SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5456-14T4

STATE OF NEW JERSEY,

    Plaintiff-Respondent,

v.

VINCENT J. DEFILIPPO,

    Defendant-Appellant.

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Submitted May 31, 2017 — Decided December 11, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Indictment No.
12-03-0257.

Joseph E. Krakora, Public Defender, attorney
for appellant (Alyssa Aiello, Assistant Deputy
Public Defender, of counsel and on the brief).

Fredric M. Knapp, Morris County Prosecutor,
attorney for respondent (Erin Smith Wisoff,
Supervising Assistant Prosecutor, on the
brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

After the prosecutor rejected his application for the

Pretrial Intervention Program (PTI), and the trial court denied

his appeal, defendant Vincent DeFilippo pleaded guilty to fourth-degree resisting arrest, and the court sentenced him to one year of probation. Defendant now appeals the trial court's order denying his PTI appeal. We vacate the court's order and remand to the prosecutor for reconsideration.

According to police reports, defendant was fifty-one years old and living with his mother on the date of the offense. Defendant's mother reported to police that defendant returned home intoxicated — his blood alcohol content was later measured at .36 percent — and refused to return her car keys. She asked the police to retrieve her keys from him.

Officers who responded to the home found defendant to be belligerent and uncooperative. He denied he possessed the keys, although an officer heard him jingle them in his pockets. When the officer attempted to retrieve the keys, defendant forcibly pushed him away. As police attempted to arrest him, he kicked an officer. Police pepper-sprayed him. He still impeded the officers' efforts, first going limp, then flailing about, knocking an officer into furniture as he was escorted out of the house. Defendant was ultimately indicted and charged with two counts of third-degree aggravated assault by committing simple assault on law enforcement officers, N.J.S.A. 2C:12-1(b)(5)(a), and one count of third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3).

Defendant applied for PTI. A probation officer recommended denial, and the prosecutor agreed.[1] The probation officer noted that this case was defendant's seventh involvement with the criminal justice system, although all led to dismissals except for a contempt charge that was transferred to Family Court and led to a probationary sentence over twelve years earlier. The probation officer recounted the facts of the new case, and recommended denial of PTI "based on the violent nature of the instant offense and the injurious consequences of his behavior . . . ."

In his brief opposing defendant's trial court appeal, the assistant prosecutor defended the denial of defendant's application. Echoing the probation officer's reasoning, the State explained:

> The State likewise objects to admitting this defendant into the PTI program. A review of the nature and facts of this case shows that this applicant is inappropriate for PTI. N.J.S.A. 2C:43-12(e)(1) [("The nature of the offense")] and (2) [("The facts of the case")]. Defendant engaged in conduct which

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[1] Although the State contends that the application "was denied by the Criminal Division," the record includes only a probation officer's initial recommendation, without a supervisor's signature, or evidence of the Criminal Division Manager's review. However, "[p]ursuant to the procedures and guidelines established by Rule 3:28 and N.J.S.A. 2C:43-12, acceptance into PTI is dependent upon an initial recommendation by the Criminal Division Manager . . . ." State v. Roseman, 221 N.J. 611, 621 (2015). Furthermore, neither party provided us with the prosecutor's letter rejecting defendant's application. We rely instead on the State's trial court brief for its reasons for rejection.

could have caused widespread public harm and
[the] State is cognizant of the needs and
interests of society. <u>N.J.S.A.</u> 2C:43-12e(7)
[("The needs and interests of the victim and
society")]. Defendant also engaged in a
continuing pattern of anti-social behavior.
The instant offense is his seventh arrest.
Although defendant only has one disorderly
persons conviction, defendant continues to
engage in the same behavior despite the
consequences. <u>N.J.S.A.</u> 2C:43-12e(8) [("The
extent to which the applicant's crime
constitutes part of a continuing pattern of
anti-social behavior")].

In a thorough and cogent oral opinion, the trial judge
reviewed the State's allegations, and, citing <u>State v. Leonardis</u>,
73 N.J. 360 (1977), and other authority, found defendant failed
to establish by clear and convincing evidence that the prosecutor's
denial of PTI constituted a gross and patent abuse of discretion.
Applying <u>State v. Bender</u>, 80 N.J. 84, 93 (1979), the judge stated
that defendant failed to show that the prosecutor did not consider
all relevant factors; considered irrelevant or inappropriate
factors; or made a clear error of judgment.

In particular, the court addressed defendant's argument that
the prosecutor inappropriately relied upon his history of arrests
that did not lead to convictions. The court noted that the "State
drew the limited conclusion that the defendant has engaged in a
continuing pattern of antisocial behavior and his dismissed
charges have not deterred him from committing subsequent

offenses." Relying on <u>State v. Brooks</u>, 175 N.J. 215, 229 (2002), the court held that the prosecutor was permitted to consider dismissed offenses, but solely in connection with whether those prior arrests should have deterred defendant from committing a new offense.

Defendant raises the following contentions for our consideration:

> POINT I
>
> THE TRIAL COURT'S ORDER DENYING DEFILIPPO'S PTI APPEAL MUST BE REVERSED.
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> A.   In Light Of The Circumstances Surrounding DeFilippo's Arrest, Including His Severe Intoxication, The Prosecutor's Heavy Reliance On <u>N.J.S.A.</u> 2C:43-12e(1), (2), (7) and (10) Was Inappropriate.
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> B.   In Finding That PTI Was Not A Sufficient Sanction To Deter DeFilippo From Committing Future Crimes, The Prosecutor Inappropriately Considered DeFilippo's Dismissed Charges, And Failed To Consider <u>N.J.S.A.</u> 2C:43-12e(6), Even Though There Was Ample Support In The Record To Support That Factor.

The principal issue before us is whether the prosecutor impermissibly weighed defendant's prior arrests that did not lead to convictions. We are constrained to vacate the trial court's order, and to remand for the prosecutor to reconsider defendant's PTI application without regard to his prior arrests that did not lead to convictions. We do so because, after the trial court's

decision, but before his appeal to this court, the Supreme Court held that a prosecutor evaluating a PTI application may not consider prior dismissed charges unless the underlying facts are undisputed, or have been determined after a hearing. State v. K.S., 220 N.J. 190, 199 (2015).

The Court expressly "disapprove[d]" statements in Brooks, 175 N.J. at 229, that permitted a prosecutor to rely on such prior arrests as evidence that a defendant was undeterred from offending. K.S., 220 N.J. at 199. Thus, K.S. established a break with prior precedent, requiring us to determine, absent direction from the Court, whether we should apply K.S. retroactively to defendant's case. See State v. Knight, 145 N.J. 233, 251 (1996) (describing when a "new rule" triggers a retroactivity analysis). Here, we must consider only whether "pipeline retroactivity" is appropriate, as defendant's case was pending when K.S. was decided. See Knight, 145 N.J. at 249 (describing forms of retroactivity).

We must weigh three factors: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." Id. at 251 (quoting State v. Nash, 64 N.J. 464, 471 (1974)).

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The first and often "pivotal" factor supports retroactivity when the purpose of the rule is to enhance "the reliability of the truth-finding process . . . ." Ibid. That is the case here. A prosecutor may inaccurately assess a defendant's amenability to diversion if dismissed charges are deemed evidence of incorrigibility. The Supreme Court noted that "deterrence is directed at persons who have committed wrongful acts," and a prosecutor may not infer guilt from dismissed charges. K.S., 220 N.J. at 199; see also Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 241 (1957) ("The mere fact that a man [or woman] has been arrested has very little, if any, probative value in showing that he [or she] has engaged in any misconduct."); Michelson v. United States, 335 U.S. 469, 482 (1948) (noting that an arrest "happens to the innocent as well as the guilty"); United States v. Berry, 553 F.3d 273, 282-84 (3d Cir. 2009) (noting the majority view of courts of appeal that sentencing courts may not base decisions "on a bare arrest record" because, without more, it is not proof of wrongdoing).

The remaining factors are entitled to lesser weight, given the clear purpose of the K.S. rule. "The second and third factors come to the forefront of the retroactivity analysis when the inquiry into the purpose of the new rule does not, by itself, reveal whether retroactive application of the new rule would be

appropriate." <u>Knight</u>, 145 N.J. at 252. We recognize, with respect to the second factor, that prosecutors and the courts relied on <u>Brooks</u> to infer that PTI applicants were undeterred from offending, based on records of dismissed charges. As for the third factor, giving <u>K.S.</u> pipeline retroactivity would no doubt burden the system by requiring reconsideration of old cases. Yet, it would enhance the administration of justice, by preventing defendants from suffering undeserved negative consequences of unproved or dismissed charges. On balance, we conclude that pipeline retroactivity is warranted.

We also reject the State's contention that even if <u>K.S.</u> applies, the PTI rejection should be affirmed because the State did not give great weight to this factor. We shall not speculate as to whether the State would have reached the same result, had it ignored defendant's prior dismissed charges and considered only a single, twelve-year-old disorderly persons conviction. Notably, the record lacks an alternative basis for the State's conclusion that defendant's current charges were part of "a continuing pattern of anti-social behavior."

The Court in <u>K.S.</u> held that when the State relies upon an inappropriate factor — as it did here — the State engages in an abuse of discretion, as distinct from a patent and gross abuse of discretion. 220 N.J. at 200. Under such circumstances, the

appropriate remedy is a remand to the prosecutor for reconsideration without regard to the impermissible factor. Ibid. That preserves the prosecutor's discretion, while assuring that PTI standards are properly employed. Ibid.

The remainder of defendant's arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We only add a brief comment regarding his argument that the prosecutor failed to consider his amenability to treatment under factor 6 — N.J.S.A. 2C:43-12(e)(6) — "[t]he 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 . . . ." Defendant presented no evidence that he was prepared to seek and comply with substance abuse treatment.

Vacated and remanded for reconsideration. We do not retain jurisdiction.