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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-3778-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY C. DIVIZIO,

Defendant-Appellant.

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Argued November 15, 2017 – Decided January 22, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,  
Law Division, Ocean County, Indictment No. 16-  
08-1664.

Daniel S. Rockoff, Assistant Deputy Public  
Defender, argued the cause for appellant  
(Joseph E. Krakora, Public Defender, attorney;  
Daniel S. Rockoff, of counsel and on the  
briefs).

William Kyle Meighan, Assistant Prosecutor,  
argued the cause for respondent (Joseph D.  
Coronato, Ocean County Prosecutor, attorney;  
Samuel Marzarella, Chief Appellate Attorney,  
of counsel; William Kyle Meighan, on the  
brief).

PER CURIAM

On April 2017, approximately eight weeks after State v. Benjamin, 228 N.J. 358 (2017) was decided, we granted defendant Anthony C. Divizio leave to appeal the denial of certain discovery requests made regarding his unsuccessful application for a Graves Act waiver. See N.J.S.A. 2C:43-6.2. We now affirm the Law Division judge's decision in part, reversing only that portion of his order which required the State to turn over defendant's file for in camera inspection.

Defendant, who has a history of drug addiction, stole a .357 magnum handgun in the spring of 2016. The weapon had belonged to his deceased father and was taken from his sister's home. He traded the gun for heroin.

After his arrest, he attempted to aid the authorities in obtaining the return of the weapon. He called the drug dealer with whom he had engaged in the gun-for-drugs exchange, but the dealer denied knowledge of its whereabouts. Defendant has a minimal criminal history – a conditional discharge and two disorderly persons drug offenses. After these charges were lodged against him, he entered into a drug rehabilitation facility where by all reports, he was doing well.

Defendant was eventually indicted for third-degree theft of a firearm, N.J.S.A. 2C:20-3(a) (count one); second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(b)(1) (count two); and

fourth-degree unlawful disposition of a firearm, N.J.S.A. 2C:39-9(d) (count three).

The exception to mandatory Graves Act sentencing "allows certain first-time offenders to receive a reduced penalty if the imposition of a mandatory term would not serve the interests of justice." Benjamin, 228 N.J. at 368. The statutory escape valve authorizes a prosecutor to request the waiver before the assignment judge, or, in the alternative, authorizes a sentencing judge, with the prosecutor's consent, to refer the matter to the assignment judge for consideration of a waiver. N.J.S.A. 2C:43-6.2. It allows the court to either impose a term of probation by way of sentence, or reduce the relevant mandatory period of parole ineligibility to one year. Ibid. The waiver, however, is subject to the court's review – whether imposition of the Graves Act minimums would not serve the "interests of justice." Ibid.

Defendant initially sought, as did the defendant in Benjamin, discovery of the prosecutor's case files of others similarly situated who obtained a waiver recommendation. After the decision in Benjamin, which concluded that production was not required, this defendant's request was modified to include only the aggravating and mitigating factors the prosecutor considered when the application was rejected.

The State's initial November 3, 2016 one-page denial of defendant's request for a waiver consisted primarily of a checklist. Boxes were marked off stating that defendant was denied "statutorily" and because of a "significant threat to the community[.]" The denial continued: "the factual circumstances concerning the 'offense conduct' is the factual circumstances that the Graves Act was intended to combat and, the imposition of a mandatory minimum sentence is [sic] this matter, is in the interests of justice."

The prosecutor's February 14, 2017 brief indicated that "at least" three aggravating factors applied to the offense: that it was committed "in an especially heinous, cruel, or depraved manner[,]" N.J.S.A. 2C:44-1(a)(1), that it was necessary to deter defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9), and that defendant was at risk to reoffend because of his heroin addiction, N.J.S.A. 2C:44-1(a)(3). In the brief, the State also explained that a case defendant cited in support of his request for a waiver involved a defendant who had traded a gun, stolen from her boyfriend, for drugs. That case, in which the prosecutor had agreed to a waiver, was distinguishable in that the weapon was recovered.

The Law Division judge, in his post-Benjamin written decision, reiterated defendant's contention, also raised on

appeal, that in order to obtain and prevail in a State v. Alvarez<sup>1</sup> hearing, defendant required a more substantive statement of reasons, including the prosecutor's analysis of aggravating and mitigating factors, and a "case-specific memorialization" of the prosecutor's decision. The judge also noted that the State contended that the initial statement of reasons, together with the reasons expressed in the brief, easily met all discovery responsibilities and provided defendant with sufficient information for attack on the merits of the decision. Although he denied defendant's discovery requests, the judge directed the prosecutor provide the case-specific memorialization of the manner in which it made the decision, in addition to his file, for in-camera inspection. This appeal followed.

Defendant raises the following points for our consideration:

POINT I

AFTER THE COUNTY PROSECUTOR REFUSED CONSENT TO A WAIVER OF THE GRAVES ACT'S 3.5-YEAR PAROLE DISQUALIFIER, THE TRIAL COURT ERRED BY ORDERING THAT THE PROSECUTOR SHOULD COMMUNICATE SOLELY TO THE COURT THE COUNTY'S ASSESSMENT OF THE N.J.S.A. 2C:44-1 SENTENCING FACTORS, EXCLUDING MR. DIVIZIO FROM DISCOVERY OF THAT INFORMATION. U.S. CONST., AMENDS. V, VI, XIV; N.J. CONST., ART. 1, PARS. 1, 9, 10.

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<sup>1</sup> 246 N.J. Super. 137, 148-49 (App. Div. 1991) (finding that "[a] hearing would be conducted only if the Assignment Judge 'after review of the materials submitted with the motion papers, concludes that a hearing is required in the interests of justice.'").

- A. The trial court's order conflicts with the holding in State v. Benjamin, 442 N.J. Super. 258, 266 (App. Div. 2015), aff'd as modified, 2017 N.J. LEXIS 377 (2017).
- B. The trial court's order conflicts with the reasonable concession made by the Attorney General of New Jersey during briefing and recorded oral argument in Benjamin.
- C. The trial court's order conflicts with R. 3:13-3, which provides that "relevant" documents in the State's possession are discoverable by the defendant.
- D. The trial court's order conflicts with State v. Alvarez, 246 N.J. Super. 137, 147 (App. Div. 1991), which promises a meaningful opportunity to challenge prosecutorial sentencing decisions for arbitrary or discriminatory treatment.
- E. The trial court's order conflicts with the prohibition against ex parte judicial communications.

We first address defendant's claim that the trial court's order violates the ban against ex parte judicial communications. Trial judges not infrequently inspect records in camera; the prohibition against ex parte communications is intended to ban very different communications. We do not discuss the point further as we consider it so lacking in merit. R. 2:11-3(e)(2).

Defendant's remaining points concern the analysis of the principles enunciated in Benjamin. In Benjamin, the Court considered the Attorney General's Directive to Ensure Uniform

Enforcement of the "Graves Act" (Oct. 23, 2008, as corrected Nov. 25, 2008) (Directive). The Directive imposes on the prosecutor the obligation to include in the decision-making process "all relevant circumstances concerning the offense conduct and the offender," including statutory aggravating and mitigating factors, and the likelihood of conviction at trial. Directive at 10. The Directive also requires prosecutors to maintain records—"case-specific memorializations" in order to enable periodic audits by the Attorney General's Office. Id. at 13-14.

Additionally, the Court also asked if there were "sufficient procedural safeguards [] in place to protect a defendant's right to challenge the denial of a Graves Act waiver." Benjamin, 228 N.J. at 370. In making that determination, the Court drew a parallel to the Comprehensive Drug Reform Act of 1987, N.J.S.A. 2C:35-1 to 36A-1. Id. at 370-71. Attorney General's guidelines relevant to that act inform the exercise of prosecutorial discretion with regard to plea offers. Id. at 371 (citing State v. Laqares, 127 N.J. 20, 28-33 (1992); State v. Vasquez, 129 N.J. 189, 195-96 (1992); see also State v. Brimage, 153 N.J. 1, 24 (1998) (rejecting Attorney General's guidelines for formalizing disparity throughout the state)). The waiver decision must be documented when made, which the State conceded was appropriate and

necessary "to facilitate judicial review for the arbitrary or discriminatory exercise of prosecutorial discretion." Id. at 372.

Finally, the Court considered a defendant's right to a hearing, at which time he or she can obtain judicial review of the imposition of the minimums if the review would serve the interests of justice. Id. at 372-73 (citing Alvarez, 246 N.J. Super. at 148-49). In sum, "prosecutors are guided by standards, inform defendants of the basis for their decisions, and are subject to judicial oversight." Id. at 373.

Importantly, the Court said the following:

All case-specific files should contain a statement of reasons which, upon a defendant's Alvarez motion, the assignment judge may consider in assessing the prosecutor's conduct, as the statement will show the prosecutor's reasons not to grant a waiver for a particular defendant. Conversely, additional case-specific information is contained in case and cumulative files for administrative reasons because those files function as internal documents, the primary purpose of which is to allow prosecutors to assess the case and the Attorney General to conduct audits to ensure compliance with the Directive.

[Id. at 373-74 (citing Directive at 14).]

It seems to us from this language that the "case and cumulative files" are maintained for internal use and assessment by the Attorney General's Office. Therefore, the Benjamin decision did



not mean that a Graves Act defendant has access to them. Id. at 374.

Benjamin also stated that despite New Jersey's long-standing precedent supporting broad discovery in criminal cases, a defendant is expected to demonstrate entitlement to an Alvarez hearing after presenting independent grounds that he or she was receiving unconstitutionally disparate treatment. Id. at 374.

In other words, the written notifications in this case of reasons for denying a waiver must suffice. The prosecutor explained the circumstances of the offense that led to the decision. Defendant's conduct resulted in the release of yet another gun into the drug underworld. The prosecutor's office also identified defendant's long-standing drug problem as a basis for its rejection, as it viewed him as a person likely to reoffend. The prosecutor has provided his reasons in writing in sufficient detail.

Nor do we agree with defendant's argument that conveying the aggravating and mitigating factors after the fact, weeks after the decision denying the waiver was made, was fatal. They were consistent with the checklist. There is nothing magical about compelling the State to produce the original document on which the aggravating and mitigating factors were recorded. The important

information has been provided, and the reasons do not appear to treat defendant in a discriminatory or arbitrary fashion.

Furthermore, there does not appear to be a basis for the judge's concern. The State should not have been ordered to produce defendant's file as well as the case-memorialization for in camera inspection.

Affirmed in part, reversed in part.

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



CLERK OF THE APPELLATE DIVISION