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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2146-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK A. HIGHSMITH,

Defendant-Appellant.

Argued March 1, 2023 – Decided March 28, 2023

Before Judges Mayer, Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 15-08-1186.

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the brief).

Patrick R. McAvaddy, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Patrick R. McAvaddy, on the brief).

PER CURIAM

Defendant Mark A. Highsmith appeals from a March 22, 2021 order denying his application for admission to pretrial intervention (PTI) after our remand. We affirm.

The facts leading to defendant's guilty plea and application for PTI are set forth in State v. Highsmith, No. A-0521-17 (App. Div. Nov. 29, 2018) (slip op. at 2-3). In brief, defendant was arrested on July 15, 2014. Two days before defendant's arrest, there was a shooting incident in Jersey City involving a police officer. The police officer and the person who shot the officer died. The community built a shrine to honor the individual who killed the police officer. As a result of the police-related shooting, there was a palpable tension among the city's residents and the local police were on high alert.

On the night of July 15, 2014, defendant claimed he had three separate encounters with the Jersey City police. It was during the last encounter with police that defendant hurled a large, pointed piece of construction lumber through the window of a marked police car, striking and injuring one of the officers. The injured officer fired two shots at defendant through the door of the police car. Defendant ran and the other officer fired several shots, hitting defendant. Defendant spent eight months in the hospital recovering from his gunshot wounds.

On July 16, 2014, while in the hospital, defendant gave a voluntary recorded statement to the police. Defendant's statement did not include any information regarding three different encounters with police on the evening of July 15, 2014. When asked how he felt about the recent deaths in the community, defendant replied "that situation was meaningless to me because I felt as though he got what he deserve[d], not the police officer but the guy that killed him. So I didn't really care too much about the situation . . . no disrespect to the police officer but that is just how I felt about it."

In his 2017 PTI application, defendant provided additional information about his run-in with the police on July 15, 2014. Defendant explained he was drinking with friends that night. During the first of the three encounters, defendant stated that the police officers confiscated his liquor and told him to go home. Defendant's second encounter with the police that evening is disputed. Defendant claims police officers forced him to kneel in front of the shrine and watch as the officers dismantled it. The third incident involved defendant hurling a large, pointed fence post into the police car and occurred not far from the shrine.

Defendant was charged with several offenses related to his throwing of the fence post at the police officers, including third-degree aggravated assault

with a deadly weapon, N.J.S.A. 2C:12-1(b)(2), and third-degree aggravated assault on a law enforcement officer, N.J.S.A. 2C:12-1(b)(5)(a). As part of a negotiated plea, defendant pleaded guilty to third-degree aggravated assault and the State agreed to recommend two years' probation and dismissal of the remaining charges. Prior to sentencing, defendant applied for PTI.

The Hudson County Assistant Criminal Division Manager recommended defendant be admitted to PTI. Despite this recommendation, the prosecutor rejected defendant's application. The prosecutor provided written reasons for rejecting defendant's PTI request, citing the factors under N.J.S.A. 2C:43-12.

Defendant appealed the prosecutor's denial of his PTI application to the Law Division. In an April 6, 2017 order, the judge denied defendant's PTI application, finding the prosecutor considered the relevant factors and his rejection of defendant's admission to PTI was not a patent and gross abuse of discretion.

Defendant appealed to this court. In our earlier decision, we reversed the prosecutor's rejection of defendant's PTI application and remanded for the prosecutor's reconsideration of defendant's request for PTI. We determined that the record lacked sufficient information upon which to "determine whether the prosecutor's decision was arbitrary or irrational under the unique circumstances

in this case." Highsmith, slip op. at 9. We also noted "[t]he prosecutor failed to consider the heightened tensions among the city's residents and the city's police force subsequent to the shooting deaths of a police officer and another individual two days" prior to defendant's arrest. Id., slip op. at 8.

On remand, we instructed the prosecutor to follow the Attorney General's directive, entitled "Uniform Statewide Procedures and Best Practices for Conducting Police-Use-of-Force Investigations" (Directive), which mandated the prosecutor investigate whether there was an actual or potential conflict of interest in his serving as both the head of the internal affairs unit investigating the officers' use-of-force against defendant and simultaneously prosecuting defendant's case. The Directive mandated the prosecutor determine whether there was a conflict of interest that would undermine the public's confidence in the impartiality and independence of the internal affairs investigation. Id., slip op. at 9. Consistent with the Directive, we explained that the prosecutor was required to send a "comprehensive conflicts inquiry" to the Director of the New Jersey Division of Criminal Justice (DCJ), Office of the Attorney General, to determine if the prosecutor had a conflict of interest. Id., slip op. at 10.

On February 27, 2019, after reviewing defendant's application for admission to PTI anew, a second prosecutor rejected defendant's request. The

new prosecutor sent a letter explaining the reasons for her determination. She found that the facts and nature of the case warranted denial of PTI because "defendant's actions were extremely violent" as he "weaponized a sharpened fence post by hurling it at [the officer]'s head" and "ran to the passenger side of the police vehicle and attempted to wrestle [the other officer]'s firearm from him." The prosecutor also concluded "any tensions that the Appellate Division may have imagined existed as a result of the shooting . . . w[ere] not a factor in the actions of this defendant," given his admission that the recent shootings did not concern him.

The second prosecutor also responded to defendant's contention that the Hudson County Prosecutor's Office (HCPO) should be disqualified from deciding defendant's admission to PTI due to a conflict of interest. The new prosecutor explained that after our remand decision, the matter was assigned to her for a de novo review of defendant's PTI application, rendering a comprehensive conflicts check moot.

Nevertheless, the HCPO conducted a conflicts check and forwarded the information to the DCJ. The DCJ agreed with the HCPO's assessment that there was no conflict, and required no further action by the HCPO. The HCPO provided a certification to defendant explaining it conducted an "updated

comprehensive conflicts questionnaire into the use-of-force investigation" and sent the information to the DCJ pursuant to our remand.

Defendant moved to compel an in-camera review of the State's comprehensive conflicts questionnaire submitted to the DCJ. Because the HCPO's certification related to the conflicts questionnaire was undated, defendant claimed the conflicts check may have been conducted prior to our remand decision.

In a November 10, 2020 order and accompanying written decision, the judge denied defendant's motion for an in-camera review. He found the State, both on the record and in a sworn certification, indicated the second conflicts questionnaire occurred after our remand decision and, thus, the omission of a date on the certification "was simply a clerical error." After reviewing the State's certification, the judge held "the State complied with the Appellate Division's direction." Additionally, the judge found "[t]he State has conducted two internal investigations under two different [a]ssistant [p]rosecutors and certified that such an investigation took place; this internal inquiry is sufficient without this [c]ourt now compromising the public interest in maintaining the confidentiality of police [personnel] records by conducting a further review."

On January 13, 2021, the judge heard argument on defendant's appeal from the new prosecutor's rejection of his renewed PTI application. In a March 22, 2021 order, the judge upheld the prosecutor's decision.

The judge reviewed the prosecutor's consideration of the seventeen factors under N.J.S.A. 2C:43-12(e). In a comprehensive sixteen-page written decision, the judge addressed each of the factors cited by the prosecutor for rejecting PTI. The judge agreed with the State that: defendant's use of a deadly weapon created a presumption against defendant's admission to PTI under N.J.S.A. 2C:43-12(b)(2)(b); the victims requested the State pursue prosecution of defendant; the criminal justice system provided programs other than PTI to address defendant's personal issues; defendant did not suffer from addictions and physical or mental health issues warranting his admission to PTI; and society had an interest in defendant's prosecution.

With respect to the tension in Jersey City at the time, the judge found that defendant was not influenced by those events based on his voluntary statement to the police.

The judge also concluded there was no evidence in the record to corroborate defendant's statements about his prior interactions with police on July 15, 2014, including being forced to watch officers spit on and dismantle the

shrine. The judge explained defendant never mentioned the prior incidents with the police on the night of the incident during his hospital interview. The prior encounters with police were first asserted by defendant in February 2017, long after his arrest on July 16, 2014. Moreover, in his PTI interview, the judge noted defendant made no mention of the tensions in Jersey City at the time, "apologized for [the] incident[,] and appear[ed] to accept the blame." Based on this information, the judge found "[t]he social problems present in Jersey City at the time did not [a]ffect this [d]efendant's actions and thus [factor eleven] weigh[ed] against his admission into PTI."

On appeal, defendant argues the following:

POINT I

THE REMAND JUDGE ERRED IN AFFIRMING THE PROSECUTOR'S UNCHANGED DECISION TO OVERRIDE THE CRIMINAL DIVISION MANAGER'S RECOMMENDATION THAT [DEFENDANT] BE ADMITTED INTO THE PRETRIAL INTERVENTION PROGRAM.

A. The Prosecutor On Remand Erroneously Applied The Enhanced Presumption Against Admission That Applies To First- And Second-Degree Crimes, And Improperly Relied On The Hotly Contested And Unsupported Allegation That [Defendant] Attempted To Disarm An Officer As A Basis To Deny Him Admission To PTI And To Reject The Criminal Division Manager's Favorable Recommendation.

B. The Prosecutor's Refusal To Consider [Defendant]'s Prior Experiences With The Officers And The Undisputed Tension On The Street Constituted An Abuse Of Discretion For The Following Reasons: (1) It Was Ordered To Do So By This Court; (2) Its Refusal Demonstrates An Unacceptable Disregard For The Legitimate Fear Of Police Held By Persons Of Color And The Impact That Over-Policing And Excessive Force Has Had On The Psyche Of Those Living In Predominantly Black Communities; And (3) Its Refusal Stands In Direct Opposition To The New Jersey Supreme Court's Commitment To Confront And Eradicate Systemic Racism In Our Courts.

i. The prosecutor's continued refusal to consider the emotionally charged atmosphere around the shrine and the intimidating number of officers, some in military gear, present during [defendant]'s second encounter with police – which was corroborated by witnesses, circumstantial evidence and videotape footage, and which the initial prosecutor did not dispute – was contrary to the Appellate Division's finding that those circumstances were relevant and should be considered.

ii. The prosecutor's cavalier dismissal of [defendant]'s explanation for his conduct demonstrates an unacceptable lack of sensitivity to the "painful history of injustice for African Americans," the "recent killings of unarmed African Americans [that] have shocked the conscience of our nation and [have] led to feelings of anger, frustration, and hopelessness," and "the racial disparities [that] still exist in the justice system." Statement of the New Jersey Supreme Court (June 5, 2020).

C. The Prosecutor's Office Committed Two Clear Errors In Judgment That Underscore Its Biased Review And Erroneous Rejection Of [Defendant]'s Application

For Diversion: (1) It Failed To Determine Whether The Original Prosecutor Had A Conflict Of Interest, As This Court Ordered It To Do, And (2) It Failed To Prepare A Comprehensive Conflicts Questionnaire in 2015, As The [Attorney General]'s Supplemental Directive Required It To Do.

D. Because The Prosecutor's Abuse Of Discretion Rose To The Level Of Patent And Gross, This Court Should Order [Defendant]'s Admission Into The Pretrial Intervention Program.

We apply a de novo standard of review of a prosecutor's rejection of PTI, the same as the trial court. State v. Waters, 439 N.J. Super. 215, 226 (App. Div. 2015). Whether to permit diversion to PTI "is a quintessentially prosecutorial function." State v. Wallace, 146 N.J. 576, 582 (1996). "[P]rosecutors are granted broad discretion to determine if a defendant should be diverted." State v. K.S., 220 N.J. 190, 199 (2015). A reviewing court must allow the prosecutor "wide latitude" in the decision whether to permit PTI. State v. Negran, 178 N.J. 73, 82 (2003).

In reviewing applications for admission to PTI, prosecutors are required to consider the seventeen factors under N.J.S.A. 2C:43-12(e). "[U]nless and until a defendant demonstrates the contrary, our judges must presume that all relevant factors were considered and weighed prior to a prosecutorial veto." State v. Bender, 80 N.J. 84, 94 (1979). To overturn a prosecutor's denial of PTI,

a defendant must "clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion." State v. Watkins, 193 N.J. 507, 520 (2008) (quoting State v. Watkins, 390 N.J. Super. 302, 305-06 (App. Div. 2007)).

We first address defendant's argument that the prosecutor erred in applying an enhanced presumption against admission that applies to first- and second-degree crimes because he pled guilty only to third-degree aggravated assault. Defendant further claims that the prosecutor improperly relied on the dismissed charge of disarming a police officer in making her PTI decision. We disagree.

There is a presumption against admission into PTI when the "crime or offense charged involved violence or the threat of violence." N.J.S.A. 2C:43-12(b)(2)(b). A crime involves violence where the actor is armed with or uses a "deadly weapon." Ibid. The presumption may be overcome if the defendant offers "compelling reasons" to justify admission into PTI. K.S., 220 N.J. at 198.

Here, defendant not only failed to offer compelling reasons to overcome the presumption against admission to PTI, but he acknowledged and accepted blame for the incident. The prosecutor properly considered each of the PTI factors, including the factors weighing in defendant's favor. The prosecutor's

findings were supported by credible evidence in the record, and she properly acted within her discretion in finding the factors weighed against defendant's admission to PTI.

Nor did the prosecutor improperly rely on the charge of disarming a police officer in rejecting defendant's application. While the prosecutor mentioned defendant's purported attempt to disarm a police officer, she denied defendant's PTI application because he hurled a six-foot piece of construction lumber at an officer. The video evidence of the encounter with defendant from the night of July 15, 2014 confirmed defendant launched a sharpened fence post through the window of the police car, striking an officer. The judge found defendant's throwing the pointed fence post at the officers and injuring one of them was a sufficient basis for the prosecutor to conclude that the statutory factors weighed against defendant's admission to PTI.

Next, defendant contends that the prosecutor failed to properly consider the tensions in the community and disregarded defendant's legitimate fear of police as a person of color. We disagree.

While prosecutors are not free "to completely disregard evidence proffered by an applicant that bears upon the applicable factors under . . . the PTI statute," they are "certainly free to disbelieve statements presented by

defense witnesses." State v. Lee, 437 N.J. Super. 555, 567-68 (App. Div. 2014). Based on defendant's own statements, the judge found defendant was not motivated or influenced by the events in Jersey City immediately prior to his arrest on July 15, 2014. While there may have been heightened tensions in Jersey City in the days preceding defendant's arrest, the judge concluded defendant "was not personally affected by this tension."

Additionally, the prosecutor articulated her reasons for discounting defendant's later stated justification for his actions that night. The prosecutor found defendant's unsupported and belated statements regarding his three encounters with the Jersey City police, proffered two-and-a-half years after his arrest, were not credible. We discern no racial basis in the prosecutor's rejection of defendant's request for PTI.

Lastly, we consider defendant's argument that the prosecutor failed to follow our instructions on remand because the second prosecutor did not address whether the first prosecutor had a conflict of interest. Defendant also argues the original prosecutor never filed a comprehensive conflicts questionnaire in 2015 and that failure warrants his admission to PTI.

First, defendant misconstrues our remand instructions. We instructed the prosecutor to follow the Directive regarding actual or potential conflicts.

Highsmith, slip op. at 10. The Directive compelled the prosecutor to conduct a comprehensive inquiry, detailing whether leadership "had any personal or professional interaction with or relationship to the principal(s) of the investigation that might reasonably create an actual or potential conflict of interest for the member or office." See Office of the Attorney General, Directive No. 2006-5, Supplemental Law Enforcement Directive Regarding Uniform Statewide Procedures and Best Practices for Conducting Police Use-of-Force Investigations (July 28, 2015). The Directive also required the prosecutor to examine "whether any person assigned to participate in or supervise the use-of-force investigation has had any such personal or professional interactions with or relationship to the principals of the investigation." Ibid. The Director of the DCJ ultimately decides whether there is a conflict issue requiring action. Ibid.

Here, we are satisfied the prosecutor complied with the Directive. The HCPO provided material to the DCJ to render a conflict decision. Contrary to defendant's argument, the HCPO supplied information related to the use-of-force incident, the follow-up investigation, and the fact that the first prosecutor was responsible for defendant's prosecution while simultaneously assigned to the internal affairs unit undertaking the use-of-force investigation. Based on the HCPO's information, the DCJ determined no action was required.

Defendant also argues that the investigation was not conducted initially in 2015 when a potential conflict may have existed. However, defendant failed to demonstrate how a conflict in 2015 would affect the integrity of the new prosecutor's review of his PTI application after our remand. Here, a different prosecutor, with no connection to the prior internal affairs use-of-force investigation or any current affiliation with the internal affairs office, reviewed defendant's PTI application.

Even if we agreed that the first prosecutor had a conflict of interest, which we do not, such a conflict would not be imputed to other prosecutors in the HCPO. A single prosecutor's conflict is not imputed to the entire office such that all prosecutors are precluded from further participation in a criminal case. See State v. Harvey, 176 N.J. 522, 529-30 (2003) (holding that a "bare allegation of prosecutorial misconduct" within the prosecutor's office "is insufficient to disqualify all other prosecutors from representing the State). In order to disqualify" the entire office, the defendant must show that the prosecutor's office as a whole is in some way conflicted. State v. Irizarry, 271 N.J. Super. 577, 599-600 (App. Div. 1994).

Defendant claims that the first prosecutor had a conflict in 2015, given that prosecutor's dual role as both the prosecutor in the criminal case and head

of internal affairs investigating the use-of-force by the officers on July 15, 2014. Defendant further contends that the denial of his original PTI application formed the basis for the new prosecutor's denial of his renewed application. However, a different prosecutor reviewed defendant's second PTI application and stated that she considered defendant's request anew in accordance with our remand instructions.

To the extent we have not specifically addressed any remaining arguments, we find them to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION