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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4340-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARYL FREEMAN, a/k/a DENIES,

Defendant-Appellant.

Submitted February 12, 2018 – Decided March 16, 2018

Before Judges Accurso and DeAlmeida.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 16-
05-1502.

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

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Matthew
E. Hanley, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Daryl Freeman appeals the denial of his application for admission into the pretrial intervention program (PTI), as well as the length of the probationary sentence imposed following his guilty plea to third-degree aggravated assault. Finding no merit in either point, we affirm.

I.

On December 28, 2015, defendant, who was then 20 years old, was standing with two friends outside a building owned by the 61-year-old victim. Defendant had previously lived in the building with his grandmother, but had moved after having had disputes with the victim. The victim asked defendant and his friends to leave the property. When they refused, the victim began taking photographs of the three with his cellphone and stated that he intended to call the police. Defendant responded by punching the victim in the face. As a result of the assault, the victim suffered a broken jaw, which had to be wired shut for ten weeks to heal.

On May 11, 2016, a grand jury returned an indictment charging defendant with one count of third-degree aggravated assault pursuant to N.J.S.A. 2C:12-1b(7). Defendant thereafter applied for admission to PTI. The Essex County PTI Program Director recommended that he be accepted into the program. The prosecutor rejected the recommendation.

In an eight-page letter, the executive assistant prosecutor carefully considered 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. While the executive assistant prosecutor acknowledged that defendant had no record of criminal convictions, she noted that defendant was presumed to be ineligible for PTI as a result of having been charged with an offense involving the deliberate use of violence. See N.J.S.A. 2C:43-12(b)(2)(b); R. 3:28 Guideline 3(i)(2). She concluded that defendant had not overcome the presumption of ineligibility by establishing "compelling reasons" demonstrating his amenability to correction and responsiveness to rehabilitation. See State v. Nwobu, 139 N.J. 236, 252 (1995).

Specifically, the executive assistant prosecutor noted the significant injuries defendant inflicted on the victim, and defendant's history as a high school dropout, who was unemployed at the time of the offense, and had never held employment. In addition, defendant tested positive for both marijuana and oxycodone at his PTI evaluation, and did not acknowledge what the evaluator identified as a severe cannabis use disorder. The defendant admitted that he had used marijuana on the day of the incident and was under the influence of the drug when he punched the victim.

After considering the victim's desire to prosecute the charges, defendant's propensity to react violently without cause, the public interest in deterring violent behavior, and defendant's background and potential for rehabilitation, the executive assistant prosecutor determined that the aggravating factors clearly outweighed the mitigating factors and denied defendant's PTI application.

Defendant appealed the rejection of his PTI application to the trial court. There, he argued that the executive assistant prosecutor failed to consider all relevant factors, incorrectly evaluated the factors that were considered, failed to consider defendant's contention that compelling reasons justified departing from the presumption that he was ineligible for PTI, and made a decision influenced by defendant's race.

The judge engaged in an extensive and detailed evaluation of the executive assistant prosecutor's review of each of the relevant factors. In addition, the court reviewed defendant's statement of compelling reasons and found nothing "extraordinary, unusual, or idiosyncratic" about defendant's circumstances that would compel his entry into PTI over the prosecutor's objections. Finally, the court, while finding plausible defendant's argument that diversion into PTI would improve the chances of defendant gaining employment necessary to make restitution to the victim,

held that it was not within the court's province to substitute its judgment for that of the prosecutor, absent a patent and gross abuse of discretion. The court found defendant's arguments with respect to racial bias to be baseless.¹

Defendant thereafter entered a guilty plea to the single count in the indictment.² In exchange for the plea of guilty, the State agreed to recommend a sentence of non-custodial probation.

Prior to imposing sentence, the court engaged in a substantive analysis of the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b). The court found the gravity and seriousness of the offense to be an aggravating factor, noting the harm inflicted on the victim. In addition, the court found the circumstances of the offense to be an aggravating factor, given that defendant was on private property, refused to leave when asked to do so, and assaulted the property owner when he threatened to call police. Finally, the court found as an aggravating factor the need to deter defendant and others from violating the law.

¹ Defendant does not raise claims of racial bias before this court.

² During his plea, defendant admitted punching the victim, but claimed that he did so after the victim pushed him. He admitted, however, that his punch did not constitute justifiable self-defense.

The court accepted as mitigating factors defendant's lack of a criminal history, that defendant would likely respond well to probationary treatment, and that defendant would participate in a program of community service. The court rejected defendant's argument that he was strongly provoked to strike the victim and that the victim induced or facilitated the crime, finding that it was defendant's refusal to leave property on which he was trespassing that initiated the encounter. The court also rejected defendant's arguments that he did not contemplate his actions would cause serious harm to the victim, and that he was unlikely to commit another offense.

The court concluded that the aggravating and mitigating factors were in equipoise, and sentenced defendant to a three-year term of probation, 210 hours of community service, \$695 in fines and penalties, and restitution to the victim in an amount to be determined when medical treatment for his injuries is complete. This appeal followed.

On appeal defendant raises the following arguments for our consideration:

Point I

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

A. Considered Factors

Factors One, Two, Nine and Ten

Factors Seven, Fourteen, and
Seventeen

B. Applicable, But Ignored Factors

Factors Five, Six and Eleven

Factor Twelve

Point II

AN EXCESSIVE SENTENCE WAS IMPOSED AFTER THE COURT FAILED TO PROPERLY FIND AND WEIGH AGGRAVATING AND MITIGATING FACTORS

A. Aggravating Factors Found in Error

Factor Nine

B. Ignored Mitigating Factors

Factor Two

Factors Three, Four, Five

Factors Eight and Nine

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.'" Nwobu, 139 N.J. at 246 (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. Dalglish, 86 N.J. 502, 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 executive 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 should be disturbed. Defendant was charged with a crime involving the deliberate use of violence, for which admission to PTI is presumed to be inappropriate, see Guideline 3(i)(2), and identified no compelling justification for his admission to the program, see Nwobu, 139 N.J. at 252.

III.

We review sentencing determinations for abuse of discretion. State v. Robinson, 217 N.J. 594, 603 (2014) (citing State v. Roth, 95 N.J. 334, 364-65 (1984)). The sentencing court must "undertake[] an examination and weighing of the aggravating and mitigating factors listed in [N.J.S.A.] 2C:44-1(a) and (b)." Roth, 95 N.J. at 359; State v. Kruse, 105 N.J. 354, 359 (1987). Furthermore, "[e]ach factor found by the trial court to be relevant

must be supported by 'competent, reasonably credible evidence'" in the record. State v. Fuentes, 217 N.J. 57, 72 (2014) (quoting Roth, 95 N.J. at 363).

We accord deference to the sentencing court's determination. Fuentes, 217 N.J. at 70 (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). We must affirm defendant's sentence unless

(1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[Fuentes, 217 N.J. at 70 (quoting Roth, 95 N.J. at 364-65).]

Our review of the trial court's sentencing determination reveals a careful consideration of each of the relevant aggravating and mitigating factors by the judge, whose findings are supported by competent and credible evidence. Defendant's probationary sentence does not shock the judicial conscience, and instead is an appropriate sanction, given the circumstances of this case.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION