

## N.J.S. 2C:36A-1 Conditional Discharge

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In New Jersey, attorneys representing defendants charged with N.J.S.2C:35-10(a)(4),<sup>i</sup> possession of 50 grams or less of marijuana, or 2C:36-2,<sup>ii</sup> use or possession with intent to use drug paraphernalia, both disorderly persons offenses, may move for conditional discharge pursuant to N.J.S. 2C:36A-1(a)(1). Under 2C:36A-1,<sup>iii</sup> a court may suspend further proceedings and place the defendant on supervisory treatment, sometimes ordering certain conditions to be met during supervisory treatment. Upon completion of supervisory treatment and any conditions, the charge is dismissed.<sup>iv</sup>

The intent of the predecessor statute to N.J.S. 2C: 36A-1 was to afford youthful first offenders who are involved with personal drug use, and who pose no threat to the community, the chance to undergo rehabilitation and avoid the stigma of a criminal conviction. State v. Telcher, 220 N.J. Super. 54, 60-61, 65 (Law Div. 1987)(denying conditional discharge where defendant nurse obtained drugs by fraud); see State v. Teitelbaum, 160 N.J. Super. 430, 433 (Law Div. 1978); State v. Sayko, 71 N.J. 8, 9 (1976)(holding that defendant should have been granted conditional discharge where defendant was a twenty- three (23)–year-old college graduate who had just secured full-time employment, and was planning to marry).

In deciding to order conditional discharge, a court considers the following factors:

- (1) Defendant's continued presence in the community, or program, will not pose a danger to the community. N.J.S. 2C:36A-1(c)(1).

This first factor is subjective. See State v. Teitelbaum, supra, 160 N.J. Super. at 434-35 (finding defendant's presence in the community would not pose a danger, where there was no indication that the offense involved anything but possession for defendant's own use); State v. Bush, 134 N.J. Super. 346, 348, 352 (Law Div. 1975)(granting conditional discharge and finding that defendant posed no danger to the community, where defendant was twenty-two (22) years old, was married with a child, gainfully employed, with no previous conviction of any drug-related offenses, and where defendant no longer used marijuana). The following may support a conclusion that a defendant's continued presence will not pose a danger to the community: (1) lack of prior arrests and convictions, compare State v. Grochulski, 133 N.J. Super. 586, 587, 590 (Law Div. 1975)(finding under the predecessor statute to N.J.S. 2C:36A-1 that defendant posed a danger to the community based on his thirty (30) prior statutory violations of the law, and his pending additional drug offense); (2) opinions and recommendations of leading members of the community that the defendant will pose no threat; and (3) absence of any evidence that defendant was a threat to the community, and evidence that defendant contributes positively to the community.

- (2) The terms and conditions of supervisory treatment will be adequate to protect the public, and will benefit the defendant by serving to correct any dependency or use of controlled substance that he may manifest. N.J.S. 2C: 36A-1(c)(2).

As to this second, subjective factor, one way that a defendant may show that any terms and conditions of supervisory treatment will be adequate to protect the public and benefit the defendant, is by demonstrating that defendant, following arrest, voluntarily enrolled in a drug rehabilitation or counseling program, and is benefiting from it. A letter from a drug treatment professional may substantiate correction or improvement.

- (3) Defendant must not have previously received supervisory treatment under section 27 of P.L. 1970, c. 226. N.J.S. 2C: 36A-1(c)(3).

This last factor is objective.

In sum, at this time, all of these criteria for conditional discharge listed in N.J.S. 2C:36A-1 must be met for a court to grant conditional discharge to a defendant charged with violating N.J.S. 2C:35-10(a)(4) or 2C:36-2. After the supervisory period, and upon fulfillment of all terms and conditions, then the court will dismiss the charge. At that time, a defendant may initiate an expungement action separately in Superior Court.

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§ 2C:35-10 provides in pertinent part:

a. It is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog, unless the substance was obtained directly, or pursuant to a valid prescription or order form from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by P.L.1970. . . . Any person who violates this section with respect to: . . .(4) Possession of 50 grams or less of marijuana, including any adulterants or dilutants, or five grams or less of hashish is a disorderly person.

Any person who commits any offense defined in this section while on any property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of any such school property or a school bus, or while on any school bus, and who is not sentenced to a term of imprisonment, shall, in addition to any other sentence which the court may impose, be required to perform not less than 100 hours of community service.

b. Any person who uses or who is under the influence of any controlled dangerous substance, or its analog, for a purpose other than the treatment of sickness or injury as lawfully prescribed or administered by a physician is a disorderly person.

In a prosecution under this subsection, it shall not be necessary for the State to prove that the accused did use or was under the influence of any specific drug, but it shall be sufficient for a conviction under this subsection for the State to prove that the accused did use or was under the influence of some controlled dangerous substance, counterfeit controlled dangerous substance, or controlled substance analog, by proving that the

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accused did manifest physical and physiological symptoms or reactions caused by the use of any controlled dangerous substance or controlled substance analog.

c. Any person who knowingly obtains or possesses a controlled dangerous substance or controlled substance analog in violation of subsection a. of this section and who fails to voluntarily deliver the substance to the nearest law enforcement officer is guilty of a disorderly persons offense. Nothing in this subsection shall be construed to preclude a prosecution or conviction for any other offense defined in this title or any other statute.

<sup>ii</sup> § 2C:36-2 provides: “ It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance, controlled substance analog or toxic chemical in violation of the provisions of chapter 35 of this title. Any person who violates this section is guilty of a disorderly persons offense.”

<sup>iii</sup> § 2C:36A-1 provides in pertinent part: “Conditional discharge for certain first offenses; expunging of records: a. Whenever any person who has not previously been convicted of any offense under section 20 of P.L.1970, c.226 (C.24:21-20), or a disorderly persons or petty disorderly persons offense defined in chapter 35 or 36 of this title or, subsequent to the effective date of this title, under any law of the United States, this State or any other state relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, is charged with or convicted of any disorderly persons offense or petty disorderly persons offense under chapter 35 or 36 of this title, the court upon notice to the prosecutor and subject to subsection c. of this section, may on motion of the defendant or the court:

(1) Suspend further proceedings and with the consent of the person after reference to the State Bureau of Identification criminal history record information files, place him under supervisory treatment upon such reasonable terms and conditions as it may require; or

(2) After plea of guilty or finding of guilty, and without entering a judgment of conviction, and with the consent of the person after proper reference to the State Bureau of Identification criminal history record information files, place him on supervisory treatment upon reasonable terms and conditions as it may require, or as otherwise provided by law.”

b. In no event shall the court require as a term or condition of supervisory treatment under this section, referral to any residential treatment facility for a period exceeding the maximum period of confinement prescribed by law for the offense for which the individual has been charged or convicted, nor shall any term of supervisory treatment imposed under this subsection exceed a period of three years. If a person is placed under supervisory treatment under this section after a plea of guilty or finding of guilt, the court as a term and condition of supervisory treatment shall suspend the person's driving privileges for a period to be fixed by the court at not less than six months or more than two years unless the court finds compelling circumstances warranting an

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exception. For the purposes of this subsection, compelling circumstances warranting an exception exist if the suspension of the person's driving privileges will result in extreme hardship and alternative means of transportation are not available. In the case of a person who at the time of placement under supervisory treatment under this section is less than 17 years of age, the period of suspension of driving privileges authorized herein, including a suspension of the privilege of operating a motorized bicycle, shall commence on the day the person is placed on supervisory treatment and shall run for a period as fixed by the court of not less than six months or more than two years after the day the person reaches the age of 17 years.

If the driving privilege of a person is under revocation, suspension, or postponement for a violation of this title or Title 39 of the Revised Statutes at the time of the person's placement on supervisory treatment under this section, the revocation, suspension or postponement period imposed herein shall commence as of the date of the termination of the existing revocation, suspension or postponement. The court which places a person on supervisory treatment under this section shall collect and forward the person's driver's license to the New Jersey Motor Vehicle Commission and file an appropriate report with the commission in accordance with the procedure set forth in N.J.S.2C:35-16. The court shall also inform the person of the penalties for operating a motor vehicle during the period of license suspension or postponement as required in N.J.S.2C:35-16.

Upon violation of a term or condition of supervisory treatment the court may enter a judgment of conviction and proceed as otherwise provided, or where there has been no plea of guilty or finding of guilty, resume proceedings. Upon fulfillment of the terms and conditions of supervisory treatment the court shall terminate the supervisory treatment and dismiss the proceedings against him. Termination of supervisory treatment and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense but shall be reported by the clerk of the court to the State Bureau of Identification criminal history record information files. Termination of supervisory treatment and dismissal under this section may occur only once with respect to any person. Imposition of supervisory treatment under this section shall not be deemed a conviction for the purposes of determining whether a second or subsequent offense has occurred under . . .chapter 35 or 36 of this title or any law of this State.

c. Proceedings under this section shall not be available to any defendant unless the court in its discretion concludes that:

(1) The defendant's continued presence in the community, or in a civil treatment center or program, will not pose a danger to the community; or

(2) That the terms and conditions of supervisory treatment will be adequate to protect the public and will benefit the defendant by serving to correct any dependence on or use

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of controlled substances which he may manifest; and

(3) The person has not previously received supervisory treatment under section 27 of P.L.1970, c.226 (C.24:21-27), N.J.S.2C:43-12, or the provisions of this chapter.

d. A person seeking conditional discharge pursuant to this section shall pay to the court a fee of \$ 75. The court shall forward all money collected under this subsection to the treasurer of the county in which the court is located. This money shall be used to defray the cost of juror compensation within that county. A person may apply for a waiver of this fee, by reason of poverty, pursuant to the Rules Governing the Courts of the State of New Jersey. Of the moneys collected under this subsection, \$ 30 of each fee shall be deposited in the temporary reserve fund created by section 25 of P.L.1993, c.275. After December 31, 1994, the \$ 75 fee shall be paid to the court, for use by the State.”

<sup>iv</sup> A defendant must initiate a separate expungement proceeding.