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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-4926-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EMMANUEL ORTIZ-ROSAS,

Defendant-Appellant.

Submitted January 10, 2018 – Decided February 7, 2018

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Indictment
No. 15-03-0219.

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

Sean F. Dalton, Gloucester County Prosecutor,
attorney for respondent (Douglas Pagenkopf,
Assistant Prosecutor, and Monica Bullock,
Legal Assistant, on the brief).

PER CURIAM

Defendant appeals the denial of his application for admission into the pretrial intervention program (PTI). We affirm.

A Gloucester County grand jury charged defendant in a single-count indictment with fourth-degree assault by auto, N.J.S.A. 2C:12-1(c)(2). Following the State's rejection of his PTI application and the trial court's denial of defendant's appeal from that decision, the twenty-four-year-old defendant accepted the State's plea offer. The plea offer required defendant to plead guilty to fourth-degree assault by auto and two motor vehicle offenses: a second offense for driving while intoxicated (DWI), N.J.S.A. 39:4-50, and driving while suspended, N.J.S.A. 39:3-40. In exchange, the State agreed to recommend a two-year probationary term on the fourth-degree offense and mandatory fines and penalties, including suspension of defendant's driving privileges for two years, on the motor vehicle offenses. The State also agreed to dismiss other motor vehicle summonses. The court sentenced defendant in accordance with the plea agreement. This appeal followed.

These are the facts concerning the offenses and the defendant's PTI application. Defendant admitted that on September 13, 2014, while driving recklessly under the influence of alcohol and without a driver's license, his car collided with another car.

He did not dispute that the other car's driver sustained bodily injury in the accident.

The driver of the other car told police she was travelling on a street in Glassboro when she noticed a car approaching her at a high rate of speed. As she started to slow down to pull over so that the car could pass her, the car slammed into the back of her car, causing it to spin out of control. When her car came to a rest, the victim saw defendant exit his vehicle and toss a box on the side of the road. The victim sustained injuries that required medical treatment.

Responding officers observed an empty six-pack box of Negro Modelo beer on the road near defendant's vehicle as well as a Bud Lite Lime box containing four bottles of Negro Modelo beer and four bottles of Bud Lite Lime. The box also contained a few broken bottles.

The police readily observed that defendant appeared to be visibly intoxicated. After defendant failed a field sobriety test, the police transported him to the station where an Alcotest revealed defendant's blood alcohol concentration (BAC) to be 0.19%. Police then transported defendant to a hospital for a blood draw. The analysis on the blood draw revealed a BAC of 0.176%. This incident was not defendant's first offense for Driving While Intoxicated, N.J.S.A. 39:4-50. Thirteen months

earlier, on August 14, 2013, he had been convicted of driving while intoxicated and refusal to submit a breath sample for testing.

Police arrested defendant and issued multiple summonses to him on September 13, 2014. He applied for admission into PTI in December of the same year. In January 2014, three months before a grand jury indicted defendant, the Gloucester County Criminal Division Manager rejected his PTI application. On January 7, 2015, the Criminal Division Manager rejected defendant's application.

In her rejection letter, the Criminal Division Manager cited Rule 3:28, Guideline 3(i)(3), which at the time stated, in pertinent part: "If the crime was . . . (3) deliberately committed with violence or threat of violence against another person . . . , the defendant's application should generally be rejected."¹ The Criminal Division Manager noted, "[t]he offense in the present case does constitute a threat of violence." She further noted, "threat of violence is inherent when driving under the influence of alcohol. It is in fact, extremely dangerous and can lead to a fatality or serious bodily injury."

¹ This Guideline has since been amended.

Explaining that "[t]he PTI guidelines and [N.J.S.A.] 2C:43-12 [have] also been considered," and finding defendant had presented no compelling reasons justifying admission into the PTI program and had not established a decision against enrollment would be arbitrary or unreasonable, the Criminal Division Manager rejected the application.

In March 2015, a grand jury later charged defendant in a single-count indictment with fourth-degree assault by auto, N.J.S.A. 2C:12-1C(2). In July of the same year, he reapplied for PTI. Eight days later, on July 22, 2015, the Gloucester County Prosecutor's Trial Section Chief rejected defendant's PTI application. The Section Chief stated: "[a]fter considering the criteria set forth in N.J.S.A. 2C:43-12 and [Rule] 3:28, and the accompanying Guidelines, I agree with the reasons given by the [Criminal Division Manager] for rejecting [defendant's] application for admission into the PTI program and reject [defendant's] PTI application for substantially the same reasons." The Section Chief informed defendant he could present any additional facts or materials demonstrating his amenability to the rehabilitative process.

Four months later, in November 2015, defendant presented additional material. The material included a letter from defendant's employer attesting to defendant's seven-year term of

employment and his status as a dependable, hard-working, and trustworthy employee. The employer stated that defendant and his brother "send all of their money home to their parents and family in Mexico."

The Gloucester County Prosecutor's Trial Chief considered the additional materials and acknowledged they demonstrated defendant had redeeming qualities. Yet, there were countervailing considerations. The Trial Chief noted, among other things, defendant had made the decision to operate a motor vehicle while intoxicated, resulting in an accident causing bodily injury to another motorist. In addition, thirteen months earlier, defendant had been convicted of operating a motor vehicle under the influence of alcohol and refusing to submit to a chemical breath test. The Trial Chief explained, "[g]iven that background, I am hard-pressed to believe that this particular defendant can be deterred from criminal behavior by the short-term rehabilitative work or supervision involved with the PTI program." For these and the other reasons noted in his letter, the Trial Chief informed defendant the original denial of defendant's PTI application would stand.

Defendant appealed the denial to the Law Division, Criminal Part. The court upheld the denial of defendant's PTI application.

On this appeal, defendant argues a single point:

THE PROSECUTOR'S REJECTION OF DEFENDANT'S ADMISSION INTO THE PRE-TRIAL INTERVENTION PROGRAM WAS AN ARBITRARY, PATENT, AND GROSS ABUSE OF DISCRETION WHICH MUST BE CORRECTED BY THIS COURT.

Defendant submits three reasons the prosecutor's rejection of his PTI application was a patent and gross abuse of discretion: the prosecutor misapplied Guideline 3(i)(3); the prosecutor relied on a single factor only, namely, the nature of the offense; and, the prosecutor demonstrated a practice of per se rejection of DWI cases. We find none of these contentions meritorious.

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. 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) (citations omitted)). Absent evidence to the contrary, a reviewing court must assume "the prosecutor's office has considered all relevant factors in reaching the PTI decision." Id. at 249 (citing State v. DalGLISH, 86 N.J. 503, 509 (1981); State v. Bender, 80 N.J. 84, 94 (1979)).

A defendant seeking to have a court 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) (alteration in original) (quoting State v. Leonardis, 73 N.J. 360, 382 (1977)). Generally, a defendant can establish a prosecutor has abused his or her discretion in denying a PTI application by establishing the prosecutor did not consider all relevant factors, considered irrelevant or inappropriate factors, or committed a clear error in judgment. Id. at 583 (citations omitted). To establish that such an abuse of discretion rises to the level of patent and gross, a defendant must also show that the alleged prosecutorial error will clearly subvert the goals of Pretrial Intervention. Ibid. (citations omitted).

Here, it can hardly be said the prosecutor's rejection of defendant's PTI application represents a patent and gross abuse of discretion that constitutes an egregious example of injustice and unfairness. See Nwobu, 139 N.J. at 246. Defendant, only twenty-four years old, undeterred by the sanctions imposed for a previous DWI, drove a car without a valid license after consuming alcohol in quantities sufficient to register a 0.19% BAC — more than twice the BAC that establishes DWI. In doing so, he damaged

another's car and injured another person. Defendant's disregard for the State's motor vehicle regulations, as evidenced by his driving without a valid license, and his disregard for the safety of others, as evidenced by his second DWI offense, amply supported the prosecutor's conclusion that defendant could not be deterred from such further criminal behavior by the short-term rehabilitative work or supervision involved in the PTI program.


Defendant argues that his offense is not of the category enumerated in Guideline 3(i)(3) and the prosecutor thus erred by applying this Guideline. Even if the Criminal Division Manager initially misconstrued Guideline 3(i)(3), the prosecutor's final rejection letter did not. In that letter, the prosecutor did not assert defendant's fourth-degree offense was deliberately committed with violence or the threat of violence intended against another. Rather, the prosecutor considered that defendant made a "decision to operate a motor vehicle while intoxicated, resulting in a violent event causing bodily injury to another motorist."

Defendant also argues the prosecutor improperly relied on a single factor only, namely, the nature of the offense, and the prosecutor demonstrated a practice of per se rejection of DWI cases. The record refutes the first of these arguments and provides no support for the second. Defendant's arguments are

without sufficient merit to warrant further discussion. 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