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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2101-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTINE CHANSKY,

Defendant-Appellant.

Submitted March 1, 2018 – Decided April 11, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Accusation No. 16-
07-0546.

Triarsi, Betancourt, Wukovits & Dugan, LLC,
attorneys for appellant (Howard P. Lesnik, on
the brief).

Ann M. Luvera, Acting Union County Prosecutor,
attorney for respondent (Paul J. Wiegartener,
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Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant appeals from a January 3, 2017 judgment of
conviction for third-degree practicing medicine without a license,

and a sentence of three years' probation. In particular, defendant challenges the December 16, 2016 trial court order, rejecting her appeal of the prosecutor's decision denying her application for admission into the Pretrial Intervention (PTI) program. On appeal, defendant makes the following argument:

THE STATE'S DENIAL OF [DEFENDANT] FROM PTI WAS A PATENT AND GROSS ABUSE OF DISCRETION AND REQUIRES THIS COURT TO REVERSE AND REMAND THIS MATTER WITH CLEAR INSTRUCTIONS TO THE PROSECUTOR'S OFFICE FOR RECONSIDERATION.

A) THE STATE'S RELIANCE ON UNFAIR, IRRELEVANT AND INAPPROPRIATE FACTORS - SUCH AS THE DEFENDANT'S OCCUPATION AS A MEDICAL PROFESSIONAL - RESULTED IN AN UNJUST REJECTION FROM THE PTI PROGRAM AND MUST BE REVERSED.

B) THERE [SIC] A PATENT AND GROSS ABUSE OF DISCRETION BY THE PROSECUTOR, AND THE PROSECUTOR'S DECISION COMPLETELY SUBVERTS THE GOALS UNDERLYING THE PTI PROGRAM; WHERE A TRUE EVALUATION OF THE CRITERIA WOULD REVEAL THAT THE DEFENDANT IS AN IDEAL CANDIDATE FOR THE PROGRAM.

Having considered the argument and applicable law, we affirm.

We discern the following facts from the record. Defendant has a Juris Doctorate degree and was licensed to practice medicine in New York and Delaware. As early as 1998, defendant became addicted to Vicodin and attended a substance abuse treatment program in 1999. However, despite years of substance abuse

treatment, defendant admitted relapsing in 2013. In October 2014, defendant admitted to the New York State Department of Health, Office of Professional Medical Conduct, that she had diverted some of her mother's prescription medications for her own personal use. Specifically, from October 2012 to September 2014, defendant diverted forty-one prescriptions for Zolpidem (generic for Ambien), a schedule IV controlled substance, Lorazepam (generic for Ativan), a schedule IV controlled substance, and Hydrocodone (an opioid pain medication), a schedule III controlled substance.¹ Based in part on this conduct, defendant's medical license was suspended in New York effective May 12, 2015,² and her prescription writing privileges for controlled substances were suspended by the Drug Enforcement Administration (DEA) on September 1, 2015.

After relapsing in 2013, defendant attended Narcotics Anonymous and Alcoholics Anonymous meetings. While in treatment,

¹ Hydrocodone has since been re-classified as a Schedule II controlled substance due, in part, to its potential for abuse. See Schedules of Controlled Substances, 21 C.F.R. 1308.12 (2015); N.J.S.A. 24:21-4.

² Defendant's license to practice medicine in Delaware was also suspended. However, defendant disputed the circumstances leading to the suspension. The State alleged her license was suspended in Delaware based on allegations that she self-prescribed narcotics and cared for patients while under the influence of narcotics. However, defendant claimed she voluntarily surrendered her license in Delaware. The trial court did "not consider[] anything that may or may not have occurred" with regard to her Delaware license.

she befriended a fellow addict, A.R., and eventually began an "intimate" relationship with him. Although defendant never treated A.R. as a patient, she wrote numerous prescriptions for controlled substances for him using her New York State prescription pad. According to A.R., he would pick up the prescriptions at defendant's home in New Jersey, fill them at a New Jersey pharmacy using his prescription plan, and then split the pills with defendant. Defendant admitted writing prescriptions for A.R. while her medical license was suspended, but claimed that A.R. threatened to report her if she did not write the prescriptions.

On February 12, 2016, A.R.'s wife reported defendant to the police and provided three empty prescription bottles to corroborate her claim. The prescription bottles showed that on April 3, July 27, and August 27, 2015, defendant prescribed for A.R. Zolpidem, Hydrocodone-Acetaminophen (generic for Vicodin), and Diazepam (generic for Valium), respectively. Further investigation revealed that between May 12 and September 1, 2015, defendant issued twenty-seven fraudulent prescriptions using the names of various friends and family members. The prescriptions, totaling 1300 pills, were for Tramadol (generic for Ultram), a schedule IV controlled substance, Alprazolam (generic for Xanax), a schedule IV controlled substance, and Zolpidem. After her DEA license was suspended on September 1, 2015, defendant issued an

additional nine prescriptions between September 1 and October 12, 2015, ostensibly for her mother, but which defendant diverted for her own personal use. Those prescriptions, totaling 510 pills, were for Alprazolam and Zolpidem, were written on defendant's New York prescription pad, and were filled at New Jersey pharmacies.

As a result, on April 20, 2016, defendant was charged by complaint-summons with three counts of third-degree distribution of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(b)(4), one count of third-degree obtaining CDS by fraud, N.J.S.A. 2C:35-13, and one count of third-degree practicing medicine without a license, N.J.S.A. 2C:21-20(d). Thereafter, defendant applied for admission into the PTI program. The PTI Director recommended defendant's admission, but the prosecutor disagreed and overruled the PTI Director's recommendation. On July 25, 2016, defendant entered a negotiated guilty plea to a one-count accusation charging her with third-degree practicing medicine without a license. Pursuant to the plea agreement, the trial court delayed sentencing to allow defendant to appeal her rejection from the PTI program. Following a remand by the court for reconsideration, to which defendant consented, the State maintained its rejection of defendant's admission and submitted a detailed statement of reasons, concluding that the factors and guidelines it relied upon

"outweigh[ed] any [f]actors or [g]uidelines that may be in defendant's favor. . . ."

In the statement, the prosecutor acknowledged that defendant, then forty-seven years old, was "a highly educated woman" with "no prior criminal history," "no history of violence, no history of being involved in organized crime and . . . no codefendants." The prosecutor acknowledged further that defendant "expressed remorse" and "admitted [her] complicity[,]" albeit with a "self-serving explanation as to what transpired in this matter." Nevertheless, noting that defendant "minimize[d] her role and central involvement in this fraudulent prescription scheme," the prosecutor rejected her application initially relying on "Guideline 3(i)(4) of [Rule] 3:28[,]" providing "that if the crime charged involves a breach of the public trust, the defendant's application should generally be rejected."

The prosecutor explained that after defendant's New York and DEA licenses were suspended, she issued additional fraudulent prescriptions "for 510 pills." According to the prosecutor, "[b]y passing such prescriptions, defendant held herself out, at least to the pharmacies filling the prescriptions as authorized to pass a New York prescription blank and prescribe a controlled dangerous substance." Relying on State v. Mahoney, 376 N.J. Super. 63, 94-98 (App. Div. 2005), aff'd in part, rev'd in part on other grounds,

188 N.J. 359, 362 (2006), for support, the prosecutor determined that "defendant's crimes constitute[d] a breach of the public trust" Further, according to the prosecutor, defendant "failed to provide compelling reasons to . . . overcome the presumption" against admission, despite defendant's reports that "she has been attending NA/AA meetings, . . . does volunteer work to help feed the homeless[,]" and "has been drug free for two years[,]" a claim the prosecutor disputed.

In rejecting defendant's application, the prosecutor relied on the following additional factors: the nature of the offense, N.J.S.A. 2C:43-12(e)(1) (factor one); the facts of the case, N.J.S.A. 2C:43-12(e)(2) (factor two); the needs and interests of the victim and society, N.J.S.A. 2C:43-12(e)(7) (factor seven); the extent to which defendant's criminal conduct constitutes part of a continuing pattern of anti-social behavior, N.J.S.A. 2C:43-12(e)(8) (factor eight); whether or not the crimes are of such a nature that the value of supervisory treatment is outweighed by the public need for prosecution, N.J.S.A. 2C:43-12(e)(14) (factor fourteen); and 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)(17) (factor seventeen).

In connection with factors one and two, the prosecutor explained that "the nature and facts" of the case were "too serious to allow defendant to avoid the criminal penalties of her actions" because her "conduct was not isolated[,]" was done for her own personal benefit, and "was done in violation of" State and federal orders prohibiting her from practicing medicine or writing prescriptions. As to factor seven, the prosecutor distinguished State v. Bender, 80 N.J. 84 (1979), and noted that "the needs of society are only met if defendant faces the criminal consequences of her actions" which made pharmacies "part of [her] criminal scheme" and caused them to "unwittingly . . . plac[e] dangerous controlled substances into the public."

With regard to factor eight, the prosecutor reasoned that defendant's continuous criminal conduct "in multiple states" was undeterred by numerous opportunities "to address her addiction . . . over the last thirteen years" The prosecutor determined that "[t]here [was] no reason and no empirical track record to demonstrate PTI diversion [would] change defendant's behavior[,]" given the fact that "[she] has been unable to address her addictive behavior through meaningful and lasting self-reform[,]" despite "having her livelihood at stake[.]" Moreover, the prosecutor noted that by virtue of defendant's claim that she had been drug free for the last two years, defendant could not "argue that an

existence of personal problems or character traits related to her crimes weigh[ed] in her favor for entry into PTI ([f]actor five)." As to factors fourteen and seventeen the prosecutor explained that defendant's crimes were "of such a nature that the value of supervisory treatment was outweighed by the public need for prosecution" and "the harm done to society by abandoning prosecution . . . outweigh[ed] the benefits to society from channeling defendant into a diversionary . . . program."

After oral argument, in an oral decision rendered on December 16, 2016, the court determined that defendant failed to "clearly and convincingly establish[]" that the prosecutor's rejection of her PTI application constituted "a patent and gross abuse of discretion." Initially, the court agreed with defendant that the prosecutor's reliance on Guideline 3(i)(4) was misplaced because "defendant's alleged actions [did] not constitute a breach of the public trust" The court distinguished the cases cited by the prosecutor in which reliance on Guideline 3(i)(4) was upheld and concluded that defendant "was neither a public employee, nor did she have a fiduciary duty to the public . . . that was breached in this particular case." The court found that "[t]he connection to the public argued by the [p]rosecutor [was] far too attenuated"

Nevertheless, the court determined the prosecutor's "reliance [on Guideline 3(i)(4)] was not clearly erroneous" because although defendant's conduct of "holding herself out as a licensed medical professional" did "not amount to a breach of the public trust in the legal sense[,]" the conduct constituted a breach of the public's trust "in the non-legal sense, . . . mainly the trust of pharmacists" Further, the court concluded that, "[d]espite []defendant's argument that the [prosecutor] rejected her without consideration of the relevant factors, this [c]ourt [found] to the contrary." The court determined that "after reviewing the entire file," including numerous character references, the prosecutor "weighed and considered all relevant Guidelines and factors" and properly relied on factors (1), (2), (7), (8), (14), and (17) of N.J.S.A. 2C:43-12(e) to reject defendant's application into PTI. The court entered a memorializing order and this appeal followed.

First, some basic principles inform our decision. "PTI is a 'diversionary program through which certain offenders are able to avoid criminal prosecution by receiving early rehabilitative services expected to deter future criminal behavior.'" State v. Roseman, 221 N.J. 611, 621 (2015) (quoting State v. Nwobu, 139 N.J. 236, 240 (1995)). The PTI program is governed by N.J.S.A. 2C:43-12 to 22, Rule 3:28, and the Guidelines for Operation of Pretrial Intervention in New Jersey, reprinted after Rule 3:28 in

Pressler & Verniero, Current N.J. Court Rules (2018). The goal of PTI is to allow defendants in appropriate situations to avoid the potential stigma of a conviction and the State to avoid "the full criminal justice mechanism of a trial." State v. Bell, 217 N.J. 336, 347-48 (2014). "Eligibility for PTI 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." Roseman, 221 N.J. at 622 (quoting Pressler & Verniero, Current N.J. Court Rules, Guideline 2 on R. 3:28 (2018)).

Deciding whether to permit a defendant to divert to PTI "is a quintessentially prosecutorial function[,]" State v. Wallace, 146 N.J. 576, 582 (1996), for which a prosecutor is given "broad discretion[.]" State v. K.S., 220 N.J. 190, 199 (2015). It involves the consideration of a non-exhaustive list of seventeen statutory factors, enumerated in N.J.S.A. 2C:43-12(e), in order to "make an individualized assessment of the defendant considering his or her 'amenability to correction and potential responsiveness to rehabilitation.'" Roseman, 221 N.J. at 621-22 (quoting State v. Watkins, 193 N.J. 507, 520 (2008)). "These factors 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, 193 N.J. at 520). The Supreme Court's Guidelines accompanying Rule 3:28 work

in harmony with the seventeen individual factors listed in N.J.S.A. 2C:43-12(e).

That said, the scope of our review of a PTI rejection is severely limited and designed to address "only the 'most egregious examples of injustice and unfairness.'" State v. Negrán, 178 N.J. 73, 82 (2003) (quoting State v. Leonardis, 73 N.J. 360, 384 (1977)). "In order to overturn a prosecutor's rejection, a defendant must 'clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion,'" meaning that the decision "has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention." Watkins, 193 N.J. at 520 (first quoting State v. Watkins, 390 N.J. Super. 302, 305-06 (App. Div. 2007); then quoting Wallace, 146 N.J. at 582-83). An abuse of discretion has occurred where it can be proven "that the [PTI] denial '(a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment'" State v. Lee, 437 N.J. Super. 555, 563 (App. Div. 2014) (quoting Bender, 80 N.J. at 93). "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." Roseman, 221 N.J. at 625 (quoting Bender, 80 N.J. at 93). "The extreme deference which a prosecutor's decision is entitled to in this context translates into a heavy burden which must be borne by a defendant when seeking to overcome a prosecutorial veto of his [or her] admission into PTI." State v. Kraft, 265 N.J. Super. 106, 112 (App. Div. 1993).

Applying these principles, we discern no patent or gross abuse of discretion in the prosecutor's denial of defendant's PTI application. Thus, there is no basis to disturb the trial court's decision sustaining the prosecutor's denial. Although defendant certainly has a number of mitigating factors in her favor, the reasons for the prosecutor's denial were premised on consideration of relevant factors, several of which weighed against her admission. Defendant renews her contention that the prosecutor based his rejection on a fundamental misunderstanding of what qualifies as a breach of public trust under Guideline 3(i)(4). We agree with the trial court that the prosecutor's reliance on Guideline 3(i)(4) was misplaced; nevertheless, defendant failed to clearly and convincingly establish that the prosecutor's decision went so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention.

Like the trial court, we reject defendant's contention that relevant factors required pursuant to N.J.S.A. 2C:43-12 and Rule 3:28 were not considered. "Absent evidence to the contrary, it is [to be] presumed that the prosecutor considered all relevant factors before rendering a decision." State v. Dalqlish, 86 N.J. 503, 509 (1981). Equally unavailing is defendant's argument that the prosecutor "targeted []defendant because she was a doctor, and then did little more than parrot[] the statutory language rejecting []defendant without any substantive analysis[,]" resulting in an unduly harsh punishment of "a highly-educated woman" "[A] court's scrutiny of a prosecutor's denial of consent is normally limited to the reasons given by the prosecutor for his [or her] action." Kraft, 265 N.J. Super. at 112. Here, the prosecutor appropriately referred to the State's version of the facts where those facts were relevant to the applicable PTI factors, and the prosecutor's statement of reasons clearly evince a substantive analysis of valid considerations.

Likewise, we reject defendant's contention that the prosecutor engaged in impermissible "double counting of factors" and failed to consider "the compelling factors or character references" submitted in mitigation. "The facts certainly can be discussed more than once within a PTI denial letter, insofar as they may bear on the discrete criteria for eligibility." Lee, 437

N.J. Super. at 570. While the prosecutor rejected some aspects of defendant's account in his analysis, "[a] prosecutor is certainly free to disbelieve statements presented by defense witnesses and to instead credit the anticipated contrary testimony of the State's witnesses." Id. at 567-68. Moreover, while reasonable minds might differ as to whether defendant is a suitable candidate for admission into the program, as the trial court noted, the court's "role . . . when considering an appeal of this sort" is "limited" and the "[c]ourt does not have the authority . . . to substitute its own discretion for that of the [p]rosecutor even where the [p]rosecutor's decision is one which the . . . [c]ourt disagrees with or finds to be harsh." See State v. DeMarco, 107 N.J. 562, 566-67 (1987).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION