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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-1125-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

V.

NATHAN T. MILLER,

Defendant-Appellant.

Submitted January 22, 2018 - Decided February 5, 2018

Before Judges Sabatino and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Salem County, Indictment No.
15-06-0310.

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

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

PER CURIAM

Defendant Nathan Miller appeals from the trial court's
October 7, 2016 order denying his motion for admission into the

pretrial intervention ("PTI") program over the prosecutor's objection. Defendant primarily contends the prosecutor and the court improperly considered his prior record, much of which involves out-of-state dispositions. He also contends the prosecutor improperly relied on mere arrests or other dispositions that did not result in convictions. Because defendant's criminal history is unclear from the record, we vacate the trial court's order and remand for further consideration.

I.

We discern the following facts from the record. Between March 29, 2015 and April 6, 2015, defendant entered a garage in Carneys Point without permission, and stole four tire rims. Defendant subsequently admitted he stole the rims, and other items, and sold them in Delaware. Defendant was charged in a Salem County indictment with third-degree burglary, N.J.S.A. 2C:18-2, third-degree theft, N.J.S.A. 2C:20-3, and fourth-degree criminal trespass, N.J.S.A. 2C:18-3(a).

Defendant applied for PTI. At the time of his application, defendant was twenty-one years old. A senior probation officer rejected defendant's application, and an assistant prosecutor

agreed.¹ In his rejection notice, the probation officer cited defendant's "multi-state court history with arrests/convictions in the State of Delaware and State of Pennsylvania." The probation officer referenced an "inquiry" into the Delaware charges that revealed three juvenile adjudications in 2011, and three adult convictions for: (1) unauthorized use of a motor vehicle in 2013; (2) a violation of probation in 2015; and (3) shoplifting in 2015. The probation officer did not reference defendant's computerized criminal history ("CCH") that also includes a violation of probation for an unspecified conviction, with an arrest date of October 10, 2013, and a disposition date of November 7, 2013.

The probation officer cited defendant for having three prior convictions in Pennsylvania, none of which is listed in defendant's CCH.² Nor did the probation officer reference any inquiry about the charges in Pennsylvania. Nevertheless, his rejection notice

¹ Although there is no indication in the record that defendant objected to the denial of his application by a probation officer and an assistant prosecutor, we note "[p]ursuant to the procedures and guidelines established by Rule 3:28 and N.J.S.A. 2C:43-12, acceptance into PTI is dependent upon an initial recommendation by the Criminal Division Manager and consent of the prosecutor." State v. Roseman, 221 N.J. 611, 621 (2015).

² In his opposition brief to the trial court, and at the PTI hearing before the motion judge, the assistant prosecutor conceded that the disposition of arrests listed on defendant's Pennsylvania CCH record are "unreported."

indicates defendant pled guilty, on March 3, 2016, to theft by unlawful taking, and use or possession of drug paraphernalia.

The probation officer's letter next indicates defendant was sentenced, in Pennsylvania, to a probationary term of six months and a term of confinement of seventy-five days to twenty-three months. Inexplicably, the probation officer's rejection notice then states that, on September 12, 2013, defendant was sentenced to eighteen months' probation for receiving stolen property and violating probation. According to the probation officer, on April 19, 2016, defendant was resentenced to "confinement with a maximum of [eighteen] months."

The assistant prosecutor found one factor disfavored defendant's acceptance into the PTI program, that is, "the applicant's criminal and penal violation[s] and the extent to which he may present a substantial danger to others." See N.J.S.A. 2C:43-12(e)(9). The assistant prosecutor reiterated defendant's criminal record as set forth in the probation officer's notice, with the exception of the violation of probation in Pennsylvania.

In sum, the assistant prosecutor cited defendant's prior convictions and the nature of the present offense as his reasons for denying defendant's admission into the PTI program. The correspondence is devoid of any reference to defendant's age or employment status. It is unclear whether the assistant prosecutor

reviewed and considered defendant's CCH, but the rejection letter does not include defendant's adult arrests, juvenile arrests or juvenile adjudications.³

Defendant appealed the denial of his PTI application to the trial court. In his brief,⁴ defense counsel contended the prosecutor had merely parroted the language of N.J.S.A. 2C:43-12(e)(9), and failed to demonstrate defendant posed a substantial danger to others. Defendant contended further he had no adult convictions in New Jersey, Delaware, or Pennsylvania. Finally, defendant claimed the State did not consider his age and employment status at the time of his application.

The State's opposition brief, unlike its earlier rejection letter,⁵ referenced defendant's "several arrests and convictions out of Delaware and Pennsylvania." The State not only listed defendant's adult arrests, but also what it characterized as his

³ Defendant's CCH was not provided to defendant until the PTI hearing.

⁴ Pursuant to Rule 2:6-1(a)(2), defendant appropriately supplied us with the parties' briefs filed in the trial court because "the issues raised before the trial court . . . are germane to the appeal."

⁵ For reasons unknown, the State's trial brief references its rejection letter as having denied defendant's PTI application "due to his past convictions and multiple arrests in Pennsylvania and Delaware." (emphasis added). However, the State's rejection letter does not mention defendant's arrests.

"large number of contacts with the criminal justice system as a juvenile in the State of Delaware." Citing the public policy of the PTI statute, the State rejected defendant because of his adult convictions in Delaware for unlawful use of a motor vehicle and violation of probation, the latter of which demonstrates defendant "is not amenable to rehabilitative treatment that PTI offers."

At the PTI hearing, defendant argued initially he did not have any felony convictions, and his violation of probation stemmed from a juvenile adjudication. After reviewing defendant's CCH record for the first time at the hearing, defense counsel requested certified copies of judgments of conviction ("JOC"). However, the hearing proceeded, nonetheless. Defendant acknowledged his conviction in Delaware for unauthorized use of a motor vehicle, but was unsure whether that offense was equivalent to a disorderly persons offense or indictable conviction in our state. Maintaining defendant did not have any prior indictable convictions, defense counsel again requested a certified JOC for the theft offense. Again, the hearing nevertheless proceeded.

The State argued defendant's Delaware theft conviction was equivalent to a fourth-degree joyriding offense in New Jersey.⁶

⁶ However, the State's appellate brief indicates the Delaware statute is a class A misdemeanor, "punishable by up to one year incarceration." See Del. Code Ann. tit. 11 § 4206 (2018).

N.J.S.A. 2C:20-10(b). Conceding for the sake of argument that the conviction was equivalent to a disorderly persons offense, the State argued "he still has multiple contacts with the system," including a juvenile record and violation of probation.

Although the State had earlier concluded defendant's violation of probation was sufficient to deny defendant's admission into the PTI program, the assistant prosecutor argued to the trial court, "based on his multiple number of arrests, [his] relatively young age, he [i]s not even [twenty-one] yet, there [are] two convictions[, t]he State feels that we were appropriate in denying him from PTI." (emphasis added).

Placing "little weight" on defendant's contacts with the criminal justice system that did not result in convictions, the motion judge found those contacts did not have "any major impact on the [p]rosecutor's decision." Rather, the judge concluded defendant's violation of probation as an adult was "a substantial factor, which the State correctly took into consideration."

On October 14, 2016, after the assistant prosecutor rejected defendant's PTI application, and the trial court denied his appeal, defendant pled guilty to criminal trespass, as amended to a disorderly persons offense, N.J.S.A. 2C:18-3(a), without waiving his right to file the present appeal of the PTI ruling. He was

sentenced on the same day to a two-year term of probation "concurrent to his Pennsylvania probation." This appeal followed.

On appeal, defendant raises a single point for our consideration:

THE PROSECUTOR'S REJECTION OF [DEFENDANT'S]
PTI APPLICATION CONSTITUTES A PATENT AND GROSS
ABUSE OF DISCRETION.

II.

We generally afford prosecutors "broad discretion to determine if a defendant should be diverted." State v. K.S., 220 N.J. 190, 199 (2015). "[T]o overturn a prosecutor's decision to exclude a defendant from the program, the defendant must clearly and convincingly show that the decision was a patent and gross abuse of . . . discretion." Id. at 200 (internal quotation marks and citation omitted).

However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Further, "[i]ssues concerning the propriety of the prosecutor's consideration of a particular [PTI] factor are akin to 'questions of law[.]'" State v. Maddocks, 80 N.J. 98, 104 (1979). "Consequently, on such matters an appellate court is free to substitute its independent judgment for that of the trial court

or the prosecutor should it deem either to have been in error."
Id. at 105; see also K.S., 220 N.J. at 199.

In K.S., the Court held a PTI applicant's "prior dismissed charges may not be considered for any purpose" where the facts related to the arrest are in dispute, or have not been determined after a hearing. K.S., 220 N.J. at 199. (emphasis added). A PTI rejection "must reflect only a proper consideration of the identified information" Id. at 198 (internal quotation marks and citation omitted). The prosecutor may not weigh inappropriate factors, or ignore appropriate factors. Id. at 200.

To meet the "gross and patent abuse of discretion" standard to justify supplanting the prosecutor's decision, a defendant must satisfy one of three criteria and must also show the prosecutor's decision undermines the purpose of PTI.

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. 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 [p]retrial [i]ntervention.

[State v. Bender, 80 N.J. 84, 93 (1979).
(citation omitted).]

However, when a defendant has not met this high standard for reversal, but nonetheless has demonstrated the trial court's abuse of discretion by considering inappropriate factors, a remand may be appropriate.

When a reviewing court determines the "prosecutor's decision was arbitrary, irrational, or otherwise an abuse of discretion, but not a patent and gross abuse of discretion," the reviewing court may remand to the prosecutor for further consideration. Remand is the proper remedy when, for example, the prosecutor considers inappropriate factors, or fails to consider relevant factors.

[K.S., 220 N.J. at 200 (quoting State v. Dalglish, 86 N.J. 503, 509 (1981)).]

As the Court explained, this middle-ground option of a remand preserves the opportunity for the exercise of the prosecutor's discretion, while assuring the PTI standards are employed properly. Ibid.

Applying these principles, we are persuaded the trial court erred in sustaining the prosecutor's decision, because defendant's actual criminal history is unclear from the record, and because the State has been inconsistent in its reliance upon that record. Specifically, while the State did not consider defendant's arrests in its initial rejection letter, it considered two purported convictions in Pennsylvania. However, at oral argument before the

trial court, the State conceded the dispositions of these charges were unknown.

Further, the trial court found the parties disputed whether defendant's conviction in Delaware for theft of a motor vehicle is the equivalent of a disorderly persons offense or a fourth-degree joyriding offense in New Jersey. It is likewise unclear whether defendant's violation of probation stemmed from this theft conviction or instead from a juvenile adjudication.

We are not satisfied, therefore, that defendant's violation of probation "alone," as argued by the State, is sufficient to deny his admission into the PTI program. Moreover, probationers are not automatically precluded from entry into the PTI program. See Guidelines for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, Official Comment to Guideline 3, following R. 3:28 at 1293-94 (2018) (setting forth "a policy permitting probationers and parolees to enter PTI programs," subject to consultation with their respective supervisory authorities).

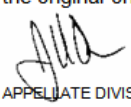
We also reject the State's contention that, even if K.S. were not strictly followed, defendant's PTI rejection should be affirmed because the State did not give great weight to his dismissed or unproven charges. While the assistant prosecutor repeatedly argued defendant's prior adult conviction and violation

of probation were sufficient to reject his application, defendant's multiple arrest record was repeatedly mentioned during oral argument.

We will not substitute our judgment for that of the prosecutor in ultimately determining whether to admit defendant into the PTI program. Nor do we intend to preclude the prosecutor from considering defendant's prior record, once determined, as properly limited by K.S. Indeed, we recognize defendant has prior juvenile adjudications. However, we are constrained to remand for reconsideration so the prosecutor may properly determine and weigh defendant's prior record along with all other applicable factors, including defendant's age and employment status.⁷ Pressler & Verniero, Guideline 3, following R. 3:28 at 1290; N.J.S.A. 2C:43-12(3).

Vacated and remanded for reconsideration by the prosecutor. If defendant is dissatisfied with the prosecutor's decision on reconsideration, he may file a new motion for relief with the trial court. We express no views on the appropriate outcome of the remand. 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

⁷ In order to properly determine defendant's out-of-state record, in this case, the State should obtain certified copies of any convictions.