

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
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-1314-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL E. SOSNOWSKI,

Defendant-Appellant.

Argued February 27, 2018 – Decided April 2, 2018

Before Judges Yannotti and DeAlmeida.

On appeal from Superior Court of New Jersey,
Law Division, Criminal Part, Middlesex County,
Indictment No. 16-01-0085.

Matthew Jordan argued the cause for appellant
(Nelson, Fromer, Crocco & Jordan, and Helmer,
Conley & Kasselmann, P.A., attorneys; Patricia
B. Quelch, of counsel and on the brief).

Patrick F. Galdieri, II, Assistant Prosecutor,
argued the cause for respondent (Andrew C.
Carey, Middlesex County Prosecutor, attorney;
Mr. Galdieri, of counsel and on the brief).

PER CURIAM

Defendant Michael E. Sosnowski appeals the denial of his application for admission into the pretrial intervention program (PTI) after he was charged with fourth-degree driving while suspended for a second driving while intoxicated (DWI) conviction in violation of N.J.S.A. 2C:40-26(b). We affirm.

I.

On March 15, 2014, defendant, then age 63, operated a motor vehicle while intoxicated. On July 24, 2014, he was sentenced for that DWI offense to a three-month driver's license suspension, and twelve hours at an Intoxicated Driver Resource Center (IDRC) program.

On November 3, 2014, eleven days after his license was restored, defendant again operated a motor vehicle while intoxicated. On March 3, 2015, he was sentenced for that DWI offense to a two-year driver's license suspension, one-year installation of an ignition interlock, and forty-eight hours at an IDRC program. Defendant admitted that on both occasions when he was driving while intoxicated his blood alcohol content was higher than .20 percent and he was driving "to pick up more alcohol."

On September 10, 2015, six months into his two-year driver's license suspension, defendant operated his motor vehicle in Monroe Township. Although defendant was not intoxicated, he crashed the

vehicle into a utility pole, causing property damage and suffering injuries requiring medical attention.

On January 19, 2016, a grand jury returned an indictment charging defendant with one count of fourth-degree driving while suspended for a second DWI conviction in violation of N.J.S.A. 2C:40-26(b).¹ Defendant thereafter applied for admission to PTI. During an interview with a probation officer, defendant stated that he completed an alcohol abuse treatment program recommended after his arrest. He admitted that he started drinking when he was twelve, and that he had difficulty controlling his anger. He reported that he had "recently become more violent" and admitted that he had "punched a hole in the wall and hit" a family member. He also reported that he had been terminated from his most recent job "after having 'issues' with another employee." After review of the application, the Middlesex County Criminal Division Manager issued a report recommending defendant not be admitted to PTI.

On May 12, 2016, an assistant prosecutor issued a three-page letter in which he applied each of the factors set forth in N.J.S.A. 2C:43-12(e) and Rule 3:28 to determine whether defendant would be admitted to the program. The assistant prosecutor noted

¹ Defendant was also issued seven motor vehicle summonses, including one for driving with a suspended license in violation of N.J.S.A. 39:3-40, and one for failure to install an ignition interlock device in violation of N.J.S.A. 39:4-50.19(a).

serious concerns about defendant's ability to comply with the terms of PTI, given that he was charged with two DWI offenses within eight months, and just six months after his license was suspended, elected to drive. The assistant prosecutor considered this to be evidence of defendant's general lack of motivation to change his behavior. In addition, the assistant prosecutor noted that during defendant's PTI interview he appeared not to believe that he has a problem with alcohol, despite his multiple DWI convictions. The assistant prosecutor considered this to be evidence that defendant did not fully accept his alcohol abuse issues, even though he was attending Alcoholics Anonymous meetings regularly.

After considering the public interest in prosecuting violations of mandatory license suspensions after repeated DWI convictions, defendant's "persistent inability to conform his behavior to lawful authority," and his failure to accept his alcohol abuse problem, the assistant prosecutor determined that on balance, the factors against admission outweighed those favoring admission and denied defendant's PTI application.

Defendant appealed the rejection of his PTI application to the trial court. There, he argued that the assistant prosecutor effectively created a per se rule denying PTI for defendants charged with violating N.J.S.A. 2C:40-26(b) because he considered

the predicate elements of the offense – two DWI convictions – to constitute a pattern of antisocial behavior. In addition, defendant contested the assistant prosecutor's determination that defendant had not recognized his problem with alcohol, and was not serious about treating his alcohol abuse, citing his consistent attendance at Alcoholics Anonymous meetings. Finally, defendant argued that the assistant prosecutor failed to consider defendant's age and the fact that he had no criminal convictions prior to his first DWI offense.

The court evaluated the assistant prosecutor's review of the relevant factors for deciding a PTI application. The court rejected defendant's argument that the assistant prosecutor had, in effect, created a per se rule denying PTI for defendants charged with violating N.J.S.A. 2C:40-26(b). The court instead observed that it was the temporal proximity of defendant's two DWI convictions and his charge of driving while his license was suspended that the assistant prosecutor weighed against defendant's admission to PTI.

In addition, the trial court noted that the assistant prosecutor acknowledged defendant's attendance at Alcoholics Anonymous meetings, gave only slight negative weight to defendant's failure to recognize his alcohol abuse, and was aware of defendant's age and criminal record. While the court

characterized the PTI admission decision as a "close call," the judge found the assistant prosecutor had properly weighed the relevant factors, and held that it was not within the court's province to substitute its judgment for that of the assistant prosecutor, absent a patent and gross abuse of discretion, which the judge found not to be present here.

Defendant thereafter entered a guilty plea to violating N.J.S.A. 2C:40-26(b). After weighing the aggravating and mitigating factors, the trial court sentenced defendant to a 180-day period of incarceration in the county jail, with a 180-day period of parole ineligibility, along with associated fines and costs. The trial court stayed the sentence to permit defendant to file an appeal.²

This appeal followed. We thereafter granted a stay of defendant's sentence pending appeal.

Defendant raises the following argument for our consideration:

² Defendant also entered a guilty plea to driving with a suspended license in violation of N.J.S.A. 39:3-40, for which he was sentenced to a twenty-day period of incarceration in the county jail to run concurrently with the sentence for violating N.J.S.A. 2C:40-26(b), as well as a one-year-and-one-day suspension of his driver's license to run consecutive to his prior license suspension, along with fines and costs. Defendant did not appeal his conviction or sentence for violating N.J.S.A. 39:3-40. The State agreed to dismiss the remaining motor vehicle violations.

THE PROSECUTOR'S REJECTION OF DEFENDANT FROM THE PTI PROGRAM CONSTITUTED A PATENT AND GROSS ABUSE OF DISCRETION AND THE TRIAL COURT ERRED BY UPHOLDING DEFENDANT'S REJECTION FROM PTI.

II.

The criteria for admission into PTI, as well as the procedures concerning the program, are set forth in N.J.S.A. 2C:43-12 to -22 and Rule 3:28. N.J.S.A. 2C:43-12(e) includes seventeen criteria which, among other factors, prosecutors and program directors must consider when deciding whether to accept or reject a PTI application and Rule 3:28 is followed by eight guidelines. If a prosecutor denies an application, he must "precisely state his findings and conclusion which shall include the facts upon which the application is based and the reasons offered for the denial." N.J.S.A. 2C:43-12(f).

Our review of a prosecutor's decision to deny a defendant admission into PTI is "severely limited." State v. Negran, 178 N.J. 73, 82 (2003) (citations omitted). Judicial review of a PTI application exists "'to check only the most egregious examples of injustice and unfairness.'" State v. Nwobu, 139 N.J. 236, 246 (1995) (quoting State v. Kraft, 256 N.J. Super. 106, 111 (App. Div. 1993)). Absent evidence to the contrary, a reviewing court must assume that "the prosecutor's office has considered all relevant factors in reaching the PTI decision." Nwobu, 139 N.J.

at 249 (citing State v. Dalqlish, 86 N.J. 503, 509 (1981)). A defendant seeking to have a court overrule a prosecutor's rejection of a PTI application must "'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.'" State v. Wallace, 146 N.J. 576, 582 (1996) (quoting State v. Leonardis, 73 N.J. 360, 382 (1977)).

Having carefully considered defendant's arguments under these standards, we conclude that no grounds exist to disturb the trial court's decision. The record demonstrates that the assistant prosecutor evaluated each of the factors set forth in N.J.S.A. 2C:43-12(e) and Rule 3:28 before denying defendant's PTI application. Thereafter, the trial court conducted a thorough review of the prosecutor's decision. On appeal, defendant advances no convincing argument that the prosecutor's determination was a patent and gross abuse of discretion.

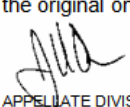
We are not persuaded by defendant's argument that the prosecutor has, in effect, created a per se rule against PTI admission for defendants charged with violating N.J.S.A. 2C:40-26(b). As the assistant prosecutor explained, and the trial court acknowledged, it was the temporal proximity of defendant's offenses that weighed against his admission to PTI, not the mere fact that he was twice convicted of DWI. Defendant twice operated

a motor vehicle while intoxicated in an eight-month period. His second offense was just eleven days after his initial license suspension ended. Six months into his two-year license suspension defendant elected to drive to work. It was within the assistant prosecutor's discretion to consider defendant's course of conduct to be evidence that he is not serious about changing his behavior and not likely to comply with the terms of PTI.

In addition, the record plainly establishes that the assistant prosecutor considered defendant's participation in Alcoholics Anonymous meetings. While defendant may be addressing his alcohol abuse issues, he admittedly committed the present offense while sober. It was not an abuse of discretion for the assistant prosecutor to give defendant's effort at alcohol abuse treatment little weight in favor of admission to PTI when defendant has demonstrated that he cannot abide by a court-imposed sanction even when he has not consumed alcohol. See State v. Rizzitello, 447 N.J. Super. 301, 314 (App. Div. 2016).

Affirmed. The stay of defendant's sentence shall remain in place for 20 days after the date of this opinion.

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


CLERK OF THE APPELLATE DIVISION