

RECORD IMPOUNDED

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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-3170-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANGEL M. FIGUEROA,

Defendant-Appellant.

Submitted March 1, 2018 – Decided May 4, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
16-05-0758.

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

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

PER CURIAM

Defendant, Angel M. Figueroa, appeals from the trial court's
upholding of the prosecutor's rejection of defendant's application

for entry into the Pre-trial Intervention Program (PTI). N.J.S.A. 2C:43-12; R. 3:28.¹ He was previously charged in an indictment with third-degree invasion of privacy, N.J.S.A. 2C:14-9(c), and third-degree cyber harassment, N.J.S.A. 2C:33-4.1(a), arising from his posting on the internet a sexually explicit photograph of his ex-girlfriend. Defendant applied for PTI, but the criminal division manager and the prosecutor rejected his admission² based upon an evaluation of the criteria set forth in N.J.S.A. 2C:43-12(e) and the Rule 3:28 Guidelines. Defendant appealed and the trial court sustained the prosecutor's objections, finding that the prosecutor's decision was not a patent and gross abuse of his discretion. For the reasons that follow, we affirm.

The allegations leading to defendant's arrest, indictment and the rejection of his PTI application are summarized from the record

¹ "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)). In 1970, PTI was established by Rule 3:28. Ibid. (citing State v. Watkins, 193 N.J. 507, 517 (2008)). "PTI programs are 'governed simultaneously by the Rule and the statute which 'generally mirror[]' each other.'" Ibid. (quoting State v. Wallace, 146 N.J. 576, 582 (1996)).

² "Pursuant to the procedures and guidelines established by Rule 3:28 and N.J.S.A. 2C:43-12, acceptance into PTI is dependent upon an initial recommendation by the Criminal Division Manager and consent of the prosecutor." Roseman, 221 N.J. at 621.

as follows. Defendant's ex-girlfriend reported to police defendant's posting to Instagram of an explicit "screen shot" photograph of herself. She explained to the police that she and defendant had dated for about two years and during that time defendant videotaped the couple, without her knowledge, while they engaged in sexual acts.

Based on the girlfriend's reporting, the police arrested and charged defendant. At the time, defendant was twenty-four years old, he had been honorably discharged from the National Guard, and was working as a chef. After his arrest, defendant explained that he posted the images to the internet in retaliation for his ex-girlfriend's alleged posting of "videos and her [having] wrote stuff" about him.³

After a grand jury indicted defendant, he applied for entry to the PTI program. In her rejection of defendant's application, the assistant criminal division manager (ACDM) noted defendant previously participated in an out-of-state- diversionary program, mentioned a charge against him in another state without any information about its disposition, and observed that defendant had been charged and fined in this state for possession of a controlled dangerous substance, a disorderly persons offense. The ACDM

³ Defendant never produced copies of the materials the girlfriend allegedly posted.

concluded that "[i]t appears that prior involvement with Law Enforcement did not serve as sufficient sanction to deter defendant from further criminal conduct and illustrates that his behavior will not be conducive to change through short term supervision."

On September 19, 2016, the prosecutor responded to the ACDM's recommendation and noted his office's agreement with her rejection of defendant's application. The prosecutor supported his decision by citing to "[t]he needs and interests of the victim(s) and society," N.J.S.A. 2C:43-12(e)(7), which, in this case included the victim's desire to pursue defendant's prosecution, N.J.S.A. 2C:43-12(e)(4), and the possible inability to remove from the internet a picture of a victim that is posted without consent. The prosecutor also relied upon "[t]he extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior," N.J.S.A. 2C:43-12(e)(8), and noted that defendant's prior involvement in another state's diversionary program did not deter him from committing new offenses. He also cited defendant's four prior arrests and his one conviction for a "minor offense."

Defendant appealed his rejection from PTI to the trial court. In his opposition to defendant's appeal, the prosecutor filed a brief that detailed his consideration of each applicable factor as set forth in N.J.S.A. 2C:43-12(e), including those cited in his

original rejection, the nature and facts of the case, the age and motivation of defendant, and the "injurious consequences" of defendant's actions.

After considering the parties' written submissions and oral arguments, the trial court rejected defendant's appeal. In an oral decision placed on the record on December 5, 2016, the trial court found that the prosecutor considered the required factors. It also recognized the "enhanced" deference courts are obligated to apply to a prosecutor's decision to reject a defendant from PTI, and the limited nature of a court's review of that decision. The court concluded by entering its order rejecting defendant's application.

Defendant pled guilty to one count of invasion of privacy and the trial court sentenced him to one year of non-custodial probation. This appeal followed.

On appeal from the trial court's decision, defendant argues:

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE STATE'S DENIAL OF DEFENDANT'S APPLICATION FOR PRE-TRIAL INTERVENTION WAS NOT A PATENT AND GROSS ABUSE OF DISCRETION.

We begin by acknowledging that "[t]he scope of judicial review of PTI decisions is 'severely limited[,]'" and interference by reviewing courts is reserved for those cases where needed 'to

check . . . the "most egregious examples of injustice and unfairness.'" State v. Lee, 437 N.J. Super. 555, 563 (App. Div. 2014) (quoting State v. Negran, 178 N.J. 73, 82 (2003)). "[O]n appeal, [we] review[] PTI decisions with 'enhanced deference.'" Ibid. (quoting State v. Brooks, 175 N.J. 215, 225 (2002)).

The court's review of a prosecutor's PTI determination is limited because of the nature of the decision being made. "PTI is essentially an extension of the charging decision, therefore the decision to grant or deny PTI is a 'quintessentially prosecutorial function.'" Roseman, 221 N.J. at 624 (quoting Wallace, 146 N.J. at 582). Prosecutors are granted "wide latitude in deciding whom to divert into the PTI program and whom to prosecute through a traditional trial." Negran, 178 N.J. at 82.

A prosecutor must evaluate PTI applications by considering the factors defined by statute and court rule, and conduct an "individualized assessment" of the applicant. The Supreme Court explained the evaluation process as follows:

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). These factors include "the details of the case, defendant's motives, age, past criminal record, standing in the community, and employment performance[.]" Additionally, a PTI determination requires that the prosecutor 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 (citations omitted).]

A trial court "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.'" Id. at 624-25 (quoting Wallace, 146 N.J. at 582). "Where a defendant can make that showing, a trial court may admit a defendant, by order, into PTI over the prosecutor's objection." Roseman, 221 N.J. at 625.

A patent and gross abuse of discretion occurs when

a prosecutorial veto (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. . . . In order for such an abuse of discretion to rise to the level of "patent and gross," it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying [PTI].

[Ibid. (quoting State v. Bender, 80 N.J. 84, 93 (1979)).]

Applying these principles, we discern no patent or gross abuse of discretion in the prosecutor's denial of defendant's PTI application. Thus, there is no basis to disturb the trial court's

decision sustaining the prosecutor's denial. Although defendant certainly has a number of mitigating factors in his favor, the reasons for the prosecutor's denial were premised on consideration of relevant factors, which weighed against his admission. Defendant failed to clearly and convincingly establish that the prosecutor's decision went so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice required judicial intervention.

We conclude defendant's arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. R., 2:11-3(e)(2). Suffice it to say, "a court's scrutiny of a prosecutor's denial of consent is normally limited to the reasons given by the prosecutor for his [or her] action[," State v. Kraft, 265 N.J. Super. 106, 112 (App. Div. 1993), and "[a]bsent evidence to the contrary, it is [to be] presumed that the prosecutor considered all relevant factors before rendering a decision." Ibid. (alteration in original) (quoting State v. Dalqlish, 86 N.J. 503, 509 (1981)).

Here, the prosecutor appropriately referred to the State's version of the facts where those facts were relevant to the applicable PTI factors, and the prosecutor's statement of reasons clearly evince a substantive analysis of valid considerations. While reasonable minds might differ as to whether defendant is a

suitable candidate for admission into the program, the court's role when considering an appeal of this sort is "limited" and the "[court] does not have the authority . . . to substitute [its own] discretion for that of the prosecutor. . . . even where the prosecutor's decision is one which the . . . court disagrees with or finds to be harsh." See Kraft, 265 N.J. Super. at 112-113 (alteration in original) (citation omitted) (citing State v. DeMarco, 107 N.J. 562, 566-67 (1987)).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION