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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3036-16T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ROBERT HERD,

Defendant-Respondent.

Argued November 8, 2017 – Decided November 27, 2017

Before Judges Carroll and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
16-06-1041.

David M. Liston, Assistant Prosecutor, argued
the cause for appellant (Andrew C. Carey,
Middlesex County Prosecutor, attorney; Mr.
Liston, of counsel and on the brief).

Rebecca Gindi, Assistant Deputy Public
Defender, argued the cause for respondent
(Joseph E. Krakora, Public Defender, attorney;
Ms. Gindi, of counsel and on the brief).

PER CURIAM

The State appeals from an order admitting defendant Robert
Herd into the Pretrial Intervention Program (PTI) over the

prosecutor's objection. The State contends the motion judge substituted his judgment for that of the prosecutor, and the prosecutor's decision to reject defendant's PTI application was based on a thorough consideration of all appropriate factors and did not constitute a gross and patent abuse of discretion. We agree with the State and reverse.

I.

The following facts are set forth in the PTI recommendation report submitted by the Criminal Division Manager serving as PTI Director. On January 19, 2016, an undercover investigator with the Middlesex County Prosecutor's Office (MCPO) Task Force completed a controlled purchase of .99 grams of marijuana from defendant for \$20. The transaction took place within 1000 feet of Mill Lake Elementary School and within 500 feet of the Monroe Community Center. On January 27, 2016, an undercover MCPO officer completed a second controlled purchase of 7.06 grams of marijuana from defendant for \$110.

These drug transactions resulted in defendant's arrest on March 29, 2016. Following his arrest, police observed defendant chewing on a green vegetation they believed to be marijuana. The police asked defendant how much marijuana he ate, to which he responded he "didn't eat shit."

Defendant was subsequently charged in Middlesex County Indictment No. 16-06-1041 with two counts of fourth-degree distribution of marijuana, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(12) (counts one and four); third-degree distribution of marijuana on or near school property, N.J.S.A. 2C:35-7 (count two); third-degree distribution of marijuana within 500 feet of public property, N.J.S.A. 2C:35-7.1 (count three); and fourth-degree evidence tampering, N.J.S.A. 2C:28-6(1).

Defendant applied for admission into PTI after he was indicted. The Criminal Division Manager, as the PTI Director, recommended defendant's admission into PTI. According to the recommendation report, defendant was then an unmarried twenty-two year old high school graduate who had attended one semester of college. He was currently unemployed but actively seeking employment. He reported smoking marijuana daily when he was younger, but recently smoked only occasionally. Documentation showed defendant participated in counselling programs in 2015 and 2016 for treatment of alcohol use disorder and cannabis use disorder.

The report stated defendant had a record of two juvenile offenses in 2007 that were dismissed. As an adult, defendant had municipal court convictions for criminal trespass and wandering,

a local ordinance violation, and a traffic violation for underage drinking.

The report recommended defendant's admission into PTI, conditioned upon a substance abuse evaluation, compliance with all treatment recommendations, and random urine monitoring. The report also recommended defendant be required to continue his education or procure and maintain employment, and remain offense free.

At a January 9, 2017 status conference, the prosecutor advised the court he was still considering defendant's application. He elaborated: "[M]y instinct is to reject [defendant] for PTI. I don't believe he's an appropriate candidate for supervision." The prosecutor proposed that defendant submit to a urine test, which defendant declined on the advice of counsel. The prosecutor stated defendant's decision to refuse the test was "neither here nor there," and would "not weigh[] either way" in his decision to approve or deny defendant's application.

On January 15, 2017, the prosecutor issued a lengthy letter rejecting defendant's application, thereby overriding the Director's recommendation. The prosecutor explained he considered "all information about [defendant] that is positive and favorable," and each of the seventeen criteria identified in

N.J.S.A. 2C:43-12(e). We quote from the rejection letter at length:

Subsections 1 and 2. The Nature of the Offense and Facts of the Case. During . . . January [] 2016, defendant engaged in the distribution of marijuana in Monroe Township. Specifically, on two separate occasions defendant sold a quantity of marijuana to an undercover officer. The first sale was also within 1000 feet of the Mill Lake Elementary School and within 500 feet of the Monroe Community Center. On March 29, 2016, defendant was arrested by officers from the Monroe Township Police Department in connection with charges relating to the prior drug sales. After he was placed under arrest, the officers observed defendant chewing on something and he had what appeared to be marijuana stuck to his lips and teeth.

Subsection 3. The Motivation and Age of the Defendant. Defendant is [twenty-two] years old and has indicated in the PTI Report that he would be a good candidate for PTI because it is the first time he is really in trouble, he wants to get his life back on track, he is trying to work and wants to go back to school. He further indicated that PTI would provide structure and would still allow him to get a job. Finally, he stated that he made a mistake and is trying to do the right thing.

Subsection 4. The desire of the complainant or victim to forgo prosecution. This factor is not applicable in the instant case.

Subsection 5. The Existence of Personal Problems and Character Traits Which May be Related to the Applicant's Crime and For Which Services are Unavailable Within the Criminal Justice System, or Which may be Provided More Effectively Through Supervisory Treatment and the Probability that the Causes of Criminal

Behavior can be Controlled by Proper Treatment and Subsection 6. The Likelihood that the Applicant's Crime is Related to a Condition or Situation That Would be Conducive to Change Through his Participation in Supervisory Treatment. There are no "personal problems" or "character traits" which are unique to this defendant for which services would only be available outside the criminal justice system. Further, since the defendant has never been subject to supervisory treatment there is no way to tell whether he would be conducive to change if given the opportunity.

Subsection 7. The Needs and Interest of the Victim and Society. While there is no specific victim of defendant's crimes, our communities as a whole suffer as a result of the actions of those who distribute drugs. Society has a strong interest in deterring individuals from such conduct. There is a need for both specific and general deterrence in this case.

Subsection 8. The Extent to Which the Applicant's Crime Constitutes Part of a Continuing Pattern of Antisocial Behavior and Subsection 9. The Applicant's Record of Criminal and Penal Violations and the Extent to Which He May Present a Substantial Danger to Others. Although[] the defendant has no prior indictable record, the instant offense appears to be part of a pattern of antisocial behavior. Defendant repeatedly engaged in criminal activity in January and March[,] 2016. Furthermore, his two prior municipal convictions along with the instant arrest failed to deter his criminal activity, as he admitted to smoking marijuana until August [] 2016, approximately five months after his arrest[.]

Subsection 10. Whether or Not the Crime is of an Assaultive or Violent Nature, Whether in the Criminal Act Itself or the Possible Injurious Consequences of Such Behavior. This factor is not applicable in the instant case.

Subsection 11. Consideration of Whether or Not Prosecution Would Exacerbate the Social Problem that led to the Applicant's Criminal Act. This factor is not applicable in the instant case.

Subsection 12. The History of the Use of Physical Violence Toward Others. The defendant has no history of the use of physical violence toward others.

Subsection 13. An Involvement With Organized Crime. This factor is not applicable in the instant case.

Subsection 14. Whether or Not the Crime is of Such a Nature that the Value of Supervisory Treatment Would be Outweighed by the Public Need for Prosecution and Subsection 17. Whether or Not the Harm Done to Society by Abandoning Criminal Prosecution Would Outweigh the Benefits to Society From Channeling an Offender Into a Supervisory Treatment Program. Channeling this particular offender into the PTI program would harm society by sending a message which would minimize and trivialize the severity of defendant's actions. Any benefit to the defendant from acceptance into the PTI program would be far outweighed by the harmful message sent to society that such offenses merit a diversionary program.

Subsection 15. Whether or Not the Applicant's Involvement With Other People in the Crime Charged or in Other Crime is Such That the Interest of the State Would Best be Served by Processing the Case Through Traditional Criminal Justice System Procedures. This factor is not applicable in the instant case.

Subsection 16. Whether or Not the Applicant's Participation in Pretrial Intervention Will Adversely Affect the Prosecution of Codefendants. This factor is not applicable in the instant case.

These factors taken as a whole, and especially subsections N.J.S.A. 2C:43-12(e)1, 2, 7, 8, 14, and 17, strongly weigh against the defendant's enrollment in PTI. While the defendant has no prior indictable record, his actions constituted a continuing pattern of antisocial activity and the seriousness of the offense and the public need for prosecution outweigh the positive factors that have been presented. See State v. Kraft, 265 N.J. Super. 106, 116-17 (App. Div. 1993). Therefore, the State must reject [defendant] from PTI.

Defendant appealed the denial of his PTI application. In a written decision, the judge found, with respect to factors one and two, that the quantity of the drugs involved was small and "the buys were solicited by the State and the State controlled the meeting place." As to factor three, the judge found defendant appeared remorseful and his desire to turn his life around "would be impeded if any one of these charges were to show on his record."

The judge expressed "concern" over the State's weighing of factors five, eight and nine. The judge instead found it was not

a negative factor that defendant had not previously been subject to supervisory treatment, and defendant's two drug sales, evidence tampering, and three municipal convictions did not constitute a pattern of criminal behavior. The judge reasoned that defendant's attempt to swallow marijuana at the time of his arrest was "demonstrative of his addiction" and his "prior record only establishes the continued control [his] addiction has on him."

The judge found "[t]he State was correct to argue under [f]actor [seven] . . . that society has a strong interest in deterring individuals from such conduct[,]" but also "society has a strong interest in rehabilitating addiction." Disagreeing with the State that factor eleven did not apply, the judge "[found] that not only does it apply, but PTI supervision would enhance [d]efendant's motivation for rehabilitation and completion of the program." In a similar vein, the judge also determined that factors fourteen and seventeen weighed in defendant's favor. The judge explained:

While there is a need to demonstrate that the State takes prosecution of all offenses seriously, that does not require prosecution of every defendant when there is an option to divert a defendant into a supervisory treatment program when that defendant has a need, like addiction. There is a public interest and need in the rehabilitative aspect of PTI. Not only does PTI offer rehabilitation, but it offers an incentive to be successful in that rehabilitation.

Ultimately, the judge viewed the State's position as "unsustainable as it was reflexive in nature, [and] premised upon a failure to give due and proper weight to all the factors to be assessed . . . [and] in several instances to conduct the requisite individualized assessment necessary[.]" Based on these findings, the judge concluded "[t]here exists clear and convincing evidence that the State abused its discretion in denying [d]efendant admission into PTI." This appeal followed.

II.

"PTI is a 'diversionary program through which certain offenders are able to avoid criminal prosecution by receiving early rehabilitative services expected to deter future criminal behavior.'" State v. Roseman, 221 N.J. 611, 621 (2015) (quoting State v. Nwobu, 139 N.J. 236, 240 (1995)). Accordingly, "a PTI determination requires that the prosecutor make an individualized assessment of the defendant considering his or her 'amenability to correction' and potential 'responsiveness to rehabilitation.'" Id. at 621-22 (quoting State v. Watkins, 193 N.J. 507, 520 (2008)).

The scope of judicial review of the prosecutor's rejection of PTI is "severely limited." State v. Negran, 178 N.J. 73, 82 (2003). Deciding whether to permit diversion to PTI "is a quintessentially prosecutorial function." State v. Wallace, 146

N.J. 576, 582 (1996). "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." Nwobu, supra, 139 N.J. at 246 (quoting Kraft, supra, 265 N.J. Super. at 111-12). Accordingly, courts give prosecutors "broad discretion" in determining whether to divert a defendant into PTI. State v. K.S., 220 N.J. 190, 199 (2015). Thus, courts must "accord[] enhanced deference to a prosecutor's decision in respect of a PTI application." State v. Brooks, 175 N.J. 215, 225 (2002).

The PTI statute requires prosecutors to consider a non-exclusive list of seventeen criteria. N.J.S.A. 2C:43-12(e). These criteria "include 'the details of the case, defendant's motives, age, past criminal record, standing in the community, and employment performance[.]'" Roseman, supra, 221 N.J. at 621 (quoting Watkins, supra, 193 N.J. at 520).

"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.'" Watkins, supra, 193 N.J. at 520 (citation omitted). "A patent and gross abuse of discretion is defined as a decision that 'has gone so wide of the mark sought to be accomplished by PTI that

fundamental fairness and justice require judicial intervention.'" Ibid. (citation omitted). An abuse of discretion is manifested where it can be proven "that the [PTI] denial '(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[.]'" State v. Lee, 437 N.J. Super. 555, 563 (2014) (quoting State v. Bender, 80 N.J. 84, 93 (1979)), certif. denied, 222 N.J. 18 (2015).

Even if a "'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,'" that constitutes only "'an abuse of discretion.'" Wallace, supra, 146 N.J. at 583. "A 'patent and gross abuse of discretion' is more than just an abuse of discretion as traditionally conceived[.]" Id. at 582-83. "'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 (citation omitted). "We must apply the same standard as the trial court," and review the "judge's reversal of the prosecutor's decision de novo." State v. Waters, 439 N.J. Super. 215, 226 (App. Div. 2015).

Guided by these standards, we conclude the judge erred in ordering defendant's admission into PTI over the prosecutor's objection. We are convinced from our review of the record that the prosecutor considered, weighed, and balanced all of the requisite factors, including those personal to defendant as well as the facts and circumstances of the offense.

The prosecutor not only gave significant emphasis to the circumstances of the offense, but also considered defendant's individual characteristics. The prosecutor considered mitigating factors personal to defendant, such as his age, background and motivation to complete the PTI program and turn his life around.

The prosecutor did not consider inappropriate factors. Contrary to defendant's argument, the prosecutor stated he would not weigh defendant's refusal to submit to a urine test against him, and that refusal played no role in the prosecutor's ultimate analysis.

The judge erred by interjecting himself into the process of weighing the applicable PTI factors, and predicated his decision upon his own assessment of those factors. Contrary to the judge's determination, the prosecutor's assessment of factors eight and nine was not inaccurate. Rather, the prosecutor's position that defendant's two drug sales, tampering with evidence, subsequent marijuana use, and prior municipal convictions, established a

pattern of antisocial behavior, finds clear support in the record. The judge also misread factor eleven to refer to rehabilitation when by its terms that factor focuses on whether "prosecution would exacerbate the social problem which caused defendant's criminal act."

Here, defendant was charged with a number of offenses spanning three different dates, including distributing marijuana in a school zone. As the State points out, "[t]he school zone statute creates the presumption against PTI[.]" State v. Caliquiri, 158 N.J. 28, 43 (1999).¹ Defendant responds that New Jersey's drug laws have undergone substantial changes since 1999, thus rendering the holding in Caliquiri inapplicable to the present case.² We need not decide the issue, since in any event the judge improperly discounted defendant's drug sales and their location because they were controlled purchases. Even if the undercover officer(s) made the purchases and chose the location, defendant was willing to sell the drugs at that location. In his brief to the trial court,

¹ The State did not present this argument to the trial court and consequently the judge did not rule on the issue.

² Defendant also argues that "marijuana's classification as a Schedule I substance, pursuant to N.J.S.A. 24:21-5, can no longer be maintained in light of the adoption of the New Jersey Compassionate Use Medical Marijuana Act," N.J.S.A. 24:6I-1 to -16. However, the Medical Marijuana Act has not yet resulted in a change in the classification of marijuana, and in any event the court did not cite it as a basis for its decision.

defendant conceded that factor seven, "[t]he needs and interests of society," bore "considerable weight against [him]." Moreover, the judge relied on the importance of addressing defendant's addiction, but defendant never contended he was addicted, or that addiction caused him to make the sales or swallow the marijuana.

While reasonable minds could differ in analyzing and balancing the applicable factors in this case, judicial disagreement with a prosecutor's reasons for rejection does not equate to a clear error of judgment or an abuse of discretion by the prosecutor. State v. DeMarco, 107 N.J. 562, 566-67 (1987). In this instance, the judge improperly substituted his own discretion for that of the prosecutor. Also, defendant did not show and the judge did not find that the prosecutor's decision would clearly subvert the goals underlying PTI. Thus, the prosecutor's rejection of defendant's PTI application was not a patent and gross abuse of discretion. We are therefore constrained to reverse and remand for further proceedings on the indictment.

Reversed and remanded.

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


CLERK OF THE APPELLATE DIVISION