

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1497-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE A. VELAZQUEZ,

Defendant-Appellant.

Submitted December 22, 2016 — Decided March 1, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
14-07-0614.

Joseph E. Krakora, Public Defender, attorney
for appellant (Lauren S. Michaels, Assistant
Deputy Public Defender, of counsel and on the
brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Jeffrey P. Mongiello,
Deputy Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant appeals from his judgment of conviction following
his guilty plea to fourth-degree endangering the welfare of a

child (possession of child pornography), N.J.S.A. 2C:24-4(b)(5)(b). Specifically, defendant challenges the December 1, 2014 Law Division decision denying his appeal of the rejection of his application for admission to the Pretrial Intervention Program (PTI). See N.J.S.A. 2C:43-12 and R. 3:28. We affirm.

I.

In February 2012, the New Jersey State Police (NJSP) conducted an investigation of a peer-to-peer file-sharing network, gathering internet protocol (IP) addresses involved in viewing and distributing child pornography. The NJSP identified a computer with a specific IP address from which they obtained a video depicting an adult male engaging in digital, oral, vaginal, and anal penetration with a child under the age of sixteen. The NJSP traced the IP address to defendant, who told police he used file-sharing software to download music and movies, and to search for adult pornography.

Defendant acknowledged that when he searched for adult pornography, child pornography would pop up with it. He explained he had seen child pornography at times because, when he searched, he would select all of the resulting files to download. Of the seventy-five cached and deleted file fragments from the file-sharing network found on defendant's computer, twenty-five contained the term "PTHC," a commonly entered search term, meaning

"Pre-Teen Hard Core," used by persons seeking child pornography. There was no specific evidence that defendant ever used that search term, but only that files downloaded by defendant contained the term.

Defendant initially faced potential charges of both second-degree distribution of child pornography and fourth-degree possession of child pornography. Because defendant had no prior criminal history, the State extended a plea offer that called for defendant to plead not guilty to an accusation, and apply for PTI. If the PTI Director admitted defendant into the program, the State would not object to his admission; however, if the Director rejected him, then the State would also reject him, and then defendant would plead guilty to fourth-degree possession of child pornography and receive a non-custodial sentence.

After review, the PTI Director deemed defendant not suitable for PTI. The Director cited the following reasons: "[a]dmission to PTI would depreciate the serious nature of the offense(s);" "[t]he needs and interests of the victim and or society would not be met by PTI enrollment of the defendant;" and "[t]he crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution."

The State adopted the PTI Director's recommendation of denial. The State also provided additional reasons for denial:

the nature of the offense; the facts of the case; the needs of the victim and society; and the harm to society outweighs the benefits to society for channeling defendant into a supervisory program.

On October 8, 2014, defendant appealed the denial of his PTI application to the Law Division.¹ N.J.S.A. 2C:43-12(f); R. 3:28(h). Following oral argument, Judge Bruno Mongiardo issued a written opinion denying defendant's appeal. The judge found the State appropriately weighed the applicable factors set forth in N.J.S.A. 2C:43-12(e), and concluded the facts of defendant's case caused the rejection of his application, rather than a categorical denial of child pornography offenders. He explained the rejection thoroughly, noting the prosecutor relied on the nature of the offense and the need to prosecute because of the significant harm to the public. He further noted:

The State directs attention to the number of files on [d]efendant's computer [,] with 25 files containing the phrase [PTHC]. The State argues that this clearly shows [d]efendant's interest in the child pornography was not one of simple curiosity or accident. This is a serious offense with victims. . . . It is the specific facts of this case[,], which causes the rejection.

¹ Even though the plea agreement did not contemplate allowing defendant to appeal his PTI denial, the State did not object to defendant appealing the denial to the Law Division, before entering a plea.

The judge concluded "the State's rejection letter clearly indicates no abuse of discretion."

After pleading guilty to fourth-degree possession of child pornography and receiving a two-year probationary sentence, defendant filed this appeal challenging the denial of his PTI appeal by the Law Division. He presents a single argument for consideration:

THE PROSECUTOR'S REJECTION OF [DEFENDANT'S] PTI APPLICATION CONSTITUED A PATENT AND GROSS ABUSE OF DISCRETION BECAUSE SHE FAILED TO CONSIDER ALL OF THE RELEVANT FACTORS AND CONDUCT AN INDIVIDUALIZED EVALUATION OF DEFENDANT, RESULTING IN A CLEAR ERROR OF JUDGMENT WHICH SUBVERTED THE GOALS UNDERLYING THE PTI PROGRAM.

II.

Admission into the PTI program is based on a favorable recommendation from the PTI director and the consent of the prosecutor. State v. Nwobu, 139 N.J. 236, 246 (1995). 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). The statutory list is not exhaustive and additional relevant factors may also be considered. State v. Negran, 178 N.J. 73, 84 (2003); State v. Brooks, 175 N.J. 215, 226-27 (2002), overruled on other grounds by State v. K.S., 220 N.J. 190 (2015).

The scope of judicial review of a prosecutor's determination is severely limited. Nwobu, supra, 139 N.J. at 246; State v. Hermann, 80 N.J. 122, 128 (1979). Prosecutors have wide latitude in deciding whom to divert into the PTI program and whom to prosecute. Nwobu, supra, 139 N.J. at 246. Courts grant enhanced or extra deference to the prosecutor's decision. Ibid.

"Judicial review serves to check only the 'most egregious examples of injustice and unfairness.'" Negran, supra, 178 N.J. at 82 (citations omitted). A reviewing court may order a defendant into PTI over a prosecutor's objection only if the defendant "clearly and convincingly establish[es] that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse" of discretion. State v. Wallace, 146 N.J. 576, 582 (1996) (citation omitted).

An abuse of discretion is manifest if defendant shows that a prosecutorial veto "(a) was not premised upon consideration of all relevant factors, (b) was based upon consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment." Id. at 583 (citation omitted). In order for such an abuse of discretion to rise to the level of patent and gross, the defendant must further show that the prosecutorial error complained of will clearly subvert the goals underlying PTI. State v. Bender, 80 N.J. 84, 93 (1979). Absent evidence to the contrary,

a reviewing court must assume the prosecutor considered all relevant factors in reaching its decision. State v. Dalqlish, 86 N.J. 503, 509 (1981) (citation omitted).

Defendant failed to meet the high burden to overturn the prosecutor's denial of his PTI application. Judge Mongiardo correctly concluded the rejection of defendant's application did not constitute a patent and gross abuse of discretion, and concisely set forth his reasons for denying defendant's appeal. Defendant's arguments to the contrary lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Mongiardo in his written opinion dated December 1, 2014.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION