

FRESH START? INDIANA EXPUNGEMENTS

By Eric J. Weitzel



In 2011, Indiana finally made its foray into allowing people to clean up their criminal history. At first, sealing the records was the only thing allowed. Then in 2013, the state began allowing people to expunge their criminal history in limited circumstances. This article will explore generally some of the issues pertaining to eligibility for an expungement in Indiana.

CHARGED BUT NEVER CONVICTED

There are several groups of people eligible for expungements. The first are those who were charged with a crime but never convicted. The requirements in these cases are found in IC 35-38-9-1. The person must have been arrested or charged with an offense and the arrest or criminal charge cannot have resulted in a conviction. The person cannot be participating in a pretrial diversion program. It also must not be earlier than one year after the arrest or criminal charge unless the prosecuting attorney agrees in writing to an earlier time. The person also must not have any criminal charges pending. Additionally, IC 35-38-9-1 lists the information required to be included in the petition and order for expungement. Under this section, the petition must be filed in the county in which the arrest occurred or county in which the information or indictment was filed. With this type of expungement petition, there is no filing fee.¹

CHARGED AND CONVICTED

The question then becomes: Are people who are convicted eligible for expungements? The answer is yes under certain circumstances. The eligibility requirements for an expungement as it pertains to a misdemeanor conviction is found in IC 35-38-9-2. This also includes a D felony committed before July 1, 2014, or Level 6 felony committed after June 30, 2014, in which the charge was reduced or entered as a misdemeanor conviction. Unless the prosecuting attorney agrees to an earlier period in writing, the person must wait five years from the date of conviction. The person must not have any pending criminal charges and not have been convicted within the previous five years. The petition is filed in a Superior or Circuit Court in the county in which the conviction occurred. There are certain exclusions under this section that prevent expungements of certain convictions. Those exclusions include a person convicted of two or more felony offenses involving the unlawful use of a deadly weapon that were not committed as part of the same episode of criminal conduct and is a sex or violent offender under IC 11-8-8-5.²

The issue has come up, based upon a prior version of this section, as to the proper time frame to be eligible for an expungement for a D felony or Level 6 felony that was amended to a Class A misdemeanor after conviction. The prior version of this section did not specify the time period that applied to a felony conviction modified to a misdemeanor. The Court of Appeals³ held the date of conviction for an expungement was the date of the misdemeanor conviction, in

other words, the date the conviction was amended. However, this opinion was vacated when the Indiana Supreme Court granted transfer.⁴ Before the Indiana Supreme Court could decide the issue, the legislature amended the statute to clarify that the original conviction date is to be used for time purposes of this section. The Indiana Supreme Court did decide that this amendment applied retroactively.⁵

Indiana has made it possible to expunge felonies in certain circumstances as well. IC 35-38-9-3 provides Level 6 or D felonies are eligible for expungement if certain criteria are met. The convicted person may seek expungement of a D felony conviction from prior to

July 1, 2014, or Level 6 felony after June 30, 2014, not earlier than eight years after the date of conviction unless the prosecuting attorney consents to a shorter time period. The convicted person must not have any pending charges against them, and have paid all fines, fees, court costs, and any restitution obligation as part of their sentence. The person cannot have been convicted within the previous eight years. The same exclusion of convictions that cannot be expunged from the misdemeanor expungement section are also excluded from eligibility under IC 35-38-9-3.

Additionally, offenses under IC 35-42-1, IC 35-42-3.5, and 35-42-4 are excluded and not eligible to be expunged. An elected official

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convicted of an offense while serving in office or as candidate for public office is barred from seeking expungement under this section. A person convicted of perjury, official misconduct, or a felony that resulted in bodily injury to another person also may not seek expungement under this section.⁶

period. The person must have also paid all their fines, fees, court costs, and any restitution obligations as part of their sentence.⁷

FELONY CONVICTIONS PREVIOUSLY EXCLUDED

The final section for expungements applies to two types of felony

"If the conviction does not fall into one of those excluded categories, the person must wait to seek expungement eight years from the date of the most recent conviction or three years from the completion of the person's sentence, unless the prosecuting attorney consents in writing to an earlier time. "

HIGHER-LEVEL OFFENSES

For a conviction of a higher-level offense, an expungement is still possible under certain circumstances. The same exclusions would apply that were previously discussed for misdemeanors and Level 6 felonies. If the conviction does not fall into one of those excluded categories, the person must wait to seek expungement eight years from the date of the most recent conviction or three years from the completion of the person's sentence, unless the prosecuting attorney consents in writing to an earlier time. The person cannot have any pending charges. The person cannot have been convicted of a misdemeanor or felony during the previous eight years unless the prosecuting attorney consents to a shorter

convictions otherwise excluded under previously discussed sections. A person with a felony conviction that resulted in serious bodily injury to another person, or an elected official convicted of an offense while serving the official's term as a candidate for public office, may petition for expungement. The person must wait 10 years from the date of the most recent conviction or five years after the completion of the person's sentence unless the prosecuting attorney consents in writing to an earlier period. The same exclusions apply as for types of felony convictions discussed earlier. The person cannot have any pending charges and cannot have been convicted of a misdemeanor or felony in the previous 10 years (or within a shorter period agreed to by the prosecuting attorney

in writing). The prosecuting attorney must consent in writing to an expungement of the person's criminal history when the petition is filed under this section.⁸ The last issue for a petition filed under IC 35-38-9-7 is the records related to the conviction and expungement are marked as expunged but remain public records.⁹

There are certain felony offenses where a person may not seek an expungement. A category of felony convictions that are completely barred from expungement throughout the code are those for a sex or violent offender as defined in IC 11-8-8-5.¹⁰ A sex or violent offender may not seek expungement under any expungement sections. Felony convictions for offenses under IC 35-42-1 (homicide), 35-42-3.5 (human trafficking), 35-42-4 (sex crimes). Additionally, a conviction for a felony that resulted in death to another person, a person convicted of official misconduct, offenses under 35-42-1, 35-42-3.5, and 35-42-4 are all excluded from expungement if the conviction was a felony.

Indiana does give a person with a prior criminal history the ability to obtain a fresh start. This fresh start is limited based on the level of offense of the conviction as well as certain time restrictions based on the conviction. People that have been conviction-free and meet the eligibility requirements should take advantage of the expungement statutes and get a fresh start. ☹

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FOOTNOTES:

1. IC 35-38-9-1
2. IC 35-38-9-2
3. *Ng v. State*, 132 NE 3d 51 (Ct. of App. 2019)
4. *Ng v. State*, 138 NE 3d 961 (Ind 2019)
5. *Ng v. State*, 148 NE 3d 971 (Ind 2020)
6. IC 35-68-9-3
7. IC 35-38-9-4
8. IC 35-38-9-5
9. IC 35-38-9-11
10. IC 35-38-9-2, IC 35-38-9-3, IC 35-38-9-4, & 35-38-9-5

