

House Bill 2698

Sponsored by Representative KENNEMER; Representatives BARKER, ESQUIVEL, GORSEK, LIVELY, NEARMAN, NOSSE, PILUSO, WITT (at the request of David Breames) (Pre-session filed.)

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 **as introduced**.

Allows person with other convictions within previous 10 years to file motion to set aside conviction after three years from date of judgment if other convictions were part of same criminal episode as conviction that is subject of motion.

A BILL FOR AN ACT

1
2 Relating to orders setting aside convictions; 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 lapse
6 of three years from the date of pronouncement of judgment, any defendant who has fully complied
7 with and performed the sentence of the court and whose conviction is described in subsection (5)
8 of this section by motion may apply to the court where the conviction was entered for entry of an
9 order setting aside the conviction. A person who is still under supervision, or who is still
10 incarcerated, as part of the sentence for the offense that is the subject of the motion has not fully
11 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18 (c) A person whose sentence of probation was revoked may not apply to the court for entry of
19 an order setting aside the conviction for which the person was sentenced to probation for a period
20 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,"
25 or "motion for setting aside arrest record" as the case may be, shall be forwarded to the Department
26 of State Police. Information resulting from the fingerprint search along with the fingerprint card
27 shall be returned to the prosecuting attorney.

28 (b) When a prosecuting attorney is served with a copy of a motion to set aside a conviction
29 under this section, the prosecuting attorney shall provide a copy of the motion and notice of the
30 hearing date to the victim, if any, of the crime by mailing a copy of the motion and notice to the

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 victim's last-known address.

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

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

10 (e) The prosecuting attorney may not charge the defendant a fee for performing the require-
 11 ments described in this section.

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

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

31 (5) The provisions of subsection (1)(a) of this section apply to a conviction for:

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

34 (A)(i) Twenty years or more have elapsed from the date of the conviction sought to be set aside
 35 or of the release of the person from imprisonment for the conviction sought to be set aside, which-
 36 ever is later; and

37 (ii) The person has not been convicted of or arrested for any other offense, excluding motor
 38 vehicle violations, after the date the person was convicted of the offense sought to be set aside.
 39 Notwithstanding subsection (1) of this section, a conviction or arrest that has been set aside under
 40 this section shall be considered for the purpose of determining whether this subparagraph is appli-
 41 cable; or

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

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

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

- 1 (d) An offense constituting a violation under state law or local ordinance.
- 2 (e) An offense committed before January 1, 1972, that, if committed after that date, would qualify
3 for an order under this section.
- 4 (6) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-
5 tion do not apply to a conviction for:
- 6 (a) Criminal mistreatment in the second degree under ORS 163.200 if the victim at the time of
7 the crime was 65 years of age or older.
- 8 (b) Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time of the
9 crime was 65 years of age or older, or when the offense constitutes child abuse as defined in ORS
10 419B.005.
- 11 (c) Endangering the welfare of a minor under ORS 163.575 (1)(a), when the offense constitutes
12 child abuse as defined in ORS 419B.005.
- 13 (d) Criminally negligent homicide under ORS 163.145, when that offense was punishable as a
14 Class C felony.
- 15 (e) Assault in the third degree under ORS 163.165 (1)(h).
- 16 (f) Any sex crime, unless:
- 17 (A) The sex crime is listed in ORS 163A.140 (1)(a) and:
- 18 (i) The person has been relieved of the obligation to report as a sex offender pursuant to a court
19 order entered under ORS 163A.145 or 163A.150; and
- 20 (ii) The person has not been convicted of, found guilty except for insanity of or found to be
21 within the jurisdiction of the juvenile court based on a crime for which the court is prohibited from
22 setting aside the conviction under this section; or
- 23 (B) The sex crime constitutes a Class C felony and:
- 24 (i) The person was under 16 years of age at the time of the offense;
- 25 (ii) The person is:
- 26 (I) Less than two years and 180 days older than the victim; or
- 27 (II) At least two years and 180 days older, but less than three years and 180 days older, than
28 the victim and the court finds that setting aside the conviction is in the interests of justice and of
29 benefit to the person and the community;
- 30 (iii) The victim's lack of consent was due solely to incapacity to consent by reason of being less
31 than a specified age;
- 32 (iv) The victim was at least 12 years of age at the time of the offense;
- 33 (v) The person has not been convicted of, found guilty except for insanity of or found to be
34 within the jurisdiction of the juvenile court based on a crime for which the court is prohibited from
35 setting aside the conviction under this section; and
- 36 (vi) Each conviction or finding described in this subparagraph involved the same victim.
- 37 (7) Notwithstanding subsection (5) of this section, the provisions of subsection (1) of this section
38 do not apply to:
- 39 (a) A conviction for a state or municipal traffic offense.
- 40 (b) A person convicted, within the 10-year period immediately preceding the filing of the motion
41 pursuant to subsection (1) of this section, of any other offense, excluding motor vehicle violations
42 [*whether or not the other conviction is*] **and excluding convictions** for conduct associated with the
43 same criminal episode that caused the arrest or conviction that is sought to be set aside. A single
44 violation, other than a motor vehicle violation, within the last 10 years is not a conviction under
45 this subsection. Notwithstanding subsection (1) of this section, a conviction that has been set aside

1 under this section shall be considered for the purpose of determining whether this paragraph is ap-
 2 plicable.

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

5 (8) The provisions of subsection (1)(b) of this section do not apply to:

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

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

13 (9) The provisions of subsection (1) of this section apply to convictions and arrests that occurred
 14 before, as well as those that occurred after, September 9, 1971. There is no time limit for making
 15 an application.

16 (10) For purposes of any civil action in which truth is an element of a claim for relief or affir-
 17 mative defense, the provisions of subsection (3) of this section providing that the conviction, arrest
 18 or other proceeding be deemed not to have occurred do not apply and a party may apply to the
 19 court for an order requiring disclosure of the official records in the case as may be necessary in the
 20 interest of justice.

21 (11) Upon motion of any prosecutor or defendant in a case involving records sealed under this
 22 section, supported by affidavit showing good cause, the court with jurisdiction may order the reo-
 23 pening and disclosure of any records sealed under this section for the limited purpose of assisting
 24 the investigation of the movant. However, such an order has no other effect on the orders setting
 25 aside the conviction or the arrest record.

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

- 30 (a) Abandonment of a child, ORS 163.535.
- 31 (b) Attempted assault in the second degree, ORS 163.175.
- 32 (c) Assault in the third degree, ORS 163.165.
- 33 (d) Coercion, ORS 163.275.
- 34 (e) Criminal mistreatment in the first degree, ORS 163.205.
- 35 (f) Attempted escape in the first degree, ORS 162.165.
- 36 (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
- 37 (h) Intimidation in the first degree, ORS 166.165.
- 38 (i) Attempted kidnapping in the second degree, ORS 163.225.
- 39 (j) Attempted robbery in the second degree, ORS 164.405.
- 40 (k) Robbery in the third degree, ORS 164.395.
- 41 (L) Supplying contraband, ORS 162.185.
- 42 (m) Unlawful use of a weapon, ORS 166.220.

43 (13) As used in this section, "sex crime" has the meaning given that term in ORS 163A.005.