

G.S. 90-96

Author : Jeff Welty

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G.S. 90-96 is one of the densest, most used, and most misunderstood statutes on the books. Let's try to unpack it a little bit.

There are two distinct subsections under which cases may fall -- subsections (a) and (a1) -- and the two subsections are different in scope and in effect. We'll start with subsection (a). This is the descendant of the original version of G.S. 90-96. (The statute was enacted in 1971, and at that time, applied only to first convictions for possession of schedule III through VI substances -- the inclusion of paraphernalia, schedule II substances, and felony cocaine possession all came later.) Subsection (a) applies to folks with no prior drug or paraphernalia convictions who plead guilty to or are found guilty of (1) misdemeanor possession of Schedule II through VI drugs, (2) possession of drug paraphernalia, or (3) felony possession of less than one gram of cocaine. There are a couple of things to note here. First, it is up to the court whether to allow a defendant the benefit of the statute: the court "may" do so, even if the state thinks that it shouldn't (though the consent of the defendant is necessary), but it isn't required to do so, even if the state and/or the defendant think that it should. Second, G.S. 90-96 isn't limited to guilty plea cases: the court "may" allow a defendant the benefit of the statute whether the defendant pled guilty or was convicted after a trial. (Whether a judge is *likely* to allow a defendant who goes to trial the benefit of the statute is a separate question, of course.) Third, it appears that at least some judges, in at least some cases, are allowing defendants the benefit of the statute in cases outside the statute's scope. *See, e.g., State v. Hasty*, 133 N.C. App. 563 (1999) (involving a defendant who was on probation, purportedly under subsection (a), for PWISD cocaine).

If the court decides to proceed under subsection (a), the disposition of the case is relatively straightforward: there is no immediate adjudication of guilt or entry of judgment. Instead, the judge places the defendant on probation, for whatever time period the court sees fit. The probation may, but need not, include drug education as a condition. Historically, there hasn't been an AOC form for this, and judges have either tried to modify judgment forms or have created their own forms. However, I understand that the AOC will shortly be releasing a new form to be used for this type of order.

If the defendant violates his probation, the court enters an adjudication of guilt and sentences the defendant under Structured Sentencing. If the defendant successfully completes his probation, the court dismisses the charges and the defendant is left without a conviction. Furthermore, as detailed in subsection (b) of the statute, if the defendant was "not over 21 years of age" at the time of the offense, he may apply for an expunction of the charges. This expunction provision is much broader than that allowed under G.S. 15A-145, which applies only to misdemeanors and only if the defendant was under 18 years of age at the time of conviction.

The other leading subsection of G.S. 90-96 is subsection (a1), which was added in 1981, and which is confusingly drafted. The best way to try to understand it is to compare it to subsection (a). Subsection (a1) is considerably broader than subsection (a). It applies to "any offense included in G.S. 90-95(a)(3)," meaning all simple possession offenses, *regardless of drug type or quantity*, and to drug paraphernalia offenses. Furthermore, although it is limited to "first conviction[s]," it *ignores prior offenses that are more than seven years old* for purposes of determining whether a defendant is a first offender, again unlike subsection (a).

The confusing part of subsection (a1) is that it doesn't completely spell out how qualifying cases are to be resolved. It says that the judge "may" place the defendant on probation -- apparently, with or without the consent of the defendant -- which must be for at least a year, and which must, absent exceptional circumstances, include drug education. (Note that the latter two requirements are absent from subsection (a), so while subsection (a1) is broader, it is also a bit tougher.) This appears to be probation *pursuant to an entry of judgment*, unlike the probation available under subsection (a). Subsection (a1) is missing the proviso, "without entering a judgment of guilt," that is included in subsection (a), and subsection (a1) contains no procedure for entering a subsequent judgment after a violation of probation -- it simply provides that probation shall be revoked, suggesting that the original imposition of probation *is* the judgment.

Furthermore, the statute is not explicit about what happens if a defendant sentenced under subsection (a1) successfully completes probation. Unlike subsection (a), it does not mandate that the court "shall . . . dismiss the proceedings." And subsection (b), which contains the expunction provisions of the statute, refers only to proceedings dismissed "under subsection (a)," not to cases that fall within (a1). Yet it appears that the General Assembly intended that at least some defendants sentenced under subsection (a1) would be somehow eligible for expunctions -- if not, why would subsection (a1) say that defendants who fail to complete their drug education classes be "den[ie]d application for expunction"?

The bottom line is that subsection (a) is clear, while subsection (a1) is broader, but not as clear. I'd like to know whether, and how, subsection (a1) is being used in practice -- are defendants being put on probation prior to judgment *a la* subsection (a), or are they being put on probation pursuant to judgment? Are they receiving expunctions? Subsection (a1) may merit clarification by the General Assembly so that defendants who fall within it are treated the same way from district to district.

Since this post is already too long, I'm not going to unpack subsection (e), but it's worth reading. Essentially, it provides for after-the-fact expunctions for folks who would have been eligible under subsection (a). There are a couple of ambiguities in the statute, including whether the court "may" or "shall" grant an expunction to eligible offenders, and whether there's an age limit for eligibility. For now, suffice it to say that *In re Expungement for Spencer*, 140 N.C. App. 776 (2000) answers some of these questions and is the leading case on subsection (e).