incarcerated, as part of the sentence for the offense that is the subject of the**
11 **motion has not fully complied with or performed the sentence of the court.**

12 (b) At any time after the lapse of one year from the date of any arrest, if no accusatory in-
13 strument was filed, or at any time after an acquittal or a dismissal of the charge, the arrested per-
14 son may apply to the court that would have jurisdiction over the crime for which the person was
15 arrested, for entry of an order setting aside the record of the arrest. For the purpose of computing
16 the one-year period, time during which the arrested person has secreted himself or herself within
17 or without this state is not included.

18 (c) **A person whose sentence of probation was revoked may not apply to the court for**
19 **entry of an order setting aside the conviction for which the person was sentenced to pro-**
20 **batation for a period of 10 years from the date of revocation.**

21 (2)(a) A copy of the motion and a full set of the defendant's fingerprints shall be served upon
22 the office of the prosecuting attorney who prosecuted the crime or violation, or who had authority
23 to prosecute the charge if there was no accusatory instrument filed, and opportunity shall be given
24 to contest the motion. The fingerprint card with the notation "motion for setting aside conviction,"

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 or “motion for setting aside arrest record” as the case may be, shall be forwarded to the Department
2 of State Police. Information resulting from the fingerprint search along with the fingerprint card
3 shall be returned to the prosecuting attorney.

4 (b) When a prosecuting attorney is served with a copy of a motion to set aside a conviction
5 under this section, the prosecuting attorney shall provide a copy of the motion and notice of the
6 hearing date to the victim, if any, of the crime by mailing a copy of the motion and notice to the
7 victim’s last-known address.

8 (c) When a person makes a motion under subsection (1)(a) of this section, the person must pay
9 a fee of \$80 to the Department of State Police. The person shall attach a certified check payable to
10 the Department of State Police in the amount of \$80 to the fingerprint card that is served upon the
11 prosecuting attorney. The office of the prosecuting attorney shall forward the check with the fin-
12 gerprint card to the Department of State Police.

13 (d) In addition to the fee established under paragraph (c) of this subsection, when a person
14 makes a motion under subsection (1)(a) of this section the person must pay the filing fee established
15 under ORS 21.135.

16 (3) Upon hearing the motion, the court may require the filing of such affidavits and may require
17 the taking of such proofs as the court deems proper. The court shall allow the victim to make a
18 statement at the hearing. Except as otherwise provided in subsection [(13)] (12) of this section, if the
19 court determines that the circumstances and behavior of the applicant from the date of conviction,
20 or from the date of arrest as the case may be, to the date of the hearing on the motion warrant
21 setting aside the conviction, or the arrest record as the case may be, the court shall enter an ap-
22 propriate order that shall state the original arrest charge and the conviction charge, if any and if
23 different from the original, date of charge, submitting agency and disposition. The order shall further
24 state that positive identification has been established by the Department of State Police and further
25 identified as to Department of State Police number or submitting agency number. Upon the entry
26 of the order, the applicant for purposes of the law shall be deemed not to have been previously
27 convicted, or arrested as the case may be, and the court shall issue an order sealing the record of
28 conviction and other official records in the case, including the records of arrest whether or not the
29 arrest resulted in a further criminal proceeding.

30 (4) The clerk of the court shall forward a certified copy of the order to such agencies as directed
31 by the court. A certified copy must be sent to the Department of Corrections when the person has
32 been in the custody of the Department of Corrections. Upon entry of the order, the conviction, ar-
33 rest or other proceeding shall be deemed not to have occurred, and the applicant may answer ac-
34 cordingly any questions relating to its occurrence.

35 (5) The provisions of subsection (1)(a) of this section apply to a conviction [of] **for:**

36 (a) A Class B felony, except for a violation of ORS 166.429 or any crime classified as a person
37 felony as that term is defined in the rules of the Oregon Criminal Justice Commission, **only if:**

38 **(A)(i) Twenty years or more have elapsed from the date of the conviction sought to be**
39 **set aside or of the release of the person from imprisonment for the conviction sought to be**
40 **set aside, whichever is later; and**

41 **(ii) The person has not been convicted of or arrested for any other offense, excluding**
42 **motor vehicle violations, after the date the person was convicted of the offense sought to**
43 **be set aside. Notwithstanding subsection (1) of this section, a conviction or arrest that has**
44 **been set aside under this section shall be considered for the purpose of determining whether**
45 **this subparagraph is applicable; or**

1 **(B) The Class B felony is described in paragraphs (b) to (e) of this subsection.**

2 ***[(b) A Class C felony, except for criminal mistreatment in the first degree under ORS 163.205 when***
3 ***it would constitute child abuse as defined in ORS 419B.005 or any sex crime.]***

4 ***[(c) The crime of possession of the narcotic drug marijuana when that crime was punishable as a***
5 ***felony only.]***

6 ***[(d) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, except***
7 ***for:]***

8 ***[(A) Any sex crime; or]***

9 ***[(B) The following crimes when they would constitute child abuse as defined in ORS 419B.005:]***

10 ***[(i) Criminal mistreatment in the first degree under ORS 163.205; and]***

11 ***[(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).]***

12 ***[(e) A misdemeanor, including a violation of a municipal ordinance, for which a jail sentence may***
13 ***be imposed, except for endangering the welfare of a minor under ORS 163.575 (1)(a) when it would***
14 ***constitute child abuse as defined in ORS 419B.005 or any sex crime.]***

15 ***[(f) A violation, whether under state law or local ordinance.]***

16 ***[(g) An offense committed before January 1, 1972, that if committed after that date would be:]***

17 ***[(A) A Class C felony, except for any sex crime or for the following crimes when they would con-***
18 ***stitute child abuse as defined in ORS 419B.005:]***

19 ***[(i) Criminal mistreatment in the first degree under ORS 163.205; and]***

20 ***[(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).]***

21 ***[(B) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, except***
22 ***for any sex crime or for the following crimes when they would constitute child abuse as defined in ORS***
23 ***419B.005:]***

24 ***[(i) Criminal mistreatment in the first degree under ORS 163.205; and]***

25 ***[(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).]***

26 ***[(C) A misdemeanor, except for endangering the welfare of a minor under ORS 163.575 (1)(a) when***
27 ***it would constitute child abuse as defined in ORS 419B.005 or any sex crime.]***

28 ***[(D) A violation.]***

29 **(b) Any crime punishable as a misdemeanor, including judgment of conviction for a**
30 **misdemeanor pursuant to ORS 161.705.**

31 **(c) Unlawful possession of a controlled substance classified in Schedule I.**

32 **(d) An offense constituting a violation under state law or local ordinance.**

33 **(e) An offense committed before January 1, 1972, that, if committed after that date,**
34 **would qualify for an order under this section.**

35 **(6) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of**
36 **this section do not apply to a conviction for:**

37 **(a) Criminal mistreatment in the second degree under ORS 163.200 if the victim at the**
38 **time of the crime was 65 years of age or older.**

39 **(b) Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time**
40 **of the crime was 65 years of age or older, or when the offense constitutes child abuse as**
41 **defined in ORS 419B.005.**

42 **(c) Endangering the welfare of a minor under ORS 163.575 (1)(a), when the offense con-**
43 **stitutes child abuse as defined in ORS 419B.005.**

44 **(d) Criminally negligent homicide under ORS 163.145, when that offense was punishable**
45 **as a Class C felony.**

1 (e) **Assault in the third degree under ORS 163.165 (1)(h).**

2 (f) **Any sex crime, unless:**

3 (A) **The sex crime is listed in ORS 181.830 (1)(a) and:**

4 (i) **The person has been relieved of the obligation to report as a sex offender pursuant**
5 **to a court order entered under ORS 181.832 or 181.833; and**

6 (ii) **The person has not been convicted of, found guilty except for insanity of or found to**
7 **be within the jurisdiction of the juvenile court based on a crime for which the court is pro-**
8 **hibited from setting aside the conviction under this section; or**

9 (B) **The sex crime constitutes a Class C felony and:**

10 (i) **The person was under 16 years of age at the time of the offense;**

11 (ii) **The person is less than three years older than the victim;**

12 (iii) **The victim's lack of consent was due solely to incapacity to consent by reason of**
13 **being less than a specified age;**

14 (iv) **The victim was at least 12 years of age at the time of the offense;**

15 (v) **The person has not been convicted of, found guilty except for insanity of or found to**
16 **be within the jurisdiction of the juvenile court based on a crime for which the court is pro-**
17 **hibited from setting aside the conviction under this section; and**

18 (vi) **Each conviction or finding described in this subparagraph involved the same victim.**

19 [(6)] (7) *Notwithstanding subsection (5) of this section, the provisions of subsection (1) of this*
20 *section do not apply to:*

21 (a) *A conviction for a state or municipal traffic offense.*

22 (b) *A person convicted, within the 10-year period immediately preceding the filing of the motion*
23 *pursuant to subsection (1) of this section, of any other offense, excluding motor vehicle violations,*
24 *whether or not the other conviction is for conduct associated with the same criminal episode that*
25 *caused the arrest or conviction that is sought to be set aside. **A single violation, other than a***
26 ***motor vehicle violation, within the last 10 years is not a conviction under this subsection.***
27 *Notwithstanding subsection (1) of this section, a conviction that has been set aside under this sec-*
28 *tion shall be considered for the purpose of determining whether this paragraph is applicable.*

29 (c) *A person who at the time the motion authorized by subsection (1) of this section is pending*
30 *before the court is under charge of commission of any crime.*

31 [(7) *Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this section*
32 *do not apply to:]*

33 [(a) *Criminal mistreatment in the second degree under ORS 163.200 if the victim at the time of the*
34 *crime was 65 years of age or older.]*

35 [(b) *Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time of the*
36 *crime was 65 years of age or older.]*

37 [(c) *Criminally negligent homicide under ORS 163.145, when that offense was punishable as a*
38 *Class C felony.]*

39 [(8) *Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this section*
40 *apply to a conviction for:]*

41 [(a) *A Class B felony described in subsection (5)(a) of this section only if:]*

42 [(A) *Twenty years or more have elapsed from the date of the conviction sought to be set aside or*
43 *of the release of the person from imprisonment for the conviction sought to be set aside, whichever is*
44 *later; and]*

45 [(B) *The person has not been convicted of or arrested for any other offense, excluding motor vehicle*

1 *violations, after the date the person was convicted of the offense sought to be set aside.*
2 *Notwithstanding subsection (1) of this section, a conviction or arrest that has been set aside under this*
3 *section shall be considered for the purpose of determining whether this subparagraph is applicable.]*

4 [(b) *A sex crime listed in ORS 181.830 (1)(a) if:]*

5 [(A) *The person has been relieved of the obligation to report as a sex offender pursuant to a court*
6 *order entered under ORS 181.832 or 181.833; and]*

7 [(B) *The person has not been convicted of, found guilty except for insanity of or found to be within*
8 *the jurisdiction of the juvenile court based on, a crime that a court is prohibited from setting aside*
9 *under this section.]*

10 [(c) *A sex crime constituting a Class C felony, if:]*

11 [(A) *The person was under 16 years of age at the time of the offense;]*

12 [(B) *The person is less than three years older than the victim;]*

13 [(C) *The victim's lack of consent was due solely to incapacity to consent by reason of being less*
14 *than a specified age;]*

15 [(D) *The victim was at least 12 years of age at the time of the offense;]*

16 [(E) *The person has not been convicted of, found guilty except for insanity of or found to be within*
17 *the jurisdiction of the juvenile court based on a crime that a court is prohibited from setting aside*
18 *under this section; and]*

19 [(F) *Each conviction or finding described in this paragraph involved the same victim.]*

20 [(9)] (8) The provisions of subsection (1)(b) of this section do not apply to:

21 (a) A person arrested within the three-year period immediately preceding the filing of the motion
22 for any offense, excluding motor vehicle violations, and excluding arrests for conduct associated
23 with the same criminal episode that caused the arrest that is sought to be set aside. An arrest that
24 has been set aside under this section may not be considered for the purpose of determining whether
25 this paragraph is applicable.

26 (b) An arrest for driving while under the influence of intoxicants if the charge is dismissed as
27 a result of the person's successful completion of a diversion agreement described in ORS 813.200.

28 [(10)] (9) The provisions of subsection (1) of this section apply to convictions and arrests that
29 occurred before, as well as those that occurred after, September 9, 1971. There is no time limit for
30 making an application.

31 [(11)] (10) For purposes of any civil action in which truth is an element of a claim for relief or
32 affirmative defense, the provisions of subsection (3) of this section providing that the conviction,
33 arrest or other proceeding be deemed not to have occurred do not apply and a party may apply to
34 the court for an order requiring disclosure of the official records in the case as may be necessary
35 in the interest of justice.

36 [(12)] (11) Upon motion of any prosecutor or defendant in a case involving records sealed under
37 this section, supported by affidavit showing good cause, the court with jurisdiction may order the
38 reopening and disclosure of any records sealed under this section for the limited purpose of assisting
39 the investigation of the movant. However, such an order has no other effect on the orders setting
40 aside the conviction or the arrest record.

41 [(13)] (12) Unless the court makes written findings by clear and convincing evidence that
42 granting the motion would not be in the best interests of justice, the court shall grant the motion
43 and enter an order as provided in subsection (3) of this section if the defendant has been convicted
44 of one of the following crimes and is otherwise eligible for relief under this section:

45 (a) Abandonment of a child, ORS 163.535.

- 1 (b) Attempted assault in the second degree, ORS 163.175.
 - 2 (c) Assault in the third degree, ORS 163.165.
 - 3 (d) Coercion, ORS 163.275.
 - 4 (e) Criminal mistreatment in the first degree, ORS 163.205.
 - 5 (f) Attempted escape in the first degree, ORS 162.165.
 - 6 (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
 - 7 (h) Intimidation in the first degree, ORS 166.165.
 - 8 (i) Attempted kidnapping in the second degree, ORS 163.225.
 - 9 (j) Attempted robbery in the second degree, ORS 164.405.
 - 10 (k) Robbery in the third degree, ORS 164.395.
 - 11 (L) Supplying contraband, ORS 162.185.
 - 12 (m) Unlawful use of a weapon, ORS 166.220.
 - 13 [(14)] **(13)** As used in this section, “sex crime” has the meaning given that term in ORS 181.805.
 - 14
-