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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-0493-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAYISHA FOSTER,

Defendant-Appellant.

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Submitted December 21, 2016 — Decided April 5, 2017

Before Judges Alvarez and Manahan.

On appeal from the Superior Court of New  
Jersey, Law Division, Gloucester County,  
Indictment No. 14-06-0559.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Amira R. Scurato, Assistant  
Deputy Public Defender, of counsel and on the  
brief).

Sean F. Dalton, Gloucester County Public  
Defender, attorney for respondent (Joseph H.  
Enos, Jr., Senior Assistant Prosecutor, of  
counsel and on the brief).

PER CURIAM

Defendant Tayisha Foster appeals from a decision denying her  
admission into the pretrial intervention (PTI) program. She was

sentenced on September 4, 2015, in accordance with a plea agreement after her guilty plea to a fourth-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a), to three years of probation with appropriate fines and penalties. Her plea agreement reserved the right to appeal her rejection from the PTI program. We affirm.

The theft charges arose from defendant's shoplifting of nine bottles of perfume while at the Deptford Mall on January 19, 2014. The Criminal Division Manager's letter recommending against her admission into the PTI program stated that defendant was not a good candidate based on PTI Guideline 3(e) in Rule 3:28, "Prior Record of Convictions." That guideline states, "[w]hile [PTI] is not limited to 'first offenders,' defendants who have been previously convicted of a criminal offense should ordinarily be excluded."

In 2010, defendant had received an "accelerated rehabilitative disposition" (ARD) in Pennsylvania on two counts of retail theft, one count of receiving stolen property, and one count of possession of an instrument of a crime. In 2012, defendant was convicted in the Cherry Hill Municipal Court of "disturbing the peace." Defendant was placed on probation in 2012 in the Philadelphia County Municipal Court for retail theft.

Eleven months after this incident, on November 24, 2014, defendant was charged in Voorhees Township with shoplifting,

N.J.S.A. 2C:20-11(b)(1), and resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2). The charges were downgraded and actually pending at the time of defendant's PTI application. Defendant eventually either pled guilty or was found guilty of disorderly persons shoplifting on those charges.

Accordingly, the Criminal Division Manager opined that "defendant's continuing criminal behavior as evidenced by her prior record and present offense indicate that she is unlikely to be deterred from criminal behavior through participation in the Pretrial Intervention Program." The prosecutor agreed that defendant was an inappropriate candidate because she was not amenable "to the rehabilitative process of PTI." Defendant appealed, and the rejection of her application was affirmed on April 26, 2015.

In rendering her decision, the Law Division judge observed that despite the benefit of a diversionary program, defendant had subsequently been convicted of disorderly persons offenses, including retail theft and disturbing the peace. That these events all occurred close in time to each other, and to the charges in this case, was a factor the court weighed heavily.

On appeal, defendant contends that rejection constituted a gross and patent abuse of discretion. She asserts that the rejection letter's failure to discuss factors weighing towards

admission revealed a fatal flaw in the decision making process. Specifically, she argues the following factors were omitted from consideration: the minimal nature of the offense, her young age of twenty-three, high school diploma, gainful employment, need to avoid a criminal conviction in order to maintain her current employment, and that she is not a drug addict. Defendant argues that her admission into PTI would fulfill the legislative goals of the program, and that denial is an abuse of discretion because of the potential benefits to her and to society if she is admitted.

Unquestionably PTI, a diversionary program, allows defendants in appropriate situations to avoid the potential stigma of a conviction. State v. Bell, 217 N.J. 336, 347-48 (2014). "Eligibility for PTI is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral changes and show that future criminal behavior will not occur." State v. Roseman, 221 N.J. 611, 622 (2015).

However, determining which defendants should be diverted into the PTI program "is a quintessentially prosecutorial function[.]" State v. Wallace, 146 N.J. 576, 582 (1996) (citing Dalqlish, 86 N.J. 503, 513 (1981)). A prosecutor enjoys broad discretion in making these decisions. State v. K.S., 220 N.J. 190, 199 (2015). The review process requires consideration of the non-exhaustive list of seventeen statutory factors enumerated in N.J.S.A. 2C:43-

12(e) in order to make the necessary individualized assessment. Roseman, supra, 221 N.J. at 621-22. The Supreme Court has promulgated the PTI guidelines found in Rule 3:28 that incorporate the statutory goals. See N.J.S.A. 2C:43-12(e).

Our review of a PTI rejection is "severely limited" and designed to address "only the most egregious examples of injustice and unfairness." State v. Negran, 178 N.J. 73, 82 (2003) (citations omitted). A defendant bears a heavy burden on appeal, and must clearly and convincingly establish that the prosecutor's decision is a patent and gross abuse of discretion which has gone so wide of the mark that fundamental fairness and justice require judicial intervention. Watkins, supra, 193 N.J. at 520. An abuse of discretion is found when a defendant can prove "that the [PTI] denial '(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 of judgment[.]'" State v. Lee, 437 N.J. Super. 555, 563 (App. Div. 2014) (quoting State v. Bender, 80 N.J. 84, 93 (1979), certif. denied, 222 N.J. 18 (2015)).

In this case, there was no abuse of discretion in the denial of defendant's application. Defendant's criminal history demonstrates she has been unable to effect the necessary behavioral changes to become law abiding. That she was charged even after

this arrest clearly makes her an inappropriate candidate. Her prior criminal contacts, together with those accumulated after this arrest, establish valid reasons for denial premised on consideration of Guideline 3(e).

PTI eligibility is ordinarily "limited to persons who have not been previously convicted of any criminal offense." N.J.S.A. 2C:43-12(a). Defendant's arrest history weighs against an exception being made to that general policy. The cluster of arrests before and after these charges demonstrates that she would not benefit from the rehabilitative process available through PTI. Consideration of the positive factors in her life does not refute that conclusion. No patent and gross abuse of discretion occurred.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION