

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-2301-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARION PEARSON,

Defendant-Appellant.

Argued June 4, 2024 – Decided June 24, 2024

Before Judges Natali and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 15-11-1469.

Susan Lee Romeo, Assistant Deputy Public Defender, argued the cause for appellant (Jennifer Nicole Sellitti, Public Defender, attorney; Susan Lee Romeo, of counsel and on the brief).

Deepa Jacobs, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel and on the brief; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

This matter returns to us following our remand in which we instructed the county prosecutor to issue a written statement of reasons with respect to defendant Marion Pearson's pretrial intervention (PTI) application and to consider his request "in light of N.J. Att'y Gen., Clarification of 'Graves Act' 2008 Directive with Respect to Offenses Committed by Out-of-State Visitors from States Where Their Gun-Possession Conduct Would Have Been Lawful (Sept. 24, 2014)" (2014 Clarification). State v. Pearson, No. A-1787-18 (App. Div. Oct. 4, 2021). In response to our instructions, the prosecutor rejected defendant's application. Defendant thereafter appealed to the Law Division and the court concluded the prosecutor's decision was not a patent and gross abuse of discretion. After a thorough and conscientious review of the record in the context of the applicable standard of review and substantive legal principles, we affirm.

I.

By way of background, defendant is a former New Jersey resident living in Georgia who had one prior arrest in Virginia in 2004 for brandishing a firearm. At the time of his arrest in New Jersey, he was working as a security guard in Georgia. He previously served in the military and was formerly

employed as a corrections officer. Despite moving from New Jersey approximately twenty-seven years earlier at the age of seventeen, defendant returned to New Jersey to visit family "more than once a year."

As relevant to the issues before us, defendant came to New Jersey authorities' attention when a customer in a 7-11 convenience store witnessed him behaving oddly while in the establishment. Specifically, the patron stated defendant greeted him as if they knew one another and also observed defendant picking up trash in the store although he did not work there. When the customer saw a holstered gun strapped to defendant's side in plain view, he became alarmed and immediately contacted the police who responded and arrested defendant at the scene.

Incident to that arrest, the police seized a Glock semi-automatic weapon from defendant's side holster, fully loaded with 9-mm ammunition including a hollow-nosed bullet in the chamber, as well as a loaded .38 caliber Taurus revolver from his right jacket pocket. Defendant maintains that when he was arrested, he immediately directed the arresting officer to the weapon in his jacket and also showed the police his identification and valid "Georgia weapons carry license." A subsequent search of defendant at the police station uncovered five additional .38 caliber rounds of ammunition in his front pocket. Police also

discovered a bullet hole in defendant's vehicle and bullet fragments inside the car.

Defendant was charged with two counts of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and one count of fourth-degree possession of hollow-nosed bullets, N.J.S.A. 2C:39-3(f). Defendant applied for entry into the pretrial intervention program (PTI), which is governed by N.J.S.A. 2C:43-12 to -22 and Rules 3:28-1 through 3:28-10.

On July 25, 2017, the Criminal Division Manager Pretrial Intervention Director rejected defendant's entry in PTI in the absence of the prosecutor's assent primarily because of the second-degree nature of the charges. The Division Manager reached this conclusion notwithstanding her acknowledgment defendant appeared to have a valid Georgia carry license at the time of his arrest. The Prosecutor's Office never responded to the Division Manager's letter of rejection nor did it otherwise formally respond to defendant's request for entry into the PTI program.

At a status conference months later, the prosecution indicated it would not join in a Graves Act¹ parole ineligibility waiver and further would not recommend any sentence less than five years with forty-two months of parole

¹ N.J.S.A. 2C:43-6(c).

ineligibility. Before the trial began, however, defendant rejected the State's reduced last offer of probation subject to 364 days in county jail. No one, however, formally commented on defendant's PTI application.

Prior to trial, the court granted the State's application to bar evidence that defendant possessed a valid permit to carry in Georgia. In doing so, the court explained the permit was "irrelevant for the determination of the elements of the offense It could only serve to act as a potential argument for juror nullification."

Defendant was thereafter convicted of two counts of second-degree unlawful possession of a handgun and one count of fourth-degree possession of hollow-nosed bullets and the court sentenced him to concurrent terms of five years, subject to forty-two months of parole ineligibility required by the Graves Act.² Pearson, slip op. at 1. We affirmed defendant's conviction and sentence but, as noted, remanded for the prosecutor to provide a written statement of reasons explaining its denial of defendant's PTI application in light of the 2014 Clarification. Id. at 1-2.

As we explained, because the prosecutor did not provide a written statement of reasons for not joining in defendant's PTI application, we could not

² The parties have informed us defendant has completed his custodial sentence.

review "the State's position at the time on whether defendant met the three prongs of the [2014 Clarification], which may have made his admission into PTI or an initial offer of a sentence of non-custodial probation possible." Pearson, slip op. at 5. We also commented the Prosecutor's Office's failure to respond, as well as defendant's failure to appeal "constituted a breakdown in the application process of unusual significance because of the context within which the application should have been assessed—the [2014 Clarification]." Ibid.

As noted, consistent with our remand instructions, the Bergen County Prosecutor's Office filed a statement of reasons explaining its decision to deny defendant's PTI application. In a December 11, 2021 letter, the prosecutor described defendant's 2017 application as "grossly out of time," as it was a year and a half late and noted defendant "absconded and was a fugitive for fifteen months."³

³ As best we can discern, a bench warrant was issued for defendant after he failed to appear in court on January 4, 2016, and he was subsequently arrested at a Veterans Affairs facility in North Charleston, South Carolina, in May 2017, and brought to New Jersey. The prosecutor notes defendant "admitted" he received notice to appear in court but stated he "couldn't make it." Defendant disagrees with the prosecutor's characterization he "absconded," and explains he was released on bail, permitted to leave New Jersey, and due to "a change of attorney and miscommunication with court notices," was deemed a fugitive after failing to appear in court. More specifically, defendant states after he was assigned new counsel, he received notice to appear and wrote to inform the court

The prosecutor concurred with the Director's decision to deny defendant admission to PTI and declined to join in defendant's application given the "nature of the offenses and facts of the case." The prosecutor noted under Guideline 3(i) to Rule 3:28, "[a] defendant charged with a first or second degree offense . . . should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the prosecutor," and explained defendants charged with such offenses "are presumptively ineligible," absent a showing of extraordinary circumstances.⁴ The prosecutor also noted defendant's "odd behavior" in the store, and explained a patron was "so frightened by the gun that he drove away and flagged down a police officer to seek assistance."

The prosecutor also argued the harm of foregoing criminal prosecution of defendant outweighed the benefits of PTI as "New Jersey has adopted a strong stance on the illegal carrying of handguns." On this point, the prosecutor

he did not have the means to travel to New Jersey. Defendant also explains after he was arrested and brought to New Jersey in 2017, the court released him on his own recognizance.

⁴ Until 2018, PTI was governed by N.J.S.A. 2C:43-12 to -22, Rule 3:28, and the Guidelines for Operation of Pretrial Intervention in New Jersey. See Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 3:28-1 (2024). The former Rule 3-28 and Guidelines were replaced with Rules 3:28-1 through 3:28-10.

referenced defendant's possession of two handguns and the bullet hole in defendant's vehicle.

With respect to the 2014 Clarification, the prosecutor explained the factors outlined do not apply to defendant as this is not a "traveler" case. According to the prosecutor, the Clarification applies to a defendant who is an out-of-state resident who proves: (1) "the firearm had been lawfully acquired in another jurisdiction," (2) "defendant's possession would have been lawful in his or her home jurisdiction," and (3) "defendant was under the misimpression that such possession was lawful in New Jersey." See 2014 Clarification at 4. The prosecutor acknowledged defendant produced his Georgia carry permit, but contended he did not prove he lawfully acquired the firearms as no weapons were listed on his permit. The prosecutor also asserted defendant did not establish his possession of two loaded weapons would have been legal in Georgia, as he failed to cite any authority demonstrating such possession would be legal.

The prosecutor also argued defendant did not demonstrate he genuinely believed his possession of the weapons was lawful as he made no statements prior to or during his arrest to suggest such. Further, the prosecutor contended it was "doubtful defendant could put forth a genuine claim of ignorance of [New

Jersey's] gun laws" given his ties to New Jersey. Specifically, records indicated a prior New Jersey address and the vehicle defendant was driving, registered in New Jersey to defendant's mother, contained defendant's belongings. The prosecutor also noted the Georgia Attorney General maintains a website with a list of states whose laws give effect to a Georgia carry permit, and New Jersey is not on the list.⁵

The prosecutor also contended defendant's possession of a hollow-nosed bullet and the bullet hole in his vehicle suggested his possession of the weapons was "anything but routine or out of habit." With respect to the mitigating factors set forth in the 2014 Clarification, the prosecutor argued the majority of factors did not apply to defendant as he (1) exposed New Jersey residents to handguns in a public space rather than securing them in his vehicle or residence, (2) did not volunteer the presence of the handguns to police, (3) did not establish ignorance of New Jersey gun laws. The prosecutor acknowledged defendant was not committing a crime when police encountered him, but such factor is diminished in light of the bullet hole in defendant's vehicle.

⁵ On appeal, the prosecutor acknowledged the website was created in 2017, three years after defendant's 2014 arrest.

Defendant filed a written response to the prosecutor's statement of reasons and appealed the decision to the Law Division. After considering the parties' written submissions and oral arguments, the court denied defendant's appeal from his denial into PTI. In a February 16, 2023 written opinion, the court acknowledged its "scope of review is severely limited," affording the prosecutor's decision "extreme deference." The court also noted it "must assume that the prosecutor considered all relevant factors in reaching a PTI decision," and, as such, will only interfere with a PTI in cases of "the most egregious examples of injustice and unfairness."

Against such standard of review, the court concluded the prosecutor considered the facts of the case, as well as "whether the harm to society from foregoing prosecution would outweigh the benefits of admitting the defendant into PTI, the timeliness of the [d]efendant's PTI application, the threshold applicability factors, and the mitigating factors set forth in the [2014 Clarification] when making their decision regarding the defendant's PTI application." The court stated it "cannot supplant its judgment on the proper relative weight of factors in lieu of the prosecutor's" and concluded defendant "failed to show by clear and convincing evidence that there was a patent and gross abuse of discretion when the State denied his admission into PTI." The

court concluded the State considered all relevant and appropriate factors, and its decision was not a clear error judgment.

II.

This appeal followed in which defendant raises the following arguments for our consideration:

I. THE PROSECUTOR'S DENIAL OF [DEFENDANT'S] PTI APPLICATION WAS A PATENT AND GROSS ABUSE OF DISCRETION THAT WARRANTS HIS ADMISSION OVER THE PROSECUTOR'S OBJECTION OR, AT MINIMUM, A REMAND FOR RECONSIDERATION UNDER THE APPROPRIATE FACTORS

1. No Deference Is Owed To The Trial Court's Conclusory Findings That Failed To Comport With The Requirements Of Rule 1:7-4

2. The Prosecutor Abused Her Discretion Because She Based Her Decision Regarding Application Of The Attorney General's Directive On Multiple Inappropriate Factors That Had No Factual Basis

a. Contrary To The Prosecutor's Assertions, The State's Own Evidence Showed That [Defendant] Lawfully Acquired The Firearms And The Prosecutor Offered No Competent Legal Support For Her Contention That His Possession Of The Firearms Was Not Legal In His Home State.

b. Contrary To The Prosecutor's Unsupported Assertion That [Defendant] Must Have Known About New Jersey Gun Laws,

[Defendant] Testified Under Oath That He Was Unaware That He Needed A Separate New Jersey Permit To Carry His Gun And The Georgia Website Relied Upon By The Prosecutor Was Not Even Created Until Three Years After [Defendant's] Arrest.

- c. Contrary To The Prosecutor's Assertions, Defendant's Application Was Not Untimely And He Never "Absconded" From New Jersey.
 - d. The Prosecutor Inappropriately Relied On The Fact That [Defendant] Was Charged With Second-Degree Offenses.
3. The Prosecutor Abused Her Discretion When She Determined That The 2014 Directive Did Not Apply Here, Because That Decision Was Based On Multiple Inappropriate Factors.
- e. [Defendant] Established The Predicate Factors For Special Consideration Under The 2014 Directive.
 - f. Assessment Of [Defendant's] Circumstances In The Context Of The 2014 Directive Supports His Admission To PTI.
4. The Prosecutor Abused Her Discretion Because She Failed To Consider Relevant Statutory Factors.
5. Defendant Should Be Admitted To PTI Over The Prosecutor's Objection, Or At Minimum, This Matter Should Be Remanded For Reconsideration, Because The Prosecutor's Denial Based On Numerous Inappropriate Factors Was A Patent And

Gross Abuse Of Discretion That Perverted The Goals Of The PTI Program.

By way of further explication, defendant argues the guidance in the 2014 Clarification applies to him as he was an out-of-state resident who lawfully acquired his firearms, his possession of the firearms would have been legal in Georgia, and he was unaware he needed a New Jersey license. Defendant contends the prosecutor abused his discretion by relying on inappropriate factors without factual support to conclude the 2014 Clarification was inapplicable. Defendant also argues the Clarification is not limited to "traveler" cases as it contemplated both situations in which an out-of-state individual was traveling through New Jersey on the interstate and "other situations where an out-of-state visitor would be more likely to interact with non-motorists in this State while armed with an unlawfully-possessed firearm."

Defendant further contends three of the four applicable mitigating factors outlined in the 2014 Clarification weigh in favor of his admission to PTI. Specifically, defendant explains he was not committing a crime, never removed the weapons from his holster or pocket, and was in full control of his weapons. Defendant also notes he informed police of the weapon in his pocket while he was being patted down, which was the first opportunity he had to alert police to the weapons.

In PTI matters, we start with the proposition that it is the "fundamental responsibility" of the prosecutor to decide whom to prosecute, State v. Kraft, 265 N.J. Super. 106, 111 (App. Div. 1993), and with an acknowledgement that prosecutors have wide latitude in PTI determinations. State v. Wallace, 146 N.J. 576, 582 (1996); State v. Nwobu, 139 N.J. 236, 246 (1995). The decision to admit a defendant to PTI is a "quintessentially prosecutorial function." State v. Roseman, 221 N.J. 611, 624 (2015) (quoting Wallace, 146 N.J. at 582). "[P]rosecutors are granted broad discretion to determine if a defendant should be diverted" to PTI instead of being prosecuted. State v. K.S., 220 N.J. 190, 199 (2015) (citing Wallace, 146 N.J. at 582); see also State v. Negran, 178 N.J. 73, 82 (2003) (stating that courts must "allow prosecutors wide latitude"). Accordingly, "the scope of [judicial] review is severely limited." Negran, 178 N.J. at 82 (citing Nwobu, 139 N.J. at 246).

"[I]nterference by reviewing courts is reserved for those cases where needed 'to check [] the most egregious examples of injustice and unfairness.'" State v. Lee, 437 N.J. Super. 555, 563 (App. Div. 2014) (quoting Negran, 178 N.J. at 82 (internal quotation marks omitted)). To overturn a rejection of a PTI application, a defendant 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" Wallace, 146 N.J. at 582 (quoting State v. Leonardis, 73 N.J. 360, 382 (1977)). "A patent and gross abuse of discretion is a decision that 'has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice requires judicial intervention.'" State v. Watkins, 193 N.J. 507, 520 (2008) (quoting Wallace, 146 N.J. at 582-83).

"PTI is a 'diversionary program through which certain offenders are able to avoid criminal prosecution by receiving early rehabilitative services expected to deter future criminal behavior.'" Roseman, 221 N.J. at 621 (quoting Nwobu, 139 N.J. at 240). Accordingly, "a PTI determination requires that the prosecutor make an individualized assessment of the defendant considering his or her 'amenability to correction' and potential 'responsiveness to rehabilitation.'" Id. at 621-22 (quoting Watkins, 193 N.J. at 520). To assist the prosecutor in making an individualized assessment, "N.J.S.A. 2C:43-12(e) sets forth a list of seventeen nonexclusive factors that prosecutors must consider in connection with a PTI application." State v. Oguta, 468 N.J. Super. 100, 107 (App. Div. 2021) (quoting State v. Johnson, 238 N.J. 119, 128 (2019)).

At the time defendant initially applied for PTI in 2017, the Guidelines for Operation of Pretrial Intervention in New Jersey provided, "[a] defendant

charged with a first or second degree offense . . . should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the prosecutor." Pressler & Verniero, Current N.J. Court Rules, Guideline 3(i) following R. 3:28 (2017). This presumption could have been rebutted by "showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable." Ibid.

While no such explicit presumption is expressly included in the current writing of Rule 3:28, the comment to the Rule provides, "it has been held that defendants charged with first and second degree crimes are deemed presumptively ineligible for admission." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:28-4 (2024). Additionally, "[t]he nature of the offense should be considered in reviewing the application," Rule 3:28-4(b)(1), and a person charged with a crime for which there is a presumption of incarceration or a mandatory minimum period of parole ineligibility "shall be ineligible for [PTI] without prosecutor consent," Rule 3:28-1(d)(1).

In 2008, the Attorney General issued a "Directive to Ensure Uniform Enforcement of the 'Graves Act,'" (2008 Directive) which mentioned the "expect[ation]" that when a defendant is subject to the Graves Act, "prosecutors

will consent to a defendant's admission to PTI only in rare cases involving extraordinary and compelling circumstances that fall outside the heartland of the legislative policy to deter unauthorized gun possession." Off. of the Att'y Gen., Directive to Ensure Uniform Enforcement of the "Graves Act," at 8. The Attorney General cited, as an example of a compelling circumstance, an event where the defendant had the lawful right to acquire and possess firearms in a different state and presence in this State "was incident to lawful travel." See State v. Waters, 439 N.J. Super. 215, 236 (App. Div. 2015).

In response to public attention on how prosecutors exercise discretion in situations involving out-of-state visitors who possess lawfully acquired firearms in New Jersey, the Attorney General issued a clarification to the 2008 Directive in 2014. See 2014 Clarification. The Clarification notes that in most cases involving out-of-state visitors who would be in lawful possession of the firearm in their home jurisdiction, "imprisonment is neither necessary nor appropriate to serve the interests of justice and protect the public safety." Id. at 1. Rather, in cases where the prosecutor does not find PTI appropriate, the 2014 Clarification "establishes a rebuttable presumption that the prosecutor will tender an initial plea offer that authorizes the court upon conviction to impose a non-custodial probationary sentence." Ibid.

Not all out-of-state defendants, however, fall within the scope of the 2014 Clarification as it is meant to address those situations where the out-of-state visitor "inadvertently" violates New Jersey law. Ibid. Furthermore, the 2014 Clarification applies only to individuals who (1) lawfully acquired the firearm in another jurisdiction, (2) live in a jurisdiction where possession would be lawful, and (3) believed that possession of the firearm was legal in New Jersey. Id. at 4. Applicability of the guidance provided in the 2014 Clarification "presupposes that the three circumstances . . . are not disputed." Ibid. We add that while the 2014 Clarification may be instructive for resolving issues involving out-of-state visitors who possess a firearm while in New Jersey, we previously noted it "is simply a statement of the current policy of the Attorney General." Waters, 439 N.J. Super at 238-39 (stating that the "validity of a trial court's order regarding PTI must be determined based on applicable law, not subsequent changes in prosecutorial policy"). The 2014 Clarification does not alter the legal standard for overcoming the presumption of imprisonment established in N.J.S.A. 2C:44-1(d).

The 2014 Clarification directed prosecutors, in exercising their discretion and in weighing all the other factors imposed by law, to "consider the following special facts": (a) "Minimal Exposure of the Firearm to Persons in New Jersey";

(b) "The Gun-Possession Offense was Isolated and Aberrational"; (c) "Volunteering Presence of Firearm to Police"; (d) "Surrendering Unloaded Firearm for Sage-Keeping"; and (e) "Circumstances Concerning Confusion of New Jersey and Other-State Law." See 2014 Clarification at 6-8.

With respect to factor (a), the Clarification explained this factor requires consideration of whether others would be exposed to the dangers posed by the weapon by "focusing on the weapon's accessibility while the defendant would be interacting with other persons while in this State." Id. at 6. This factor considers whether defendant carried the firearm outside their vehicle, whether the firearm was loaded, and whether "the time during which the unlawfully-possessed firearm would present a risk to anyone in New Jersey." Ibid. The Clarification notes traveling through New Jersey's interstate "presents less danger than a more protracted visit, or multiple visits, where it is likely that the defendant will be interacting with non-motorists in this State." Ibid.

With respect to factor (b), whether the gun offense was "Isolated and Aberrational," the Clarification requires consideration of whether the defendant "is otherwise a law-abiding person," and considers defendant's prior brushes, if any, with the criminal justice system. Ibid. Factor (c) suggests prosecutors are to consider whether defendant's own initiative revealed the presence of a firearm

to a police officer, and factor (d) provides a mitigating example of a defendant presenting "an unloaded firearm to a hotel clerk for safekeeping to prevent it from being stolen from defendant's vehicle during a hotel stay." Id. at 7.

Factor (e), circumstances concerning confusion of New Jersey and other-state law, recognizes that "everyone is presumed to know the law," but that "a claim of inadvertence should be viewed with greater skepticism if defendant was on actual notice" that possession of the weapon was contrary to this State's law. Id. at 7-8. The Clarification also notes it is "defendant's responsibility to provide information needed to overcome the presumption against PTI." Id. at 7-8.

The Clarification recognized "[t]here is no mathematical formula for evaluating" these circumstances "in relation to the other aggravating and mitigating circumstances that prosecutors must consider," and that it is not "possible to ascribe the precise weight that should be given to any particular circumstance militating for or against admission to PTI." Id. at 8.

Here, the record establishes the prosecutor considered special facts in the record and found the 2014 Clarification factors (a), (c), and (e) weighed against defendant's admission to PTI. The prosecutor explained defendant carried two loaded weapons into a public place, exposing New Jersey residents to the weapons, rather than securing the weapons in his vehicle or residence where he

was staying. The prosecutor also noted defendant did not volunteer the presence of the weapons to police as the first gun was observed when police ordered defendant to raise his arms and the second discovered when police patted him down. Additionally, the prosecutor stated defendant did not demonstrate a genuine belief his possession of the weapons in a public place was lawful and noted it was doubtful defendant could claim such ignorance or confusion as defendant visits and stays with family in New Jersey after previously living in the state. The prosecutor acknowledged factor (b) favors defendant because he was not committing other crimes when police stopped him, but explained such factor was given little weight given the bullet hole in defendant's vehicle and his lack of cooperation with the police.

Because defendant resided in Georgia, had a valid carry permit in that state, and was visiting New Jersey with his firearms, he argues his gun charge fell outside the Graves Act "heartland," and made him eligible for PTI. He also argues, as detailed in Point II, the 2014 Clarification applies to situations other than "traveler" cases and three of the four applicable 2014 Clarification factors weigh in his favor. Specifically, defendant argues while he was in a public place with loaded firearms, the one gun remained holstered and there is no indication the second gun was in view of any New Jersey citizen, and he exercised full

control of the weapons and himself. Defendant also argues he informed police of the concealed weapon while being patted down but did not have an opportunity to inform police of the weapons prior to that moment as they approached him with weapons drawn. Additionally, defendant argues the bullet hole in his vehicle should not weigh against him as he was merely an innocent bystander to a shooting. Defendant also notes he testified he was unaware he needed a New Jersey license to carry a weapon and the prosecutor's rejection of his testimony lacked factual support.

Given the balance of the record, we are convinced defendant failed to establish by clear and convincing evidence the prosecutor committed a patent and gross abuse of discretion in rejecting his PTI application. First, even if we were to accept defendant's argument the majority of the 2014 Clarification factors weighed in his favor, the prosecutor was within his discretion to reject defendant's statement, made at trial, he was unaware he needed a license to carry a handgun in New Jersey. Indeed, defendant offered no further explanation to support his purported misunderstanding of New Jersey law other than this statement, which, we note, was made merely in response to the prosecutor's question if defendant "ever [made] an application to the [S]tate of New Jersey for a license to carry a handgun[.]" The prosecutor noted and considered that

conclusory testimony, but was clearly unpersuaded by it, particularly in light of the fact defendant did not explain his confusion or misinterpretation of New Jersey law prior to trial and he maintained ties to New Jersey since moving out of the state, including visiting "more than once a year."

Further, the facts surrounding defendant's arrest were particularly alarming. As noted, on defendant's sixth day in New Jersey on this particular trip, a customer in a convenience store observed him acting strangely, noticed a holstered handgun in plain view, and contacted police. Police recovered the holstered handgun, fully loaded and with a hollow-nosed bullet in the chamber, as well as a fully loaded concealed handgun from defendant. At best, defendant did not resist arrest, but did not inform police of the five loose rounds of ammunition in his pocket, which were discovered in a subsequent search.

In addition, because it is not "possible to ascribe the precise weight that should be given to any particular circumstance militating for or against admission to PTI," see 2014 Clarification at 8, defendant satisfying a majority of factors does not amount to clear and convincing evidence the prosecutor's decision was a patent and gross abuse of discretion. Indeed, in reaching the decision to deny defendant's PTI application, the prosecutor here relied on the presumption against defendants charged with second-degree offenses, the nature

of the offense and facts of the case under N.J.S.A. 2C:43-12(e)(1)-(2), the interests of society and the harm of foregoing criminal prosecution outweighing the benefits of PTI, N.J.S.A. 2C:43-12(e)(7), (14), (17).

Further, neither the 2008 Directive nor 2014 Clarification compel a prosecutor to consent to a defendant's PTI application. Rather, the 2008 Directive "authorizes" prosecutors to consent to PTI "only in rare cases involving extraordinary and compelling circumstances," see Waters, 439 N.J. Super. at 236, and the 2014 Clarification "provides that in the absence of case-specific aggravating circumstances . . . it may be appropriate for the prosecutor" to consent to PTI. See 2014 Clarification at 1. Additionally, we have noted the 2014 Clarification "is simply a statement of the current policy of the Attorney General [and] does not change the criteria for PTI set forth in [N.J.S.A. 2C:43-12 to -22 and Rules 3:28-1 through 3:28-10]." Waters, 439 N.J. Super. at 238-39. Stated differently, we cannot conclude defendant carried his "heavy burden" in clearly and convincingly establishing the prosecutor's decision was a patent and gross abuse of discretion. Watkins, 193 N.J. at 520.

When viewed in context, we consider the prosecutor's reliance on the Georgia Attorney General's website, which the State acknowledged post-dated defendant's arrest and which it disclaimed on appeal as a basis to support the


denial of defendant's PTI application, as inconsequential when considered in light of the particular other facts weighing against defendant's claim he was unaware of New Jersey law. So too with respect to defendant's argument the prosecutor inappropriately, and without factual support, considered defendant's "absconding," that his possession of both weapons would have been illegal in Georgia, or the fact there was a bullet hole in his vehicle and bullet fragments in his car. Indeed, considering such arguments within the context of the facts of the case, particularly the danger defendant presented by carrying two readily accessible loaded weapons in a public place, we discern no abuse of the prosecutor's discretion as the denial of defendant's application was not "so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention." Wallace, 146 N.J. at 583 (internal citation omitted).

At bottom, the prosecutor complied with our remand instructions and issued a statement of reasons with respect to his decision to not join in defendant's PTI application and specifically addressed the 2014 Clarification. In that statement of reasons, the prosecutor explained defendant did not meet the criteria for the Clarification to be applicable. Given the facts and circumstances of the case, we are satisfied the prosecutor did not abuse his discretion.

To the extent we have not directly addressed any of defendant's remaining arguments, it is because we have concluded they are without sufficient merit to warrant discussion in this 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