STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAMIAN FALLON,

Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL PART
MONMOUTH COUNTY

Municipal Appeal MA24-032
Eatontown Municipal Court (1311)
Summons S 2023-000183

MEMORANDUM OPINION AND ORDER

Trial de novo April 9, 2025 – Decided April 15, 2025

Jonathan Petty, Esq. (Fetky & Petty, LLC) for defendant.

Melinda A. Harrigan, Assistant Prosecutor, for the State; Olivia Christy, Law Clerk, argued; Alexander S. Karn, Legal Assistant, on the brief (Raymond S. Santiago, Monmouth County Prosecutor).

GUADAGNO, J.A.D. (retired and temporarily assigned on recall).

Defendant, Damian Fallon seeks de novo review of the October 24, 2024, order of the Eatontown Municipal Court denying defendant's application for admission into the Conditional Dismissal Program, N.J.S.A. 2C:43-13.1-13.9, after defendant's guilty plea to the disorderly persons offense of lewdness. After de novo review and for the following reasons, defendant's application for conditional dismissal is denied.

The following facts are gleaned from the record before the municipal court. During the late afternoon/early evening of July 31, 2023, defendant was making deliveries of food for Grubhub when he decided to take a "break." Defendant pulled his vehicle into the parking of the CVS drugstore, located at 130 Route 35 in Eatontown, and parked "a few spots away" from the front door of the store. Defendant observed several other vehicles in the CVS parking lot.

As defendant sat behind the wheel of his car, he began to watch pornography on his cell phone, exposed his penis and masturbated. At this time, a young woman, J.D.[1] who had gone to CVS to buy shampoo, walked by defendant's vehicle and observed defendant masturbating as she looked through the driver's side window. J.D. called police and reported what she observed, but by the time police arrived defendant had left. Defendant later claimed he left because he had received a Grubhub delivery order.

J.D. had given police the license number of defendant's vehicle, and on August 17, 2023, defendant was arrested and charged with fourth-degree lewdness, N.J.S.A. 2C:14-4B(1). After review by the Monmouth County Prosecutors Office (MCPO), the matter was remanded to the municipal court on February 10, 2024, as a downgraded lewdness/disorderly persons offense, N.J.S.A. 2C:14-4(a).

[1] Initials are being used to protect the victim's privacy. R. 1:38-3(c)(12).

Defendant first appeared before Judge Eugene Melody on March 14, 2024. Counsel of record was Jonathan Petty, Esq., but he was not available that day and Michael Cennimo. Esq. appeared for defendant. Mr. Cennimo indicated that he was seeking a conditional dismissal, but the prosecutor was under the impression that there was a minor victim, which would have precluded such a disposition. The matter was adjourned to allow the prosecutor to speak with the victim.

On April 18, 2024, Mr. Petty appeared with defendant. Judge Melody identified the victim as J.D. and the municipal prosecutor advised the judge that he had not been in contact with J.D. Mr. Petty sought an adjournment, arguing it was necessary to have the victim present for identification purposes.

On May 16, 2024, Fania Veksler, Esq., appeared for defendant. Ms. Veksler advised Judge Melody that she had spoken with the prosecutor and suggested that if defendant got "some therapy" he might consider a conditional dismissal. Judge Melody observed that the complaint alleged that a minor was involved which would preclude a conditional dismissal.

The matter was next heard on June 20, 2024. Christian Nwaopara, Esq. appeared for defendant. The municipal prosecutor informed Judge Melody that the case "does not involve a minor." He then stated that defendant's counsel had agreed to provide proof that defendant was receiving counseling and/or therapy but had not done so, and the State would oppose a conditional dismissal. Mr.

Nwaopara argued that a conditional dismissal was permissible because a minor was not involved and asked for an adjournment to brief the matter.

On August 1, 2024, Reid Weinman, Esq. appeared for defendant. Judge Melody stated that a conditional dismissal would not be in the interests of justice and indicated that the matter would be scheduled for trial. Mr. Weinman stated that Mr. Petty was considering an interlocutory appeal of Judge Melody's ruling. Judge Melody adjourned the matter to give defendant an opportunity to appeal, but scheduled trial for September 6, 2024.

No appeal was filed, and on September 6, the arresting officer, Detective Errickson, and the victim, J.D. appeared for trial. Mr. Petty was again unavailable, and Mr. Weinman appeared for defendant. Judge Melody set a new trial date for October 24, 2024, and asked Mr. Weinman if he would try the case if Mr. Petty continued to be unavailable. Mr. Weinman agreed.

On October 24, 2024, Albert Alvarez, Esq., appeared for defendant. Judge Melody indicated that an agreement had been reached whereby defendant would plead guilty to lewdness as a disorderly persons offense and would seek a conditional dismissal at sentencing.

Defendant was placed under oath and admitted that on July 23, 2023, he parked in the front of the Eatontown CVS and began to watch pornography on his phone while masturbating. Defendant acknowledged that the CVS was open

for business, the weather was clear, and he was parked near the front entrance in a "low sitting" vehicle, where anyone who passed by could see in. Defendant further admitted that his penis was exposed while masturbating, and he was doing so for sexual arousal and gratification. Finally, defendant acknowledged that he "reasonably expected that other people would observe the lewd and offensive act which [he] was engaged in." Judge Melody found that defendant had provided an adequate factual basis for the lewdness plea.

At sentencing, the municipal prosecutor opposed a conditional dismissal on the grounds that defendant's conduct constituted "aberrational behavior . . . putting members of the public, kids, families, people that are going into the drug store . . . they shouldn't be subject to this."

Judge Melody asked J.D., who was in court and prepared to testify, if she wanted to say anything at sentencing. J.D. stated that she went to CVS that day to buy shampoo. As she was leaving the store, she observed defendant driving his vehicle "really, really fast" passing right in front of her and almost hitting her. She then saw defendant masturbating in his car. J.D. called police and provided them with defendant's license plate number. At the time, J.D. was 24 and said that the experience made her feel "really creeped out."

Judge Melody then read a lengthy decision into the record denying defendant's application for a conditional dismissal. The judge first noted that

when J.D. observed defendant masturbating, it made her "upset . . .disturbed [and] offended." Judge Melody had "significant concern" that defendant made the decision to perform this lewd act in the front of CVS, then during the plea allocution, he did not take responsibility for his actions, claiming people could not see into his vehicle. The judge noted that the victim, J.D., testified credibly that she "clearly saw it right through the window" and found there was a lack of accountability by defendant.

Judge Melody imposed a $750 fine, $33 in court costs, $75 Safe Neighborhood Services Fund assessment, and a $50 Violent Crimes Compensation Board penalty. On November 8, 2024, Judge Melody filed an amplified opinion. As this court is deciding this application de novo, I will not discuss Judge Melody's 12-page written opinion in detail.[2]

Defendant filed a timely notice of appeal and, in his brief, raises the following point:

> THIS COURT MUST REVIEW THE CONDITIONAL DISMISSAL APPLICATION DE NOVO AND ALLOW DEFENDANT INTO THE PROGRAM.

LEGAL STANDARD

Subject to certain exceptions set forth in N.J.S.A. 2C:43-13.1(b)(1), a

[2] I will note that it is rare that municipal judges provide written opinions due to the volume of cases they handle. Judge Melody explained that he writes opinions to benefit the appellate courts and because it furthers the development of respect for law on the part of the citizenry.

defendant who is charged with a petty disorderly persons offense or disorderly persons offense, and who has not previously been convicted of such offenses or crimes, and who has not previously participated in one of the diversionary programs set forth in N.J.S.A. 2C:43-13.1(a), may apply to the municipal court to enter into the conditional dismissal program. The defendant must file the application "after a plea of guilty or a finding of guilt, but prior to the entry of a judgment of conviction." The defendant must also provide "appropriate notice" to the municipal prosecutor that an application will be made, so that the prosecutor can make a recommendation to the municipal court judge as to whether the application should be granted or denied. N.J.S.A. 2C:43-13.2.

Relevant to this opinion, N.J.S.A. 2C:43-13.1(1) provides in pertinent part:

> (1) A defendant shall not be eligible for participation in the conditional dismissal program if the offense for which the person is charged involved: . . . (e) an offense against an elderly, disabled or minor person;
>
> [N.J.S.A. 2C:43-13.1]

In addition to reviewing the municipal prosecutor's recommendation and the defendant's criminal record, the municipal court must also consider the following ten factors set forth in N.J.S.A. 2C:43-13.1(c):

> (1) The nature and circumstances of the offense;
>
> (2) The facts surrounding the commission of the offense;
>
> (3) The motivation, age, character and attitude of the

> defendant;
>
> (4) The desire of the complainant and victim to forego prosecution;
>
> (5) The needs and interests of the victim and the community;
>
> (6) The extent to which the defendant's offense constitutes part of a continuing pattern of antisocial behavior;
>
> (7) Whether the offense is of an assaultive or violent nature, whether in the act itself or in the possible injurious consequences of such behavior;
>
> (8) Whether the applicant's participation will adversely affect the prosecution of codefendants;
>
> (9) Whether diversion of the defendant from prosecution is consistent with the public interest; and
>
> (10) Any other factors deemed relevant by the court.
>
> [N.J.S.A. 2C:43-13.1(c)]

DISCUSSION

The municipal prosecutor was adamantly opposed to a conditional dismissal. He argued that if defendant were to commit the same crime again there would be no record of the first offense and defendant would not receive a harsher sentence that would receive as a second offender. The State now makes the same argument.

When considering factor (1), the nature and circumstances of the offense,

it is clear that defendant parked in front of CVS at a time when customers were present in an area where he was likely to be seen. This court rejects defendant's claim that he thought people could not see into his vehicle because the windows were tinted. Judge Melody accepted J.D.s testimony as credible that she saw clearly into defendant's car through the driver's side window and had an unobstructed view of his lewd actions. This court defers to Judge Melody's credibility findings as he had the opportunity to observe the witness firsthand, see State v. Adubato, 420 N.J. Super. 167, 176 (App. Div. 2011). I independently find that J.D. is credible.

Also, as Judge Melody observed, defendant chose to commit this lewd act in the populated CVS parking lot, when the expansive and partially abandoned Ft. Monmouth property was directly across the street, offering numerous locations where he could have committed this act in complete isolation.

Although there was no proof that any minors were present or observed defendant's actions, that was only by serendipity, given the time of day and nature of CVS's business, and not because of any caution defendant exercised in choosing the location.

As to factor (2), the facts surrounding the commission of the offense, defendant made a deliberate and conscious choice to expose himself and masturbate in a public place with absolutely no concern with who might observe

him. He displayed a callous disregard for anyone in the area who happened to walk by his vehicle, as J.D. did.

Factor (3) is the motivation, age, character and attitude of the defendant. Defendant was 21 on the date of the incident, with no prior criminal record. While those factors weigh in defendant's favor, the attitude of the defendant does not. This can be gleaned from defendant's responses to Judge Melody's questions during his guilty plea allocution. He initially claimed he did not recall the date, time of day, or whether the sun was out or setting, prompting Judge Melody to tell defendant's counsel that he was not sure defendant could make an acceptable allocution. Defendant then attempted to excuse his conduct by claiming that all the windows in his car were tinted, and he was "under the presumption" that no one could see into the car. It is significant J.D. later testified credibility that she noticed no window tinting with the possible exception of the rear window. Defendant's excuse is rejected as not credible.

Factor (4) addresses the desire of the complainant and victim to forego prosecution. J.D. called police after observing defendant masturbating, then appeared on both September 5 and October 24, 2024, prepared to testify at trial. J.D. spoke at defendant's sentencing and told Judge Melody that defendant saw her, and she thought his actions were "intentional." Clearly, there is nothing in the record to indicate that J.D. wanted to forego prosecution.

Similarly, factor (5), the needs and interests of the victim, who appeared in court ready to testify on two occasions, weighs against a conditional dismissal.

Factors (6), (continuing pattern of antisocial behavior); (7), (assaultive or violent nature); and (8), (prosecution of codefendants); do not apply.

Factor (9), whether diversion of the defendant from prosecution is consistent with the public interest, requires an examination of whether a conviction may serve as a deterrence to further similar criminal activity. In discussing deterrence, Justice Handler observed:

> the goal of deterrence is to thwart future crimes and to modify the conduct both of the offender and others who might commit offenses, it constitutes a much more potent factor in the treatment of persons who have committed crimes which are perceived to be avoidable or preventable. Such crimes are usually those which result from volitional, deliberate and nonimpulsive behavior. This type of criminal behavior is presumably capable of being modified or reversed by punishment.
>
> [State in Interest of C.A.H., 89 N.J. 326, 335 (1982) (citations omitted).]

A dismissal will not serve to deter further similar criminal activity by defendant. Quite the opposite. As the State observed in its brief, if defendant is inclined to again commit a lewd act in public:

> The State might be deprived of the evidence relating to a prior conviction for lewdness because of a conditional dismissal. The prosecutor in such a case would be hampered from making arguments related to recidivism or escalating conduct.

This court agrees and notes that there is a strong deterrent effect if this conviction is maintained, discouraging defendant from re-offending, knowing that a second conviction will probably involve a harsher penalty.

Factor (10) addresses any other factors deemed relevant by the court. This court concludes that defendant has not demonstrated a shred of remorse for his actions and has attempted repeatedly to minimize his behavior. In addition, with the victim present in the courtroom on two occasions, defendant has failed to express any remorse, regret or contrition to her.

CLAIM OF BIAS

Next, defendant's counsel raises a claim for the first time in his brief, that, in attempting to determine whether a minor was present during defendant's lewd acts, Judge Melody demonstrated "bias and inability to adjudge this application fairly." During the trial de novo, counsel expanded on this allegation, claiming that after defendant entered his guilty plea, Judge Melody decided to "reopen the hearing" and asked the prosecutor "to get an officer in the courtroom to verify that there was a minor victim involved in this case." Counsel went on to accuse Judge Melody of a lack of impartiality by "intervening and inserting himself in a prosecution to try to further present or create a record to deny Mr. Fallon a conditional dismissal."

On de novo review, this court does not perform an "appellate function . . .

but rather an independent fact-finding function." State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000). Nevertheless, because a allegation against a judge that challenges that judge's impartiality represents an attack on our independent and impartial judiciary, which is "indispensable to justice in our society" see Code of Judicial Conduct, Canon 1, this court will address the merits of counsel's argument.

To review a judge's alleged prejudicial actions, the entire record must be considered. State v. J.J., 391 N.J. Super. 91, 102-03. It is essential to note that the original Complaint Summons filed on August 18, 2023, alleged that there was a minor victim:

> WITHIN THE JURISDICTION OF THIS COURT, EXPOSE INTIMATE PARTS FOR THE PURPOSE OF AROUSING OR GRATIFYING THE SEXUAL DESIRE OF ONE SELF UNDER CIRCUMSTANCES WHERE THE ACT REASONABLY EXPECTED AND WAS LIKELY TO BE OBSERVED BY A CHILD WHO WAS LESS THAN 13 YEARS OF AGE WHILE 4 YEARS OLDER THAN THE CHILD, SPECIFICALLY BY MASTURBATING INSIDE OF HIS VEHICLE WITH AN EXPOSED PENIS DURING THE NORMAL BUSINESS HOURS OF CVS WITH CUSTOMERS AND EMPLOYEES PRESENT IN VIOLATION OF N.J.S.A. 2C:14 4B(l).
>
> [Emphasis supplied.]

From the time of the remand by the MCPO to the entry of defendant's guilty plea, there was continuing confusion as to whether a minor was present

during defendant's lewd act. This confusion was exacerbated by an apparently unintentional misstatement by the municipal prosecutor prior to sentencing.

On June 20, 2024, four months after the remand from MCPO, the municipal prosecutor informed Judge Melody for the first time that, while the initial charge alleged that a minor was involved, the remanded charge "does not involve a minor."

On October 24, 2024, before defendant entered a guilty plea, Judge Melody called the case and read from the complaint, including the original allegation highlighted above. Judge Melody then reviewed the history of the case. At the conclusion of defendant's allocution, Judge Melody proceeded to sentencing and asked the municipal prosecutor several questions relating to the State's argument opposing a conditional dismissal. Because these questions and responses form the basis of counsel's claims of bias, I repeat them verbatim:

> THE COURT: Mr. Kean you have had the opportunity to speak to either the officer and/or the people that witnessed this.
>
> MR. KEAN: Both.
>
> THE COURT: How many people were there? Was it one person, two people, do you remember?
>
> MR. KEAN: Yes
> .
> THE COURT: I mean who were these people?

> MR. KEAN: Yes, there was one woman in particular who was with at least one minor and that was confirmed, I talked to her directly in Court, I talked to the officer. The officer is adamant, the officer said it was really obvious about what was going on here.
>
> [emphasis supplied.]

This was totally inconsistent with the information the prosecutor provided to Judge Melody on June 20, 2024, and the judge, presented with this inconsistency, understandably asked the prosecutor, "Mr. Kean this issue with the minor and the conditional dismissal, don't we need the officer here to tell us what this minor's involvement was. Because right now we don't have anything in the record." The prosecutor then requested a short recess.

When court resumed, the prosecutor explained that when the responding officer arrived at CVS, he observed a minor present but "the minor was not in the presence [sic] on scene when the conduct took place."

In denying defendant's motion for admission into the conditional dismissal program, Judge Melody did not in any way base his decision on the "minor victim" exclusion contained in N.J.S.A. 2C:43-13.1. There is nothing in the record to support counsel's claim that Judge Melody "halted the proceedings and ordered the prosecutor to contact the arresting officer to seek to get those facts in the record so he could justify his rejection decision." Nor is there any evidence in the record to show that Judge Melody conducted this proceeding in

a biased or unfair way and nothing he said or did here provides "an 'objectively reasonable' belief that the proceedings were unfair." DeNike v. Cupo, 196 N.J. 502, 517 (quoting State v. Marshall, 148 N.J. 89, 279, cert. denied, 522 U.S. 850 (1977)).

When counsel abandons the traditional advocacy standards of arguing the facts and the law and crosses the Rubicon to engage in an ad hominem attack on a judge, the stakes become much larger than only the reputation of the targeted judge. "The strategy is designed to blame any loss on the decision-maker rather than fallacies in the substantive legal arguments presented." Perkins Coie LLP v. U.S. Department of Justice, et al., Civ. No. 25-716 (BAH) (slip op. at 1) (D.D.C. March 26, 2025). A close review of the record indicates that there is no support for counsel's claim, and he has distorted the record in an attempt to prevail in this matter. Counsel's argument exceeds the bounds of acceptable advocacy.

Finally, this court soundly rejects counsel's suggestion that defendant would have "fared" better if a child had seen him masturbating, as the case would have remained as a fourth-degree crime and defendant

> would have likely been admitted into the pretrial intervention program. In other words, defendant fared worse by not exposing himself to a child. That result is - in a word - absurd.

This court's response - in a word - nonsense.

ORDER

For the reasons addressed above, it is hereby **ORDERED** that defendant's motion for admission into the Conditional Dismissal Program is **DENIED**; and it is further **ORDERED**, that the sentence imposed by the municipal court, to wit: a $750 fine, $33 in court costs, $75 Safe Neighborhood Services Fund assessment and a $50 Violent Crimes Compensation Board penalty, is **REIMPOSED**; and it is further **ORDERED** that the stay of sentence imposed by the municipal court is **VACATED** and the fines and assessments are to be paid within ten days.

Michael A. Guadagno
MICHAEL A. GUADAGNO, J.A.D.
(Retired and temporarily assigned)

Date: April 15, 2025

Original: Criminal Division Manager
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