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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3766-15T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LORRAINE MORGAN,

Defendant-Respondent.

Argued March 6, 2017 – Decided March 13, 2017

Before Judges Sabatino, Nugent and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 15-
09-1909.

William Kyle Meighan, Senior Assistant
Prosecutor, argued the cause for appellant
(Joseph D. Coronato, Ocean County Prosecutor,
attorney; Samuel Marzarella, Supervising
Assistant Prosecutor, of counsel; Mr. Meighan,
on the brief).

Michael B. Roberts argued the cause for
respondent (Roberts & Teeter, attorneys; Mr.
Roberts, on the brief).

PER CURIAM

The State appeals from a May 3, 2016 Law Division order
denying its motion for reconsideration of a March 17, 2016 order

admitting defendant Lorraine S. Morgan¹ into the Pre-Trial Intervention ("PTI") program over the State's objection. Because there have been a number of important factual and legal developments since the time of the trial court's orders, we remand for further proceedings.

In light of our disposition of this appeal, a brief summary of the background of this case will suffice. The State alleges that codefendant Walter Uszenski, along with his daughter, codefendant Jacqueline Halsey, and Morgan worked together to "fraudulently provide Uszenski's grand[child] . . . with educational, travel, and other expenses for which [the child] was not entitled." These expenses were paid with district funds.

Defendant was the Academic Officer of the Brick Township Public School District ("the district"). The State alleges that after Uszenski's grandchild began attending kindergarten in September 2014, defendant gave the final sign-off for the payment of \$141 to a social worker for counseling services that had already been provided to the child to assist him in transitioning from a special needs pre-school program to a general education kindergarten class. The State asserted that this action

¹ Defendant Lorraine Morgan and her husband, codefendant Andrew J. Morgan, share the same surname. To avoid confusion, we refer to Lorraine Morgan as "defendant" and to Andrew Morgan as "Morgan."

constituted official misconduct because defendant allegedly did not review all of the documentation underlying the request prior to giving her sign-off. On September 29, 2015, an Ocean County grand jury charged defendant solely in the final count of a nineteen-count indictment² with third-degree official misconduct in violation of N.J.S.A. 2C:30-2.

Defendant applied for admission into the PTI program. The Ocean County PTI Director ("director") reviewed defendant's application and denied it on January 11, 2016. In a letter and an accompanying notice of rejection, the director gave positive weight to defendant's lack of a criminal history or substance abuse issues, together with her age, marital status, child care

² The indictment charged Morgan with fourth-degree false swearing, N.J.S.A. 2C:28-2(a) (count one); three counts of third-degree theft by deception, N.J.S.A. 2C:20-4 (counts two, seven, and thirteen); two counts of second-degree conspiracy, N.J.S.A. 2C:5-2 (counts three and eight); three counts of second-degree official misconduct, N.J.S.A. 2C:30-2 and N.J.S.A. 2C:2-6 (counts six, eleven, and twelve); and third-degree official misconduct, N.J.S.A. 2C:30-2 (count seventeen). The indictment charged Uszenski with two counts of second-degree conspiracy (counts three and eight); two counts of second-degree official misconduct (counts four and nine); two counts of third-degree theft by deception (counts five and ten); and third-degree official misconduct (count sixteen). Finally, the indictment charged Halsey with second-degree conspiracy (count eight); second-degree official misconduct (count fourteen); third-degree theft by deception (count fifteen); and third-degree official misconduct (count eighteen).

responsibilities, educational degrees, and employment status. However, the director concluded that these positive factors were outweighed by the asserted negative impact admitting defendant into PTI would have on the prosecution of her codefendants³ and by the nature of the offense, which involved an alleged breach of the public trust. The director advised defendant that she could appeal her rejection from PTI to the trial judge and defendant did so.

The State submitted a letter brief in opposition to defendant's PTI application. In its brief, the State addressed each of the seventeen factors set forth in N.J.S.A. 2C:43-12(e) for determining PTI eligibility. However, the State primarily emphasized the nature of the alleged offense, N.J.S.A. 2C:43-12(e)(1); the facts of the case, N.J.S.A. 2C:43-12(e)(2); and its contention that placing defendant in PTI would adversely affect the State's prosecution of the three codefendants. N.J.S.A. 2C:43-12(e)(16).

In making its argument under N.J.S.A. 2C:43-12(e)(16), the State acknowledged that none of the other codefendants were charged in count nineteen of the indictment, the only count that applied to defendant, and that defendant was not implicated with the

³ Although the claimed negative impact is somewhat vague, the State contended that defendant's absence from the case could weaken its narrative before a jury. The State has, however, disavowed any intention to seek to have defendant waive her spousal privilege.

codefendants in any of the counts in which they were charged. Nevertheless, the State asserted that defendant's approval of the counseling services payment was "the final piece of the puzzle" in the scheme involving her three codefendants.

On March 17, 2016, the trial judge rendered an oral opinion reversing the State's rejection of defendant's application and admitting her into PTI. The judge found that the State had addressed all of the factors set forth in N.J.S.A. 2C:43-12(e), and that there was a presumption against defendant's admission into PTI under N.J.S.A. 2C:43-12(b)(2)(a) because she was a public officer or employee whose offense involved or touched upon her public office or employment. However, the trial judge found that defendant had demonstrated that compelling circumstances existed to rebut the presumption under the Supreme Court's decision in State v. Roseman, 221 N.J. 611 (2015).

As the State did in its analysis, the trial judge first noted defendant's age, educational accomplishments, employment history, and child care responsibilities. The judge also observed that defendant had no prior criminal history, did not "display any pattern of antisocial behavior[,]" had no history of violence, and did not "pose any kind of substantial danger to others if she's allowed to remain in society." The judge believed that defendant

would do well in a supervisory treatment program and contribute to the community in the future.

Moving away from the mitigating factors, the trial judge recognized that the State had given great weight to the nature of defendant's offense. However, the judge found it more significant that in a nineteen-count indictment, defendant was only charged with one count of official misconduct. In discussing the nature of defendant's offense, the trial judge stated that "the loss alleged by the State due to [defendant's] conduct is a mere \$141. And that sum didn't go in her pocket; it went for in-home services for three sessions by a social worker who had already rendered that for the benefit of the child."

Finally, the trial judge rejected the State's argument that admitting defendant into PTI would adversely affect its ability to prosecute defendant's codefendants. The judge stated:

I agree with defense counsel that equity dictates that [defendant's] application should not be denied simply because other people are also charged in the same indictment. The State could have charged [defendant] separately or not at all. And I believe it would be a very different result had that occurred.

Based upon these findings, the trial judge decided to overrule the prosecutor, and admit defendant into PTI. The judge summed up her ruling by stating:

[Defendant's] strong moral character, history of hard work, minimal nature of her involvement in the case, a lack of any criminal history or any kind of antisocial behavior, the suffering she's already endured because of this prosecution, the benefit to society that would . . . be gained if [defendant] was admitted into PTI, that provide compelling circumstances to admit [defendant] into PTI.

I agree this would be an egregious example of injustice and unfairness. It would be an arbitrary and unreasonable denial. I agree that if ever there existed a defendant who could overcome the presumption against PTI, [defendant] is that person. I find that the prosecutor's rejection of . . . defendant into PTI is a clear error in judgment that clearly subverts the goals underlying PTI.

The State thereafter filed a motion for reconsideration, which the trial judge denied on May 3, 2016. This appeal followed.

Circumstances occurring after the State filed its appeal require that we remand this matter to the trial court for further proceedings. While defendant's PTI application was under review, she and the three codefendants filed motions to dismiss the indictment. On May 24, 2016, after the State filed this appeal, the grand jury returned a superseding nineteen-count indictment against the three codefendants and defendant. Defendant was again

only charged in count nineteen with third-degree official misconduct.⁴

The three codefendants filed motions to dismiss the charges in the new indictment that involved them. Because of the State's appeal, however, defendant was unable to file a similar motion to dismiss while the appeal remained pending. See R. 2:9-1(a) (stating that "the supervision and control of the proceedings on appeal . . . shall be in the appellate court from the time the appeal is taken").

On February 28, 2017, just six days before the appellate oral argument in this case, the trial judge rendered a twenty-nine-page written opinion dismissing counts three through eighteen of the indictment pertaining to Uszenski, Morgan, and Halsey.⁵ In dismissing these counts, the judge found that the State failed to present exculpatory evidence to the grand jury which rendered the indictment.

⁴ The original indictment had stated that this offense occurred between August 1, 2014 and October 30, 2014. In the superseding indictment, the offense was alleged to have occurred between September 1, 2013 and October 30, 2014. This was the only change in the superseding indictment that concerned defendant.

⁵ The judge denied Morgan's motion to dismiss counts one and two, which involved the State's allegation that Morgan failed to disclose that he had a criminal record during the period he was seeking employment with the district.

According to the trial judge's opinion, this evidence included documentation that Uszenski's grandchild had been classified as in need of special education services before Uszenski, Morgan, or defendant were employed by the district. Because of the State's pending appeal, the judge did not consider or rule upon count nineteen of the indictment, which pertained only to defendant. However, the judge noted that the State also "had in its possession documentation which would have allowed the grand jury an ability to make [its] own assessment of the evidence and the propriety of the in-home [counseling] services" provided to Uszenski's grandchild in September 2014.

With the issuance of the trial judge's decision, Uszenski and Halsey are no longer codefendants and the two remaining charges against Morgan have no connection to defendant. Thus, one of the major underpinnings of the State's denial of defendant's PTI application no longer exists because it does not appear that placing defendant in PTI could have any negative impact on the prosecution of individuals who are no longer codefendants. In addition, the facts that have now come to light in connection with the codefendants' motions to dismiss were not considered by the trial judge or addressed by the parties when the judge admitted defendant into PTI.

Under these circumstances, we have concluded that the most prudent course of action would be to remand this matter to the trial court to enable defendant to file her own motion to dismiss the indictment on similar grounds to those raised by her codefendants or on any other ground she considers appropriate. In remanding, we obviously express no view on the merits of such an application. However, basic fairness requires that defendant also have the opportunity to seek relief which the pendency of the State's appeal had prevented her jurisdictionally from pursuing. See R. 2:9-1(a).

In view of this remand, we also vacate the trial court's order permitting defendant to enter the PTI program, without prejudice to her right to file another application if her motion to dismiss the indictment is unsuccessful. In so ruling, we specifically note that because of the unique circumstances of this case, we have not considered nor ruled upon the merits of the State's appeal. We vacate the order only because the evidence upon which it was based is now stale in view of the developments detailed in the trial judge's February 28, 2017 oral opinion. It would also be fair to give both parties, should defendant again seek PTI, the opportunity to address the new facts that were disclosed in connection with the codefendants' motions to dismiss the indictment. At a minimum, the developments would appear to

alter the analysis of the factor concerning the impact of PTI for defendant upon the State's prosecution of her codefendants.

The March 17, 2016 order is vacated and the matter is remanded for proceedings consistent with this opinion. 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