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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-4915-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GREGORY B. HARRIS, a/k/a BO
HARRIS and GREGORY BERNARD
HARRIS,

Defendant-Appellant.

Submitted January 10, 2018 – Decided January 29, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Accusation No.
15-12-0971.

Joseph E. Krakora, Public Defender, attorney
for appellant (Lauren S. Michaels, Assistant
Deputy Public Defender, of counsel and on the
brief).

Ann M. Luvera, Acting Union County Prosecutor,
attorney for respondent (Paul J. Wiegartner,
Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant appeals the denial of his application for admission into the pretrial intervention program (PTI). He argues:

POINT I

THE PROSECUTOR'S REJECTION OF MR. HARRIS' PTI APPLICATION CONSTITUTED A PATENT AND GROSS ABUSE OF DISCRETION BECAUSE HE FAILED TO CONSIDER ALL OF THE RELEVANT FACTORS AND CONDUCT AN INDIVIDUALIZED EVALUATION OF THE DEFENDANT, RESULTING IN A CLEAR ERROR OF JUDGMENT WHICH SUBVERTED THE GOALS UNDERLYING THE PTI PROGRAM.

POINT II

WHERE A PROSECUTORIAL VETO IS BASED PRIMARILY UPON THE NATURE OF THE CASE, TO ENSURE MEANINGFUL APPELLATE REVIEW AND PROTECT APPLICANTS FROM ARBITRARY PROSECUTORIAL DECISIONS INCLUDING PROHIBITED PER SE RULES AND INAPPROPRIATE DISPARATE TREATMENT, THE DEFENDANT'S REASONABLE REQUEST TO REVIEW THE PROSECUTOR'S DECISIONS IN SIMILAR CASES SHOULD HAVE BEEN GRANTED.

Finding no merit in either argument, we affirm.

For purposes of defendant's PTI application, the parties relied on the accounts of the incident contained in the reports of participating police and sheriff's officers. According to these documents, on the morning of August 31, 2015, Union County Sheriff's officers responded to a reported fight in a county building's courtyard. Once there, they observed defendant, who was near a bike rack, wielding a large chain with a lock, swinging it at the victim's head and body. The victim was bleeding from

the head. An officer twice shouted to defendant to drop the chain, and defendant twice ignored the commands. Defendant finally complied when the officer threatened to shoot him.

The victim refused medical attention. He told police he was not trying to steal the bike as defendant alleged, but was merely looking at tires on two bikes in the rack to see if they were similar to the tires on his bike. Defendant appeared, removed the chain from his bike, accused the victim of trying to steal the bike, and began beating the victim with the chain. The victim said he had known defendant approximately nine years and had been drinking with him on several occasions.

Defendant told police the victim was trying to remove a tire from his bike. When defendant asked what he was doing, the victim said, "my baby needs a tire but if I knew it was yours, I wouldn't have took it." Defendant told police, "that's why it's aggravated assault, because I got aggravated, so I busted his head wide open."

Police charged defendant on a summons with third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2), and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). Two months later, in October, defendant applied for admission into PTI. In early December, the Union County Criminal Division Manager recommended accepting defendant's application, but a prosecutor rejected it.

In an email rejecting defendant's PTI application, the prosecutor said he had carefully considered "the Guidelines pursuant to [Rule] 3:28 and the Factors pursuant to N.J.S.A. 2C:43-12(e). It is only after this careful review in conjunction with considering the Guidelines and Factors, that the State reached its decision to reject defendant's application for entry into PTI."

The prosecutor acknowledged defendant, age forty-nine, was employed, had no prior convictions for indictable offenses, and had never been placed on parole or probation, though he had twice been convicted of shoplifting. The prosecutor noted, however, "Guideline 3 of [Rule] 3:28 states that a defendant whose crime was a deliberate act of violence or threat of violence should generally have his application for PTI denied."¹ Explaining that he could reject defendant's PTI application on that ground alone, the prosecutor nonetheless relied upon six of the factors enumerated in N.J.S.A. 2C:43-12(e). The prosecutor further explained how the facts underlying defendant's offenses supported each of these factors.

¹ When defendant was charged, Rule 3:28, Guideline 3(i)(3) provided in relevant part: "Any defendant charged with [a] crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in reviewing the application. If the crime was . . . deliberately committed with violence or threat of violence against another person[,] . . . the defendant's application should generally be rejected." The Guideline has since been amended.

Following the prosecutor's rejection of his PTI application, defendant accepted a plea offer. In December 2015, defendant pled guilty to an accusation's single charge of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7). In exchange, the prosecutor agreed to recommend a term of non-custodial probation and restitution to the victim.

Four months later, before sentencing, defendant appealed the prosecutor's rejection of his PTI application. In a supporting brief, he argued that "[t]he State must explain why others similarly situated were allowed into the Pre-Trial Intervention Program and [defendant's] application is rejected." Defendant requested in his brief that "the State provide a record of all persons admitted to the Pre-Trial intervention program . . . that were charged with violent behavior for review by the [c]ourt and [d]efense [c]ounsel." The trial court rejected both the appeal and the discovery request and upheld the prosecutor's rejection of defendant's PTI application.

The court sentenced defendant to a probationary term of one year. The court also imposed appropriate fees, penalties, and assessments. This appeal followed.

The criteria for admission into PTI, as well as the procedures concerning the program, are set forth in Rule 3:28 and N.J.S.A. 2C:43-12 to -22. Rule 3:28 is followed by eight guidelines and

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. 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." State v. Nwobu, 139 N.J. 236, 246 (1995) (quoting State v. Kraft, 265 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." Id. at 249 (citing State v. Dalqlish, 86 N.J. 503, 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 his arguments are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2). We add the following brief comments.

Defendant's offense fell within those enumerated in Guideline 3(i)(3), as that Guideline existed at the time. The Supreme Court has explained "[t]he effect of . . . Guideline [3(i)] is to create a 'presumption against acceptance' into PTI for defendants whose crimes fall within the enumerated categories." State v. Watkins, 193 N.J. 507, 520 (2008) (quoting State v. Baynes, 148 N.J. 434, 442 (1997)). "To overcome 'the presumption against PTI, defendant must establish "compelling reasons" for admission' to the program." Ibid. (quoting Nwobu, 139 N.J. at 252). Here, defendant failed to establish any reasons of such a compelling nature.

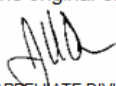
Defendant also argues the trial court should have granted his "reasonable request" to review the prosecutor's decisions in similar cases. It does not appear defendant ever made such a request, in writing or otherwise, to the prosecutor. Rather, defendant raised the issue for the first time in his brief in the Law Division, where he sought "a full accounting of all defendants admitted to the PTI program in Union County on assaultive charges in the past [five] years."

The Supreme Court "has never mandated discovery to aid defendants in demonstrating arbitrary and capricious conduct or disparate treatment without a preliminary showing." State v. Benjamin, 228 N.J. 358, 374 (2017). A defendant must show a prosecutor has committed an abuse of discretion before obtaining a hearing to review the prosecutor's decision. Ibid. As to PTI applications, defendants do not have a license to subpoena prosecutors' files; rather, defendants seeking such discovery must first support their claims by independently secured evidence. State v. Sutton, 80 N.J. 110, 120-21 (1979).

Here, defendant produced no competent, independent evidence that the prosecutor either treated defendant disparately or maintained a policy of excluding from PTI all defendants charged with an offense involving assault. We thus reject his argument.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION