

**RECORD IMPOUNDED**

**NOT FOR PUBLICATION WITHOUT THE  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-2071-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.P.C.,

Defendant-Appellant.

---

Submitted February 14, 2018 – Decided March 23, 2018

Before Judges Nugent, Currier, and Geiger.

On appeal from Superior Court of New Jersey,  
Law Division, Salem County, Indictment No.  
16-04-0195.

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

John T. Lenahan, Salem County Prosecutor,  
attorney for respondent (David M. Galemba,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant J.P.C. appeals from a September 23, 2016 order  
denying his motion to dismiss count one of the indictment and his

appeal of the prosecutor's rejection of his application for pre-trial intervention (PTI). For the reasons that follow, we affirm.

Defendant and the victim were involved in a romantic relationship during which they consensually recorded themselves being sexually intimate. After their relationship ended, defendant created an online Facebook profile of the victim on which he posted images of the victim which showed her intimate parts. Although the victim consented to the recording of the images, defendant posted them online without the victim's knowledge or consent. Defendant did this with the intent to emotionally harm her.

On April 13, 2016, Detective Robert Parry of the New Jersey State Police testified before a Salem County grand jury as the State's sole witness. He testified the victim's husband informed her there were nude photographs of her on the Internet. The victim searched the Internet and found an unauthorized profile under her name on several social media websites containing photographs which exposed her intimate parts.

Parry further testified the victim indicated J.P.C. had been harassing and stalking her since 2009. The victim stated defendant, her ex-boyfriend, was responsible for posting the photographs, which defendant posted under a screen name he created. Parry then testified regarding the results of his further

investigation, which included an Internet search using the screen name created by defendant. The search revealed images and videos of the victim being intimate with defendant. Parry also testified the victim stated the photographs were posted without her knowledge or permission.

Parry also stated he obtained a statement from defendant. In his statement, defendant admitted to posting the photographs without first obtaining the victim's permission. Defendant explained he did so because he "believed [the victim] was a bad person and she needed to be taught a lesson." The detective also testified defendant harassed the victim on two or more occasions.

The grand jury charged defendant with third-degree invasion of privacy, N.J.S.A. 2C:14-9(c) (count one); fourth-degree stalking, N.J.S.A. 2C:12-10(b) (count two); and fourth-degree cyber harassment, N.J.S.A. 2C:33-4.1(a)(2) (count three).

Defendant applied for admission to PTI. In a preliminary PTI rejection notice, the Criminal Division Manager noted defendant pled guilty to contempt for violating a domestic abuse restraining order in 2009 and had municipal court convictions for loud music in 2001 and disorderly conduct in 2010 for which defendant was sentenced to one year probation. The notice further states:

Although this appears to be the defendant's first indictable offense, based on the factors contained in 2C:43-12 Supervisory

treatment-pretrial intervention criteria, the defendant is felt to be an inappropriate candidate for PTI Diversion based on the following factors: (1) the nature of the offense; (2) the facts of the case; (7) the needs and interests of society; (14) the value of supervisory treatment would be outweighed by the public need for prosecution; and (17) the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling the defendant into a supervisory treatment program.

On June 21, 2016, an Assistant Salem County Prosecutor issued a letter rejecting defendant's application. After recounting the pending charges and underlying facts, the Assistant Prosecutor noted the victim opposed PTI and believed defendant was still harassing her online. The Assistant Prosecutor explained the State found defendant was not an appropriate candidate for PTI, citing statutory factors: (1) the nature of the offense; (2) the facts of the case; (3) the motivation and age of the defendant; (4) the desire of the complainant or victim to forego prosecution; (7) the needs and interests of society; (11) whether prosecution would exacerbate the social problem that led to the applicant's criminal act; (14) the value of supervisory treatment would be outweighed by the public need for prosecution; and (17) the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling the defendant into a

supervisory treatment program. N.J.S.A. 2C:43-12(e)(1), (2), (3), (4), (7), (11), (14), and (17).

The letter further states:

The Prosecutor has weighed the defendant's amenability to correction and responsiveness to rehabilitation, against the serious nature of the offense and the need for deterrence, and finds that the defendant's participation in the PTI program would depreciate the serious nature of the offense and substantially undermine the goal of deterrence in this area.

Defendant filed a motion challenging the prosecutor's denial. The State's opposing brief describes the underlying facts in detail, including defendant's intent to hurt the victim. It also states the victim "vehemently oppose[d] the defendant's admission into PTI" and claimed his actions still impacted her. The State attached the victim's letter opposing PTI. The brief also contains the following analysis:

This is a case where the victim in this matter had intimate photographs and videos of herself posted on the internet without her knowledge. He posted it on several pornographic websites without the victim's knowledge. To make matters worse, these embarrassing images of her were shown to her friends and family, and the defendant even created a fake profile page of her and went out of his way to contact her family. The defendant even admitted that he did it with the intent to "harm" her. The defendant was also the subject of a restraining order, but violated that restraining order and was convicted of it, but still subjected the victim to humiliation.

The nature of the offense, and the continued embarrassment the victim still goes through today weighed heavily in the State's decision to deny the defendant's PTI application.

The trial court rejected defendant's challenge in a September 23, 2016 oral decision, concluding the prosecutor's decision did not amount to a patent and gross abuse of discretion.

Defendant also moved to dismiss the indictment. Defendant argued, because the images were recorded consensually, he became the owner of the images and was thereby privileged to disseminate them. In a September 23, 2016 oral decision, the trial court dismissed count two but denied defendant's motion as to counts one and three. The court reasoned:

In this case, the defense's argument is some type of implied consent. I find that is misplaced. Not only for the reasons that the State places on the record, which is he indicated - - at least which was presented to the Grand Jury that he was aware that there was no implied consent.

But, even away from that, the language is very clear that there must be consent. And, it says under 2C:14-9-C, the last portion of 9-C says, "Unless that person has consented to such disclosure." And, . . . there is no consent to the disclosure here. If anything, there's consent to the photos being taken; but, that's a different argument.

Immediately thereafter, defendant reached a plea agreement with the State. Defendant entered a guilty plea to fourth-degree cyber harassment in exchange for a recommendation of two years'

probation, prohibition of any contact with the victim, and dismissal of count one. He admitted he created an online Facebook profile of the victim on which he posted a photograph exposing her intimate parts. He further admitted he posted the photograph without her permission and with the purpose to emotionally harm her. The court accepted the plea and subsequently sentenced defendant to probation for two years, imposed appropriate penalties and assessments, and dismissed count one.

Defendant appeals the denial of his motion to dismiss count one and for admission into PTI. On appeal, he argues:

POINT I

THE COURT ERRED IN DENYING [J.P.C.'S] MOTION TO DISMISS COUNT ONE OF THE INDICTMENT BECAUSE THE IMAGES HAD BEEN TAKEN WITH THE VICTIM'S CONSENT AND, THEREFORE, THE STATE DID NOT ESTABLISH AN ELEMENT OF THE OFFENSE OF THIRD-DEGREE INVASION OF PRIVACY.

A. The plain language of the statute contains an element that the images were obtained without the other person's consent.

B. The legislative history demonstrates an intent to only criminalize the disclosure of images taken without consent.

C. The rest of the statutory scheme reveals a legislative intent to require lack of consent to establish the third-degree offense of invasion of privacy.

D. Recent amendments to N.J.S.A. 2C:14-9(c) clarify that the Legislature always intended to require a lack of consent in the taking of the images as an element of the offense.

E. This Court has implicitly held that an element of N.J.S.A. 2C:14-9(c) is that the victim did not consent to the taking of the intimate photographs.

F. The rule of lenity requires an interpretation of the statute favoring the defendant.

## POINT II

BECAUSE THE PROSECUTOR FAILED TO PROVIDE ANY STATEMENT OF REASONS WHY THE LISTED FACTORS WEIGHED IN FAVOR OF REJECTION FROM PTI AND FAILED TO CONSIDER FACTS SUPPORTING ADMISSION, A REMAND FOR RECONSIDERATION IS REQUIRED.

Defendant argues the trial court should have dismissed count one because the evidence presented to the grand jury was insufficient to support the charge of third-degree invasion of privacy since the victim had consented to the images being taken.

An indictment should be dismissed "only on the clearest and plainest ground, and only when the indictment is manifestly deficient or palpably defective." State v. Hogan, 144 N.J. 216, 228-29 (1996) (citations omitted) (quoting State v. Perry, 124 N.J. 128, 168 (1991)). A trial court deciding a motion to dismiss an indictment must "evaluate whether, viewing the evidence and the rational inferences drawn from that evidence in the light most



favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it." State v. Morrison, 188 N.J. 2, 13 (2006). "A trial court, however, should not disturb an indictment if there is some evidence establishing each element of the crime to make out a prima facie case." Id. at 12.

Our standard of review in examining the trial court's denial of the motion to dismiss the indictment is limited. "The trial court's decision denying defendant's motion to dismiss [his] indictment is reviewed for abuse of discretion." State v. Saavedra, 222 N.J. 39, 55 (2015) (citing Hogan, 144 N.J. at 229).

Defendant argues he was privileged to post the revealing images and videos of the victim because they had been recorded consensually. He contends the images must be both recorded and disseminated without the victim's consent. The trial judge rejected this argument.

At the time of the offense, the invasion of privacy statute read:

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.

[N.J.S.A. 2C:14-9(c) (emphasis added).]

Accordingly, the elements of third-degree invasion of privacy during the time period in question, were: (1) the defendant must know he is not licensed or privileged to disclose a photograph; (2) the defendant actually disclosed the image; (3) the image must be of another whose intimate parts are exposed; and (4) the individual depicted in the image has not consented to the disclosure of the image. Therefore, an individual commits third-degree invasion of privacy if the images are disclosed without the victim's consent, even if the images were recorded consensually.

We have reviewed the Grand Jury transcript. We detect no abuse of discretion by the trial court or manifest deficiency in the Grand Jury process here. Parry's Grand Jury testimony described the events substantially as we have related them above. We are satisfied this presentation complied with the required evidential standard, presenting at least some evidence as to each element of the offense. The Grand Jury testimony supports the State's contention that defendant did not have permission to disclose the victim's images to third parties. Accordingly, the denial of defendant's motion to dismiss count one was appropriate.

Defendant's remaining arguments regarding the dismissal of count one lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We next consider defendant's argument that the prosecutor failed to provide an adequate statement of reasons for rejecting defendant's PTI application. Defendant implies the prosecutor's rejection letter is deficient because it merely lists, by number, the factors supporting the rejection. Defendant further contends the prosecutor failed to consider the factors weighing in favor of admission.

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. "Deciding whether to permit diversion to PTI 'is a quintessentially prosecutorial function.'" State v. Waters, 439 N.J. Super. 215, 225 (App. Div. 2015) (quoting State v. Wallace, 146 N.J. 576, 582 (1996)). "Prosecutorial discretion in this context is critical for two reasons. First, because it is the fundamental responsibility of the prosecutor to decide whom to prosecute, and second, because it is a primary purpose of PTI to augment, not diminish, a prosecutor's options." State v. Nwobu, 139 N.J. 236, 246 (1995) (quoting State v. Kraft, 265 N.J. Super. 106, 111 (App. Div. 1993) (citations omitted)).

"Trial courts may overrule a prosecutor's decision to accept or reject a PTI application 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." State v. Roseman, 221 N.J. 611, 624-25 (2015) (citation omitted) (quoting Wallace, 146 N.J. at 582). Absent evidence to the contrary, a reviewing court must assume "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); State v. Bender, 80 N.J. 84, 94 (1979)).

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). We apply the same standard of review as the trial court, and review its decision de novo. Waters, 439 N.J. Super. at 226.

Generally, a defendant can establish a prosecutor has abused his or her discretion in denying a PTI application by establishing the prosecutor did not consider all relevant factors, considered irrelevant or inappropriate factors, or committed a clear error in judgment. See Wallace, 146 N.J. at 583 (quoting Bender, 80 N.J. at [93]). To establish such an abuse of discretion rises to the level of patent and gross, a defendant must also show the alleged prosecutorial error "will clearly subvert the goals underlying Pretrial Intervention." Ibid. (quoting Bender, 80 N.J. at [93]).

Here, it can hardly be said the prosecutor's rejection of defendant's PTI application represents a patent and gross abuse of discretion that constitutes an egregious example of injustice and unfairness. See Nwobu, 139 N.J. at 246. Nor has defendant shown the rejection of his application will clearly subvert the goals of PTI. The prosecutor found numerous factors militating against defendant's admission into PTI. The prosecutor took into account defendant's prior record, the victim's opposition to diversion, the ongoing nature of defendant's conduct, the continuing impact of the defendant's conduct, and defendant's intent to hurt the victim.

Defendant complains the prosecutor did not explain his consideration of each statutory factor in his initial rejection letter. We agree. However, there is a presumption the prosecutor considered all relevant factors and such presumption is warranted here as all factors were addressed in the prosecutor's subsequent brief. Therefore, a remand is unnecessary as it would serve no useful purpose.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION