

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2367-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

SHEM C. JENKINS,

Defendant-Respondent.

Submitted May 9, 2023 – Decided July 28, 2023

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Accusation No. 20-03-0120.

Jeffrey H. Sutherland, Cape May County Prosecutor, attorney for appellant (Gretchen A. Pickering, Senior Assistant Prosecutor, of counsel and on the briefs).

Kimberley Stuart, LLC, attorney for respondent (Kimberley Stuart, on the brief).

PER CURIAM

On August 1, 2019, a cyclist (the victim) was struck by a vehicle that fled the scene of the collision. Shortly thereafter, police located damaged car parts consistent with the accident and matching damage to a car driven by defendant. Defendant was arrested because police had probable cause to believe he was intoxicated. After defendant refused blood alcohol tests, a warrant was obtained, and a test indicated he had a .187% blood alcohol concentration. In addition to being charged with motor vehicle violations,¹ defendant was charged with third-degree assault by auto, N.J.S.A. 2C:12-1(c)(2), and third-degree leaving the scene of an accident resulting in serious injuries to the victim, N.J.S.A. 2C:12-1.1.

On March 12, 2020, defendant waived his right to prosecution by indictment, agreed to proceed by accusation, and submitted a pre-trial intervention (PTI) application to the vicinage's criminal division manager (CDM). During negotiations to resolve the charges, the prosecutor and defense counsel tentatively agreed to an alternative plea; however, defendant was allowed to make an application for PTI before considering or accepting the

¹ He was charged with driving under the influence (DUI), N.J.S.A. 39:4-50; refusal to submit to testing, N.J.S.A. 2C:39:4-50.4(a); leaving the scene of an accident, N.J.S.A. 39:4-129(a); failure to report an accident, N.J.S.A. 39:4-130; and reckless driving, N.J.S.A. 39:4-96.

alternative plea. The prosecutor represented it was unlikely defendant would be accepted into PTI.

On October 8, 2020, contrary to the prosecutor's expectations, the CDM provided her an unsigned recommendation accepting defendant's entry into PTI. The recommendation indicated defendant had no prior indictable convictions, but he did have three prior DUI convictions, one in Florida from 1992 and two in New Jersey from 1994 and 1995. The CDM noted that although defendant had not received treatment for his alcoholism, he has been sober in the fourteen months after the incident and sought recommendations from a licensed mental health counselor to control his addiction.

Defendant was scheduled to be admitted to PTI on January 21, 2021. On January 17, however, the prosecutor sent a letter to defense counsel rejecting defendant's application after considering the PTI admission factors, N.J.S.A. 2C:43-12(e)(1)-(17) and Rule 3:28.

Considering factors one and two, the nature and facts of the offense, N.J.S.A. 2C:43-12(e)(1) and (2), and factor ten, the assaultive or violent nature of the crime, N.J.S.A. 2C:43-12(e)(10), the prosecutor determined PTI was not appropriate because it is primarily used for victimless crimes and defendant had caused serious injuries to the victim, including "a traumatic brain injury, facial

fracture, laceration of the liver and spleen, dislocation and fracture of the elbow, and multiple abrasions."

Regarding factor three, defendant's motivation and age, N.J.S.A. 2C:43-12(e)(3), the prosecutor noted defendant minimized his involvement by blaming the victim in his application, suggesting he was not amenable to rehabilitation.

Applying factors five, the existence of personal problems and character traits not amenable to services available within the criminal justice system, N.J.S.A. 2C:43-12(e)(5), and six, whether the offense is addressable by supervisory treatment, N.J.S.A. 2C:43-12(e)(6), the prosecutor found defendant's newfound sobriety "admirable" but "disturbing at best," and this was not "idiosyncratic" enough to be a compelling reason for admission into PTI. Additionally, there was "no causal relationship between defendant's crimes and any personal problems, situation, or condition conducive to change particularly through PTI's rehabilitative services." The prosecutor maintained the "ordinary criminal justice system" could afford the same quality of alcohol counseling as PTI.

Considering factor eight, a continuing pattern of anti-social behavior, N.J.S.A. 2C:43-12(e)(8), the prosecutor deemed defendant was likely unamenable to rehabilitation through PTI because of his anti-social behavior,

specifically drunk driving when he knew the consequences of his actions from his three prior DUIs.

Reviewing factor nine, criminal history, N.J.S.A. 2C:43-12(e)(9), the prosecutor acknowledged defendant had no prior criminal convictions, but believed a harsher punishment must be imposed "to help him to understand the seriousness of his crime."

Lastly, considering factors seven, the victim's and society's interest, N.J.S.A. 2C:43-12(e)(7), fourteen, whether supervisory treatment outweighs the public need for prosecution, N.J.S.A. 2C:43-12(e)(14), and seventeen, whether PTI entry benefits society, N.J.S.A. 2C:43-12(e)(17), the prosecutor determined that while this conviction would negatively impact defendant's future, she was unconvinced PTI would "deter him from future criminal activity." The prosecutor asserted this position was strengthened by the fact that defendant is a repeat offender who is "either not taking [DUI] seriously or . . . has a complete disregard for the law."

In response to the prosecutor's rejection, defendant moved to compel entry into PTI. The prosecutor opposed, reiterating the reasons she set forth in her rejection letter. In addition, she amplified that under factor three, defendant's age (almost fifty-three years old) weighed against him because he was not a

youthful offender. For the first time, she noted that under factors four, the victim's desire to forego prosecution, N.J.S.A. 2C:43-12(e)(4), and eleven, whether prosecution exacerbates the societal problem causing the offense, N.J.S.A. 2C:43-12(e)(11), neither the State nor the victim wished to forego prosecution, and such prosecution would not exacerbate DUI but deter it. The prosecutor did not assess the other PTI factors —twelve, thirteen, fifteen, and sixteen—contending they were not present.

The trial court entered an order and eight-page written decision granting defendant's motion to be admitted into PTI. The court was not persuaded by the State's reliance on State v. Negran, 178 N.J. 73, 82 (2003), which held a prosecutor's recommendation against PTI should be granted deference where all relevant N.J.S.A. 2C:43-12(e) factors were considered. The court instead found Negran supported defendant's PTI entry, since it held a PTI applicant's multiple traffic infractions and DUI charge occurring more than a decade prior were too remote to support his disqualification from PTI under N.J.S.A. 2C:43-12(e)(9) or Rule 3:28. The court likened defendant's circumstances to Negran because his PTI rejection was primarily based on three, twenty-seven-year-old DUI charges.

The court also disagreed with the State discounting "the benefits of rehabilitative supervision," specifically, the State's conclusory arguments diminishing his ongoing treatment and stating the deterrence interest outweighed the benefits of PTI supervisory treatment. The court found that "in weighing defendant's amenability to rehabilitation and the impact on the prosecution, both significant factors relevant to defendant's application, the prosecutor's failure to give any weight to [d]efendant's rehabilitative efforts following this accident constitutes an abuse of discretion."

The State appeals the court's order as of right. R. 3:28-6(c). We reverse and remand because we agree with the State that the trial court applied an abuse of discretion standard, instead of the appropriate, higher, gross and patent abuse of discretion standard.

"PTI is essentially an extension of the charging decision, therefore the decision to grant or deny PTI is a 'quintessentially prosecutorial function.'" State v. Roseman, 221 N.J. 611, 624 (2015) (quoting State v. Wallace, 146 N.J. 576, 582 (1996)). "As a result, the prosecutor's decision to accept or reject a defendant's PTI application is entitled to a great deal of deference." Ibid. (citing State v. Leonardis, 73 N.J. 360, 381 (1977)).

"A court reviewing a prosecutor's decision to deny PTI may overturn that decision only if the defendant 'clearly and convincingly' establishes the decision was a 'patent and gross abuse of discretion.'" State v. Johnson, 238 N.J. 119, 128-29 (2019) (quoting Wallace, 146 N.J. at 583). "A patent and gross abuse of discretion is defined as a decision that 'has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention.'" State v. Watkins, 193 N.J. 507, 520 (2008) (citation omitted).

Ordinarily, an abuse of discretion will be manifest if defendant can show that 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 Pretrial Intervention.

[Roseman, 221 N.J. at 625 (quoting State v. Bender, 80 N.J. 84, 93 (1979)).]

The same standard governs our review. Negran, 178 N.J. at 83. "The question is not whether we agree or disagree with the prosecutor's decision, but whether the prosecutor's decision could not have been reasonably made upon weighing the relevant factors." State v. Nwobu, 139 N.J. 236, 254 (1995). "When a defendant convincingly demonstrates a patent and gross abuse of

discretion, a court may admit the defendant into PTI over the prosecutor's objection." Johnson, 238 N.J. at 129 (citing Roseman, 221 N.J. at 624-25).

In this case, the trial court concluded the prosecutor abused her discretion by denying defendant's admission into PTI. The State argues this was error because the court should have determined whether the prosecutor's denial was a patent and gross abuse of discretion. See id. at 128-29. The State is correct; therefore, we remand so that the court can apply the correct standard in assessing the State's consideration of the N.J.S.A. 2C:43-12(e) and Rule 3:28-4 PTI factors it applied to deny defendant's application.

Given the scope of our remand, we do not address the State's arguments that the trial court failed to grant proper deference to the prosecutor's consideration of all relevant PTI factors, especially the State's consideration of the comparative benefits of rehabilitation through PTI versus traditional criminal prosecution.

On remand, we also direct the court to address the impact, if any, of the prosecutor's failure to comply with Rule 3:28-3(d)'s requirement to "complete a review of the application and inform the court, the defendant and the defendant's attorney of the decision on enrollment within 14 days of the receipt of the [CDM]'s recommendation." In its decision, the court stated "[t]he prosecutor

denied the PTI application four months after the [CDM] formally approved the application and admitted [d]efendant into PTI contrary to [Rule 3:28-3(d)]."² However, the court did not indicate the extent to which this non-compliance factored into its order admitting defendant into PTI. The State's merits brief, citing the oral argument transcript, suggests the COVID-19 pandemic impacted its timely submission of its PTI rejection letter. The court, however, made neither findings of fact nor conclusions of law regarding the compliance with Rule 3:28-3(d). It must do so on remand. See R. 1:7-4(a).

Reversed and remanded for further proceedings consistent with this opinion. Remand should be completed within sixty-days of this decision. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION

² The trial court improperly cited to Rule 3:28(h), which was repealed and replaced by Rule 3:28-3(d) in 2018. See RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 473 n.4 (2018) (noting Rule 3:28 and the PTI Guidelines were repealed and replaced, effective July 1, 2018, by Rule 3:28-1 to -10).