

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0524-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NICHOLAS GONZALEZ,

Defendant-Appellant.

Argued March 6, 2017 – Decided March 29, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Accusation No.
14-09-0422.

Philip Nettle argued the cause for appellant
(Benedict & Altman, attorneys; Mr. Nettle, on
the brief).

Brian D. Gillet, Deputy First Assistant
Prosecutor, argued the cause for respondent
(Andrew C. Carey, Middlesex County Prosecutor,
attorney; Mr. Gillet, of counsel and on the
brief).

PER CURIAM

Defendant Nicholas Gonzalez appeals from two judgments of
conviction: a May 12, 2015 judgment of conviction for third-degree

theft; and an August 27, 2015 judgment of conviction terminating his three-year probationary sentence. Defendant argues:

The State's rejection of Defendant from PTI, against the recommendation of the PTI director, should be reversed, because it was a Patent and Gross Abuse of Discretion.

A. The State considered inappropriate factors against Defendant's admission into PTI, and failed to consider positive factors.

1. It was inappropriate for the State to treat this matter as a Second Degree offense.

2. The needs and interests of the victim and society were inappropriately weighed against PTI.

3. The motivation and age of the defendant were inappropriately weighed against PTI.

4. The State inappropriately found that the crime is of such a nature that the value of the supervisory treatment would be outweighed by the public need for prosecution, when they found the opposite in a substantially similar matter.

B. The State's decision is a clear error in judgment which subverts the goals of PTI.

For the reasons that follow, we reverse and remand for further proceedings.

Defendant, now age thirty, worked for an employer who sold cellular phones and cellular phone contracts at a kiosk inside a retail store. On June 26, 2014, after being confronted by his employer with an audit, defendant admitted to selling phones without contracts at discounted contract prices. Between November 26, 2013, and May 29, 2014, defendant sold ninety-nine phones without contracts at the discounted contract price. He would sometimes accept money from friends, ranging from twenty to one hundred dollars, for discounting the phones. The aggregate difference between the cost of the phones without the discount and the cost of the discounted phones was \$55,704.91. Defendant immediately offered to make full restitution by paying back the money over time. He entered into a restitution agreement with his employer and agreed to repay \$1000 per month.

The same day the employer confronted defendant, law enforcement officers arrested him and charged him in a complaint-warrant with theft by deception and conspiracy. Two months later, on August 29, 2014, defendant appeared at a pre-indictment conference. An assistant prosecutor¹ offered defendant a plea to third-degree theft with a non-custodial sentence. The assistant prosecutor said he intended to present evidence of second-degree

¹ A different assistant prosecutor represents the State on this appeal.

computer theft to a grand jury if defendant refused the plea bargain but agreed - at the court's urging - to keep the offer open for one week so defendant could discuss the discovery with his attorney and have his pre-trial intervention (PTI) application processed.²

Following defense counsel's request to review the discovery and determine the outcome of defendant's PTI application, the assistant prosecutor recounted the number of phones defendant had improperly discounted over a seven-month period. The assistant prosecutor stated:

When I see a repeated course of conduct like that, I do not - - unless there's something incredible in that PTI report, and even then - - I generally would not consider it, because it's a continuing course of conduct. It's not a single crime; it's many crimes. That's been my - - how I view these cases. And I advise counsel I would be highly unlikely to go the PTI route. If - - but that doesn't mean I won't look at it fairly. He can do what he wants with that.

The following month, on September 12, 2014, the same assistant prosecutor prepared a two-count accusation charging defendant with second-degree computer theft, N.J.S.A. 2C:20-25(c), and third-degree theft, N.J.S.A. 2C:20-3. Defendant waived his right to

² The assistant prosecutor provided discovery to defendant on the day of the hearing. The record is not clear as to whether the assistant prosecutor gave defendant the discovery at the hearing or before the hearing.

indictment, and the parties entered into the plea they had negotiated. Defendant pled guilty to the theft offense and the assistant prosecutor agreed to recommend a probationary sentence. Sentencing was deferred pending defendant's PTI application.

On September 25, 2014, the Middlesex County PTI Director recommended defendant's admission into the PTI program for thirty-six months. The next month, however, as he presaged at the pre-indictment conference, the assistant prosecutor rejected the PTI application. In doing so, he emphasized the nature of the offense, including defendant using a scanner on ninety-nine occasions to make false entries into the computer tracking the sales. The assistant prosecutor noted that by accepting the plea, defendant avoided "presentation to the grand jury of [second-]degree computer theft."

The assistant prosecutor asserted, "[t]he nature of the crime is such that it results in increased prices to all consumers of such phones as losses have to be built into the cost of the goods sold." He also asserted that at age twenty-six and college educated, defendant could not simply dismiss the conduct as a stupid mistake, "especially in light of his prior juvenile history in 2003 for shoplifting at age [sixteen]. Notwithstanding the de minimis nature of the prior shoplifting offense, it should

certainly have served as a shot over the bow that such conduct has consequences."³

Defendant appealed to the Law Division.⁴ He argued, among other things, that his attorney had informed the assistant prosecutor that defendant's co-worker, who was "caught doing the same scheme," was admitted into the PTI program by another assistant prosecutor in the same office. Documentation submitted in support of this claim reveals the co-worker worked for defendant's employer selling phones out of a store operated by the same retailer, but in a different location in the same county. He was a few years older than defendant, and was caught after under-ringing phones "to the value of \$32,655."

In response, the assistant prosecutor handling defendant's case asserted he was not privy to the facts and circumstances of the other case. Moreover, he argued the PTI report was "not the tell all of what was . . . taken into consideration in the other

³ The record reflects defendant was charged with "shoplifting less than \$2" and the charge was dismissed.

⁴ Generally, a defendant does not have the right to appeal the denial of a PTI application after he or she has entered a guilty plea. See State v. Waters, 439 N.J. Super. 215, 224-25 (App. Div. 2015). Here, however, it is apparent that throughout the proceedings in the trial court, as a result of discussions among the parties and the court, defendant was led to believe he could have his PTI application processed after entering his plea. Given these special circumstances, we address the appeal on its merits.

matter." The assistant prosecutor again emphasized he had charged defendant with a second-degree crime and defendant had committed ninety-nine separate offenses.⁵ The assistant insisted he had not committed a patent and gross abuse of discretion.

The judge upheld the prosecutor's decision. The same day he denied defendant's PTI appeal, the judge sentenced defendant to a three-year probationary term, ordered him to pay restitution in full, and imposed required penalties and assessments. The resulting judgment of conviction (JOC) stated: "If defendant successfully meets all conditions of [p]robation, early termination can be recommended." The judge entered the JOC on May 12, 2015.

Defendant moved for reconsideration of the judge's PTI decision. On August 27, 2015, at a hearing on the motion, defense counsel withdrew the motion for reconsideration and requested the judge terminate defendant's probation.⁶ Over the prosecutor's objection, the judge granted defendant's application. The judge entered an amended JOC, which stated: "As to count [two],

⁵ Another assistant prosecutor in the same office charged the co-worker in an accusation with third-degree under-ringing merchandise, N.J.S.A. 2C:20-11(b)(5).

⁶ The record on appeal includes a letter from defendant's employer, dated July 27, 2015, supporting defendant's PTI application. The judge referenced the letter during the August 27 hearing.

[p]robation is terminated. Restitution and all [c]ourt fines/penalties have been paid in full." Following the entry of the amended JOC, defendant filed this appeal.

The policies and procedures underpinning and providing for admission into pre-trial intervention programs are set forth in Rule 3:28 and N.J.S.A. 2C:43-12. The guidelines following Rule 3:28 in Pressler & Verniero, Current N.J. Court Rules (the Guidelines) and N.J.S.A. 2C:43-12(a) establish criteria a prosecutor is required to consider when evaluating a PTI application. See Guideline 3; N.J.S.A. 2C:43-12(e). Significantly, "[e]ligibility for PTI is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur." Guideline 2. In addition, "[e]ach applicant for supervisory treatment shall be entitled to full and fair consideration of his application." N.J.S.A. 2C:43-12(f).

Our review of a prosecutor's decision to deny a defendant admission to PTI is "severely limited." State v. Negran, 178 N.J. 73, 82 (2003) (citations omitted). Judicial review of a PTI application exists "to check only the most egregious examples of injustice and unfairness." State v. Kraft, 265 N.J. Super. 106, 111 (App. Div. 1993) (citations omitted). Absent evidence to the contrary, a reviewing court must assume that "the prosecutor's

office has considered all relevant factors in reaching the PTI decision." State v. Nwobu, 139 N.J. 236, 249 (1995) (citing State v. Dalqlish, 86 N.J. 503, 509 (1981)).

Nonetheless, "[i]f a defendant can 'clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of . . . discretion,' . . . a reviewing court may overrule the prosecutor and order a defendant admitted to PTI." State v. Wallace, 146 N.J. 576, 582 (1996) (quoting State v. Leonardis, 73 N.J. 360, 382 (1977)). Generally, a defendant can establish a prosecutor has abused his or her discretion by showing

that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment. . . . In order for such an abuse of discretion to rise to the level of 'patent and gross,' it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pretrial Intervention.

[Id. at 583 (citations omitted).]

Additionally, if a "reviewing court determines that the 'prosecutor's decision was arbitrary, irrational, or otherwise an abuse of discretion, but not a patent and gross abuse' of discretion, the reviewing court may remand to the prosecutor for further consideration." State v. K.S., 220 N.J. 190, 200 (2015)

(quoting Dalqlish, supra, 86 N.J. at 509). Thus, if a prosecutor does not consider factors that should be considered, or considers factors that should not be considered, a remand is appropriate. Ibid. "A remand to the prosecutor affords an opportunity to apply the standards set forth by the court 'without supplanting the prosecutor's primacy in determining whether [Pretrial Intervention] is appropriate in individual cases.'" Ibid. (citation omitted).

Here, the assistant prosecutor considered an irrelevant factor and failed to considered several relevant factors. Thus, we conclude the decision was arbitrary and an abuse of discretion. Accordingly, we remand the matter to the prosecutor's office for further consideration.

The assistant prosecutor who rejected defendant's PTI application relied on, and even emphasized, an irrelevant factor; namely a juvenile charge that had been dismissed. Nothing in the record suggests the assistant prosecutor had evidence of anything more than a prior arrest when he considered defendant's juvenile record in rejecting the PTI application. Consequently, the prosecutor's reliance upon, and emphasis of, the juvenile arrest was error. K.S., supra, 220 N.J. at 199.

In addition, the assistant prosecutor unfortunately failed to consider certain relevant factors. He refused to consider that

another defendant, employed by the same employer, who engaged in the same scheme, was approved for PTI by another assistant prosecutor in the same office. Although the amounts involved differed, the policy underpinnings of PTI were arguably the same in both cases.

"Potentially disparate treatment of defendants has always been the subject of judicial concern." State v. Maldonado, 314 N.J. Super. 539, 544 (App. Div. 1998). As we explained in Maldonado:

The decision to grant or deny diversion to a defendant carries with it an obligation to fairly exercise the broad discretion given to the prosecutor, in light of the potential consequences to persons charged with criminal offenses. Therefore, where, as here, the prosecutorial veto that appears to be based upon the nature of the offense is challenged by a defendant arguing that a co-defendant has received PTI, the prosecutor must set forth the reasons for the apparent disparate treatment.

[Ibid.]

Although Maldonado involved co-defendants, its principles apply here as well, given defendant's proofs concerning the similarity of the crimes. Like Maldonado, the assistant prosecutor's reasoning here appeared to be primarily based on the nature of the offense. For that reason, the assistant prosecutor should have at least considered defendant's arguments concerning

the other PTI approved for the other employee rather than refuse to consider them outright.

Significantly, the disparate treatment of similarly situated defendants by different assistant prosecutors in the same office raises the specter of PTI decisions driven – or at least that could reasonably be perceived to be driven – by differing prosecutorial idiosyncrasies and the luck of the draw; not objective and balanced consideration of relevant PTI criteria. This concern is accentuated where, such as here, an assistant prosecutor has made statements to the court before reviewing a PTI application forecasting that he will likely reject it. Such circumstances do not instill confidence that a PTI applicant will receive "full and fair consideration of his application." N.J.S.A. 2C:43-12(f).

In view of our disposition of this appeal, we need not address defendant's contention the prosecutor patently and grossly abused his discretion by emphasizing defendant faced a second-degree offense that was facially inapposite to under-ringing. Nor need we address defendant's contention the prosecutor engaged in speculation in asserting the cost of defendant's theft from a

retailer increased the cost of consumer goods.⁷ Remanding to the prosecutor will afford "an opportunity to apply the standards set forth by the court 'without supplanting the prosecutor's primacy in determining whether [PTI] is appropriate.'" K.S., supra, 220 N.J. at 200. (citation omitted).

Reversed and remanded for further consideration by the prosecutor. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

⁷ We note that when defendant moved for reconsideration his employer wrote in support of the PTI application. PTI criteria direct that "[t]he prosecutor and the court, in formulating their recommendations or decisions regarding an applicant's participation in [PTI], shall give due consideration to the victim's position on whether the defendant should be admitted." N.J.S.A. 2C:43-12(e). On remand, this mandate should be evaluated explicitly.