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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-4137-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT NAHM a/k/a BOB NAHM,  
ROBERT T. NAHM,

Defendant-Appellant.

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Submitted September 27, 2017 — Decided October 23, 2017

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,  
Law Division, Gloucester County, Indictment  
No. 15-10-0728.

Bruce H. Sherman, attorney for appellant.

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

PER CURIAM

Defendant Robert Nahm was charged with fourth-degree  
operating a motor vehicle during a period of license suspension  
for multiple convictions of driving while intoxicated (DWI),

N.J.S.A. 2C:40-26(b), and driving while suspended, N.J.S.A. 39:3-40. Defendant applied for admission into Pretrial Intervention (PTI). Following rejection of his PTI application by the Gloucester County Prosecutor, defendant filed a motion in the Law Division appealing from that rejection, which was denied by the trial court. Defendant then pled guilty to both offenses and was sentenced. Defendant appeals the February 19, 2016 order denying his motion to override the prosecutor's rejection, and the April 28, 2016 judgment of conviction, arguing the trial court erred when it upheld the prosecutor's rejection of his PTI application. We affirm.

We glean the following facts from the record on appeal. On March 21, 2015, at approximately 10:30 a.m., a Harrison Township police officer manning a stationary radar post on the shoulder of Mullica Hill Road (Route 322) ran a registration check on the work van being driven by defendant, which revealed that the driver's license of owner of the van, defendant Robert Nahm, was suspended. During the subsequent motor vehicle stop, defendant admitted his license was suspended as a result of a DWI conviction. Because the police officer was required to respond to a priority domestic violence call, defendant was issued a summons in the mail for driving while suspended. He was subsequently charged and indicted for violating N.J.S.A. 2C:40-26(b) after it was discovered that

defendant's license suspension was a result of a second DWI conviction.

Defendant alleges he began driving the van after his co-worker refused to drive it further because it was swaying in the wind. Defendant claims they would have been stranded if he did not take over driving. The incident did not involve a motor vehicle accident, drugs, or alcohol.

Defendant is fifty-two years old. He works as an independent contractor and has a nineteen-year-old daughter in college. Defendant has no prior criminal convictions, has no history of violence, and has never participated in any diversionary programs. Defendant claims he attended the required period of detainment at an Intoxicated Driver Resource Center, see N.J.S.A. 39:4-50(a)(1)(i), and was attending a sixteen-week alcohol counseling course.

Defendant applied for admission into PTI. He was recommended for admission into PTI by the vicinage's criminal division manager. In a one-page letter, the Gloucester County Prosecutor's Office objected to defendant's admission into PTI, citing criteria 1 (the nature of the offense), 2 (the facts of the case), and 17 (whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory program). N.J.S.A. 2C:43-12(e) (1), (2), (17).

The letter references defendant's prior DWI convictions in 2010 and 2014. The letter then states:

Coincidentally, the instan[t] offense occurred almost exactly one year to the day of his second conviction for operating a motor vehicle while intoxicated. These circumstances suggest to the Prosecutor that the defendant is not amenable to the rehabilitative process offered by the PTI Program.

Having considered all statutory factors set forth in N.J.S.A. 2C:43-12 in their totality, the Gloucester County Prosecutor opposes this application.

The letter did not discuss any other admission criteria or include any further fact specific analysis.

Defendant then appealed the denial of entry into PTI to the Law Division. The Prosecutor submitted a ten-page letter brief in opposition to the appeal. Unlike his rejection letter, the Prosecutor's letter brief included a fact-specific discussion of all of the applicable statutory admission criteria.

The PTI judge issued a February 19, 2016 order and oral decision denying defendant's appeal. The oral decision included a detailed review of the prosecutor's basis for rejecting defendant's PTI application, including the fact-specific analysis of the statutory criteria set forth in the prosecutor's opposing letter brief.

The judge found that the prosecutor used a "significant and clear rationale," including weighing all of the factors in making his determination. The judge noted that the prosecutor considered the repetitive nature of defendant's continuing offenses, which led the prosecutor to conclude that the defendant is not amenable to the rehabilitative processes offered by the program. The prosecutor further considered the fact that given defendant's age, the offense could not be excused as a youthful indiscretion. The prosecutor also gave significant weight to the protective benefit to society by prosecuting this type of case. Finally, the judge indicated that the prosecutor had engaged in an individualized assessment of the application. As a result, the judge concluded that the prosecutor's rejection was not a per se or categorical denial and did not amount to a patent and gross abuse of discretion.

Thereafter, defendant pled guilty to violating N.J.S.A. 2C:40-26, and driving while suspended, N.J.S.A. 39:3-40. Defendant was sentenced to the mandatory minimum 180-day jail term with no eligibility for parole, plus applicable penalties and assessments for the fourth-degree offense. He was ordered to pay fines and court costs and received a one-year suspension of driving privileges for the driving while suspended charge. The period of incarceration was stayed pending appeal.

Defendant appeals the denial of his PTI motion. See R.  
3:28(g). He raises the following arguments:

POINT ONE:

THE REJECTION OF THIS DEFENDANT FROM THE PRE-  
TRIAL INTERVENTION PROGRAM, BASED ON THE  
RECORD BEFORE THE COURT, SHOULD BE VIEWED AS  
AN IMPERMISSIBLE PER SE EXCLUSION.

POINT TWO:

A. THE STATEMENT OF REASONS FOR THE REJECTION  
OF DEFENDANT IS INADEQUATE AND FAILS TO  
ESTABLISH SUFFICIENT INDIVIDUALIZED  
EVALUATION OF HIS SUITABILITY TO PARTICIPATE  
IN PRE-TRIAL INTERVENTION.

B. THE PROSECUTOR HAS COMMITTED AN ABUSE OF  
DISCRETION BY WAY OF PLACING TOO MUCH WEIGHT  
ON THE NATURE OF THE OFFENSE AND ACCORDINGLY  
FAILING TO PROPERLY EVALUATE THE FACTORS THAT  
JUSTIFY DEFENDANT'S ADMISSION.

After reviewing the record presented to the PTI judge and  
being mindful of the enhanced deferential standard governing  
judicial review of prosecutorial decisions affecting admission  
into this diversionary program, we affirm. We conclude that the  
PTI judge did not err when he denied defendant's motion to override  
the prosecutor's rejection of defendant's PTI application on the  
basis that the prosecutor's decision did not constitute a "patent  
and gross abuse of discretion" as defined by our Supreme Court in  
State v. Bender, 80 N.J. 84, 93 (1979).

Defendant argues that the prosecutor's rejection was an impermissible per se denial. We note that N.J.S.A. 2C:40-26(c) requires the imposition of a mandatory minimum period of incarceration of 180 days during which the defendant is not eligible for parole. State v. French, 437 N.J. Super. 333, 336 (App. Div. 2014), certif. denied, 220 N.J. 575 (2015). Notwithstanding same, N.J.S.A. 2C:40-26(b) does not carry a presumption against admission into PTI under either N.J.S.A. 2C:43-12(b) or Guideline 3(i) to Rule 3:28. State v. Rizzitello, 447 N.J. Super. 301, 312-13 (App. Div. 2016).

The absence of a presumption against admission into PTI is not dispositive of the issue presented by this appeal – whether there is a sufficient basis to conclude the prosecutor's rejection of defendant's PTI application amounted to a patent and gross abuse of discretion. In our view, the PTI judge used the appropriate deferential standard of review when he answered this question in the negative.

Although defendant contends that his co-worker refused to drive any further, we do not view this as a case "in which an unforeseen emergency compelled defendant to undertake a course of action that [he] would not have taken under ordinary circumstances." State v. Sylvester, 437 N.J. Super. 1, 7 (App. Div. 2014). "Absent any mitigation, [the defendant's] actions can

be reasonably characterized as contemptuous of the court's authority." Ibid.

As statutorily established in N.J.S.A. 2C:43-12 to -22, and as implemented under Rule 3:28 and the Guidelines for Operation of Pretrial Intervention in New Jersey, PTI is fundamentally a discretionary program. Subject to judicial review, admission into PTI is based on a recommendation by the criminal division manager, with the consent of the prosecutor. State v. Nwobu, 139 N.J. 236, 246 (1995). The prosecutor's assessment is to be guided by seventeen non-exclusive factors enumerated in the PTI statute. N.J.S.A. 2C:43-12(e)(1)-(17). Courts must "presume that a prosecutor considered all relevant factors, absent a demonstration by the defendant to the contrary." State v. Wallace, 146 N.J. 576, 584 (1996).

"Deciding whether to permit diversion to PTI 'is a quintessentially prosecutorial function.'" State v. Waters, 439 N.J. Super. 215, 225 (App. Div. 2015) (quoting Wallace, supra, 146 N.J. at 582). "Prosecutorial discretion in this context is critical for two reasons. First, because it is the fundamental responsibility of the prosecutor to decide whom to prosecute, and second, because it is a primary purpose of PTI to augment, not diminish, a prosecutor's options." Nwobu, supra, 139 N.J. at 246. "Accordingly, 'prosecutors are granted broad discretion to

determine if a defendant should be diverted' to PTI instead of being prosecuted." Waters, supra, 439 N.J. Super. at 225 (quoting State v. K.S., 220 N.J. 190, 199 (2015)). In State v. Negran, 178 N.J. 73 (2003), the Court described the wide but not unlimited discretion afforded prosecutors when reviewing PTI applications, and the enhanced deference courts should employ:

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. The deference has been categorized as enhanced or extra in nature. Thus, the scope of review is severely limited. Judicial review serves to check only the most egregious examples of injustice and unfairness.

A prosecutor's discretion in respect of a PTI application is not without its limits, however. A rejected applicant must be provided with a clear statement of reasons for the denial. That writing requirement is intended to facilitate judicial review, assist in evaluating the success of the PTI program, afford to defendants an opportunity to respond, and dispel suspicions of arbitrariness. The requirement also enables a defendant to challenge erroneous or unfounded justifications for denial of admission.

[Id. at 82 (citations omitted); see also K.S., supra, 220 N.J. at 199-200.]

As correctly noted by the PTI judge, the trial court must not substitute its own discretion for that of the prosecutor even

where the prosecutor's decision is one which the trial court disagrees or finds to be harsh. See State v. Kraft, 265 N.J. Super. 106, 112-13 (App. Div. 1993). "Trial courts may overrule a prosecutor's decision to accept or reject a PTI application only when the circumstances clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of . . . discretion." State v. Roseman, 221 N.J. 611, 624-25 (2015) (citations omitted). We apply the same standard of review as the trial court, and review its decision de novo. Waters, supra, 439 N.J. Super. at 226.

In Rizzitello, we described the burden imposed on a defendant seeking to overturn a prosecutorial rejection.

To establish the prosecutor's rejection of defendant's PTI application amounted to a patent and gross abuse of discretion, a defendant must prove, by clear and convincing evidence, 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. . . . In order for such an abuse of discretion to rise to the level of patent and gross, it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pretrial Intervention.

[Rizzitello, supra, 447 N.J. Super. at 313 (citations omitted).]

Here, defendant has not met his heavy burden. Nor has the defendant shown that the prosecutor's decision clearly subverted the goals underlying PTI. Conversely, granting defendant PTI would not necessarily serve all the goals of PTI set forth in N.J.S.A. 2C:43-12(a)(1)-(5). Moreover, we cannot say that the prosecutor's decision could not have been reasonably made upon weighing the relevant factors. See Nwobu, supra, 139 N.J. at 254. On the contrary, we find that that the prosecutor properly considered and weighed all of the relevant factors in reaching his decision to reject defendant's application. Accordingly, we hold that the prosecutor's refusal to sanction admission into the program did not constitute a patent and gross abuse of discretion, and affirm.

We add the following observations. Generally, motor vehicle violations are not appropriate factors for consideration, but where the prosecutor indicates that such violations are indicative of a pattern of anti-social behavior, they may be considered. See Negran, supra, 178 N.J. at 84-85. Here, the prosecutor recited defendant's prior DWI convictions in 2010 and 2014 and the license suspensions imposed to explain the extent to which defendant's crime constituted part of a continuing pattern of anti-social behavior, N.J.S.A. 2C:43-12(e)(8), and to show that defendant was not amenable to the rehabilitative process offered by the program,

N.J.S.A. 2C:43-12(e)(2). In these circumstances we find the prosecutor properly relied upon the repetitive nature and timing of defendant's prior DWI convictions and resulting license suspensions.

The prosecutor also gave significant weight to the protective benefit to society by prosecuting violations of N.J.S.A. 2C:40-26(b). The consideration of that factor was appropriate and within the prosecutor's discretion. By enacting N.J.S.A. 2C:40-26(b), "the Senate intended to lodge 'criminal penalties for persons whose [drivers'] licenses are suspended for certain drunk driving offenses and who, while under suspension for those offenses, unlawfully operate a motor vehicle.'" State v. Luzhak, 445 N.J. Super. 241, 245 (App. Div. 2016) (quoting Senate Law and Public Safety and Veterans' Affairs Committee, Statement to S. 2939 (November 23, 2009)). In State v. Carrigan, 428 N.J. Super. 609, 614 (App. Div. 2012), certif. denied, 213 N.J. 539 (2013), we noted that the "strengthened penalty" for violation of N.J.S.A. 2C:40-26(b) was "legislatively prompted, at least in part, by reports of fatal or serious accidents that had been caused by recidivist offenders with multiple prior DWI violations, who nevertheless were driving with a suspended license."

Defendant complains that the prosecutor did not provide a full consideration of each statutory factor in his initial

rejection letter. We agree. "A prosecutor is required to provide a criminal defendant with a statement of reasons justifying his or her PTI decision, and the statement of reasons must demonstrate that the prosecutor has carefully considered the facts in light of the relevant law." Wallace, supra, 146 N.J. at 584; see also K.S., supra, 220 N.J. at 198-99 (the prosecutor is required to consider the criteria set forth in N.J.S.A. 2C:43-12). If a prosecutor does not consider factors that should be considered, or does consider factors that should not be considered, a remand may be appropriate. K.S., supra, 220 N.J. at 200. Here, the failure to provide a full consideration of each factor was adequately addressed in the prosecutor's subsequent letter brief, which provided a fact specific consideration of each relevant factor. Therefore, a remand is unnecessary as it would serve no useful purpose.

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION