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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-2474-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JUAN A. FERRER, JR.,

Defendant-Appellant.

Argued July 18, 2017 – Decided August 21, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Burlington County, Indictment
No. 15-03-0210.

Jordan G. Zeitz argued the cause for
appellant.

Jennifer B. Paszkiewicz, Assistant
Prosecutor, argued the cause for respondent
(Scott A. Coffina, Burlington County
Prosecutor, attorney; Ms. Paszkiewicz, of
counsel and on the brief; Linda Rinaldi, Legal
Assistant, on the brief).

PER CURIAM

Defendant Juan A. Ferrer, Jr. appeals the April 29, 2015 denial of his application for pretrial intervention (PTI). We affirm.

I.

The police report alleged the following facts. On October 5, 2014, a resident reported to police dispatch that his Palmyra apartment was being burglarized. The resident was in Philadelphia but able to view on his cellphone the video from his home surveillance system. He reported that three suspects broke into his residence and that at least one of the suspects appeared to be armed and pointed a gun at his dog.

Upon arriving at approximately 4:57 a.m., Sergeant Timothy Leusner and Patrolman Ludlow observed individuals moving around and using flashlights inside the residence. The officers requested backup to set up a perimeter. At 5:05 a.m., dispatch advised that suspects had reportedly exited the rear of the residence and fled. But, as the officers approached the rear of the residence, the back door opened and a flashlight shined into Leusner's face. He ordered the suspect to show his hands. The suspect instead slammed the door shut.

Two suspects attempted to exit through second- and third-story windows but retreated inside upon observing the police perimeter. The pair later attempted to flee via the front door,

but officers apprehended them. One suspect was defendant. The second suspect identified himself as Joseph R. Montez, but was found to be co-defendant Joseph R. Rios. Both defendants denied being accompanied by a third perpetrator and no additional suspect was discovered.

Inside the back door, police later recovered a bag containing items from the residence, including watches, jewelry, and other property. The officers also noticed a door and door jamb were damaged, and the home security system had been ripped from the wall and had its wires severed. A vehicle registered to co-defendant Rios was located on the street near the residence.

Defendant and Rios were charged with third-degree burglary, N.J.S.A. 2C:18-2(a)(1); third-degree attempted theft by unlawful taking, N.J.S.A. 2C:5-1(a) and N.J.S.A. 2C:20-3(a); third-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2); and fourth-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1). Rios was also charged with third-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(4).

Defendant applied for admission to PTI. An April 29, 2015 letter stated that the Superior Court's Criminal Division Manager

("CDM") recommended against PTI.¹ The CDM found "the crime is such that the public need for prosecution outweighs the value of supervisory treatment," citing N.J.S.A. 2C:43-12(e)(7), (14), and (17). The CDM explained that "[b]urglary of a home is a very serious offense," because "[t]here is always a great potential for violence if the perpetrator is interrupted in the middle of the crime," and because of the "fear and anxiety it causes its victims and society in general." The CDM noted that "[t]he sanctity and security of a person's home has been violated" and that the burglars had damaged the resident's property. The CDM stated "[s]uch a crime is worthy of vigorous prosecution" in order "to deter this defendant and others."

The CDM further noted the victim "completely opposed" PTI, citing N.J.S.A. 2C:43-12(e)(4). Finally, the CDM found that as "defendant [had] not presented any compelling reasons which may justify his admission" into PTI, "the needs and interests of society" would be best served by continued presentation. See N.J.S.A. 2C:43-12(e)(7), (15).

On May 6, 2015, defendant appealed "the denial" of his application. The prosecutor filed a brief stating "[t]he

¹ The letter was signed by a case supervisor/parole officer and a team leader. The prosecutor refers to this as the letter from the "PTI director."

Prosecutor's Office did not separately reject defendant; however, it is the State's position the rejection of the PTI Director for the Criminal Division was appropriate, and must be reviewed pursuant to an abuse of discretion standard."²

After reviewing submitted papers and hearing oral arguments, the trial court denied defendant's appeal on June 8, 2015. The

² Defendant does not challenge this procedure. However, the procedure improperly diverged from the three-step process required by Rule 3:28(h): (1) "The criminal division manager shall complete the evaluation [of the defendant's PTI application] and make a recommendation," (2) "[t]he prosecutor shall complete a review of the application and inform the court and defendant [of the prosecutor's decision and reasoning] within fourteen days of the receipt of the criminal division manager's recommendation," and (3) the defendant may appeal by filing a motion in the trial court "within ten days after the [prosecutor's] rejection." Ibid. (emphasis added). The CDM's letter mistakenly said that defendant's motion to the trial court "must be filed within ten (10) days of the date of this letter."

Moreover, the prosecutor mistakenly waited to evaluate defendant's application until after the defendant had filed a motion with the trial court. "The language in Rule 3:28(h) is both clear and emphatic. The prosecutor must independently evaluate whether a defendant should be admitted into PTI." State v. Rizzitello, 447 N.J. Super. 301, 311 (App. Div. 2016). "The [prosecutor]'s failure to perform this important, legally required evaluation is unacceptable." Ibid. As explained further infra, "policy determinations, such as which offenses to aggressively prosecute, fall within the domain of the prosecutor, not the judiciary" or judicial employees such as the CDM. State v. Waters, 439 N.J. Super. 215, 232 (App. Div. 2015) (quoting State v. Kraft, 265 N.J. Super. 106, 116 (App. Div. 1993)). "Notwithstanding this oversight, [because] the record before us contains sufficient facts" and the prosecutor adopted the CDM's rationale, we can decide the challenges defendant does raise. Rizzitello, supra, 447 N.J. Super. at 311; see State v. Nwobu, 139 N.J. 236, 250 (1995) (holding a "prosecutor [may] adopt the PTI director's reasoning as his own").

court found all appropriate factors were considered and no inappropriate factors were considered.

On October 6, 2015, defendant pleaded guilty to third-degree burglary and fourth-degree resisting arrest by flight. He was sentenced to two years' probation. Defendant was also ordered to pay \$3000 in restitution to his victims.

Defendant appeals the denial of PTI. See R. 3:28(g). He argues:

THE LAW DIVISION SHOULD HAVE ADMITTED APPELLANT INTO THE PRETRIAL INTERVENTION ("PTI") PROGRAM BECAUSE APPELLANT WAS A FIRST-TIME OFFENDER WHO WAS NOT CHARGED WITH ANY CRIMES CREATING A PRESUMPTION AGAINST SUCH ADMISSION AND BECAUSE THE CRIMINAL DIVISION MANAGER'S REASONS FOR REJECTING HIS PTI APPLICATION (WHICH WERE LATER ADOPTED BY THE STATE) WERE SPECULATIVE, LADEN WITH GENERALITIES, BARE ON SUPPORTING FACTS, OVER INCLUSIVE, AND CONTRARY TO WELL-ESTABLISHED LAW.

II.

The PTI program is governed by N.J.S.A. 2C:43-12 to -22, Rule 3:28, and the Guidelines for Operation of Pretrial Intervention in New Jersey, reprinted after Rule 3:28 in Pressler & Verniero, Current N.J. Court Rules (2017) [hereinafter Guidelines]. "N.J.S.A. 2C:43-12(e) lists seventeen non-exclusive factors to be considered by the criminal division manager and prosecutor in determining admission into [PTI]." State v. K.S., 220 N.J. 190,

197 (2015). Courts must "presume that a prosecutor considered all relevant factors, absent a demonstration by the defendant to the contrary." State v. Wallace, 146 N.J. 576, 584 (1996).

"Deciding whether to permit diversion to PTI 'is a quintessentially prosecutorial function.'" Waters, supra, 439 N.J. Super. at 225 (quoting Wallace, supra, 146 N.J. at 582). "Prosecutorial discretion in this context is critical for two reasons. First, because it is the fundamental responsibility of the prosecutor to decide whom to prosecute, and second, because it is a primary purpose of PTI to augment, not diminish, a prosecutor's options." Ibid. (quoting Nwobu, supra, 139 N.J. at 246). "Accordingly, 'prosecutors are granted broad discretion to determine if a defendant should be diverted' to PTI instead of being prosecuted." Ibid. (quoting K.S., supra, 220 N.J. at 199).

"Thus, the scope of review is severely limited." Ibid. (quoting State v. Negran, 178 N.J. 73, 82 (2003)). "Reviewing courts must accord the prosecutor 'extreme deference.'" Ibid. (quoting Nwobu, supra, 139 N.J. at 246). "[I]nterference by reviewing courts is reserved for those cases where needed 'to check . . . the "most egregious examples of injustice and unfairness.'" State v. Lee, 437 N.J. Super. 555, 563 (App. Div. 2014) (quoting Negran, supra, 178 N.J. at 82), certif. denied, 222 N.J. 18 (2015).

We apply the same standard as the trial court, and review its decision de novo. Waters, supra, 439 N.J. Super. at 226. We must hew to that standard of review.

"In order to overturn a prosecutor's rejection, a defendant must 'clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion.'" Ibid. (quoting State v. Watkins, 193 N.J. 507, 520 (2008)).

"Ordinarily an abuse of discretion will be manifest if defendant can show 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."

[Wallace, supra, 146 N.J. at 583 (quoting State v. Bender, 80 N.J. 84, 93 (1979)).]

III.

The prosecutor ultimately adopted the CDM's reasoning, which recommended rejection primarily on the nature of the offense of burglary and the victim's opposition to admitting defendant into the program. Defendant claims the CDM improperly established a per se rule of exclusion when referencing the "potential for violence" created by the crime of burglary. Here, by contrast, defendant has not demonstrated the CDM engaged in a categorical

denial. Rather, the CDM's letter indicated a review of the nature of the offense, the desires of the victim, and the defendant's "background and circumstances." Cf. State v. Caliquiri, 158 N.J. 28, 33 (1999) (finding an improper categorical rejection of PTI where "the prosecutor relied on a purported legislative belief that drug offenses near a school were 'deserving of enhanced punishment' and 'too serious for Pre-Trial Intervention'").³

Moreover, the CDM could properly emphasize the seriousness of defendant's crime. In Kraft, supra, the prosecutor similarly denied PTI based on "the nature of the offense" of third-degree burglary of an apartment. 265 N.J. Super. at 10. The prosecutor found that "'a burglary of a dwelling is always a most serious offense'" for the same reasons given by the CDM here. Id. at 116. We found "the Prosecutor's reasons for denying defendant admittance into PTI were entirely unassailable." Id. at 117. We explained:

It cannot reasonably be disputed that the burglary of a residence is a serious offense. Nor can it be earnestly debated that such an offense accounts for a legitimate source of fear and anxiety on the part of homeowners. Undoubtedly, these already existent and

³ Defendant argues Caliquiri, supra, established a presumption in favor of PTI for third-degree offenses. Rather, Caliquiri merely ruled that where there is a presumption against PTI, "the weight of the evidence to rebut the presumption against PTI [for a third-degree offense] need not be as great as if the defendant had been charged with a second-degree offense." 158 N.J. at 44.

justified fears would only be heightened if the public were to detect a lack of vigorous prosecution, whether real or perceived, relating to such offenses. In light of these factors, the Prosecutor's conclusion that the public interest would best be served in this matter by prosecution rather than by diversion can hardly be faulted.

[Id. at 116.]

In Kraft, supra, the trial court overturned the prosecutor's decision because "'nobody was home, it's not that he was in the house threatening somebody or there was a potential for violence.'"

Id. at 117 (emphasis omitted). We reversed, reasoning:

While it is true that there may have been no one present in the particular dwelling that defendant burglarized, the record indicates that this residence was part of an apartment complex and thus, was surrounded by neighboring units. . . . Under such circumstances, there clearly existed a significant potential for violence, which could easily have been realized if one of the victim's neighbors had interrupted the perpetrators in the middle of their crime. Thus, not only did the trial court err in attempting to downplay the severity of the particular offense involved here, its rationale for doing so was deficient.

[Ibid.]

Here, defendant similarly burglarized an apartment, raising the possibility occupants in neighboring apartments "could hear, and possibly even see" the burglars, just as the police later saw the burglars from outside the apartment. Ibid. Thus, there

clearly existed a potential for violence. Indeed, one burglar appeared to be armed with a handgun which he pointed at the resident's dog. Moreover, rather than comply with the officers' orders to surrender peaceably, the burglars engaged in a standoff before running outside of the apartment.

Defendant notes the CDM stated that "defendant has not presented any compelling reasons which may justify his admission into [PTI]." Defendant asserts this was a reference to Guideline 3(i), which provides PTI is not ordinarily granted for certain categories of offenses, creates a presumption against admission, and requires an applicant to show "compelling reasons justifying the applicant's admission." However, there is no indication the CDM, the prosecutor, or the trial court applied a presumption against admission. In any event, "[b]ecause burglary of a home is similar to robbery, in the sense that it raises the public's concern regarding the threat of personal safety, it is a crime that implicates Guideline 3(i)." State v. Baynes, 148 N.J. 434, 446 (1997) (citing Kraft, supra, 265 N.J. Super. at 117); see Guideline 3(i) (providing PTI should not ordinarily be granted for crimes "deliberately committed with violence or threat of violence"). That is particularly true here, as one of the robbers was carrying and pointing a gun. As noted by the trial court, this burglary was "on the more extreme end factually."

Defendant further asserts the CDM placed undue weight on the victim's desires. However, N.J.S.A. 2C:43-12(e)(4) requires prosecutors and CDMs to consider "[t]he desire of the . . . victim to forego prosecution," and the victim's opposition to PTI "is an appropriate factor to consider under Guideline 3 and N.J.S.A. 2C:43-12(e)(4)," State v. Imbriani, 291 N.J. Super. 171, 180 (App. Div. 1996). Given that the robbers broke into the victim's home, pointed a gun at his dog, attempted to steal his possessions, and damaged his apartment, the victim had valid reasons to oppose PTI, which were properly considered and weighed. In any event, the Legislature and Rule 3:28 "leave the weighing process to the prosecutor or program director." Wallace, supra, 146 N.J. at 585-86; accord Waters, supra, 439 N.J. Super. at 234.

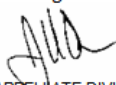
Defendant cites his age, education, children and motorcycle injuries, and claims he was under the influence leading up to the burglary, but those factors did not require PTI. The CDM and prosecutor are presumed to have considered those factors. Wallace, supra, 146 N.J. at 584. Indeed, the rejection letter stated that "defendant's application for [PTI] has been reviewed" and the "background and circumstances provided by" defendant have been "taken into consideration." See id. at 588.

We agree with the trial court that defendant did not show the denial of PTI (1) "was not premised upon a consideration of all

relevant factors"; (2) "was based upon a consideration of irrelevant or inappropriate factors"; or (3) "amounted to a clear error in judgment." Id. at 583. Defendant certainly did not establish a "patent and gross abuse of discretion." Ibid.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION