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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2399-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WAYNE KACZOWSKI,

Defendant-Appellant.

Submitted April 11, 2018 – Decided May 21, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Indictment
No. 15-12-0683.

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

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Paul H.
Heinzel, Assistant Prosecutor, of counsel
and on the brief).

PER CURIAM

Defendant Wayne Kaczowski appeals the denial of his
application for admission into the pretrial intervention program
(PTI) after he was charged with violating N.J.S.A. 2C:40-26(b), a

fourth-degree offense, by driving during a third license suspension for driving while intoxicated (DWI), N.J.S.A. 39:4-50. We affirm.

On October 6, 2015, at 9:11 p.m., a North Plainfield police officer conducted a motor vehicle stop of defendant's vehicle after a random license plate inquiry revealed the driving privileges of the registered owner were suspended and after noting the license plate was partially obstructed by a license plate frame.

Defendant was determined to be the driver and registered owner of the vehicle. Investigation revealed defendant's driving privileges were suspended for ten years on November 19, 2014, as a result of a third DWI conviction. He had previously been convicted of DWI on January 18, 2011 and January 5, 1999. Further investigation revealed defendant had also failed to comply with a November 19, 2014 order requiring the installation of an ignition interlock device.

Defendant, then age 61, was charged with fourth-degree driving while suspended for a second or subsequent violation of N.J.S.A. 39:4-50, driving while suspended, N.J.S.A. 39:3-40, and improper display of plates, N.J.S.A. 39:3-33. Defendant was subsequently indicted by a grand jury for the fourth-degree offense.

Defendant applied for admission into PTI. The PTI Director recommended defendant's PTI application be denied the following reasons:

The crime(s) defendant is charged with constitute part of a continuing pattern of antisocial behavior, or the defendant has a record of criminal and penal violations and presents a substantial danger to others. N.J.S.A. 2C:43-12e(8); N.J.S.A. 2C:43-12e(9).

The defendant would not be benefitted by supervisory treatment - his/her crime is related to a condition or situation that likely could not be corrected through supervisory treatment. N.J.S.A. 2C:43-12e(6); see also N.J.S.A. 2C:43-12e(5).

On 1/05/1999 the defendant was convicted of Driving While Intoxicated and his license was suspended for that offense. On 1/18/2011 the defendant was cited for Driving While Intoxicated and his license was suspended for that offense. On 11/19/2014 the defendant was again cited for Driving While Intoxicated and his license was suspended for that offense. It should be noted that the instant offense carries a mandatory sentence of 180 days in Jail upon conviction. Therefore the interest of society would best be served through prosecution in the traditional manner rather than by diversion in the PreTrial Intervention Program.

Defendant then filed a motion in the Law Division appealing the PTI rejection. Defendant argued the PTI Director's recommendation and failure to consider relevant factors constituted an abuse of discretion. He noted the Prosecutor's Office had not yet taken a position on the application. Defendant

claimed the following circumstances warranted admission into PTI: (1) he was stopped while driving home from a new job he had just started, involving a thirty-mile commute; (2) while admitting he was just beginning his ten-year suspension, he had only sporadic employment since the recession began in 2008; (3) he needed the income from the new job to support himself and his wife; (4) he had no other reasonable way of commuting to work; (5) he was sober when stopped and "had obeyed all rules of the road;" (6) his debt load was high and he and his wife cared for his disabled father-in-law; (7) a six-month sentence would be a financial burden and emotionally difficult for his wife; (8) he was amenable to treatment and had been sober since December 28, 2015; (9) he had no prior criminal history and he was only a danger when driving under the influence of alcohol; and (10) his driving while suspended while sober did not pose a danger.

The Somerset County Prosecutor submitted an eleven-page letter brief in opposition to defendant's application. After recounting the underlying facts, defendant's DWI conviction history, his repeated failures to obey court orders, and his other moving violations, the Prosecutor's Office addressed each of the seventeen statutory factors listed in N.J.S.A. 2C:43-12(e). The prosecutor noted defendant was serving a third DWI suspension and his driving on October 6, 2015, came only eleven months after his

ten-year suspension began. Thus, he had proven himself incapable of living a law-abiding life. The prosecutor also noted defendant had a "significant history of motor vehicle offenses," was "unable to successfully overcome his alcohol problem," and "had repeatedly elected to drive after consuming alcohol," which did not "bode well for defendant's likelihood of success in the PTI program." The prosecutor concluded "defendant's character traits reveal that a more serious sanction may be necessary to deter defendant from committing similar conduct in the future." The prosecutor also expressed the "strong need to deter the defendant and society from drinking and driving, and from driving without a license after driving privileges have been suspended due to DWI." The prosecutor also emphasized defendant's conduct "was potentially assaultive and possessed a potential to result in serious harm" and that he "has a history of conduct that had the potential to cause great harm to others."

The prosecutor also addressed Guidelines 1, 2, 3 (a), and 3(i) of the Guidelines for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, Guidelines 1, 2, 3(a), and 3(i), following R. 3:28 at 1289-91 (2018). As to Guidelines 1 and 2, the Prosecutor noted: "[D]efendant has failed at previous attempts to deter him from driving while intoxicated, or to restrict his driving by imposing

conditions such as installing an ignition interlock device. Thus, defendant has demonstrated that he needs more severe sanctions to deter him from committing future criminal conduct." As to Guidelines 3 (a) and (i), the Prosecutor stated: "[D]efendant's age, history, and the nature of the offense militate in favor of prosecuting defendant through traditional means rather than resolving this matter through a diversionary program."

Following oral argument, the trial court issued a May 2, 2016 order and thirteen-page written opinion denying the PTI appeal. The opinion included a detailed review of defendant's contentions and the prosecutor's basis for rejecting defendant's PTI application, including the fact-specific analysis of the statutory criteria set forth in the prosecutor's opposing letter brief. The judge then engaged in the following analysis:

In this matter the [c]ourt does sympathize with defendant who from the looks of things has an alcohol problem which he is trying to overcome. However, this does not excuse his intentional disregard of the restrictions placed on his driver's license. Defendant drove his vehicle to his place of employment while his driver's license was suspended. Defendant also has a long history of motor vehicle violations and seems to disregard the rules of the road. Based on this the [c]ourt cannot conclude that the State's objection of the defendant[']s application into PTI constituted a patent and gross abuse of discretion.

Upon review of the factors set forth in N.J.S.A. 2C:43-12(e), this [c]ourt finds of greatest concern factors (1) The nature of the offense; (2) The facts of the case and (8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior.

Here the defendant has a history of serious [m]otor [v]ehicle violations which reveal he is and has been a danger to persons traveling on the roadways. Several times he has consumed an excess amount of alcohol and subsequently operated a motor vehicle. Through the laws of this State [c]ourts have made efforts to deter defendant from violating [m]otor [v]ehicle laws and prevent him from causing danger to others. These efforts have not been successful. Defendant disregards these sanctions that are placed on his driving privileges and continues to operate his motor vehicle. Therefore this [c]ourt does not find the State has abused [its] discretion in denying defendant admission into the PTI program.

The case proceeded to trial. A jury found defendant guilty of operating a motor vehicle during a period of license suspension for a second or subsequent multiple DWI conviction. The trial judge found defendant guilty of driving while suspended but not guilty of having an obstructed license plate. On the fourth degree offense, defendant was sentenced to a two-year probationary term conditioned upon serving the mandatory 180-day jail term without eligibility for parole. This appeal followed.

Defendant does not raise any issues relating to the jury trial or his conviction for violating N.J.S.A. 39:3-40. Rather,

he appeals the denial of his PTI application, raising the following arguments:

POINT I

THE PROSECUTOR'S REJECTION OF DEFENDANT'S ADMISSION INTO PRETRIAL INTERVENTION WAS A PATENT AND GROSS ABUSE OF DISCRETION BECAUSE HE FAILED TO PROVIDE ANY REASON FOR HIS DECISION.

- A. Our law requires the prosecutor to evaluate a PTI application based on an individualized assessment of the applicant's amenability to rehabilitation, and to follow the prescribed procedures that ensure both meaningful appellate review.
- B. The prosecutor's failure to provide a statement of reasons for rejecting Mr. Kaczowski is palpably deficient as it fails to provide any reasons – let alone valid ones – for withholding consent to enter PTI.
- C. Even if the PTI director's recommendation against admission could be substituted for consideration by the prosecutor himself, the one-page check-off form amounted to a per se rejection devoid of individualized assessment of Mr. Kaczowski or the circumstances of the charged offense.
- D. Had the prosecutor conducted a full and fair evaluation of Mr. Kaczowski and the charged offense, he would have admitted him into PTI.

POINT II

EVEN CONSIDERING THE POST-HOC JUSTIFICATIONS IN THE PROSECUTOR'S TRIAL BRIEF, THE

PROSECUTOR'S REJECTION OF DEFENDANT'S
ADMISSION INTO PRETRIAL INTERVENTION IS A
PATENT AND GROSS ABUSE OF DISCRETION THAT
CLEARLY SUBVERTED THE GOALS UNDERLYING PTI,
WHICH MUST BE CORRECTED BY THIS COURT.

A. The prosecutor improperly enlarged the
basis for rejecting Mr. Kaczowski in its
brief before the trial court.

B. Even if, arguendo, the factors argued by
the State in its trial brief were
properly presented, Mr. Kaczowski's
rejection was still a patent and gross
abuse of discretion.

. . . .

POINT III

IN THE ALTERNATIVE, BECAUSE THE PROSECUTORIAL
VETO WAS BASED ALMOST ENTIRELY ON THE NATURE
OF THE CASE, THE CASE SHOULD BE REMANDED TO
ALLOW MR. KACZOWSKI TO MAKE A REASONABLE
REQUEST FOR DISCOVERY TO CHALLENGE WHAT
APPEARS TO BE THE APPLICATION OF A POLICY OF
REJECTING ALL APPLICANTS CHARGED WITH
VIOLATING N.J.S.A. 2C:40-26(b). (. . . Request
for Discovery not raised below).

The criteria for admission into PTI, as well as the procedures
concerning the program, are set forth in N.J.S.A. 2C:43-12 to -22
and Rule 3:28. N.J.S.A. 2C:43-12(e) includes seventeen criteria
which, among other factors, prosecutors and program directors must
consider when deciding whether to accept or reject a PTI
application. Rule 3:28 is followed by eight guidelines. If a
prosecutor denies an application, he must "precisely state his
findings and conclusion which shall include the facts upon which

the application is based and the reasons offered for the denial." N.J.S.A. 2C:43-12(f).

Our review of a prosecutor's decision to deny a defendant admission into PTI is "severely limited." State v. Negran, 178 N.J. 73, 82 (2003) (citations omitted). Judicial review of a PTI application exists "to check only the most egregious examples of injustice and unfairness." State v. Nwobu, 139 N.J. 236, 246 (1995) (quoting State v. Kraft, 265 N.J. Super. 106, 111, (App. Div. 1993)). Absent evidence to the contrary, a reviewing court must assume "the prosecutor's office has considered all relevant factors in reaching the PTI decision." Nwobu, 139 N.J. at 249 (citing State v. Dalglish, 86 N.J. 503, 509 (1981)). A defendant seeking to overrule a prosecutor's rejection of a PTI application must "clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of . . . discretion." State v. Wallace, 146 N.J. 576, 582 (1996) (quoting State v. Leonardis, 73 N.J. 360, 382 (1977)). We apply the same standard of review as the trial court and review its decision de novo. State v. Waters, 439 N.J. Super. 215, 226 (App. Div. 2015).

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

To establish the prosecutor's rejection of defendant's PTI application amounted to a patent and gross abuse of discretion, a defendant must prove, by clear and convincing evidence,

that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment. . . . In order for such an abuse of discretion to rise to the level of "patent and gross," it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pretrial Intervention.

[447 N.J. Super. 301, 313 (App. Div. 2016) (quoting State v. Roseman, 221 N.J. 611, 625 (2015)).]

Having carefully considered defendant's arguments under these standards, we conclude no grounds exist to disturb the trial court's decision. The record demonstrates the prosecutor properly considered and weighed the relevant factors in reaching his decision to reject defendant's application. Thereafter, the trial court conducted a thorough review of the prosecutor's decision. On appeal, defendant advances no convincing argument that the prosecutor's determination was a patent and gross abuse of discretion.

Defendant has not shown the prosecutor's decision clearly subverted the goals underlying PTI. Conversely, granting

defendant PTI would not necessarily serve all the goals of PTI set forth in N.J.S.A. 2C:43-12(a)(1) to (5). Moreover, we cannot say that the prosecutor's decision could not have been reasonably made upon weighing the relevant factors. See Nwobu, 139 N.J. at 254.

We are not persuaded by defendant's argument that the prosecutor has, in effect, created a per se rule against PTI admission for defendants charged with violating N.J.S.A. 2C:40-26(b), basing his denial almost entirely on the nature of the case. We recognize N.J.S.A. 2C:40-26(c) does not carry a presumption against admission into PTI under either N.J.S.A. 2C:43-12(b) or Guideline 3(i) to Rule 3:28. Rizzitello, 447 N.J. Super. at 312-13. However, the absence of a presumption against admission into PTI is not dispositive. As the prosecutor explained, and the trial court acknowledged, the temporal proximity of defendant's last DWI conviction, his two other DWI convictions, and his failure to comply with the ignition interlock order weighed against his admission to PTI, not merely the fact that he was guilty of violating N.J.S.A. 2C:40-26(b).

Generally, motor vehicle violations are not appropriate factors for consideration, but, where the prosecutor indicates that such violations are indicative of a pattern of anti-social behavior, they may be considered. See Negran, 178 N.J. at 84-85. Here, the prosecutor recounted defendant's prior DWI convictions

in 2014, 2011, and 1999, and the resulting license suspensions to explain the extent to which defendant's crime constituted part of a continuing pattern of anti-social behavior, N.J.S.A. 2C:43-12(e)(8), and to show defendant was not amenable to the rehabilitative process offered by the program, N.J.S.A. 2C:43-12(e)(2). In these circumstances, we find the prosecutor properly relied upon the repetitive nature and timing of defendant's prior DWI convictions and resulting license suspensions.

The prosecutor also gave significant weight to the "strong need to deter the defendant and society from drinking and driving, and from driving without a license after driving privileges have been suspended due to DWI" by prosecuting violations of N.J.S.A. 2C:40-26(b). The consideration of that factor was appropriate and within the prosecutor's discretion. By enacting N.J.S.A. 2C:40-26(b), "the Senate intended to lodge 'criminal penalties for persons whose [drivers'] licenses are suspended for certain drunk driving offenses and who, while under suspension for those offenses, unlawfully operate a motor vehicle.'" State v. Luzhak, 445 N.J. Super. 241, 245 (App. Div. 2016) (quoting S. Law and Public Safety and Veterans' Affairs Comm. Statement to S. 2939 (November 23, 2009)). In State v. Carrigan, we noted the "strengthened penalty" for violation of N.J.S.A. 2C:40-26(b) was "legislatively prompted, at least in part, by reports of fatal or

serious accidents that had been caused by recidivist offenders with multiple prior DWI violations, who nevertheless were driving with a suspended license." 428 N.J. Super. 609, 614 (App. Div. 2012). As we recently noted:

We are mindful of the devastating toll that impaired driving exacts upon society. We also acknowledge the erosion of the enforcement scheme that results from persons driving while suspended. That is so, even if they are unimpaired when they do so, although too often they are impaired, resulting in tragic consequences.

[State v. Rodriguez, ___ N.J. Super. ___ (App. Div. 2018) (slip op. at 27).]

Defendant complains the PTI Director and the prosecutor did not provide a full consideration of each statutory factor. If a prosecutor does not consider factors that should be considered, or does consider factors that should not be considered, a remand may be appropriate. State v. K.S., 220 N.J. 190, 200 (2015). While the prosecutor did not initially respond to the PTI Director's recommendation, the prosecutor's letter brief provided a fact specific consideration of each relevant factor. Therefore, a remand is unnecessary, as it would serve no useful purpose.

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

Affirmed.

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



CLERK OF THE APPELLATE DIVISION