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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-4705-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUIS E. GAMBOA-APARICIO,

Defendant-Appellant.

Submitted November 16, 2017 – Decided April 19, 2018

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
13-10-1336.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Joie D. Piderit,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

This case is back to us after a remand. See State v. Gambao-
Aparicio, No. A-4358-13 (App. Div. Mar. 18, 2015). On remand, the

Middlesex County Prosecutor again rejected defendant Luis E. Gambao-Aparicio's application for admission into the pre-trial intervention (PTI) program, and the trial court affirmed. For the following reasons, we affirm.

A grand jury indicted defendant for third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3); and third-degree distribution of a CDS, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3). The charges stemmed from defendant's sale of approximately three grams of cocaine to an undercover narcotics officer for \$80 during an ongoing investigation into defendant's drug dealing.

Defendant applied for admission into the PTI program. The record revealed that he emigrated from Mexico at the age of thirteen and one-half but was residing in this country illegally. The State provided no record of his criminal history, if any, in Mexico, and, except for two arrests in New Jersey for non-indictable offenses, he had no prior juvenile adjudications or adult convictions in the United States. The charges for those arrests were dismissed after defendant voluntarily left the United States. Defendant committed the present offenses after illegally

returning to this country. Following his arrest, he obtained employment and stable housing with family members.

The prosecutor rejected defendant's application for admission into the PTI program, but the trial court granted defendant's motion to compel admission. On appeal, we vacated the order admitting defendant into PTI and remanded for the prosecutor to reconsider defendant's application. Id. at 4-5. We determined that defendant's brother's incarceration was irrelevant to whether defendant qualified for PTI, defendant's employment and housing were relevant positive factors to be considered, the prosecutor's reasons for N.J.S.A. 2C:43-12(e)(14), (15) and (17) were too generalized, and it was improper to use defendant's prior dismissed charges alone as evidence supporting N.J.S.A. 2C:43-12(e)(8). Id. at 4.

On remand, the prosecutor no longer relied on defendant's brother's criminal record or defendant's dismissed charges as factors weighing against admission. The prosecutor reassessed the statutory factors, and found all but two weighed against admission.¹ As to N.J.S.A. 2C:43-12(e)(1), "[t]he nature of the offense[,]" the prosecutor reasoned:

¹ The prosecutor did not consider N.J.S.A. 2C:43-12(e)(12), "[t]he history of the use of physical violence toward others[,]" or N.J.S.A. 2C:43-12(e)(16), "[w]hether or not the applicant's

The defendant was indicted for possessing [c]ocaine, possessing the [c]ocaine with the intent to distribute, and distributing [c]ocaine. Our office considers an individual who possesses drugs with the intent to distribute and in fact distributes drugs as a serious crime. The defendant is not to be considered in the same category as a person who is addicted to the use of illegal drugs. A drug user may very well benefit from the PTI program and attend counseling to receive help for his addiction. On the contrary, this defendant is providing the would-be drug addicts the means and opportunity to continue their addiction thereby leading them down the path to self-destruction.

As to N.J.S.A. 2C:43-12(e)(2), "[t]he facts of the case[,]"
the prosecutor reasoned:

The arrest of his defendant was the result of an ongoing investigation into the drug dealing of this defendant and others. Information had been received that this defendant was engaged in the selling of [c]ocaine. As a result of that information, members of the Middlesex County Prosecutor['s] Office Narcotics Task force and the Old Bridge Police Department became involved in the investigation. . . . [T]he use of an undercover police officer exposes the officer to a dangerous situation where he could be seriously injured. This office considers the instant matter as an entirely different situation whereby a drug dealer is observed and arrested selling drugs to his normal customers.

participation in pretrial intervention will adversely affect the prosecution of codefendants[.]"

As to N.J.S.A. 2C:43-12(e)(3), "[t]he motivation and age of the defendant[,]" the prosecutor reasoned:

The defendant was clearly motivated by profit. This is not a situation where an individual had to steal a loaf of bread to feed his family. This defendant was interested in material gains for himself. Moreover, he was [twenty-five] years old at the time he committed this crime and was fully mature and aware of the potential consequences. His power of reason did not consider the harm he would be doing to others, only how much money he could make for himself.

As to N.J.S.A. 2C:43-12(e)(4), "[t]he desire of the complainant or victim to forego prosecution[,]" the prosecutor reasoned that the detective, "who functioned in the undercover capacity, is adamant about not foregoing prosecution in this matter."

As to N.J.S.A. 2C:43-12(e)(5), "[t]he 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[,]" the prosecutor reasoned:

After carefully considering all the information provided by the defense, we are unable to find any personal problems or character traits of this defendant for which services are unavailable within the criminal

justice system or that the cause of the behavior can be controlled by proper treatment. The character trait that drove this defendant to commit this crime was profit. He desired money and material gains for himself to the detriment of anyone who would purchase his drugs. It is the State's position that the PTI program does not offer any unique programs that are not available through the criminal justice system for this defendant. Supervisory treatment offered through PTI will not control his desire to acquire material objects through the sale of illegal drugs.

As to N.J.S.A. 2C:43-12(e)(6), "[t]he 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[,]" the prosecutor reasoned:

There is no indication in this case that the defendant's actions were related to a situation which could be changed due to participation in the supervisory treatment. It appears that defendant was solely influenced by profit. This is not a situation where an individual had to steal a car in order to get to work so he [would not] get fired. The selling of drugs was providing funds for him in addition to his purported job.

As to N.J.S.A. 2C:43-12(e)(7), "[t]he needs and interests of the victim and society[,]" the prosecutor reasoned:

It is quite clear that there is a great need and interest of society to stop the sale of illegal drugs. It is well known that the actions of people who sell drugs as this defendant did, destroys lives. People become addicted; squander their life savings and those of family members. Addicts become a

drain on society and often lead to a life of crime such as burglaries, robberies, and theft to support their habit. The fact that this defendant cared more for his material gain than the lives of those who he is destroying indicate that this factor weighs against his admission into PTI.

As to N.J.S.A. 2C:43-12(e)(8), "[t]he extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior[,]" the prosecutor reasoned:

The fact that a phone call was placed to the defendant and he readily was able to meet with an undercover police officer, (an individual whom he had never met before), and sell him a quantity of cocaine on short notice is indicative of a continuing pattern of drug dealing on the part of the defendant. If a phone call were placed to any law abiding citizen and that citizen were asked to provide a quantity of [c]ocaine, the State contends that the average law abiding citizen would be hard pressed to provide the [c]ocaine.

As to N.J.S.A. 2C:43-12(e)(9), "[t]he applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others[,]" the prosecutor reasoned:

A review of the defendant's criminal history reveals that the defendant failed to appear in Municipal Court on February 24, 2012 and a [b]ench [w]arrant was issued for his arrest on April 24, 2012. While those charges were pending, he sold [c]ocaine to an undercover police officer in May of 2013. He was convicted of [d]riving [w]hile [i]ntoxicated [on] October 22, 2013. This contempt for the criminal justice process is

indicative of the defendant's contempt for the law and the judicial system and makes him an unfavorable candidate for PTI. Moreover, the defendant was in this country illegally. He faced deportation and was ordered to either voluntarily depart himself by a United States Immigration Judge or be deported. He chose to depart before he was deported and left the country I January of 2011. Within months of his leaving this country, he then again illegally reentered this country and was arrested and subsequently convicted of [d]riving [w]hile [i]ntoxicated. The defendant was caught committing the instant offense while the [d]riving [w]hile [i]ntoxicated charges were pending. This is a further indication of the defendant's contempt for the criminal justice system and is illustrative of his desire not to obey the laws of this country. Upon his illegal reentry into this country, he did not choose to become a productive member of society but rather he chose to commit a crime that poses a direct danger to the people who buy his drugs.

As to N.J.S.A. 2C:43-12(e)(10), "[w]hether 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[,]" the prosecutor reasoned:

The definition of an assault is a knowing or purposeful act that causes injury to another. As indicated above, the actions of this defendant create a direct injury upon the individuals that ingest the drugs that he sells. He has shown no remorse for his actions and has not accepted the consequences of his actions.

As to N.J.S.A. 2C:43-12(e)(11), "[c]onsideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act[,]" the prosecutor reasoned:

Prosecution of this defendant in the traditional manner would assist in alleviating not exacerbating the drug problem in society. If this defendant is allowed to be placed into PTI, it would fuel a misconception that drug dealers can escape with minor punishment and will be seen by others as acceptance of the illegal drug trade.

As to N.J.S.A. 2C:43-12(e)(13), "[a]ny involvement of the applicant with organized crime[,]" the prosecutor reasoned:

The illegal drug trade is, in and of itself, "organized crime". The major drug cartels cultivate the drugs and arrange for transportation into this country. The drugs are then moved to distribution points within the country. Those distribution points then distribute the drugs to the higher level distributors who in turn eventually distribute the drugs to individuals such as this defendant who sells them to the individuals on the street. During each step of the procedure the criminals involved receive a share of the proceeds. Without individual sellers such as this defendant the drug cartels would cease to exist. In order to properly combat the drug distribution organization, defendants such as this must be prosecuted in the traditional fashion.

As to N.J.S.A. 2C:43-12(e)(14), "[w]hether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution[,]" the prosecutor reasoned:

The State contends that there is no proper "supervisory treatment" in this particular case for this defendant. His ready access to drugs and lack of consideration for who he sells the drugs to are indicative of the facts that he cares not for the consequences of his actions. He will sell to people he does not know and has met for the first time. The fact that this individual does not care about the consequences of his actions makes "supervisory treatment" inapplicable in this case.

As to N.J.S.A. 2C:43-12(e)(15), "[w]hether 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[,]" the prosecutor reasoned:

The fact that there are no other codefendants indicted in this case does not remove this factor from consideration by the State. Clearly this defendant did not cultivate and transport the drugs into this country thereby indicating that there are other unindicted unknown coconspirators with this defendant. The interest of the State is best served by sending a clear message to those other individuals in this case as well as in other cases that illegal drug trafficking will not be tolerated and will be prosecuted through the traditional criminal justice system procedures.

As to N.J.S.A. 2C:43-12(e)(17), "[w]hether 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[,]" the prosecutor reasoned:

One of the key purposes of traditional prosecution is to focus on both general and specific deterrence. Even if this defendant might be deterred by his arrest and involvement in this criminal episode, there is the question of general deterrence by the prosecution of defendant. Here, the facts and circumstances of the case makes clear that the public need for prosecution outweighs any of the potential benefits to society by channeling this defendant into a program of supervisory treatment. There is no benefit to society from channeling this offender into a supervisory treatment program. He is not a drug user; he is a drug seller, motivated by profit. This is not an individual who is an addict; he is a profiteer making his living by preying on the unfortunate disabilities of others.

Lastly, the prosecutor explained that Guideline 3(i) of Rule 3:28-1 disfavors admission of a person charged with the sale or dispensing of a Schedule I or II narcotics, and there is a rebuttable presumption against enrollment when the prosecutor refuses to consent.

In assessing defendant individually, the prosecutor considered positive information, including that he financially contributed to support his family; lived with his family; graduated from vocational high school and wanted to pursue a career as a diesel mechanic; and was employed full-time from June 2009 to September 2010, from March 2011 to January 2012, and for two weeks in 2014.

The prosecutor also considered defendant's amenability and potential responsiveness to rehabilitation, and found:

Nowhere in the submissions does defendant indicate that he no longer engages in the illegal behavior related to the sale of illegal drugs. He has submitted no drug related tests nor medical records which demonstrate that he has determined to eliminate the sale and/or use of illegal substances from his life. Factually, there is no proof offered that this [twenty-five] year old defendant has been rehabilitated relating to the root causes of his crime as well as his obvious personal attraction to profit at the misfortune of others.

Defendant appealed to the Law Division. In a written opinion, Judge Diane Pincus found the prosecutor improperly considered factors (4) and (13), but properly considered the other factors. As to factors (1) and (2), the judge rejected defendant's view that this was merely a one-time occurrence involving a small amount of drugs. Rather, the judge found "[d]efendant was arrested as part of an ongoing investigation whereby the State set up this undercover operation focusing on [d]efendant[,] and [d]efendant was readily available to quickly acquire and sell drugs to a stranger." The judge also found that dealing drugs is a serious crime that harms the community and society as a whole.

As to factor (3), Judge Pincus found defendant's work history and efforts to support his family did not mean he was not motivated by profit in his sale of drugs or was so young as to not appreciate

the consequences of his actions. As to factors (5) and (6), the judge found "[d]efendant committed this crime solely for profit and . . . the traditional criminal justice process, rather than PTI, would adequately deter [d]efendant from continuing to commit crimes."

As to factor (7), Judge Pincus found "the sale of drugs is a detriment to the community, and society has an interest in deterring the distribution of drugs." As to factor (8), the judge recognized defendant had no subsequent involvement with the criminal justice system, but found he had "a prior DWI conviction and was readily available to acquire and sell drugs to a stranger."

As to factor (9), Judge Pincus found defense counsel conceded that defendant's immigration status could be considered in conjunction with other PTI factors, and counsel did not dispute defendant's failure to appear in municipal court could be considered a criminal or penal violation and used to support the denial of PTI. As to factor (10), the judge accepted the State's analysis that "[d]efendant's sale of drugs injures those who ingest the drugs and this constitutes an assault" was proper. As to factor (11), the judge found there was sufficient information supporting the State's analysis "that traditional prosecution of [d]efendant would alleviate, not exacerbate the problem in that

it would send a message to drug dealers that they are not entitled to special treatment in the criminal justice system." (Da33)

As to factor (15), Judge Pincus accepted the State's analysis that "there are people involved as [d]efendant could not have cultivated and transported the drugs he was selling himself[,]" and "denying [d]efendant entry into PTI . . . is sending a message to the people who are cultivating and transporting drugs that illegal drug trafficking will not be tolerated."

As to factor (17), Judge Pincus accepted the State's analysis that "the general deterrence offered by traditional prosecution of [d]efendant is so great that the public need for prosecution far outweighs the benefits of allowing [d]efendant into PTI." The judge concluded:

The State has presented sufficient facts to sustain its decision to reject [d]efendant's PTI application. The State conducted a reassessment of relevant factors after removing the factors cited by the Appellate Division as inappropriate and considered positive information regarding [d]efendant cited by the Appellate Division. Furthermore, there is a strong presumption in favor of denying [d]efendant's admission into PTI. Despite finding that the State improperly considered factors (4) and (13), the [c]ourt finds that the State did not make a clear error in judgment. The State's decision to not admit [d]efendant into PTI did not clearly subvert the goals underlying the program. Accordingly, this [c]ourt finds that [d]efendant has not established by clear and convincing evidence that the State's decision

to reject his PTI application was a patent and gross abuse of discretion. Moreover, [d]efendant has failed to establish that the State's decision was arbitrary or irrational such that a remand is required.

This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

THE PROSECUTOR'S REJECTION OF THE DEFENDANT FROM PTI WAS A PATENT AND GROSS ABUSE OF DISCRETION; THIS COURT SHOULD THEREFORE COMPEL THE DEFENDANT'S ADMISSION INTO PTI.

A. The prosecutor improperly applied nearly all of the statutory factors in rejecting the defendant's application.

1. The facts of the case -- that the defendant made a single sale of a small amount of cocaine to an undercover officer -- do not weigh against admission [N.J.S.A. 2C:43-12(e)(2)].

2. The defendant's relative youth does not weigh against admission [N.J.S.A. 2C:43-12(e)(3)].

3. The prosecutor's reliance on [N.J.S.A. 2C:43-12(e)(5), (6) and (14)] to deny admission is belied by the fact that he recommended non-custodial probation as the ultimate sentence.

4. There is no evidence in the record that the defendant engaged in a continuing pattern of anti-social behavior [N.J.S.A. 2C:43-12(e)(8)].

5. Consideration of a bench warrant as evidence of a criminal or penal violation was improper [N.J.S.A. 2C:43-12(e)(9)].

6. The prosecutor's conclusion that the defendant's conduct was "assaultive" was plainly erroneous and contrary to law [N.J.S.A. 2C:43-12(e)(10)].

7. [N.J.S.A. 2C:43-12(e)(3), (7), (11), (15), and (17)] were premised on the nature of the crime without an individualized assessment of the defendant.

8. The trial court properly found that [N.J.S.A. 2C:43-12(e) (4) and (13)] were inappropriately applied.

- B. The prosecutor failed to consider the many factors weighing in favor of admission.
- C. The prosecutor's willingness to admit the defendant into PTI if he confessed to the crime reveals that the prosecutor, in fact, believed that the defendant would be an acceptable candidate for PTI, and that his ultimate rejection of the defendant's application was arbitrary.
- D. The defendant's immigration status underlies the prosecutor's rejection.
- E. Rejection of the defendant will subvert the goals of PTI.
- F. Because the prosecutor's denial was a patent and gross abuse of discretion, this [c]ourt should compel the defendant's admission into PTI.

Our scope of review of a PTI rejection is severely limited. State v. Negran, 178 N.J. 73, 82 (2003). We afford the prosecutor's decision great deference. State v. Wallace, 146 N.J. 576, 589 (1996)). Prosecutors are granted "wide latitude in deciding whom to divert into the PTI program and whom to prosecute through a traditional trial." Negran, 178 N.J. at 82. A "[d]efendant generally has a heavy burden when seeking to overcome a prosecutorial denial of his [or her] admission into PTI." State v. Watkins, 193 N.J. 507, 520 (2008) (citation omitted). 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." State v. Hoffman, 399 N.J. Super. 207, 213 (App. Div. 2008) (citation omitted). "A patent and gross abuse of discretion is defined as a decision that '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 (quoting Wallace, 146 N.J. at 582-83). "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." State v. Bender, 80 N.J. 84, 93 (1979).

We have considered defendant's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We are satisfied that the prosecutor's rejection of defendant's PTI application was not a patent or gross abuse of discretion. Thus, there is no basis to disturb Judge Pincus' decision sustaining the prosecutor's decision. The reasons for the prosecutor's rejection were premised on consideration of relevant factors, which weighed against defendant's admission, and the prosecutor did not consider irrelevant or inappropriate factors. We agree with Judge Pincus that while the prosecutor improperly considered factors (4) and (13), the State did not make a clear error in judgment. 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.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION