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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5084-15T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DONOVAN L. HAYDEN,

Defendant-Respondent.

Submitted February 7, 2017 – Decided August 1, 2017

Before Judges Espinosa, Suter and Guadagno.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
16-03-0353.

Esther Suarez, Hudson County Prosecutor,
attorney for appellant (Stephen J. Natoli,
Assistant Prosecutor, on the brief).

Joseph E. Krakora, Public Defender, attorney
for respondent (Rochelle Watson, Assistant
Deputy Public Defender, of counsel and on the
brief).

PER CURIAM

This is the State's appeal from a decision by the trial court
to admit defendant into the Pre-Trial Intervention (PTI) program

over the Prosecutor's objection on the ground that the State had applied a per se rule to reject defendant's application.

At his arraignment on a second-degree weapons offense charge, defendant's counsel stated defendant was applying for admission into the Pre-Trial Intervention program (PTI). The assistant prosecutor countered, "the State will be opposing any PTI application for [defendant.]" After its review of defendant's PTI application, the Criminal Division recommended defendant's admission into the Pre-Trial Intervention program (PTI), citing a number of factors personal to defendant and concluding he was "not a danger to society." The prosecutor rejected this recommendation and denied defendant's application in a terse letter that essentially relied upon the presumption of ineligibility for persons charged with second-degree offenses.

We have reviewed the prosecutor's statement of reasons for rejecting defendant's application. We conclude the prosecutor failed to make an individualized assessment of the defendant under the PTI Guidelines, established by R. 3:28, that took into account his "'amenability to correction' and potential 'responsiveness to rehabilitation,'" State v. Roseman, 221 N.J. 611, 621-22 (2015) (quoting State v. Watkins, 193 N.J. 507, 520 (2008)); N.J.S.A. 2C:43-12(b)(1), and to consider the statutory criteria required by N.J.S.A. 2C:43-12(e).

For the reasons that follow, we reverse the trial court's decision to admit defendant into PTI and remand to the trial court to: provide additional reasons for its decision, remand to the prosecutor for further consideration or reverse its decision, in light of the principles we review in this opinion.

I.

Defendant was twenty-six years old at the time of his arrest on November 15, 2015. He was stopped by Jersey City police officers for a motor vehicle offense, tailgating, N.J.S.A. 39:4-89. When defendant opened the center console of his car to retrieve his credentials, one of the officers observed a handgun in the console. The gun, a loaded Taurus Model PT.22, a .22 caliber handgun, was seized. Defendant was arrested and charged with second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(b).

"Any defendant charged with crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in reviewing the application." Guidelines for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, Guideline 3(i) following R. 3:28 at 1235 (2017). However, depending upon the nature of the offense charged, the PTI Guidelines establishes a rebuttable presumption that the application "should generally be rejected"

or "should ordinarily not be considered." Ibid. A "defendant's application should generally be rejected" if the charged offense was:

(1) part of organized criminal activity; or
(2) part of a continuing criminal business or enterprise; or (3) deliberately committed with violence or threat of violence against another person; or (4) a breach of the public trust where admission to a PTI program would deprecate the seriousness of defendant's crime.

[Ibid.]

Defendant was not charged with an offense that fell within these categories. Because he was charged with a second-degree offense, his offense was subject to a different rebuttable presumption: "A defendant charged with a first or second degree offense . . . should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the prosecutor." Ibid. Notwithstanding this presumption, the Guideline establishes the procedure for review of the PTI application:

However, in such cases, the applicant shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against

enrollment would be arbitrary and unreasonable.

[Ibid.]

The statute that governs PTI does not bar defendants charged with a second-degree offense from admission or codify a presumption against admission for such defendants. N.J.S.A. 2C:43-12. As amended by L. 2015, c. 98, which was effective August 10, 2015, prior to defendant's application, the only limitation applicable to defendant's admission to PTI was that he enter a plea of guilty. N.J.S.A. 2C:43-12(g)(3). The statute provides further, "the plea shall be held in an inactive status pending termination of supervisory treatment Upon successful completion of the program of supervisory treatment the charges shall be dismissed." Ibid.

At defendant's arraignment, his attorney stated he had made application and been interviewed for PTI. The prosecutor responded summarily, "the State will be opposing any PTI application for [defendant.]"

Following a review of defendant's application, the Criminal Division recommended that defendant be enrolled in PTI. The recommendation letter cited the following reasons for that conclusion:

This case represented defendant's "initial known contact with the criminal justice system." He had no contact with the juvenile justice system. There was no need to refer him for a substance abuse evaluation. He was employed, lived with his father and sister in a "relatively quiet" neighborhood in Jersey City, and contributed approximately twenty-five to thirty percent of the rent each month. Defendant admitted that purchasing and carrying the handgun "were both examples of very poor judgment," stating:

I just felt unsafe, that's all. I felt unsafe and nervous at the time because of all the things that were going on in the area. Honestly I don't even like guns or dealing with stuff like that, but I just felt unsafe. I actually don't want to live here anymore. I want to move to Pennsylvania with my girlfriend because I feel like you can't even go outside around here anymore.

The recommendation acknowledged the seriousness of the offense charged but noted the circumstances that led to defendant's arrest "were not of a violent or assaultive nature." The officer's evaluation included the following:

It is the belief of this Officer that the defendant is not a danger to society. Taking into consideration the defendant's lack of a criminal history in addition to being gainfully employed and abstaining from the use of drugs, this Officer cannot readily identify any evidence to suggest Mr. Hayden is likely to reoffend.

. . . .

This Officer does not believe that Mr. Hayden's poor judgment merits a response from the Court that would result in a conviction on the defendant's otherwise non-existent criminal history, especially a conviction that carries the possibility of a custodial sentence.

It is the belief of this Officer that the hardships Mr. Hayden will inevitably face as the result of having a criminal record containing a conviction for a second degree crime would outweigh any harm done to society by abandoning traditional criminal prosecution in favor of the supervisory treatment that the defendant would receive through acceptance into the PTI program.

[(Emphasis added).]

After receiving this recommendation, the prosecutor's office was required to make an individualized assessment of the defendant under the PTI Guidelines, established by Rule 3:28, that took into account his "'amenability to correction' and potential 'responsiveness to rehabilitation.'" Roseman, supra, 221 N.J. at 621-22 (quoting Watkins, supra, 193 N.J. at 520); N.J.S.A. 2C:43-12(b)(1).

The prosecutor was also specifically required to consider the seventeen factors listed in N.J.S.A. 2C:43-12(e), State v. Lee, 437 N.J. Super. 555, 562 (App. Div. 2014), which we list for ease of reference:

- (1) The nature of the offense;
- (2) The facts of the case;

(3) The motivation and age of the defendant;

(4) The desire of the complainant or victim to forego prosecution;

(5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;

(6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment;

(7) The needs and interests of the victim and society;

(8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;

(9) The applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others;

(10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;

(11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;

(12) The history of the use of physical violence toward others;

(13) Any involvement of the applicant with organized crime;

(14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;

(15) Whether or not the applicant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;

(16) Whether or not the applicant's participation in pretrial intervention will adversely affect the prosecution of codefendants; 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 treatment program.

[N.J.S.A. 2C:43-12(e).]

When the prosecutor rejects a PTI application, N.J.S.A. 2C:43-12(f) requires the prosecutor to "precisely state his findings and conclusion which shall include the facts upon which the application is based and the reasons offered for the denial." See also State v. K.S., 220 N.J. 190, 198-99 (2014); State v. Nwobu, 139 N.J. 236, 248 (1995) (citing Pressler & Verniero, supra, Guideline 8, at 1240-41); State v. Rizzitello, 447 N.J. Super.

301, 311 (App. Div. 2016); Pressler & Verniero, supra, Official Comment to Guideline 2 at 1234.

The rejection letter relied upon by the State to justify its rejection of defendant's PTI application reads as follows:

The defendant is charged in the Indictment with a second degree weapons offense which carries a mandatory term of imprisonment and is therefore presumptively ineligible for admission into the PTI Program, absent compelling reasons justifying his admission. Defendant's first offender status, standing alone, does not constitute a "compelling reason," and nothing in defendant's character or background is sufficiently "extraordinary" or "unusual" to overcome the presumption against admission. See State v. Nwobu, 139 N.J. 236 (1995).

Moreover, given the alarming proliferation of illegal, unregistered weapons and the threat they pose to public safety, the nature of the offense is such that the public need for prosecution and deterrence outweighs the value of supervisory treatment.

In sharp contrast to the Criminal Division manager's recommendation, this letter cited no facts regarding defendant's personal background other than his first offender status. Similarly, the letter relies heavily upon the "nature of the offense" but reveals no consideration of the circumstances of the offense. Further, the letter associates the offense with "the alarming proliferation of" firearms although there is no

allegation that defendant was engaged in the trafficking of firearms.

Defendant appealed from the State's rejection. He argued the rejection letter sent to the Criminal Division failed to show the prosecutor had taken all of defendant's circumstances into consideration. He argued further that, when viewed together, the rejection letter and the prosecutor's statement at the arraignment that the State would oppose any application for PTI represented a "per se" rejection. See State v. Baynes, 148 N.J. 434, 451 (1997) (reversing the prosecutors per se rejection of the defendants PTI application).

In opposition to defendant's motion, the prosecutor confirmed that defendant's PTI rejection was based on the reasoning set forth in the rejection letter. The prosecutor argued that because the statement made at arraignment did not constitute the State's rejection or play any role in the rejection decision, they did not contribute to any "per se" bar. Finally, the prosecutor argued the reasoning for rejecting defendant's application – as set forth in the rejection letter – was "sound logically and legally." The thrust of the argument presented was that there was nothing extraordinary or unusual to overcome the presumption against admission contained in Guideline 3(i).

After reviewing applicable legal principles, the trial judge found the rejection constituted a patent and gross abuse of discretion:

And in this case, this is a second degree offense. And it is whether or not the defendant has overcome the presumption against admission. Here, in the view of this Court, that the rejection of the defendant's application for PTI has, is considered a patent and gross abuse of discretion where the prosecution has created a per se bar on his admission based on a statement at arraignment relating to the likelihood of defendant's rejection from PTI, based on the statement made by the State at arraignment, and then the subsequent rejection by the Prosecutor's Office. It appears from the record that the State knew it would reject defendant's application prior to even receiving it solely based on the nature of the offense rather than upon examination of defendant's background and characteristics.

Upon reviewing the transcript and listening to the tape, or the record of the arraignment, the State specifically noted the State will be opposing any PTI application for Mr. Hayden. Based on this statement in combination with the rejection from the Prosecutor's Office, following a careful consideration, and acceptance into PTI by the Criminal Division Manager, it appears that the Prosecutor has per se barred defendant's admission into PTI.

She then ordered that defendant be enrolled in the PTI program.

In its appeal, the State argues:

POINT I

THE COURT ERRED IN ADMITTING THE RESPONDENT INTO PTI BASED ON THE PROSECUTOR'S STATEMENTS MADE AT THE ARRAIGNMENT.

POINT II

THE TRIAL COURT ERRED BY ADMITTING RESPONDENT INTO PTI OVER THE STATE'S OBJECTION AS RESPONDENT FAILED TO DEMONSTRATE THAT THE PROSECUTOR'S REJECTION AMOUNTED TO A PATENT AND GROSS ABUSE OF DISCRETION.

A. THE STATE CONSIDERED ALL RELEVANT FACTORS IN ITS REJECTION OF RESPONDENT'S PTI APPLICATION.

II.

The prosecutor's decision to accept or reject a defendant's PTI application is entitled to a great deal of deference. Roseman, supra, 221 N.J. at 624-25; State v. Leonardis, 73 N.J. 360, 381 (1977). We do not evaluate the case as if we "stood in the shoes of the prosecutor." State v. Wallace, 146 N.J. 576, 589-90 (1996). A prosecutor's decision to accept or reject a PTI application may be overruled 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.'" Roseman, supra, 221 N.J. at 624-25 (citation omitted); see Nwobu, supra, 139 N.J. at 254 ("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.").

Although we rarely overturn a PTI rejection, the prosecutor's discretion is not unlimited. State v. Negran, 178 N.J. 73, 82 (2003). In rendering the decision, the prosecutor must "make an individualized assessment of the defendant" and consider whether the defendant is amenable to rehabilitation. Roseman, supra, 221 N.J. at 621-22 (citing Watkins, supra, 193 N.J. at 520). The prosecutor may not weigh inappropriate factors or ignore appropriate factors. K.S., supra, 220 N.J. at 200. Further, judicial review is not so limited that a denial which addresses all the statutory factors and the Guidelines escapes further scrutiny. In Wallace, the Supreme Court instructed, "We are not to be understood as endorsing unbridled prosecutorial discretion simply because all relevant factors and no inappropriate factors are in the mix." Wallace, supra, 146 N.J. at 586. Rather, we are obligated "to check those instances where the prosecutor has so inappropriately weighted the various considerations so as to constitute a 'clear error in judgment.'" Ibid.; see also State v. Denman, 449 N.J. Super. 369, 376 (App. Div. 2017).

We are mindful of the distinction between a prosecutor's "abuse of discretion" and "gross and patent abuse of discretion"

and the remedies appropriate for each. In Roseman, the Court noted:

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 of judgment.

[221 N.J. at 625 (quoting State v. Bender, 80 N.J. 84, 93 (1979)).]

To establish a "gross and patent abuse of discretion" that justifies supplanting the prosecutor's decision, a defendant must also show "that the prosecutorial error complained of will clearly subvert the goals underlying Pretrial Intervention." Ibid. (quoting Bender, supra, 80 N.J. at 93). 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." Wallace, supra, 146 N.J. at 582-83 (citation omitted).

"If the prosecutor's abuse arises from a clear error of judgment, a court may order that a defendant be admitted into the program," State v. DeMarco, 107 N.J. 562, 567 (1987), and may do so "over the prosecutor's objection." Roseman, supra, 221 N.J. at 625; see also Nwobu, supra, 139 N.J. at 247.

When there has been an error that does not meet the "patent and gross abuse of discretion" standard, the appropriate remedy is a remand to the prosecutor, which affords the prosecutor "an opportunity to apply the standards set forth by the court 'without supplanting the prosecutor's primacy in determining whether [PTI] is appropriate in individual cases.'" K.S., supra, 220 N.J. at 200 (quoting State v. Dalqlish, 86 N.J. 503, 514 (1981)); see also Denman, supra, 449 N.J. Super. at 377.

III.

As the trial judge correctly stated, it is a patent and gross abuse of discretion when a prosecutor applies a per se bar to reject a defendant's application to PTI. We disagree, however, with the conclusion that the record supports the finding that the prosecutor applied a per se bar here.

Most typically, a per se bar is based upon an explicit, admitted policy the prosecutor follows without regard to the defendant's personal characteristics. For example, in Baynes, supra, 148 N.J. at 440, the prosecutor advised the defendant in writing "that his PTI application was rejected because of that prosecutor's acknowledged policy to deny PTI admission to defendants charged with "school zone offenses," including those involving possession of CDS for personal use." (emphasis added). Similarly, in State v. Caliguiri, 158 N.J. 25 (1999), the

prosecutor treated the PTI applicant as "categorically ineligible" based upon a directive from the Attorney General that required prosecutors to object to any PTI application by any person charged under N.J.S.A. 2C:35-7 unless the proofs were insufficient to sustain a conviction. Id. at 34.

The consequences for finding a per se rule was applied are significant:

By their nature, per se rules require prosecutors to disregard relevant factors, contrary to the guidelines, and when a defendant demonstrates that a prosecutor has relied on such a rule, the presumption that the prosecutor has considered all relevant facts is overcome.

[Baynes, supra, 148 N.J. at 444-45 (emphasis added).]

Here, the conclusion that a per se rule was applied can only be inferred from the statement of the prosecutor and the deficiencies in the rejection letter. Although those facts are not inconsistent with that conclusion, they are not sufficiently probative of that conclusion. As a result, the court was required to engage in closer scrutiny of the prosecutor's rejection.

IV.

Because defendant is charged with offenses that fall within PTI Guideline 3(i)(2) and thus is presumptively ineligible for admission into PTI, the court must first determine whether he has

satisfied his burden to present "compelling reasons" to rebut the presumption against his admission into PTI. Defendant was required to present facts or materials "'demonstrating [his] amenability to the rehabilitative process' and 'showing compelling reasons justifying [his] admission and establishing that a decision against enrollment would be arbitrary and unreasonable.'" State v. Seyler, 323 N.J. Super. 360, 369 (1999), aff'd o.b., 163 N.J. 69 (2000); Pressler & Verniero, supra, Guidelines 2, 3(i), at 1234-35. This means he "must demonstrate something extraordinary or unusual, something 'idiosyncratic,' in his . . . background." Nwobu, supra, 139 N.J. at 252 (quoting State v. Jabbour, 118 N.J. 1, 7 (1990)). This does not, however, require proof that denial of his PTI application "would constitute a 'serious injustice.'" Caliquiri, supra, 158 N.J. at 44.

To determine whether defendant has presented "compelling" reasons to justify his admission into PTI, "the prosecutor and any reviewing court are required to consider the criteria set forth in N.J.S.A. 2C:43-12," which "include '[t]he nature of the offense,' '[t]he facts of the case,' '[t]he needs and interests of . . . society,' and '[w]hether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution.'" Seyler, supra, 323 N.J.

Super. at 369-70 (alterations in original) (citations omitted); see also K.S., supra, 220 N.J. at 198.

It is appropriate to bear in mind the rationale underlying the presumptions contained in the Guidelines. Presumptions against PTI reflect an assumption that certain defendants "have committed crimes that are, by their very nature, serious or heinous and with respect to which the benefits of diversion are presumptively unavailable." Roseman, supra, 221 N.J. at 622 (quoting Watkins, supra, 193 N.J. at 523). The reasoning underlying the presumption is that applicants "who have committed serious and heinous crimes are generally recognized as problematic from a rehabilitation standpoint." Watkins, supra, 193 N.J. at 513.

This case is ill-suited for the application of this assumption. First, the offense charged cannot reasonably be considered "heinous," or of such a character that the offender should be considered unlikely to be amenable to correction. Second, defendant's personal circumstances offer strong support for the conclusion, reached by the Criminal Division manager, that he is unlikely to reoffend. We leave it to the trial court to apply the statutory criteria to the facts in defendant's background and the circumstances of the offense to determine whether defendant has presented compelling reasons for his admission to PTI.

V.

In the event the trial court should conclude defendant has presented compelling reasons for his admission, the next consideration is whether defendant has shown an abuse of discretion by satisfying one of the three factors identified in Roseman, i.e., whether the prosecutor's rejection was "premised upon a consideration of all relevant factors." Roseman, supra, 221 N.J. at 625 (quoting Bender, supra, 80 N.J. at 93). Scrutiny of the prosecutor's statement of reasons here is particularly appropriate because the State has consistently maintained in the trial court and on appeal that its statement of reasons reflects a full and fair consideration of all factors relevant to defendant's PTI application and provides a sound legal basis for rejection. Additionally, we note, "a reviewing court's scrutiny is generally limited to the justification contained in the statement of reasons." Wallace, supra, 146 N.J. at 584.

Our courts have emphasized the importance of the statement of reasons mandated by N.J.S.A. 2C:43-12(f), which "serves four purposes: (1) It facilitates effective judicial review; (2) it assists in evaluating the success of the PTI program; (3) it affords the defendant the opportunity to prepare a response; and (4) it dispels suspicions of arbitrariness." Nwobu, supra, 139 N.J. at 249 (citing Leonardis, supra, 71 N.J. at 114-15).

A.

A review of the applicable principles is helpful in evaluating the statement of reasons here.

Each PTI applicant is "entitled to full and fair consideration of his application." N.J.S.A. 2C:43-12(f). The statement of reasons must show that the prosecutor has made an individualized assessment of the defendant, giving due consideration to the statutory factors, N.J.S.A. 2C:43-12(e), and evaluating the individual applicant's "amenability to rehabilitation," Roseman, supra, 221 N.J. at 630 (quoting Nwobu, supra, 139 N.J. at 255). The factors that must be considered include "the details of the case, defendant's motives, age, past criminal record, standing in the community, and employment performance[.]" Id. at 621 (alteration in original) (quoting Watkins, supra, 193 N.J. at 520); accord Denman, supra, 449 N.J. Super. at 376. The prosecutor cannot ignore evidence bearing on the relevant factors in the Guidelines and PTI statute. State v. Lee, 437 N.J. Super. 555, 567-68 (App. Div. 2014), certif. denied, 222 N.J. 18 (2015). At a minimum, the prosecutor "should note the factors present in defendant's background or the offense purportedly committed which led [the prosecutor] to conclude that admission should be denied." Nwobu supra, 139 N.J. at 249 (alteration in original) (quoting State v. Sutton, 80 N.J. 110, 117 (1979)).

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. "[B]ald declarations" that "merely parrot[] the statutory language without providing any factual justification . . . are insufficient to support PTI denial." Roseman, supra, 221 N.J. at 627-29.

"[T]he statement of reasons must not be vague," either. Nwobu, supra, 139 N.J. at 249. Rather, the prosecutor's reasons for rejection of the PTI application must be stated with "sufficient specificity so that defendant has a meaningful opportunity to demonstrate that they are unfounded." Ibid. (citation omitted).

Typically, a prosecutor's rejection letter addresses each of the factors listed in N.J.S.A. 2C:43-12(e) and explains how each factor is or is not relevant to its consideration of an application. Although plainly a preferred approach, it need not be followed if the prosecutor's consideration of all appropriate factors is evident from a reading of the statement of reasons. That is not the case here.

B.

There are certain glaring deficiencies in the rejection letter relied upon as the prosecutor's statement of reasons. Of the seventeen factors listed in N.J.S.A. 2C:43-12(e), only two are

reflected in the statement of reasons: "(1) the nature of the offense," 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 treatment program." Even as to these two factors, the rejection letter merely notes defendant is charged with a second-degree offense and parrots factor (17). To the extent the rejection letter may be viewed as invoking factors (11) and (14), it was only in conclusory fashion.

Statutory factors that plainly should have been considered include: N.J.S.A. 2C:43-12(e)(2), (3), and (8) through (13). While the prosecutor noted the degree of the offense, there was no discussion of the circumstances of the offense. See Roseman, supra, 221 N.J. at 621; Watkins, supra, 193 N.J. at 520; Cannel, New Jersey Criminal Code Annotated, comment 2 on N.J.S.A. 2C:43-12 (2017) (noting, "the circumstances of the crime rather than the particular crime charged must be involved in the decision.") Relevant to factors (2) and (10), the offense was discovered as the result of a motor vehicle stop for tailgating. The weapon was not associated with any other crime and was revealed only because defendant looked in the console for his credentials to comply with the officer's request following a motor vehicle stop. There was nothing in the police reports to suggest that defendant was

anything other than fully cooperative with their commands — no assaultive, suspicious or evasive behavior.

Factor (3), the defendant's age and motivation were also highly relevant factors. It was dismissive of the prosecutor to merely describe defendant as a first-time offender. There was no discussion of his age, personal history, standing in the community or employment record. See Roseman, supra, 221 N.J. at 621; Watkins, supra, 193 N.J. at 520.

At age twenty-six, this was defendant's first known contact with the criminal justice system. That means he had no juvenile adjudications or charges, no charges that were dismissed and no arrests for criminal or disorderly persons offenses. And, as a result, there is no evidence of a "continuing pattern of anti-social behavior" (factor 8), any "record of criminal and penal violations" that signal "a substantial danger to others" (factor 9), no "history of the use of physical violence toward others" (factor 12), and no involvement with organized crime (factor 13).

Because "juveniles are responsible for a large share of the total amount of crime, . . . an applicant's juvenile record clearly is relevant to the question whether admission into a PTI program 'can reasonably be expected to deter future criminal behavior by an applicant,'" and "whether an applicant's history includes 'the use of physical violence towards others[.]'" State

v. Brooks, 175 N.J. 215, 227-28 (2002) (alteration in original) (citations omitted). We note further that defendant expressed remorse and acknowledged he exercised poor judgment in engaging in this conduct.

Although defendant's fear does not justify arming himself in anticipation of the need to act in self-defense, it does provide a non-criminal purpose for his possession of the firearm relevant to factor (3). His stated motivation was accepted as credible by the Criminal Division manager. The lack of any criminal history bolstered that conclusion. Yet, the rejection letter reflects no consideration that defendant was motivated by fear rather than by a motive consistent with the assumption underlying the presumption against PTI, such as an intent to use the firearm to commit an independent offense.

All these factors weigh heavily in evaluating the likelihood that a PTI applicant may be deterred from further criminal activity without the need for criminal prosecution. They were considered by the Criminal Division in reaching the conclusion that defendant was a suitable candidate for PTI but were not addressed in the rejection letter.

In addition to failing to adequately address the statutory factors or conduct an individualized assessment of defendant, the rejection letter did not apply the principle set forth in N.J.S.A.

2C:43-12(b)(1): "Admission of an applicant into a program of supervisory treatment shall be measured according to the applicant's amenability to correction, responsiveness to rehabilitation and the nature of the offense." See also Roseman, supra, 221 N.J. at 621-22; State v. Mickens, 236 N.J. Super. 272, 278 (App. Div. 1989) (finding a patent and gross abuse of discretion that warranted ordering defendant into PTI where "the prosecutor had not one positive word to say about the rehabilitation standard, which is so fundamental a part of PTI" and the defendant's amenability to rehabilitation). The rejection letter demonstrates that defendant's PTI application was measured based upon the nature of the offense to the exclusion of the other statutorily mandated considerations, which require a focus on the defendant's personal attributes.

The record plainly shows the prosecutor failed to consider all relevant factors in defendant's application or to make an individualized assessment of him.

C.

To determine whether the rejection rose to the level of a "patent and gross" abuse of discretion the trial court must consider whether this failure clearly subverted the goals underlying PTI. See Roseman, supra, 221 N.J. at 625.

The Guidelines for Operation of Pretrial Intervention in New Jersey adopted by the Supreme Court include an articulation of the program's purposes:

(1) to enable defendants to avoid ordinary prosecution by receiving early rehabilitative services expected to deter future criminal behavior; (2) to provide defendants who might be harmed by the imposition of criminal sanctions with an alternative to prosecution expected to deter criminal conduct; (3) to avoid burdensome prosecutions for "victimless" offenses; (4) to relieve overburdened criminal calendars so that resources can be expended on more serious criminal matters; and (5) to deter future criminal behavior of PTI participants.

[Nwobu, supra, 139 N.J. at 247 (citing Pressler & Verniero, supra, Guideline 1, at 1233).]

Pursuant to Guideline 2, "[a]ny defendant accused of crime shall be eligible for admission into a PTI program," and such eligibility "is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur." Pressler & Verniero, supra, Guideline 2, at 1234, see also Nwobu, supra, 139 N.J. at 247-48. Because the breadth of eligibility is measured by the defendant's capacity to avoid future criminal conduct, offense-related factors will not defeat eligibility in appropriate cases. See Caliquiri, supra, 158 N.J. at 39 ("Even offenders charged with violent or first-degree offenses are not

categorically ineligible."). Guideline 3 explicitly provides for consideration, under specific circumstances, of PTI applications from persons who are not first offenders, Pressler & Verniero, supra, Guideline 3(e), at 1234-35; are charged with more than one offense, Nwobu, supra, 139 N.J. at 247-48; or are parolees or probationers, Pressler & Verniero, supra, Guideline 3(f), at 1235. Guideline 3(i), therefore calls for a "balance [to be] struck between a defendant's amenability to correction, responsiveness to rehabilitation and the nature of the offense." Id., Official Comment to Guideline 3, at 1237-38.

The prosecutor made no effort to strike such a balance, in contravention of Guideline 3(i). Moreover, the narrow focus on the nature of the offense, divorced from its circumstances and the factors in defendant's background that led the Criminal Division manager to conclude he was unlikely to reoffend, is at odds with the goal of PTI to afford the opportunity to avoid criminal prosecution to "all defendants" who can show "future criminal behavior will not occur."

The Official Comment to Guideline 1 notes that diversion "can serve as sufficient sanction to deter future criminal conduct" in appropriate cases; that some people "can be deterred from criminal behavior by short term rehabilitative work or supervision" while for others, "no more than a supervised pretrial probationary period

may be necessary when no extensive need for rehabilitative services can be discerned." Id., Official Comment to Guideline 1, at 1233. Further, the public interest can be served when diversion "results in the deterrence of future misconduct." Ibid.

These principles highlight the fact that the central purpose of PTI is to "divert[] eligible defendants out of the criminal process to their own advantage, society's and that of the criminal justice system." Mickens, supra, 236 N.J. Super. at 277. The relevant question is whether defendant can be deterred from future criminal behavior and it is answered through an individualized assessment of his amenability to refrain from such conduct. The label placed on the offense charged does not dictate the answer and it is understood that some PTI applicants, like defendant, will not require extensive rehabilitative services to accomplish this goal.

The prosecutor ignored these principles. There was no individualized assessment of defendant's amenability to correction. It is also noteworthy that the prosecutor failed to consider the deterrent value of the requirement imposed by N.J.S.A. 2C:43-12(g)(3). Because he was charged with a second degree offense, defendant would be required to enter a guilty plea that would be held in abeyance pending defendant's successful completion of the PTI program. Yet, there was no consideration

as to whether this veritable sword of Damocles would adequately serve any of the legitimate prosecution interests regarding defendant's offense or provide sufficient incentive for defendant to be deterred from future criminal activity.

Despite the manifest inadequacy of the rejection letter, the prosecutor has maintained throughout that its rejection was based upon a full and fair consideration of defendant's application. "Failure to provide 'comprehensive and flexible' evaluation 'undermine[s] the efficacy of PTI.'" Caliquiri, supra, 158 N.J. at 39 (alteration in original) (citations omitted).

D.

In the event the trial judge concludes the rejection here constituted a patent and gross abuse of discretion, the next decision concerns the appropriate remedy. In Mickens, supra, Judge Pressler succinctly described the task at hand:

[T]he appellate court must distinguish between prosecutorial abuse consisting of the failure to consider all relevant factors specific to the individual candidate and prosecutorial abuse represented by a judgment reached after a full consideration. In the first instance, it is the obligation of the reviewing court to remand to the prosecutor for reconsideration. In the second instance, the reviewing court is free to conclude that the abuse "arises from a clear error of judgment," and, if it does so, it "may order that a defendant be admitted into the program.

[236 N.J. Super. at 277-78 (quoting State v. DeMarco, 107 N.J. 562, 567 (1987)).]

Although a remand to the prosecutor is the customary remedy, that is not the required disposition even when the prosecutor's error is merely an abuse of discretion and does not rise to the level of a patent and gross abuse of discretion. The reviewing court should determine that a remand will "serve a useful purpose." Caliquiri, supra, 158 N.J. at 43 (citing Dalqlish, supra, 86 N.J. at 509).

Although these examples are not exclusive, a useful purpose is served when "the prosecutor failed to consider all relevant factors," Wallace, supra, 146 N.J. at 583-84; when the prosecutor mistakenly applied a presumption of PTI ineligibility under Guideline 3(i) to a defendant not charged with one of the included crimes, State v. Coursey, 445 N.J. Super. 506, 512 (App. Div. 2016); when the rejection was improperly based upon a prosecutor's policy, State v. Baynes, 148 N.J. 434, 450 (1997), or a directive from the Attorney General, Caliquiri, supra, 158 N.J. at 45, rather than upon an individualized assessment of the PTI applicant; or when the Court has announced a new interpretation of a Guideline to be considered in evaluating the defendant's application, K.S., supra, 220 N.J. at 199. What is common to each of these examples is that the rejection decision rested upon a legal error that

could readily be remedied on remand pursuant to the reviewing court's direction.

A different course of action is appropriate when the error represents an error in judgment.

It is unlikely, on the other hand, that a remand would serve a useful purpose if the prosecutor's decision was based on appropriate factors but, clearly and convincingly, amounted to a plain error of judgment equivalent to a patent and gross abuse of discretion. In that situation it is usually appropriate for a court directly to order admission to PTI.

[Wallace, supra, 146 N.J. at 584.]

In Roseman,¹ supra, the Court acknowledged that a remand was the customary remedy for an inadequate statement of reasons by the prosecutor. 221 N.J. at 629. Nonetheless, the Court concluded a remand was inappropriate because the "circumstances show clearly and convincingly that there has been a patent and gross abuse of discretion by the prosecutor which constituted a clear error in judgment that will 'subvert the goals underlying [PTI].'" Id. at 629-30 (alteration in original) (citation omitted); see also Wallace, supra, 146 N.J. at 582 (noting a reviewing court may order a defendant into PTI if the defendant can "clearly and

¹ In Roseman, the defendants were charged with second-degree official misconduct, which creates a presumption against acceptance into PTI under both the Guidelines and N.J.S.A. 2C:43-12(b). 221 N.J. at 617, 618-19.

convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of . . . discretion." (alteration in original) (citation omitted)). "[A]n error in applying guidelines to the facts of the case" will rise to a "clear error of judgment" if it "is one that 'could not have reasonably been made upon a weighing of the relevant factors.'" Nwobu, supra, 139 N.J. at 253-54 (quoting State v. Roth, 95 N.J. 334, 366 (1984)).


At the time the assistant prosecutor announced at defendant's arraignment that the State would oppose his PTI application, it was evident that the statement was made without any access to or consideration of defendant's personal background or amenability to correction. The State has not contended otherwise. If the rejection here was not based on the offense charged, per se, the rejection letter was not just the prosecutor's opportunity to elaborate; it was the prosecutor's obligation to show there had been an individualized assessment of defendant and the offense committed, applying the statutory factors. The statement of reasons relied upon by the State utterly failed to do so.

Certainly, the nature of the offense is a relevant factor, but the rejection letter also includes an implicit conclusion — that defendant is not amenable to correction. That factor is at the core of any assessment of a defendant's PTI application. Yet,

despite the State's persistence it has fully and fairly considered all relevant factors, there is no evidence that the prosecutor properly considered and weighed defendant's amenability to correction.

We therefore remand this matter to the trial judge for further proceedings consistent with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION