

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2858-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MOHAMMAD FAROOQ,

Defendant-Appellant.

Argued May 17, 2017 – Decided April 5, 2018

Before Judges Fuentes, Simonelli and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
15-05-0764.

Daniel V. Gautieri, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Daniel V. Gautieri, of counsel and on the
brief; Sophie B. Kaiser, on the brief).

Kerry J. Salkin, Assistant Prosecutor, argued
the cause for respondent (Esther Suarez,
Hudson County Prosecutor, attorney; Kerry J.
Salkin, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

A Hudson County Grand Jury indicted defendant Mohammad Farooq of third-degree criminal attempt, N.J.S.A. 2C:5-1, third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a), third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), and fourth-degree child abuse, N.J.S.A. 9:6-1 and N.J.S.A. 9:6-3. The State also filed a related complaint against defendant charging him with the petty disorderly persons offense of harassment, N.J.S.A. 2C:33-4(b). The State charged that defendant touched the leg of a thirteen-year-old girl who was seated next to him on a public bus. The child claimed defendant touched her knee and inner thigh three times in an obviously inappropriate manner.

Defendant applied for admission into the Pretrial Intervention Program (PTI). In support of his PTI application, defendant stated he fell asleep while seated in a public bus next to where the victim was seated. Thus, any physical contact that he may have had with the child was inadvertent. Defendant subsequently consulted with his primary care physician, who referred him to the JFK Medical Center Neurology Department where he was tested and diagnosed with the asleep disorder known as severe obstructive sleep apnea.

In a form letter dated July 14, 2015, the vicinage's Criminal Division Manager "approved" defendant's "enrollment" into PTI and "submitted" defendant's application to the Hudson County

Prosecutor for her "consideration."¹ In a letter dated July 28, 2015, Deputy First Assistant Prosecutor Debra Simon informed defendant's counsel that after reviewing and evaluating all of the relevant reports and information available, the Hudson County Prosecutor's Office "objects" to defendant's admission into PTI. Simon cited factors (1), (2), (3), (4), (7), (9), (14), and (17) under N.J.S.A. 2C:43-12(e) as the legal basis for opposing defendant's PTI application.

Simon emphasized that according to the thirteen-year-old victim, defendant's conduct was both intentional and persistent. The victim stated defendant touched her "knee and inner thigh" three times "while riding on a bus." She "tried to distance

¹ We take this opportunity to point out that pursuant to Rule 3:28(h), the Criminal Division Manager is required to conduct an evaluation of a defendant's PTI application and make a recommendation to the prosecutor as to his or her suitability to participate in the program. Here, the Criminal Division Manager sent a form-letter that merely stated: "The below named defendant has been approved by this office for enrollment into the [PTI] program." The words evaluation and recommendation in Rule 3:28(h) requires more than a mere perfunctory response. Consistent with the important role the Supreme Court assigned to the Criminal Division Manager, the evaluation should reflect a comprehensive and individualized assessment of the applicant's suitability for admission into PTI, after applying the statutory factors in N.J.S.A. 2C:43-12(e) and the regulatory Guidelines in Rule 3:28. The Criminal Division Manager's recommendation report to the prosecutor should reflect the insights and findings made based on this process. In short, the Criminal Division Manager's task is a key component of this diversionary program.

herself from the defendant" after he twice touched her in an inappropriate manner, but had nowhere else to move to after the third time. She finally alerted her mother, who reported the incident to the bus driver. Simon characterized defendant's conduct as "continuous, egregious behavior by a fifty[-]year[-]old stranger towards a thirteen[-]year[-]old girl[,]" and thus not suited for admission into PTI.

Defendant appealed the prosecutor's rejection to the vicinage's Presiding Judge of the Criminal Part.² The matter came for oral argument before the motion court on September 17, 2015. After considering the evidence defendant presented, the arguments of counsel, and reviewing and applying the relevant legal standard, the judge found the prosecutor "failed to consider all relevant factors" in determining that defendant was not suitable for admission into PTI. The judge specifically rejected the prosecutor's contention that she was not required to consider defendant's "medical history" to conclude he was not a suitable candidate for admission into PTI. By contrast, the judge viewed defendant's medical evidence "extremely relevant to the matter at hand," and "remanded" the case for the prosecutor to determine

² Pursuant to Rule 3:28(a), the vicinage's Assignment Judge must designate "a judge or judges to act on matters pertaining to pretrial intervention programs . . . in accordance with N.J.S.A. 2C:43-12 and 13."

defendant's suitability for admission into PTI after giving due consideration to his medical condition.

In a letter dated October 22, 2015, Assistant Prosecutor C. Christina Krauthamer responded to the judge's ruling. Krauthamer noted that the Hudson County Prosecutor's Office had "considered the defendant's application, as well as that he continues to suffer from sleep apnea." After summarizing the legal standard for admission into PTI and emphasizing that defendant "bears the burden when seeking to overcome a prosecutorial denial[,]" Krauthamer stated that the "statement of reasons upon which the denial was based included a consideration, weighing and balancing all of the requisite factors, including those personal to defendant as well as the facts and circumstances of the offenses." The prosecutor thus reaffirmed the original rejection of defendant's PTI application.

The judge resumed oral argument on defendant's appeal on October 23, 2015, the day following the receipt of Krauthamer's letter. After giving both sides the opportunity to argue the merits of their respective positions, the judge began her analysis by noting the recently released opinion of State v. Roseman, 221 N.J. 611 (2015), in which the Supreme Court reaffirmed that:

the prosecutor's decision to accept or reject a defendant's PTI application is entitled to a great deal of deference. Trial courts may

overrule a prosecutor's decision to accept or reject a PTI application 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."

[Id. at 624-25 (alterations in original).]

With these principles in mind, the judge found that defendant had not satisfied this burden of proof. Defendant thereafter entered into a negotiated agreement with the State through which he pled guilty to fourth degree child abuse. The State agreed to dismiss the remaining charges and recommend that the court sentence defendant to a term of probation. On January 29, 2016, the trial judge sentenced defendant to a two-year term of probation and "[as] a special condition of probation [he] will . . . continue with his medical [treatment]."

Defendant now appeals raising the following arguments.

POINT I:

BECAUSE FAROOQ PRESENTED UNREFUTED MEDICAL EVIDENCE THAT HE LACKED THE MENS REA TO COMMIT A CRIME, THE PROSECUTOR'S DECISION TO REJECT HIS PTI APPLICATION CONSTITUTED A PATENT AND GROSS ABUSE OF DISCRETION.

A. Legal Standard.

B. The Prosecutor's Rejection Was Not Premised On A Consideration Of All Relevant Factors, Placed Undue Weight On The Nature Of The Offense, Amounted To A Clear Error In Judgment, And Clearly

Subverted The Goals Underlying The PTI Program.

C. In The Alternative, Because The Prosecutor Failed To Properly Consider Farooq's Medical Evidence, His Case Should Be Remanded For Reconsideration.

In light of the record developed before the PTI court, we discern no legal basis to interfere with the court's decision to uphold the prosecutor's rejection. "The purpose of the PTI Program is to provide the opportunity to certain defendants to avoid the traditional prosecutorial route by receiving rehabilitative services." State v. Rizzitello, 447 N.J. Super. 301, 310 (App. Div. 2016). Our Supreme Court has made clear that "PTI is essentially an extension of the charging decision, therefore the decision to grant or deny PTI is a 'quintessentially prosecutorial function.'" Roseman, 221 N.J. at 624 (quoting State v. Wallace, 146 N.J. 576, 582 (1996)).

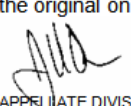
A defendant seeking to overturn the prosecutor's decision to reject his application for admission into PTI must prove, by clear and convincing evidence, that the rejection constituted a patent and gross abuse of discretion. Id. at 624-625. Here, the prosecutor's rejection was heavily influenced by defendant's behavior as described by the victim. According to the victim, defendant touched an inappropriate area of her body three separate times. After the first two incidents, the child attempted to

distance herself from defendant, only to find herself unable to escape his touch. She finally alerted her mother who immediately responded to protect her child by reporting defendant to the bus driver.

Defendant's medical explanation for his conduct is not binding on the prosecutor. The prosecutor has the discretion to reject defendant's account of the event as not credible. More importantly, the prosecutor can properly view defendant's conduct as predatory sexual behavior against a vulnerable child. The prosecutor's characterization of defendant's behavior as "continuous" and "egregious" is supported by the record and provides a rational basis for the prosecutor's decision finding defendant as not a suitable candidate for diversion into the PTI program. See N.J.S.A. 2C:43-12(e)(1) and (2). It is also proper for the prosecutor to consider the victim's desire not to forgo formal prosecution. N.J.S.A. 2C:43-12(e)(4). In short, the record supports the PTI judge's decision.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION