

**NOT FOR PUBLICATION WITHOUT THE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-2951-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MOHAB S. KHAN,

Defendant-Appellant.

Submitted March 6, 2018 – Decided April 2, 2018

Before Judges Mawla and DeAlmeida.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
15-12-1455.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Susan L. Berkow,
Special Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Mohab S. Khan appeals from an October 3, 2016 order, which denied his admission into pre-trial intervention (PTI). We affirm.

The facts underlying this appeal occurred in July 2015. In three separate incidents, defendant approached two women and an eleven-year old girl at Cheesequake State Park, and attempted to straddle, jump, or lay on them. Police were called and observed defendant was under the influence of a substance. As defendant was placed under arrest he attempted to run, but was restrained, and taken to the hospital. Drugs and drug paraphernalia were discovered in defendant's backpack.

Defendant was transported to Raritan Bay Hospital because of his behavior. On route to the hospital, defendant continued to behave erratically, made sexually suggestive gestures, and rambled sexually suggestive language. Once at the hospital, police removed defendant's handcuffs at the request of hospital staff who intended to place defendant into a four point restraint. Before defendant could be placed into the restraint, he groped the genitals of a female nurse standing at his bedside.

While in his hospital bed awaiting treatment and under police guard, defendant continued to ramble in a sexually aggressive matter. Ultimately, defendant admitted he ingested LSD, and remained at the hospital until he could be safely discharged.

Defendant was indicted on a single count of fourth-degree criminal sexual contact in violation of N.J.S.A. 2C:14-2. He was also charged with five disorderly persons offenses, including disorderly conduct, resisting arrest, obstruction, possession of controlled dangerous substance (CDS), and possession of CDS paraphernalia. Defendant applied for PTI, and while awaiting the PTI decision, was arrested and charged with soliciting prostitution. The Criminal Division Manager and the prosecutor each denied defendant's admission to PTI. The trial judge upheld the denial of PTI.

As a result, defendant pled guilty to the indictment, and admitted he committed an act of criminal sexual contact when he groped the nurse. Defendant was sentenced to four years of probation. In addition, defendant's sentence required him to enroll in and comply with various alcohol, drug, and mental health treatment programs, maintain employment, and remain offense free.

On appeal, defendant raises the following point:

POINT I – THE STATE'S DENIAL OF DEFENDANT'S APPLICATION FOR PRE-TRIAL INTERVENTION WAS A PATENT AND GROSS ABUSE OF DISCRETION.

"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)). "[A]cceptance into PTI is dependent upon an initial recommendation by the Criminal Division Manager and consent of the prosecutor." 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 (quoting 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 judge 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 (alteration in original) (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 judgment" and "that the prosecutorial error complained of will clearly subvert the goals

underlying [PTI]." Id. at 625 (quoting 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 582-83 (quoting State v. Ridgway, 208 N.J. Super. 118, 130 (Law Div. 1985)).

"Thus, the scope of review is severely limited." State v. Waters, 439 N.J. Super. 215, 225 (App. Div. 2015) (quoting State v. Negran, 178 N.J. 73, 82 (2003)). "Reviewing courts must accord the prosecutor 'extreme deference.'" Id. at 226 (quoting Nwobu, 139 N.J. at 246). "We must apply the same standard as the trial court. Therefore, we review the [trial court's ruling] of the prosecutor's decision de novo." Ibid.

Defendant argues the State failed to consider all of the factors of N.J.S.A. 2C:43-12, which constituted "a patent and gross abuse of discretion" by the prosecutor. Specifically, defendant claims the State did not adequately assess N.J.S.A. 2C:43-12(e)(3), (5), (6), (7), and (11). Instead, defendant argues the State improperly considered N.J.S.A. 2C:43-12(e)(1), (2), (4), (8), and (9), and gave no justification for its consideration of N.J.S.A. 2C:43-12(e)(14) and (17). Finally, defendant claims the State failed to consider his motivation to participate in PTI.

N.J.S.A. 2C:43-12(e) states, in relevant part:

Prosecutors and program directors shall consider in formulating their recommendation of an applicant's participation in a supervisory treatment program, among others, the following criteria:

- (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;
- (5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;
- (6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment;
- (7) The needs and interests of the victim and society;
- (8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;
- (9) The applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others;
- (10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;

(11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;

(12) The history of the use of physical violence toward others;

(13) Any involvement of the applicant with organized crime;

(14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;

(15) Whether or not the applicant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;

(16) Whether or not the applicant's participation in pretrial intervention will adversely affect the prosecution of codefendants; and

(17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.

We are not persuaded by defendant's arguments. The Supreme Court has stated:

Guideline 1 identifies five purposes of PTI. Those are: (1) to enable defendants to avoid ordinary prosecution by receiving early rehabilitative services expected to deter future criminal behavior; (2) to provide defendants who might be harmed by the

imposition of criminal sanctions with an alternative to prosecution expected to deter criminal conduct; (3) to avoid burdensome prosecutions for "victimless" offenses; (4) to relieve overburdened criminal calendars so that resources can be expended on more serious criminal matters; and (5) to deter future criminal behavior of PTI participants.

[Nwobu, 139 N.J. at 247.]

Here, both the PTI program director and prosecutor independently found defendant ineligible for diversion. In consideration of the guidelines, the assistant prosecutor cited the following factors:

Guidelines 3(1) and (14) [-] The nature of the offense: The defendant deliberately reached out with his right hand and groped the vaginal area of the [victim.] The crime is of such nature that the value of supervisory treatment would be outweighed by the public need for prosecution. The police were called to the scene because the defendant was lying on top of females at the beach.

Guideline 3 (2) [-] The facts of the case: The defendant groped the victim, a nurse, while she was trying to treat him at the hospital. According to the police report, the police were called to the beach because the defendant, possibly intoxicated, was jumping on people. The defendant admitted being under the influence of LSD. He was transported to the hospital where the [instant offense] occurred.

Guideline 1(d) [-] Responsiveness to rehabilitation: The defendant admitted to being under the influence of acid and marijuana at the time of the commission of the instant offense. The defendant participated

in treatment for approximately one month. Since that time, the defendant has continued to use marijuana once a week and has not voluntarily enrolled in treatment.

Additionally, the assistant prosecutor noted the following in its decision not to recommend defendant for PTI:

Guideline 1(d) provides for removing from ordinary prosecution those who can be deterred from criminal behavior by short term rehabilitative work or supervision. It is to be emphasized that the potential for rehabilitation must be considered in light of the time periods embodied in Rule 3:28. . . .

The deterrence of criminal behavior in many cases requires intensive work: counseling, psychotherapy, drug-abuse prevention and control, employment placement. Programs in these cases should be measured against available treatment facilities and the time constraints of PTI. For other defendants, however, no more than a supervised pretrial probationary period may be necessary when no extensive need for rehabilitative services can be discerned.

Guideline 1(e)[:] The purpose of pretrial intervention [is] to deter future criminal or disorderly behavior by a defendant in pretrial intervention. While pending the disposition of the instant offense the defendant committed another offense. On December 3, 2015, the defendant was charged with [soliciting] prostitution and is scheduled for court on February 23, 2016.¹

Guideline 1(c) provides for the use of PTI as a mechanism for minimizing penetration into the criminal process for a broad categor[y]

¹ The pre-sentence report indicates defendant was found guilty of this offense on June 21, 2016.

of offenders accused of "victimless" crimes. This instant offense is not a victimless crime. The victim did not respond to CCM [criminal case management]. The police were called to the scene because the defendant was lying on top of females on the beach, [p]olice reports do not indicate the victim suffered any physical injuries.

The program concluded that "[i]n considering these factors and all the factors of this case, it may be an indication the defendant would not be an appropriate candidate for short-term supervision and would not abide by the terms/conditions of PTI. CCM is rejecting the defendant's application for PTI and recommending this case be handled through the traditional court process."

In rejecting defendant's PTI application, the State relied upon the following factors: the nature of the offense, N.J.S.A. 2C:43-12(e)(1); the facts of the case, N.J.S.A. 2C:43-12(e)(2); the desire of the complainant or victim to forego prosecution, N.J.S.A. 2C:43-12(e)(4); the needs and interests of the victim and society, N.J.S.A. 2C:43-12(e)(7); the crime is of such a nature that the value of supervisory treatment is outweighed by the public need for prosecution, N.J.S.A. 2C:43-12(e)(14); and the harm done to society by abandoning criminal prosecution would outweigh any benefit to society from channeling an offender into a supervisory treatment program, N.J.S.A. 2C:43-12(e)(17).

The trial court denied defendant's application for PTI and stated:

[T]he State has indicated that they reviewed factors 1, 2, 4, 7, 14, and 17, and that those factors support the State's position that [defendant] is not a candidate for [PTI]. . . .

So the 17 factors that are to be considered, the Court must first ask did the State, prosecutor, consider those factors. And [the prosecutor] in a several-page decision did consider those factors and outlined . . . why the State did not believe or does not believe [PTI] is appropriate.

The second is were there any errors being made as a result of . . . their judgment or their abuse of discretion. And the standard must be shown by the defendant by clear and convincing evidence that the prosecutor's decision was an error of judgment.

So did [the State] consider the factors? I'm satisfied [the prosecutor] did. Did [the State] . . . in . . . applying those factors [abuse] their discretion? I can't find a pattern of gross abuse of discretion.

While the State and I may not agree on each of the particular factors, I think the State . . . outlined why [defendant] should not be permitted in. And that finding is consistent with . . . probation's recommendation. So even with the additional information that's been supplied today . . . it does not appear that it would change [defendant]'s position. . . .

So Mr. Khan I'm going to deny your application at this time because . . . although the nature of the offense is fourth degree, it involves a victim. And overall I can't find that the State was being arbitrary in [its] denial of your acceptance into this program.

We agree with the trial judge's assessment. The State considered all of the relevant factors, and the prosecutor's decision not to admit defendant to PTI was not an abuse of discretion. Furthermore, N.J.S.A. 2C:43-12(e) does not require the State to consider all of the criteria enumerated, rather only those which are relevant. We will not disturb the trial judge's decision to uphold the prosecutor's denial of 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