

## RECORD IMPOUNDED

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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-3173-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

YUJIE GAO,

Defendant-Appellant.

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Submitted May 24, 2017 – Decided July 18, 2017

Before Judges Fuentes and Simonelli.

On appeal from the Superior Court of New  
Jersey, Law Division, Middlesex County,  
Accusation No. 14-10-0483.

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

Andrew C. Carey, Middlesex County Prosecutor,  
attorney for respondent (Nancy A. Hulett,  
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Yujie Gao appeals from the October 29, 2015 Law  
Division order, which denied his appeal of the rejection of his

application for admission into the pre-trial intervention (PTI) program. We affirm.

Defendant was charged with fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). The charges stemmed from an incident on a public bus where defendant sat next to a female passenger, who was asleep, and groped her breast and buttocks. The victim awoke when she felt a hand on her right breast and a hand on her buttock. She jumped up and screamed, and asked for the bus to be stopped. Another passenger moved defendant to the back of the bus. The bus driver stopped the bus and the New Jersey State Police were called.

A State Trooper arrived at the scene and saw that the victim appeared visibly disturbed and was crying and gasping for breath between sobs. The Trooper entered the bus and saw that defendant's pants button was unclasped and his zipper was lowered. Two passengers told the Trooper that after hearing the victim scream, they saw defendant masturbating and attempting to cover his penis with his jacket. Defendant told the Trooper that his elbow touched the victim's elbow and she seemed like a nice girl, so he decided to give her a massage, but stopped when she began screaming. Defendant admitted that he touched his penis during the incident and touched the victim under her pants and shirt.

Defendant legally emigrated from China in 1997. He has no criminal history or substance abuse issues, and dedicated himself to raising his son while his wife continued living and working in China to support the family. He has two Masters Degrees, one in Engineering Mechanics, and another in Computer Science and Engineering, and had a job offer to work as a Clinical Programmer, but the start date was delayed due to the pending charge.

Defendant applied for admission into the PTI program. The Criminal Division manager (CCM) did not recommended defendant's admission, finding as follows:

The nature of the offense is of such severity that admission into PTI would deprecate the seriousness of the offense (Guideline 3(i)). PTI is a short-term program intended for victimless crimes (Guideline 1)  
. . . .

The defendant committed the offense while on a public bus. He took advantage of a young woman sleeping whose life could be significantly affected by the defendant's actions. The offense is a violation of an individual's body. It is felt defendant's admission into the program would not significantly protect the needs of the victim[] and society (Guideline 3(7)).

It appears the defendant is in need of mental health counseling. The defendant advised [State Troopers] he was "messaging" the victim because they touched elbows and the victim "seemed like a nice girl." the defendant's actions cannot be excused. According to PTI Guideline 3(i) there must be a balance struck between a defendant's amenability to

correction, responsiveness to rehabilitation and the nature of the offense. At the time of the defendant's PTI application, he did not take responsibility for his actions and indicated he did not commit the offense. CCM believes the defendant requires more intense supervision than is provided by the [PTI] program.

The CDM recognized favorable factors, including that defendant was charged with a fourth-degree offense, had a minimal court history, and a conviction could prohibit him from obtaining employment. However, the CDM rejected defendant's application "based on the seriousness of the offense, the need to protect society, and the public need for prosecution[.]"

The prosecutor agreed with the CCM's reasons and incorporated them in her reasons for rejecting defendant's admission into the PTI program. The prosecutor also considered all relevant factors set forth in N.J.S.A. 2C:43-12, stating as follows:

The State has evaluated this case from all aspects noted in the PTI guidelines and statutes. Among the factors which bear upon the Prosecutor's decision is the fact that this is a crime that involves a victim of a sexual assault. As noted in PTI Guideline 1(c) and N.J.S.A. 2C:43-12(a)(3), the purpose of [PTI] is to "provide a mechanism for permitting the least burdensome form of prosecution possible for defendant's charged with 'victimless' offenses." Defendant's actions clearly do not constitute a victimless offense. The victim in this case has been in contact with the State on numerous occasions. It is her sincere desire for this case to be handled through the traditional means of

prosecution. The needs and interests of the victim and society in prosecuting this case weigh in favor of rejecting this defendant from the PTI program. N.J.S.A. 2C:43-12(e)(7).

The nature of the offense and the facts of the case, as set forth above, weigh against admission into the PTI program. In this case, the value of supervisory treatment is outweighed by the public need for prosecution. N.J.S.A. 2C:43-12(e)(1), (2) and (14).

Defendant appealed the prosecutor's decision. While the appeal was pending, the CDM issued an addendum, stating that documents she received from defendant's attorney after the rejection of defendant's PTI application did not change the initial recommendation. In an oral opinion, Judge Diane Pincus denied defendant's appeal, finding there was no abuse of discretion or misapplication of the law, and no compelling reason warranting admission into PTI.

Defendant then pled guilty to fourth-degree criminal sexual contact in exchange for the State's agreement to recommend a one-year term of non-custodial probation. The trial court sentenced defendant to a one-year term of probation, and imposed the appropriate assessments, fines, and penalties.

On appeal, defendant raises the following contention:

POINT I

THE PROSECUTOR'S REJECTION OF  
DEFENDANT'S ADMISSION INTO [PTI] IS A

PATENT AND GROSS ABUSE OF DISCRETION THAT CLEARLY SUBVERTED THE GOALS UNDERLYING PTI, WHICH MUST BE CORRECTED BY THIS COURT.

We have considered this contention in light of the record and applicable legal principles and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Pincus in her comprehensive and cogent oral opinion. However, we make the following comments.

We have held that

PTI is a diversionary program designed to augment the options of prosecutors in disposing of criminal matters . . . [and] provide applicants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services or supervision, when such services or supervision can reasonably be expected to deter future criminal behavior by an applicant.

[State v. Motley, 369 N.J. Super. 314, 320 (App. Div. 2004) (quoting State v. Brooks, 175 N.J. 215, 223 (2002)).]

To gain admission, a defendant must obtain a positive recommendation from the PTI director and the consent of the prosecutor. Ibid.

In making a PTI determination, the prosecutor must evaluate the criteria set forth in N.J.S.A. 2C:43-12(e) and the Rule 3:28 Guidelines. State v. Negran, 178 N.J. 73, 80-81 (2003). As part

of that determination, the prosecutor must assess a defendant's "amenability to correction," potential "responsiveness to rehabilitation," and the nature of the offense charged. State v. Watkins, 193 N.J. 507, 520 (2008) (quoting N.J.S.A. 2C:43-12(b); State v. Bender, 80 N.J. 84, 89 (1979)).

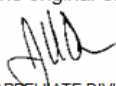
A "[d]efendant generally has a heavy burden when seeking to overcome a prosecutorial denial of his [or her] admission into PTI." Ibid. (citation omitted). In order to overturn a prosecutor's rejection, a defendant must "clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion." State v. Hoffman, 399 N.J. Super. 207, 213 (App. Div. 2008) (quoting State v. Watkins, 390 N.J. Super. 302, 305 (App. Div. 2007), aff'd, 193 N.J. 507 (2008)). "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)). "Ordinarily, an abuse of discretion will be manifest if defendant can show that a prosecutorial veto (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 in judgment." State v. Bender, 80 N.J. 84, 93 (1979).

Prosecutors are granted "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. We afford the prosecutor's decision great deference. Wallace, supra, 146 N.J. at 589. For that reason, "[t]he scope of judicial review of a decision to reject a PTI application is 'severely limited.'" Hoffman, supra, 399 N.J. Super. at 213 (quoting Negran, supra, 178 N.J. at 82). A trial court can only overturn a prosecutor's decision to deny PTI upon finding a patent and gross abuse of discretion. Kraft, supra, 265 N.J. Super. at 112-13.

Here, there is no evidence, let alone clear and convincing evidence of a patent and gross abuse of discretion.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION