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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-0459-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICARDO PEREZ,

Defendant-Appellant.

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Argued December 19, 2017 – Decided February 15, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,  
Law Division, Hudson County, Indictment No.  
15-10-1441.

Daniel S. Rockoff, Assistant Deputy Public  
Defender, argued the cause for appellant  
(Joseph E. Krakora, attorney; Daniel S.  
Rockoff, of counsel and on the brief).

Kerry J. Salkin, Assistant Prosecutor, argued  
the cause for respondent (Esther Suarez,  
Hudson County Prosecutor, attorney; Kerry J.  
Salkin, on the brief).

PER CURIAM

After his motions for admission to pre-trial intervention (PTI) and to suppress evidence were denied, defendant pled guilty to possession of a .32 caliber handgun without a permit, contrary to N.J.S.A. 2C:39-5(b)(1), a second-degree offense. The trial court thereafter sentenced defendant to five years of incarceration, with a one-year period of parole ineligibility. Defendant appeals from the judgment of conviction entered by the trial court on August 25, 2016. We affirm.

I.

On May 21, 2015, Jersey City Police Officers Omar Aly and Daniel Mundo were on patrol in the area of Bramhall Avenue and Sackett Street of Jersey City, responding to civilian complaints of disorderly groups, drug dealing, and shots being fired in the area. While on parole, the officers observed defendant speak with an individual at the door to a residence on Bramhall Avenue. The individual was later identified as defendant's cousin, C.N.<sup>1</sup>

The officers said that during this discussion, defendant opened his backpack to show C.N. what was inside. The two men then walked towards Kennedy Boulevard. The officers followed them because they suspected defendant was in possession of narcotics. Eventually, the officers observed defendant remove his backpack.

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<sup>1</sup> We use initials to protect this individual's identity.

According to Aly, defendant opened the bag, partially removed the handle of a black handgun, and immediately placed the gun back in the bag. Defendant closed the bag, placed the bag back on his shoulder, and continued walking.

The officers requested backup, and at the corner of Clendenny Avenue and Kennedy Boulevard, they drove onto the sidewalk and exited their vehicle. They approached defendant and C.N. They searched his backpack, found the gun, and placed him under arrest. Defendant later gave a statement to the police explaining how and where he obtained the weapon and the person from whom he obtained the weapon. Defendant also explained why he was transporting the gun.

Defendant was charged with second-degree possession of a handgun without a permit, contrary to N.J.S.A. 2C:39-5(b). Defendant thereafter submitted an application for admission to PTI. The assistant criminal division manager (CDM) in Hudson County denied defendant's application, and on November 20, 2015, an assistant prosecutor issued a letter stating that the county prosecutor agreed with that decision.

Defendant filed a motion seeking his admission to PTI over the State's objection. On March 2, 2016, Judge Mark J. Nelson considered the motion and placed his decision on the record. The judge noted that defendant had been charged with a second-degree

offense, and there was a presumption against his admission to PTI. The judge found that the prosecutor had considered the relevant factors, and the prosecutor's decision was not a patent or gross abuse of discretion. The judge entered an order dated March 2, 2016, denying the motion.

In addition, on March 21, 2016, Judge Nelson heard oral argument on defendant's suppression motion. The judge then placed his decision on the record. The judge determined the motion should be denied and entered an order memorializing his decision.

On April 18, 2016, defendant pled guilty to second-degree possession of a weapon without a permit. The State submitted an application to the court pursuant to N.J.S.A. 2C:43-6.2 for an exemption from the mandatory minimum term required by N.J.S.A. 2C:43-6(c). The State recommended a five-year prison term, with one-year of parole ineligibility. Judge Sheila A. Venable entered an order granting the application.

Defendant then filed a motion with the Assignment Judge seeking a probationary sentence. On June 17, 2016, Assignment Judge Peter F. Bariso filed an order denying the motions for the reasons set forth in an accompanying statement of reasons. Defendant appeared for sentencing before Judge Venable on August 25, 2016. The judge sentenced defendant in accordance with the

plea to a term of five years of incarceration with one year of parole ineligibility. This appeal followed.

On appeal, defendant raises the following arguments:

POINT I

THE TRIAL COURT ERRED BY DECLINING TO ADMIT [DEFENDANT], A FIRST-TIME OFFENDER, INTO PTI. AMONG SEVERAL REASONS THIS COURT SHOULD REVERSE, THE PROSECUTOR AND CRIMINAL DIVISION MANAGER FALSELY ALLEGED [DEFENDANT] HAD A DOZEN ARRESTS AND THREE DISORDERLY-PERSONS CONVICTIONS, [WHEREAS DEFENDANT] HAD NEITHER . . . .

POINT II

THE ASSIGNMENT JUDGE IMPERMISSIBLY SENTENCED [DEFENDANT] TO PRISON WITHOUT A HEARING. U.S. Const., amends. V, VI, XIV; N.J. Const., art. I, ¶¶ 1, 9, 10; R. 3:21-4(b). . . .

POINT III

THE PRESIDING JUDGE, AT THE ONLY HEARING ACTUALLY HELD, FOUND FOUR SIGNIFICANT MITIGATING FACTORS, AND ONLY ONE NEGLIBLE AGGRAVATING FACTOR, BUT DETERMINED THE ASSIGNMENT JUDGE HAD LEFT HER "NO CHOICE." THIS COURT SHOULD REMAND TO THE PRESIDING JUDGE FOR A QUALITATIVE ANALYSIS NOT BOUND BY THE ASSIGNMENT JUDGE'S PRONOUNCEMENT OF SENTENCE WITHOUT A HEARING. . . .

POINT IV

ALTERNATIVELY, THIS COURT SHOULD REMAND TO THE ASSIGNMENT JUDGE, WHO ALSO ERRED, WHEN SENTENCING [DEFENDANT] ON THE PAPERS, BY (1) MISINTERPRETING N.J.S.A. 2C:43-6.2, (2) FAILING TO FIND THREE MITIGATING FACTORS SUBSEQUENTLY FOUND BY THE PRESIDING JUDGE, AND (3) ENGAGING IN DISPARATE TREATMENT. . . .

## II.

We turn first to defendant's contention that the trial court erred by denying his motion for admission to PTI. He contends the prosecutor's decision was a patent and gross abuse of discretion. We disagree.

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)). Acceptance into PTI is dependent upon an initial recommendation by the CDM and the prosecutor's consent. Ibid. "The assessment of a defendant's suitability for PTI must be conducted under the Guidelines for PTI provided in Rule 3:28, along with consideration of factors listed in N.J.S.A. 2C:43-12(e)." Ibid.

The decision to admit a defendant to PTI is a "quintessentially prosecutorial function." Id. at 624 (citing State v. Wallace, 146 N.J. 576, 582 (1996)). Therefore, the prosecutor's decision to grant or deny a defendant's PTI application is entitled to great deference. Ibid. (citing State v. Leonardis, 73 N.J. 360, 381 (1977)). A trial court may overrule a prosecutor's PTI determination only when the circumstances "clearly and convincingly establish that the prosecutor's refusal

to sanction admission into the program was based on a patent and gross abuse of . . . discretion." Id. at 624–25 (quoting Wallace, 146 N.J. at 582).

To establish a patent and gross abuse of discretion, a defendant must show that the prosecutor's decision "(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 judgement" and that "the prosecutorial error complained of will clearly subvert the goals underlying [PTI]." Id. at 625 (citing State v. Bender, 80 N.J. 84, 93 (1979)). The prosecutorial decision must be "so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention." Wallace, 146 N.J. at 583 (quoting State v. Ridgway, 208 N.J. Super. 118, 130 (Law Div. 1985)).

Here, Judge Nelson correctly found that the prosecutor's decision to deny defendant's application for admission to PTI was not a patent and gross abuse of discretion. The judge noted that Guideline 3(i)(3) provided, among other things, that a defendant charged with a second-degree offense ordinarily should not be considered for enrollment in PTI. Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:28 (2018); see also Roseman, 221 N.J. at 622. The guideline creates a "presumption against

acceptance" into PTI. State v. Watkins, 193 N.J. 507, 520 (2008) (quoting State v. Baynes, 148 N.J. 434, 442 (1997)).

To overcome the presumption, the defendant must present "compelling reasons" for admission to PTI. Ibid. (quoting Nwobu, 138 N.J. at 252). Here, defendant was charged with possession of a handgun, which is a second-degree offense, and he failed to show compelling reasons for his admission to PTI.

Defendant argues, however, that the prosecutor failed to consider all relevant factors in evaluating his eligibility for PTI. Although the assistant prosecutor did not discuss all seventeen factors in the decision denying PTI admission, the court must "presume that a prosecutor considered all relevant factors, absent a demonstration by the defendant to the contrary." State v. Waters, 439 N.J. Super. 215, 233 (App. Div. 2015) (quoting Wallace, 146 N.J. at 584). Defendant did not rebut that presumption. Thus, the trial court properly found that the "prosecutor and the criminal division [considered] all of the [appropriate] factors."

Defendant further argues that the assistant prosecutor relied on inappropriate factors in denying his application. The State acknowledges that the assistant prosecutor and CDM erroneously alluded to defendant's dismissed charges in their respective decisions. However, the error was harmless. As the judge noted in



his decision, in denying admission to PTI, the assistant prosecutor had not relied on defendant's prior criminal record. Indeed, the judge stated that this was defendant's first offense and presumably his first arrest.

The judge found that the prosecutor had properly given weight to factor one (the nature and circumstances of the offense). N.J.S.A. 2C:43-12(e)(1). As stated previously, unlawful possession of a handgun, contrary to N.J.S.A. 2C:39-5(b)(4), is a second-degree offense. The judge also found that the prosecutor properly considered factor two (the facts specific to this case). N.J.S.A. 2C:43-12(e)(2). The judge noted that defendant had been carrying a loaded gun on the street in Jersey City. Defendant did not have a permit allowing him to possess the weapon.

The judge further found that the prosecutor had properly considered factors seven (the needs and interests of the victims and society); fourteen (the nature of the crime and whether the value of supervisory treatment would be outweighed by the public need for prosecution); and seventeen (the harm done to society by abandoning criminal prosecution). N.J.S.A. 2C:43-12(e)(7), (14), and (17). The record supports the judge's findings.

Defendant also argues that the assistant prosecutor erred by relying upon factor ten (whether defendant was charged with a violent offense), N.J.S.A. 2C:43-12(e)(10). He argues that the

failure to get a license to possess a handgun is not a violent act. He notes that the State has not alleged he used the weapon, and no individual was shot or threatened with the gun.

As the trial court recognized, however, possession of a loaded weapon on the streets in Jersey City created a danger that members of the public may be harmed. Even if the prosecutor erred by considering this factor, the decision to deny defendant admission to PTI is amply justified by the other factors that the prosecutor relied upon.

We are therefore convinced that the trial court correctly determined that the prosecutor's decision to deny defendant's application for admission to PTI was not a patent and gross abuse of discretion. We affirm the court's order denying defendant's motion.

### III.

Defendant contends he was denied due process because Judge Bariso decided his motion for a probationary sentence without a hearing. Defendant contends he had the right to be present and to be heard when the judge ruled on the motion.

The Graves Act was enacted as "a direct response to a substantial increase in violent crime in New Jersey," and provides for the imposition of a mandatory minimum term of incarceration and parole ineligibility for an offender "who uses or possesses a

firearm while committing, attempting to commit, or fleeing after the commission of certain designated crimes." State v. Nance, 228 N.J. 378, 384, 390 (quoting first State v. Des Marets, 92 N.J. 62, 68 (1983); then State v. Robinson, 217 N.J. 594, 607 (2014)). The mandatory minimum term is "fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater . . . during which the defendant shall be ineligible for parole." N.J.S.A. 2C:43-6(c).

However, N.J.S.A. 2C:43-6.2 provides that when a defendant has not been previously convicted of a Graves Act offense, and the statutory mandatory minimum term "does not serve the interests of justice," the prosecutor may move before the assignment judge for imposition of a one-year mandatory minimum term or a probationary term. The prosecutor retains the discretion to decide whether to seek the waiver and may argue in favor of either sentence. Nance, 228 N.J. at 389. Moreover, "nothing in the statute suggests that the assignment judge or designee must accept the prosecutor's recommendation." Ibid.

If the State has not sought the Graves Act exception, the defendant may not simply "challenge the prosecutor's decision in a conclusory manner." State v. Alvarez, 246 N.J. Super. 137, 148 (App. Div. 1991). The defendant "must make a showing of arbitrariness constituting an unconstitutional discrimination or

denial of equal protection constituting a 'manifest injustice,' and should be required to do so by moving papers designed to convince the [a]ssignment [j]udge that any kind of hearing on the issue is warranted." Ibid. (citing R. 3:21-10(c)).

A hearing will be conducted only if the assignment judge, "after review of the materials submitted with the motion papers, concludes that a hearing is required in the interests of justice." Ibid. Thus, "a hearing need not be conducted on every application before the assignment judge." State v. Mastapeter, 290 N.J. Super. 56, 64-65 (App. Div. 1996).

In this case, the State agreed to waive the mandatory minimum term required by N.J.S.A. 2C:43-6(c), but did not agree to a probationary sentence. As we have explained, in the plea agreement, the State agreed to recommend a five-year custodial term with one-year of parole ineligibility. Defendant then filed a motion seeking a probationary sentence. The State and defendant presented their arguments to the court in written submissions, and the Assignment Judge made his decision based on those submissions.

On appeal, defendant argues that the judge's decision on the waiver motion was essentially a sentencing proceeding and he had a constitutional right to be present and to be heard before the judge decided the motion. He argues the judge erred by failing to conduct a hearing on the motion.

The Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee a defendant's right to be present at trial. State v. Tedesco, 214 N.J. 177, 189 (2013) (citing U.S. v. Gagnon, 470 U.S. 522, 526 (1985)). Moreover, Rule 3:16(b) states that "[t]he defendant shall be present at every stage of the trial . . . and at the imposition of sentence, unless otherwise provided by Rule." In addition, Rule 3:21-4(b) provides that a "[s]entence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. Before imposing sentence the court shall address the defendant personally."

A decision on a motion to the assignment judge under N.J.S.A. 2C:43-6.2 is not, however, a proceeding during which the sentence is imposed. Indeed, in Nance, the Court distinguished between the role of the assignment judge or designee in deciding the Graves Act waiver motion, and the role of the sentencing court in imposing the sentence. Nance, 228 N.J. at 394-97.

The Court noted that under N.J.S.A. 2C:43-6.2, the assignment judge or designee is authorized to decide if the defendant will be sentenced to a probationary term or a term of incarceration with one year of parole ineligibility. Id. at 393-94. The sentencing court is not authorized to choose between the two statutory alternatives. Id. at 394. The Court explained that "[t]he

sentencing court's task is to devise a sentence that comports with the assignment judge's ruling and the sentencing provisions of the Code." Ibid.

The Court stated that the sentencing court "may impose the sentence recommended by the State under the plea agreement, [but] it is not required to do so." Ibid. The Court added that after the assignment judge or designee has decided the motion under N.J.S.A. 2C:43-6.2, "the sentencing court, applying N.J.S.A. 2C:44-1 and other pertinent provisions of the Code, exercises its discretion to weigh the aggravating and mitigating factors and determine the remaining terms of the sentence." Id. at 397.

Thus, the assignment judge's decision on the waiver motion is not the proceeding in which the sentence is imposed. Moreover, N.J.S.A. 2C:43-6.2(c) does not require a hearing on a waiver motion unless the assignment judge or designee determines that a hearing is required in the interests of justice.

Here, Judge Bariso did not abuse his discretion by finding that a hearing was not required on defendant's motion. Furthermore, defendant was present and exercised his right of allocution at the sentencing hearing before Judge Venable on August 25, 2015. We conclude defendant was not denied his constitutional right to be present when his sentence was imposed.

#### IV.

Defendant further argues that we should remand the matter to the Assignment Judge for reconsideration of his decision on the waiver motion. Defendant contends the judge erred by noting in his decision that defendant had been charged with a second-degree offense, "which directly implicates the presumption of incarceration under N.J.S.A. 2C:44-1(d)."

Defendant argues that in N.J.S.A. 2C:43-6.2, the Legislature "plainly intended" to give the court "meaningful discretion" and the statute creates a specific exemption to the "inflexible presumption" of incarceration in N.J.S.A. 2C:44-1(d). However, in Nance, which was decided after defendant filed his brief on appeal, the Court expressly rejected this contention. The Court held that "[t]he presumption of incarceration set forth in N.J.S.A. 2C:44-1(d) should apply when an assignment judge or his or her designee chooses between" the alternative sentences in N.J.S.A. 2C:43-6.2. Nance, 228 N.J. at 397.

Next, defendant argues that Judge Bariso erred because he did not find three "important" mitigating factors later found by the sentencing judge. Here, Judge Bariso found aggravating factor nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law). The judge found only mitigating factor

seven, N.J.S.A. 2C:44-1(b)(7) (defendant has no prior history of delinquency or criminal activity).

Judge Bariso considered and rejected the other mitigating factors, including mitigating factors eight, N.J.S.A. 2C:44-1(b)(8) ("defendant's conduct was the result of circumstances unlikely to recur"); and nine, N.J.S.A. 2C:44-1(b)(9) (defendant's "character and attitude . . . indicate that he is unlikely to commit another offense"). In his opinion, the judge stated:

In regards to factor eight, . . . the defense merely states that this was the first time that [defendant] handled a firearm. However, there is no other evidence provided to show that his actions were the result of a unique set of circumstances that are unlikely to reoccur. Moreover, [defendant's] untruthfulness with law enforcement demonstrates a lack of responsibility, accountability, and lack of remorse or appreciation for his conduct. [Defendant] also cannot claim that [his] character and attitude . . . indicate that he is unlikely to commit another offense in accordance with factor nine. The defense has not presented any evidence to show that [defendant] has taken steps to avoid reoffending. Additionally, no employment history or educational background were provided.

At sentencing, Judge Venable found aggravating factor nine, and mitigating factors seven, eight, and nine. She also noted the non-statutory factor of remorse. Defendant contends the matter should be remanded and Judge Bariso ordered to reconsider his decision in light of the sentencing court's findings. We disagree.



Here, there is sufficient credible evidence to support Judge Bariso's findings on the aggravating and mitigating factors. The judge need not reconsider his decision on the waiver motion based on the subsequent findings of the sentencing judge. Moreover, the aggravating and mitigating factors must be weighed qualitatively, not quantitatively. State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Fuentes, 217 N.J. 47, 72–73 (2014)). The record shows that Judge Bariso weighed the aggravating and mitigating factors appropriately.

In addition, defendant argues that in denying his motion for a probationary sentence, the Assignment Judge treated him differently from a similarly-situated defendant. In support of this contention, defendant relied upon an unpublished opinion of this court, in which the defendant had been charged with second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); second-degree possession of a weapon for an unlawful purpose; N.J.S.A. 2C:39-4(a); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); and third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2). State v. Tanco-Brito, No. A-4218-13 (App. Div. 2015) (slip op. at 2, n.1)

The defendant in Tanco-Brito was tried before a jury and found guilty of second-degree unlawful possession of a weapon, and not guilty on the other charges. Id. at 3. Judge Bariso downgraded the conviction to a third-degree offense for sentencing purposes and granted the defendant's motion to waive the mandatory-minimum term required by N.J.S.A. 2C:43-6(c). Ibid. The judge decided that the defendant should be sentenced to a three-year term of probation. Ibid. The State appealed and we affirmed. Id. at 2-3.

In this case, Judge Bariso found that defendant was not similarly-situated to the defendant in Tanco-Brito. The judge noted, defendant had the benefit of a plea agreement, whereas the defendant in Tanco-Brito was tried on numerous charges. Id. at 2, n.1. In addition, defendant pled guilty to a second-degree offense, and the conviction in Tanco-Brito was downgraded to a third-degree offense for sentencing purposes. Id. at 3. The record supports the judge's rejection of defendant's claim of disparate sentencing.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION