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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5244-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SEAN K. JUSTICE,

Defendant-Appellant.

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Submitted August 8, 2017 — Decided December 19, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey,  
Law Division, Salem County, Indictment No.  
15-12-0602.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Daniel S. Rockoff, Assistant  
Deputy Public Defender, of counsel and on  
the briefs).

John T. Lenahan, Salem County Prosecutor,  
attorney for respondent (Derrick Diaz, Salem  
County Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant Sean K. Justice appeals from his conviction for third-degree distribution of heroin, N.J.S.A. 2C:35-5(a)(1). Specifically, he challenges the denial of his motion to admit him into the pretrial intervention program (PTI), N.J.S.A. 2C:43-12 to -22. For the reasons that follow, we reverse the order denying defendant's motion and remand for reconsideration of his application by the assistant prosecutor (prosecutor).

I

We briefly recite the salient facts. Defendant was indicted for third-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3), as well as for third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1). As this was his first offense, defendant sought admission into PTI. The PTI Program Director recommended defendant's admission but the prosecutor rejected his application.

In a letter setting forth his reasons for denying defendant entry into PTI, the prosecutor did address the nature of the offense, which we recount. A confidential informant advised the police that defendant and others planned to participate in a narcotics transaction at a particular location. The letter did not specify the circumstances under which the police initiated contact with defendant, but the letter stated defendant told the

police he was on his on his way to meet a friend at a nearby motel. The police conducted a pat-down search of defendant and discovered two box cutters and forty-eight wax folds of heroin in his pocket.

The balance of prosecutor's rejection letter merely stated:

Based on the State's reading of R. 3:28 and N.J.S.A. 2C:43-12, the State feels that [defendant] is not a suitable candidate for PTI. Additionally, the State has reviewed the following factors, R. 3:28 (3)(i) et. seq. as well as [N.J.S.A.] 2C:43-12(e)(1), (2), (4), (7), (14), and (17), and found that your client is not an appropriate candidate.

The Prosecutor has weighed the defendant's amenability to correction and responsiveness to rehabilitation, against the nature of the offense and the need for deterrence, and finds that the defendant would be ineligible to participate in PTI due to the nature of the offense, as well as the need of the public to prosecute these types of offenses.

Defendant filed a motion seeking to be admitted into PTI, asserting the prosecutor abused his discretion when he denied defendant's application. Specifically, defendant argued the prosecutor either failed to or did not properly consider all of the relevant factors before he rejected defendant's application. In addition, defendant claimed the Prosecutor's Office admitted another person into PTI who had been charged with the same offenses. Finally, in support of his application, defendant

attached a letter from a co-worker, his mother, and a nurse. One of the letters referenced defendant's addiction to heroin.

The court denied defendant's motion. The court found the prosecutor "appears to have considered and weighed all relevant factors in this case." The court also determined the factual differences between defendant's case and the case of the person charged with the same offenses but admitted into PTI were too attenuated to merit any meaningful comparison.

Finally, the court found there existed a rebuttable presumption defendant was ineligible for admission into PTI under Guideline 3(i) of the PTI Guidelines. 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) (Guideline 3(i)). Guideline 3(i) provides in pertinent part:

A defendant charged with a first or second degree offense or sale or dispensing of Schedule I or II narcotic drugs as defined in L. 1970, c. 226 (N.J.S.A. 24:21-2 et seq.) by persons not drug dependent, should ordinarily not be considered for enrollment in a PTI program except . . . . 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.

[Guideline 3(i).]

The court determined Guideline 3(i) made defendant ineligible for PTI because "there is a rebuttable presumption against admission into PTI for individuals charged with possession of CDS, and possession with intent. It does not appear that facts are present . . . to rebut that presumption."

Following the court's decision, defendant pled guilty to third-degree distribution of heroin, N.J.S.A. 2C:35-3(a)(1). The factual basis for his plea was he intended to share the heroin in his possession with friends. He was sentenced to two years of probation, and ordered to submit to a substance abuse evaluation and adhere to any recommended treatment.

## II

On appeal, defendant asserts the following arguments for our consideration:

POINT I — THE TRIAL COURT ERRED BY DECLINING TO ADMIT MR. JUSTICE INTO PTI AFTER THE PROSECUTOR OVERRULED THE PTI DIRECTOR. THIS COURT SHOULD EITHER (1) ADMIT MR. JUSTICE INTO PTI, AS THE PTI DIRECTOR RECOMMENDED, OR (2) REMAND FOR RECONSIDERATION.

A. General Principles

B. The Court Erred By Declining To Admit Mr. Justice Into PTI.

C. At The Very Least, This Court  
Should Remand For a Fresh Look.

Specifically, defendant reprises the two arguments he asserted before the trial court and, in addition, challenges the court's determination that the terms of Guideline 3(i) created a rebuttable presumption he was not eligible for PTI. As for the latter argument, defendant does not dispute heroin is a Schedule I narcotic drug and that he was charged with selling or dispensing this drug. However, he contends he was addicted to heroin at the time he was charged and that, as a drug dependent person, the presumption in Guideline 3(i) he is ineligible for PTI is inapplicable.

Defendant also asserted various arguments that were not raised before the trial court; we decline to review any argument defendant failed to bring to the trial court's attention. "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012) (citing Deerfield Estates, Inc. v. E. Brunswick, 60 N.J. 115, 120 (1972)).

A prosecutor's decision to accept or reject a defendant's PTI application is entitled to great deference. However, each PTI applicant is "entitled to full and fair consideration of his application." N.J.S.A. 2C:43-12(f). The prosecutor must "make

an individualized assessment of the defendant" and consider whether the defendant is amenable to rehabilitation. State v. Roseman, 221 N.J. 611, 621-22 (2015) (quoting State v. Watkins, 193 N.J. 507, 520 (2008)). The prosecutor is also specifically required to consider the factors in N.J.S.A. 2C:43-12(e).<sup>1</sup> In

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<sup>1</sup> These factors are: (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

addition, evidence a defendant was drug dependent is a factor to consider when assessing a defendant's application for PTI. See N.J.S.A. 2C:43-12(a)(1).

If a prosecutor rejects an 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." Ibid. In addition, "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.'" State v. Nwobu, 139 N.J. 236, 249 (1995) (quoting State v. Maddocks, 80 N.J. 98, 109 (1979)).

Here, the prosecutor did note the circumstances of the offenses, although it is not clear the forty-eight wax folds found in defendant's possession was for distribution. But it is plainly evident from the balance of the prosecutor's rejection letter he failed to explicate the reasons for his opinion defendant was not qualified for PTI. Other than the first factor, the prosecutor did not specifically address the factors in N.J.S.A. 2C:43-12(e) or the various considerations required

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channeling an offender into a supervisory treatment program. N.J.S.A. 2C:43-12(e).



by the PTI Guidelines. Further, by clear implication, he did not even review factors three, five, six, eight, nine, ten, eleven, twelve, thirteen, fifteen, sixteen, and seventeen of N.J.S.A. 2C: 43-12(e).

"A prosecutor's decision to deny a defendant's PTI application is a 'patent and gross abuse of discretion' if the prosecutor's decision 'failed to consider all relevant factors . . . .'" Roseman, 221 N.J. at 627 (citing Nwobu, 139 N.J. at 247). "Ordinarily, the appropriate remedy for an inadequate statement of reasons by the prosecutor [is to] remand for further consideration . . . of a defendant's PTI application, and [give the prosecutor] the opportunity to provide an adequate factual basis for [his] findings." Id. at 629.

Here, because the prosecutor failed to consider all the relevant factors in defendant's application or to make an individualized assessment of him, we are compelled to reverse the order denying defendant admission into PTI and remand this matter back to the prosecutor so that he can properly review defendant's application and explain the bases for any opinion he reaches.

## B

Defendant next contends the trial court erred when it found defendant was presumptively ineligible for PTI because he was

charged with, as stated by the trial court, "possession of CDS, and possession with intent."

Guideline 3(i) states in pertinent part:

A defendant charged with a first or second degree offense or sale or dispensing of Schedule I or II narcotic drugs as defined in L. 1970, c. 226 (N.J.S.A. 24:21-2 et seq.) by persons not drug dependent, should ordinarily not be considered for enrollment in a PTI program except . . . .

[Emphasis supplied.]

Defendant's sole argument is he was drug dependent and, thus, the Guideline 3(i) presumption against admission into PTI does not apply to him.

We agree there is some indication in the record defendant was drug dependent. If defendant was drug dependent at the time of the commission of the charged offenses, the presumption of ineligibility in Guideline 3(i) would not apply.


We are guided by the remedy utilized in State v. Coursey, 445 N.J. Super. 506, 512 (App. Div. 2016), when confronted with analogous circumstances. Accordingly, not only do we reverse the order denying his PTI appeal and remand for reconsideration of his application by the prosecutor, but also direct that as part of the prosecutor's reconsideration of defendant's PTI application, defendant shall be permitted to submit any evidence

he was drug dependent at the time he committed the subject offenses, see ibid.

We have considered defendant's remaining argument and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Reversed and remanded. 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