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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0132-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS J. BUNTING,

Defendant-Appellant.

Submitted January 10, 2018 – Decided April 23, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Indictment No.
13-09-0559.

Wilentz, Goldman & Spitzer, PA, attorneys for
appellant (Jay J. Ziznewski, of counsel and
on the briefs; Eric J. Marcy, on the brief).

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Paul H.
Heinzel, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

On July 29, 2016, defendant Thomas J. Bunting was sentenced
in accord with a negotiated plea agreement to two years probation

and 180 days in county jail on a charge of fourth-degree operation of a motor vehicle during a period of license suspension for a second or subsequent violation of N.J.S.A. 39:4-50 (driving while intoxicated), N.J.S.A. 2C:40-26(b). Defendant now appeals, contending that the trial judge erred in denying his motion to suppress as well as his application for admission into the pretrial intervention (PTI) program. We affirm, and dissolve the stay previously granted by the trial court of service of the sentence pending appeal. Defendant is to arrange with the trial court to turn himself in within fifteen days of this decision.

On July 29, 2013, while using a mobile data terminal (MDT), a South Bound Brook police officer ran a random license plate check on a white Dodge pickup truck. He learned that the registered owner of the truck's driver's license, defendant, was suspended. The MDT information included defendant's age, sex, height, home address, date of birth, and a photograph.

When stopped, defendant explained that he was driving to a pharmacy to refill pain medication for burn injuries. After defendant produced identification, he was arrested.

The Criminal Division Manager denied defendant's application for admission into PTI, citing to N.J.S.A. 2C:43-12(e)(8), because the offense constituted part of a continuing pattern of antisocial behavior. Defendant's first conviction occurred on September 5,

1989, resulting in a six-month suspension of his driver's license; the second on July 15, 2009, resulting in a seven-month suspension; and the third conviction on September 13, 2011, resulting in a ten-year suspension. The Criminal Division Manager's written denial also noted that defendant was "charged with a serious offense that carries a presumption of imprisonment if the defendant is convicted, and has not shown compelling reasons justifying admission and establishing that a decision against enrollment would be arbitrary and unreasonable." See N.J.S.A. 2C:44-1(d).

The Somerset County Prosecutor's Office also rejected the application on similar grounds. Defendant appealed, and the trial court initially remanded the matter to the Prosecutor's Office for further consideration. The Prosecutor's Office reiterated its opposition.

After oral argument on the appeal from the rejection, the judge did not order defendant's admission into the program:

[The prosecutor] did not fail to consider any factors that would weigh heavily in the [d]efendant's favor and there is nothing in the record to show that [d]efendant has made any effort[] to seek rehabilitation. Thus, this [c]ourt finds that [d]efendant has not "clearly and convincingly established" that the prosecutor's decision was either a gross and patent abuse of discretion or arbitrary and unreasonable. We cannot conclude that the prosecutor's decision has gone so wide off the mark . . . that fundamental fairness and justice require [the court's] intervention.

The [prosecutor's] rejection confirmed that [his] decision rested on an evaluation of all of the relevant factors in this case, and therefore, this [c]ourt must afford the [prosecutor] the enhanced deference required by law.

Relying on State v. Parks, 288 N.J. Super. 407 (App. Div. 1996), defendant filed a motion to suppress, asserting that the arresting officer needed to confirm that the person driving the vehicle matched the description of the owner. The trial judge rejected this argument. He found that even if the officer did not compare the physical description of the registered owner to the driver, law enforcement had reasonable and articulable suspicion to stop the vehicle.

The defendant raises two points on appeal:

POINT I

A POLICE OFFICER'S STOP OF A MOTOR VEHICLE IS CONSIDERED A SEIZURE WITHIN THE MEANING OF THE UNITED STATES AND NEW JERSEY CONSTITUTIONS AND IF SAID STOP IS NOT REASONABLE, ALL EVIDENCE SEIZED AS A RESULT OF THAT STOP MUST BE SUPPRESSED.

POINT IA

WHEN A POLICE OFFICER CONDUCTS A RANDOM MOBILE DATA TERMINAL CHECK OF A MOTOR VEHICLE LICENSE PLATE AND DISCOVERS THAT THE DRIVER'S LICENSE OF THE PERSON WHO OWNS THE VEHICLE IS SUSPENDED, THE POLICE OFFICER MUST AT LEAST MAKE AN ATTEMPT TO MATCH THE IDENTIFYING CHARACTERISTICS OF THE OWNER OF THE VEHICLE WITH THE ACTUAL DRIVER OF THE VEHICLE PURSUANT TO STATE V. PARKS AND THE CONSTITUTIONAL

VALIDITY OF ANY STOP MUST DEPEND ON WHAT IS REASONABLE BASED ON THE FACTS AND CIRCUMSTANCES AT THE TIME.

POINT II

WHERE A DEFENDANT IS DENIED ADMISSION INTO A PTI PROGRAM BY THE STATE, AND THE STATE'S DECISION WAS NOT BASED UPON ALL RELEVANT FACTORS, BUT WAS BASED UPON A CONSIDERATION OF INAPPROPRIATE FACTORS AND WHERE THE DECISION AMOUNTED TO A CLEAR ERROR IN JUDGMENT, WHICH WOULD SUBVERT THE GOALS UNDERLYING THE PTI PROGRAM, A COURT SHOULD OVERRULE THE PROSECUTOR AND ADMIT THE DEFENDANT INTO THE PTI PROGRAM.

I.

On appellate review of a motion to suppress, we defer to the factual findings made by the trial court unless "clearly mistaken" or "so wide of the mark" that the interests of justice require intervention. State v. Elders, 192 N.J. 224, 245 (2007) (citation omitted). Review of the trial court's application of the law to established facts, however, is plenary. State v. Rockford, 213 N.J. 424, 440 (2013).

As a matter of law, defendant's argument regarding the motion to suppress lacks merit because Parks was essentially overruled by State v. Donis, 157 N.J. 44 (1998). In Donis, the Court said that MDT information that a car's owner "had an expired or revoked license" gives an officer "adequate grounds to stop th[e] vehicle." 157 N.J. at 57. That principle is the current state of the law:

"when the records reveal that the owner's license to drive is suspended, that information is sufficient to give rise to a reasonable suspicion that the vehicle is being driven in violation of the motor vehicle laws and to warrant a stop of the vehicle." State v. Pitcher, 379 N.J. Super. 308, 315 (App. Div. 2005) (citing Donis, 157 N.J. at 54-57).

The police officer in this case learned from the MDT that the registered owner of the truck, defendant, had a suspended license. Therefore, he was authorized to stop the truck since the information "in itself [was] sufficient to justify a stop." Donis, 157 N.J. at 58.

Defendant argues that the Donis language relied upon by the State is "nothing more than dicta[]" since it was not necessary to the opinion's holding. Even if that were not the case, trial and appellate courts "consider themselves bound by [the Supreme] Court's pronouncements, whether classified as dicta or not." State v. Rawls, 219 N.J. 185, 198 (2014) (citing State v. Dabas, 215 N.J. 114, 136-37 (2013)); see State v. Breitweiser, 373 N.J. Super. 271, 282-83 (App. Div. 2004) (finding "[a]s an intermediate appellate court, we consider ourselves bound by carefully considered dictum from the Supreme Court"); Barreiro v. Morais, 318 N.J. Super. 461, 468 (App. Div. 1999) (holding "[w]e recognize these rulings are dictum. Nonetheless, we consider ourselves

bound by them"). Therefore, the trial judge did not err in denying the motion to suppress.

II.

Defendant also contends the prosecutor's decision rejecting his PTI application was a clear error in judgment because the prosecutor did not do an individualized analysis, but relied solely on defendant's three prior DWI convictions. Thus, defendant maintains, the prosecutor placed undue emphasis on defendant's DWI convictions and ignored the other factors that favored admission.

PTI is a discretionary program designed to divert criminal defendants facing formal prosecution. State v. Caliquiri, 158 N.J. 28, 35 (1999). A defendant's admission into PTI is contingent upon the PTI director's favorable recommendation and the prosecutor's consent. State v. Nwobu, 139 N.J. 236, 246 (1995) (citing R. 3:28(b)).

In assessing a defendant's suitability for admission into PTI, the prosecutor must give individualized consideration to the applicant's "amenability to correction" and potential "responsiveness to rehabilitation." N.J.S.A. 2C:43-12(b); Nwobu, 139 N.J. at 246; State v. Sutton, 80 N.J. 110, 119 (1979). Prosecutors are required to consider a non-exhaustive list of seventeen factors. N.J.S.A. 2C:43-12(c); State v. Watkins, 193

N.J. 507, 518-19 (2008). Additionally, prosecutors must consider the Guidelines for Operation of PTI found in Rule 3:28.

When rejecting a PTI application, the prosecutor must provide a clear statement of reasons. N.J.S.A. 2C:43-12(f). However, it suffices for the prosecutor to "note the factors present in [the] background or the offense purportedly committed which led him to conclude that admission should be denied." Sutton, 80 N.J. at 117.

Moreover, a prosecutor's decision to reject a PTI application "will rarely be overturned." State v. Leonardis, 73 N.J. 360, 380 n.10 (1977). "[T]he prosecutor has great discretion in selecting whom to prosecute and whom to divert to . . . PTI." State v. Wallace, 146 N.J. 576, 582 (1996) (citing Leonardis, 73 N.J. at 381). Accordingly, after the prosecutor has "determined that he will not consent to the diversion of a particular defendant, his decision is to be accorded great deference." Nwobu, 139 N.J. at 246 (quoting State v. Kraft, 265 N.J. Super. 106, 111-12 (App. Div. 1993)). Judicial review of a prosecutor's decision to reject a defendant from PTI is limited to curtailing "the most egregious examples of injustice and unfairness." Leonardis, 73 N.J. at 392.

To override a prosecutor's rejection, a defendant is required to prove by "clear and convincing evidence" that the prosecutor's refusal to allow admission into the program amounted to a patent

and gross abuse of discretion. Watkins, 193 N.J. at 520. In order to demonstrate such an abuse of discretion, a defendant must show the prosecutor (1) neglected to consider all relevant factors, (2) considered irrelevant or inappropriate factors, or (3) made a clear error of judgment in reaching his recommendation. State v. Roseman, 221 N.J. 611, 625 (2015) (quoting State v. Bender, 80 N.J. 84, 93 (1979)). For "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 [PTI]." Ibid. (quoting Bender, 80 N.J. at 93).

Given these standards for review of a prosecutor's decision, we disagree with defendant's characterization of his rejection from admission into PTI as having been cursory and overly focused on his DWI convictions. We agree with the trial judge that the State extensively considered the factors enumerated in N.J.S.A. 2C:43-12(e), specifically (1) through (6), (8), (11), and (17). Furthermore, the State's reliance on the three DWI convictions was proper. Although the first, committed twenty-six years earlier, would not alone have supported a rejection from PTI, that defendant was subsequently convicted in 2009 and 2011 displayed an inability to comply with the law.

Additionally, defendant was not legally or otherwise justified in driving on the occasion he was stopped. Defendant

could have called someone to drive him to a pharmacy, just as he was able to call someone to pick him up and take him home after his arrest. He could have taken a taxi. Nowhere in the police record of the stop is there any indication that defendant was in such pain that he required immediate medical attention. It was not unforeseeable that someone taking pain medication would in time require refills. Therefore, defendant has not proven by clear and convincing evidence that the refusal to admit him into PTI amounted to a patent and gross abuse of discretion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION