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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-1106-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUIS M. OLIVA,

Defendant-Appellant.

Submitted February 14, 2018 – Decided April 12, 2018

Before Judges Koblitiz and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Indictment No.
14-06-0537.

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

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

PER CURIAM

Defendant Luis M. Oliva appeals from the September 15, 2016
judgment of conviction entered following his guilty plea to fourth

degree operating a motor vehicle during a period of license suspension, N.J.S.A. 2C: 40-26(b), and to driving with a suspended license, N.J.S.A. 39:3-40. His application for pretrial intervention (PTI) was denied. Defendant's guilty plea preserved his ability to appeal the December 5, 2014 order that denied his acceptance into PTI. See R. 3:9-3(f). We affirm that denial.

On March 6, 2014, defendant was driving his vehicle in Lincoln Park when a police officer, who had performed a routine vehicle registration check, learned that defendant's driver's license was suspended, and stopped him. Defendant was on his way home from his part time job. He was not under the influence of alcohol. Defendant admitted that he knew his license was suspended based on his 2013 second conviction for driving while under the influence (DWI), N.J.S.A. 39:4-50.

Defendant was indicted for fourth-degree driving while suspended, N.J.S.A. 2C:40-26(b) and charged with motor vehicle summonses for driving with a suspended license, N.J.S.A. 39:3-40, and for failure to surrender a suspended license, N.J.S.A. 39:5-35.

N.J.S.A. 2C:40-26(b) provides that "[i]t shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension . . . if the actor's license was suspended

. . . for a second or subsequent violation of R.S. 39:4-50." "A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment." Ibid. "[T]he sentence imposed shall include a fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole." N.J.S.A. 2C:40-26(c).

The Morris County Prosecutor's Office rejected defendant's application for PTI on August 7, 2014, advising that,

[a]fter a careful weighing of the interests of society and considering the circumstances of the offense, and taking into account the amenability of this defendant for the PTI program, it is clear the state must exercise its discretion to handle this crime in the normal course of prosecution.

The letter provided that defendant's driving record, which included "two (2) prior DWI convictions,¹ eight (8) previous suspensions of driving privileges and two (2) persistent offenders," that "indicate[d] a pattern of anti-social behavior and lack of amenability to rehabilitation." The prosecutor contended that the Legislature's mandatory sentence and parole ineligibility under N.J.S.A. 2C:40-26 was "clearly intended to

¹ Defendant's first DWI was December 4, 2004, and the second, July 17, 2013.

deter" driving under the influence, which deterrence would be "undermined" if defendant were not prosecuted.

Defendant filed a motion to compel admission to PTI. The prosecutor's brief in opposition addressed the PTI Guidelines² and each of the criteria set forth in N.J.S.A. 2C:43-12, including the nature of the offense and need to deter, defendant's unwillingness to abide by the law, age, criminal history, motivation to enter PTI, and that the crime was not related to "any condition or situation that a period of supervisory treatment would . . . change." The prosecutor noted the mandatory minimum period of incarceration under the statute.

On December 5, 2014, the court denied defendant's motion, finding that the prosecutor's review of defendant's application was objective and without consideration of anything that was inappropriate. The State had considered the applicable factors and guidelines. Thus, the court found no "patent or gross abuse of discretion" by the prosecutor in its determination that traditional prosecution was necessary because defendant "would not be responsive to [PTI]."

On July 18, 2016, defendant pled guilty to fourth-degree operating a motor vehicle during a period of license suspension,

² See Rule 3:28, Guidelines for Operation of Pretrial Intervention.

N.J.S.A. 2C:40-26(b) and to driving with a suspended license, N.J.S.A. 39:3-40.³ He was sentenced on the fourth-degree offense to 180 days in the Morris County Correctional Facility and fined. His guilty plea to driving with a suspended license was merged, and the remaining motor vehicle charge was dismissed.

On appeal, defendant raises the following issues:

POINT I

THE PROSECUTOR'S REJECTION OF MR. OLIVA'S PTI APPLICATION CONSTITUTES AN ABUSE OF DISCRETION, THUS WARRANTING A REMAND FOR RECONSIDERATION OF THE APPLICATION.

A. The Prosecutor's Justification for Rejecting Mr. Olivo from PTI was Premised on the Erroneous and Impermissible Notion that a Per Se Bar Against PTI Admission Exists for All Individuals Charged with Violating N.J.S.A. 2C:40-26.

B. Although the State Ostensibly Analyzed the PTI Factors for Purposes of the Record, the Prosecutor's Improper Application of a Per Se Bar Clouded His Ability to Objectively Assess the PTI Factors. Consequently, the Prosecutor's Other Proffered Reasons for Rejecting Mr. Oliva from PTI Overemphasized the PTI Factors Present in Every N.J.S.A. 2C:40-26 Case, and Failed to Properly Consider Mr. Oliva's Individual Application.

"PTI is a 'diversionary program through which certain offenders are able to avoid criminal prosecution by receiving

³ Defendant's plea followed the denial of his motion to suppress the statement he made to the police when he was stopped.

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)). The goal of PTI is to allow, in appropriate situations, defendants to avoid the potential stigma of a guilty conviction and the State to avoid "the full criminal justice mechanism of a trial." State v. Bell, 217 N.J. 336, 348 (2014). "[E]ligibility for PTI is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur." Roseman, 221 N.J. at 622.

Deciding whether to permit a defendant to divert to PTI "is a quintessentially prosecutorial function." State v. Wallace, 146 N.J. 576, 582 (1996) (citing State v. Dalqlish, 86 N.J. 503, 513, (1981)). It involves the consideration of a non-exhaustive list of seventeen statutory factors, see N.J.S.A. 2C:43-12(e), in order to "make an individualized assessment of the defendant considering his or her 'amenability to correction' and potential 'responsiveness to rehabilitation.'" Roseman, 221 N.J. at 621-22 (citing State v. Watkins, 193 N.J. 507, 520 (2008)); N.J.S.A. 2C:43-12(b). Prosecutors are given "broad discretion" in determining whether to divert a defendant into PTI. State v. K.S., 220 N.J. 190, 199 (2015) (citing Wallace, 146 N.J. at 582)).

"The fourth degree offense that defendant is charged with committing . . . does not carry a presumption against admission into PTI." State v. Rizzitello, 447 N.J. Super. 301, 312 (App. Div. 2016).

The scope of our review of a PTI rejection is "severely limited." State v. Negran, 178 N.J. 73, 82 (2003) (citing Nwobu, 139 N.J. at 249)). "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, 193 N.J. at 520 (citing Negran, 178 N.J. at 82), meaning that the decision "has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention." Ibid. (quoting Wallace, 146 N.J. at 582-83). 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 (App. Div. 2014) (quoting State v. Bender, 80 N.J. 84, 93 (1979)).

Applying these principles, there is no basis to disturb the trial court's decision. Defendant's contention is that the

prosecutor applied a per se bar to his application for PTI because his conviction under N.J.S.A. 2C:40-26(b) required a sentence to a term of imprisonment "of not less than 180 days during which the defendant shall not be eligible for parole." N.J.S.A. 2C:40-26(c). Defendant parses through the brief that the prosecutor submitted to the trial court, citing to portions that reference the statute's incarceration requirement, in support of his position.

The argument raised now about a per se bar, was not raised before the trial court. Instead, defendant's counsel contended that defendant's driving record was not reflective of who he was presently, asserting he "is a man who grew up, changed and became an individual who is a productive member of our society."


Defendant's current argument has mischaracterized the prosecutor's position. Neither the August 7, 2014 letter nor the brief in opposition to defendant's motion referred to a per se rule. The prosecutor analyzed the criteria under the statute and guidelines, concluding that based on all of those factors, it chose to "exercise its discretion to handle this crime in the normal course of prosecution" because defendant's record did not show an amenability to rehabilitation. The assistant prosecutor expressly represented to the trial court during argument of the

motion that there was no per se rule in its office, stating, "[s]o it's not a bright line rule in our office. We look at each and every case on a case by case basis."

We agree there is no indication from this record that the prosecutor applied a per se rule in rejecting defendant's PTI application. Defendant's driving record supported the finding that he was a poor candidate for PTI's goal of short-term rehabilitation. This showed that over a ten year period, he had two DWI convictions, eight previous suspensions of driving privileges, and was considered a persistent offender. The infraction in 2014 did not arise from an addiction; he was not arrested for DWI. Defendant did not explain how his current circumstances justified operating a vehicle without a license in defiance of his license suspension. As such, the record did not show defendant's amenability to rehabilitation. We agree therefore that there was no patent and gross abuse of discretion by the prosecutor in denying defendant's admission into PTI.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION