

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE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-0993-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN M. MCCOURT,

Defendant-Appellant.

Submitted November 14, 2017 – Decided December 8, 2017

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Indictment No.
16-03-0290.

Joseph E. Krakora, Public Defender, attorney
for appellant (Theresa Yvette Kyles, Assistant
Deputy Public Defender, of counsel and on the
brief).

Fredric M. Knapp, Morris County Prosecutor,
attorney for respondent (Paula Jordao,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from the August 2, 2016 Law Division order affirming the prosecutor's denial of his application for admission into the pretrial intervention (PTI) program. We affirm.

I

In March 2015, defendant hacked into the iCloud account of a young woman (the victim) and found nude pictures of her. Defendant posted the pictures on an anonymous website for public viewing. The victim did not consent to the posting of the pictures. Defendant subsequently admitted his wrongdoing, removed the pictures from the website, and apologized to the victim. The prosecutor contends defendant admitted his wrongdoing to the victim only after "he thought he would not get in trouble with law enforcement."

On April 8, 2015, the police interviewed defendant, and he admitted to hacking into the victim's account and posting the pictures. A grand jury returned an indictment charging defendant with third-degree invasion of privacy, N.J.S.A. 2C:14-9(c) (count one); third-degree access and disclosure, N.J.S.A. 2C:20-31(a) (count two); and third-degree computer criminal activity, N.J.S.A. 2C:20-25(a) (count three).

On May 26, 2015, defendant applied for admission into PTI. A probation officer interviewed defendant and recommended him for enrollment in PTI. The Morris County Prosecutor rejected the

recommendation and denied defendant admission into PTI. The prosecutor found "[d]efendant's actions were deliberate and manipulative; . . . defendant [tried] to appear as a protector to the victim, but was in fact the perpetrator." The prosecutor noted this was not a victimless crime and the victim "does not wish to forego prosecution." The prosecutor further reasoned prosecution was in the best interests of the public in deterring this type of crime. The prosecutor did acknowledge the facts that defendant was employed and had no prior criminal record, and therefore offered a plea agreement "with a sentencing recommendation of probation."

Pursuant to Rule 3:28(h), defendant appealed the prosecutor's decision rejecting his application. The Law Division denied defendant's appeal, concluding defendant failed to meet his burden of proving a patent and gross abuse of discretion and failed to establish a clear error of judgment.

After the trial court ruled on his PTI appeal, defendant pled guilty to one count of third-degree invasion of privacy, pursuant to a plea agreement that called for a one-year term of non-custodial probation. After the trial court sentenced defendant in accordance with the plea agreement, he filed this appeal.

Before us, defendant presents the following argument:

The rejection of [defendant's] application for [PTI] constituted a patent and gross abuse of discretion requiring a reversal or, at minimum, a clear error of judgment, requiring a remand for reconsideration.

Specifically, defendant argues the prosecutor failed to consider defendant's amenability to rehabilitation and overemphasized the victim's desire to prosecute.

II

Eligibility for PTI is based primarily on "the applicant's amenability to correction, responsiveness to rehabilitation and the nature of the offense." N.J.S.A. 2C:43-12(b). In determining whether to recommend or consent to admission, the PTI director and the prosecutor must consider seventeen factors listed in N.J.S.A. 2C:43-12(e).

"Admission [into PTI] requires a positive recommendation from the PTI director and the consent of the prosecutor." State v. Negran, 178 N.J. 73, 80 (2003) (citing State v. Nwobu, 139 N.J. 236, 246 (1995)). In making a determination to admit, "a prosecutor must consider an individual defendant's features that bear on his or her amenability to rehabilitation." Nwobu, supra, 139 N.J. at 255 (citing State v. Sutton, 80 N.J. 110, 119 (1979)). A "[d]efendant generally has a heavy burden when seeking to overcome a prosecutorial denial of his admission into PTI." State v. Watkins, 193 N.J. 507, 520 (2008) (citing Nwobu, supra, 139

N.J. at 246). "In respect of the close relationship of the PTI program to the prosecutor's charging authority, courts allow prosecutors wide latitude in deciding whom to divert into the PTI program and whom to prosecute through a traditional trial." Negran, supra, 178 N.J. at 82 (citing Nwobu, supra, 139 N.J. at 246).

Accordingly, a court's scope of review of such a decision is "severely limited." Ibid. (citing Nwobu, supra, 139 N.J. at 246). It has been characterized as one of "'enhanced' or 'extra'" deference. Ibid. (quoting State v. Baynes, 148 N.J. 434, 443-44 (1997)). "A defendant attempting to overcome a prosecutorial veto must 'clearly and convincingly establish that the prosecutor's refusal to sanction admission into a PTI program was based on a patent and gross abuse of his discretion'" Ibid. (quoting Nwobu, supra, 139 N.J. at 246). "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.'" Watkins, supra, 193 N.J. at 520 (quoting State v. Wallace, 146 N.J. 576, 582-83 (1996)). "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." Nwobu, supra, 139 N.J. at 254.

III

Applying the above standards, we discern no abuse of discretion in the prosecutor's denial of defendant's application, much less one that is "patent and gross." Negran, supra, 178 N.J. at 82. The record here fully supports the prosecutor's denial of defendant's application based on findings that defendant's actions were deliberate and manipulative, the victim wished to pursue prosecution, and public interest favored prosecution. The prosecutor further acknowledged defendant was employed and had no prior criminal record. As the trial court noted, "the prosecutor articulated the relevant factors and described thoroughly how they were applied to the personal facts of defendant's case." Like the trial court, we find no reason to disturb the prosecutor's decision that defendant's actions and the victim's desire to prosecute outweighed defendant's employment and lack of criminal history.

Defendant argues, unpersuasively, that the prosecutor abused his discretion by focusing on the victim's desire to prosecute rather than defendant's amenability to rehabilitation. The trial judge rejected that contention. Instead, she found that the prosecutor reasonably considered defendant's individual situation, and she found no gross and patent abuse of the prosecutor's discretion in rejecting defendant's PTI application. We find no

error in that decision, which is supported by the evidence and the applicable law.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION