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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0106-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BOBBY O. SPANN,

Defendant-Appellant.

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Argued December 7, 2021 – Decided April 11, 2022

Before Judges Currier and Smith.

On appeal from the Superior Court of New Jersey,  
Law Division, Monmouth County, Indictment No. 19-  
09-1201.

Melanie K. Dellplain, Assistant Deputy Public  
Defender, argued the cause for appellant (Joseph E.  
Krakora, Public Defender, attorney; Melanie K.  
Dellplain, on the brief).

Alecia N. Woodard, Designated Counsel, argued the  
cause for respondent (Lori Linskey, Acting Monmouth  
County Prosecutor, attorney; Monica do Outeiro,  
Special Deputy Attorney General/Acting Assistant

Prosecutor, of counsel; Jonathan Lugo, Legal Assistant, on the brief).

## PER CURIAM

Defendant Bobby O. Spann appeals from the Law Division's order which affirmed rejection of his application for admission to the Pretrial Intervention Program (PTI) by the Program Director and the Monmouth County Prosecutor (prosecutor). After considering defendant's arguments in light of the record and applicable legal standards, we affirm.

### I.

On April 26, 2019, law enforcement officers obtained and executed a search warrant for defendant's Freehold residence. The search warrant was based on a tip from a confidential informant (CI) "who advised that he/she had been purchasing cocaine from [defendant]" at his residence. Based on the tip, police conducted two controlled buys in which the CI purchased cocaine from defendant under police surveillance.

In executing the search warrant at defendant's residence, which he shared with codefendant Marc Budhai, officers found numerous items consistent with a narcotics operation. In defendant's bedroom, the officers seized two bottles of a cutting agent, a digital scale, and seventeen multi-colored sandwich bags containing a white powdered residue. While searching

Budhai's bedroom, the officers found a safe containing a plastic bag of suspected cocaine, ten small clear Ziploc bags of suspected cocaine weighing approximately 1.5 ounces, \$3,250 in U.S. currency, a digital scale with a white powdery substance or residue, a bag containing forty small Ziploc bags and a clear sandwich bag with a white powdery substance, two vape cartridges, a Ziploc bag containing suspected marijuana, thirty small yellow Ziploc bags, and \$431 in U.S. currency in his wallet.

After the search, defendant and Budhai were arrested and taken to police headquarters. Defendant and Budhai were advised of their Miranda<sup>1</sup> rights and asked if they wanted to give a formal statement. Budhai waived his Miranda rights, and made several admissions, including that: defendant had picked up the cocaine the day before the search; the confiscated drugs were both his and defendant's; defendant sold drugs at a local restaurant; and that he and defendant had sold cocaine together as partners for approximately six months.

Defendant also waived his Miranda rights and revealed that "he was selling [drugs] for one and half months; prior to that, he was directing people who wanted drugs to other people." Defendant described himself as a

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

"middle[]man" and denied using illegal drugs due to his company's drug-use policy.

On September 5, 2019, a grand jury indicted defendant and Budhai of the following crimes: second-degree possession of a controlled dangerous substance (CDS) with intent to distribute, N.J.S.A. 2C:35-5(b)(2); third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); and third-degree conspiracy, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5(b)(2). Defendant was also charged with two disorderly-persons offenses: CDS possession, N.J.S.A. 2C:35-19(a)(4), and drug paraphernalia use or possession with the intent to distribute, N.J.S.A. 2C:36-2.

Defendant applied to the prosecutor for admission into PTI. Defendant's counsel provided the prosecutor with a supplemental letter brief. Defendant argued that his role in the operation was "minimal" compared to Budhai and his involvement was caused by his desire to "sustain his own drug habit." Defendant offered to seek substance abuse treatment. Defendant cited his limited previous criminal history and his willingness to plead guilty before entering PTI.

The prosecutor rejected defendant's application, concluding that defendant did not overcome the presumption of incarceration that attends

being charged with a second-degree crime, pursuant to R. 3:28-1(d)(1). The prosecutor found defendant failed to present "extraordinary and compelling" reasons "to overcome the heavy presumption against PTI admission . . . ." The prosecutor rejected defendant's claims of addiction, finding that defendant's "employment did not prevent or mitigate [his] involvement in a drug distribution scheme" and that such a scheme "militate[s] against admission into PTI." The prosecutor concluded by finding that defendant's admission to the program would be contrary to the State's goal of eradicating drug-related criminal activity. Following rejection, defendant entered a guilty plea of third-degree possession of CDS with intent to distribute. Defendant reserved the right to reapply to PTI, which he did.

After reviewing the record, the PTI Director recommended defendant be accepted into PTI, given that: the offense was non-violent and victimless; defendant was remorseful; defendant had no history of narcotic sales; and defendant appeared highly motivated to live a law-abiding life and reenroll in college to pursue a business management degree. However, the Director also found that "defendant had ample opportunities to correct his behavior" and that his actions were financially driven. The Director was doubtful the PTI

program was "the proper form of supervision required to divert . . . defendant from future criminal involvement."

The prosecutor again rejected defendant's application. He cited the factors contained in N.J.S.A. 2C:43-12(b)(1), (2) and (17). In finding factors one and two, the prosecutor stated:

[t]he facts indicate that defendant was engaged in the sale of illegal drugs for profit. He admittedly operated a low-level cocaine distribution business out of his home. Defendant was engaged in this business for profit; supplementing his low income with drug sales. This was not a momentary lapse of judgment but a business; such was evidenced by sale proceeds that were secured in a locked safe.

Further, the prosecutor found it could not "ignore[] that the defendant was charged with possession and intent to sell second-degree weight of cocaine: an amount the Legislature deems so serious as to warrant a presumption of incarceration." The prosecutor also emphasized that defendant failed to present evidence that indicated that he suffered from a substance abuse problem. Lastly, the prosecutor noted that "[t]he negotiated plea agreement considered all mitigating circumstances, in particular, that this case is not PTI appropriate. The[] circumstances of this crime weigh against admission into PTI."

In finding factor seventeen, the prosecutor acknowledged "[t]here is a public need to deter people from engaging in illegal narcotics businesses in their residences" and there is a "rising need to deter drug dealers while at the same time reducing available drugs that may lead to addiction and/or overdoses is a growing societal concern." The prosecutor stated that our legislature has recognized that "the unlawful use, manufacture and distribution of controlled dangerous substances continues to pose a serious and pervasive threat to the health, safety and welfare of the citizens of this State." The prosecutor added that "the incidence of such offenses is directly related to the rate of other violent and non-violent crimes." The prosecutor concluded that "[t]he public need for prosecution of this defendant, who sold cocaine out of his residence, and would have continued but for police intervention, is far outweighed by the value of supervisory treatment."

In analyzing the mitigating factors, the prosecutor "considered the positive aspects of defendant's application, including his mental health diagnosis, acknowledgment of guilt, and his employment." The prosecutor ultimately concluded that "[d]espite defendant's positive aspects, the nature of the offense, facts of the case, and needs and interests of society make this crime best suited for traditional prosecution."

Defendant moved before the Law Division to compel PTI entry. He argued that the prosecutor's rejection was a patent and gross abuse of discretion because the prosecutor's analysis ignored that most of the evidence was found in Budhai's bedroom, not his, and he only played a "minor role" in the drug operation. Additionally, defendant argued that the prosecutor's public policy findings only focused on public deterrence, and the prosecutor did not sufficiently discuss supervisory treatment. The trial court considered defendant's arguments and affirmed, finding the prosecutor's rejection of defendant's PTI application was not a patent and gross abuse of discretion.

At sentencing, the court conducted an analysis of the aggravating and mitigating factors listed in N.J.S.A. 2C:44-1. The court found aggravating factor nine, "the need to deter this defendant and others from violating the law . . . generally and specifically in the dealing of cocaine[,] " which he gave significant weight. In finding aggravating factor nine, the judge looked to the facts, finding defendant "was acting as a drug dealer" for the past six months. The judge also found mitigating factors seven, eight, nine, and ten, each of which he gave minimal weight. In balancing the aggravating and mitigating factors, the court concluded that the aggravating and mitigating factors were in equipoise. After hearing testimony and reviewing the record, the court



departed from the State's recommended sentence and, instead, imposed eighteen months of probation.<sup>2</sup> The court also dismissed all other charges.

On appeal, defendant argues that the State improperly relied on a per se rule barring that all persons who commit drug offenses with the intent to distribute from PTI, and that the prosecutor failed to consider several relevant factors weighing in favor of admission. Defendant also contends that his sentence is excessive.

## II.

We apply the same standard of review of a prosecutor's rejection of a PTI application as the trial court and review the court's decision de novo. State v. Nicholson, 451 N.J. Super. 534, 554 (App. Div. 2017). The scope of judicial review of a PTI denial is "severely limited." State v. Negran, 178 N.J. 73, 82 (2003). The decision to grant or deny PTI is a "quintessentially prosecutorial function." State v. Roseman, 221 N.J. 611, 624 (2015) (quoting State v. Wallace, 146 N.J. 576, 684 (1996)). Accordingly, we may overturn a prosecutor's rejection of a defendant's 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

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<sup>2</sup> Pursuant to the plea agreement, the State recommended a sentence of two years of probation.

of . . . discretion." Id. at 624-25 (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.'" State v. Watkins, 193 N.J. 507, 520 (2008) (quoting Wallace, 146 N.J. at 582-83).

We give prosecutors "a great deal of deference" in determining whether to divert a defendant into PTI. Roseman, 221 N.J. at 624. Such discretion is not, however, without limits. Negran, 178 N.J. at 82. "A rejected applicant must be provided with a clear statement of reasons for the denial." Ibid. The decision whether to admit a defendant to a PTI program is "'primarily individualistic in nature' and a prosecutor must consider an individual defendant's features that bear on his or her amenability to rehabilitation." State v. Nwobu, 139 N.J. 236, 255 (1995) (quoting State v. Sutton, 80 N.J. 110, 119 (1979)). "N.J.S.A. 2C:43-12(e) sets forth a list of seventeen nonexclusive factors that prosecutors must consider in connection with a PTI application." State v. Johnson, 238 N.J. 119, 128 (2019). Rule 3:28-4(b)(1)(ii) creates a presumption of rejection:

[i]f the crime was . . . (ii) part of a continuing criminal business or enterprise . . . the defendant's application should generally be rejected.

The prosecutor's statements of reasons, moreover, must demonstrate a "careful[] consider[ation] [of] the facts in light of the relevant law." Wallace, 146 N.J. at 584. It is not sufficient for the prosecutor merely to "parrot[] the statutory language, and present[] bare assertions regarding [the defendant's] amenability to PTI." Roseman, 221 N.J. at 627.

### III.

#### A.

Defendant argues that the prosecutor's rejection was based solely on the nature of his offense, and that pursuant to State v. Baynes, 148 N.J. 434 (1997), and State v. Caliguiri, 158 N.J. 28 (1999), such a categorical rejection was improper. Defendant also contends the prosecutor's decision was not based on a thorough consideration of all appropriate factors and, thus, constituted a gross and patent abuse of discretion.

The precedent defendant cites is inapposite to the facts of this case. Additionally, in both cases, the prosecutor adopted a per se rule rejecting PTI applications from defendants charged with certain drug offenses. See Baynes, 148 N.J. at 451 (holding prosecutor's per se rule rejecting PTI applicants for possessory narcotics offenses in a school zone was an abuse of discretion); see also Caliguiri, 158 N.J. at 32 (holding that per se exclusion of defendants

charged with violations of N.J.S.A. 2C:35-7 was an abuse of discretion). In Baynes and Caliguiri, the prosecutor provided a "'parrot-like' recitation of the language of relevant statutes," which constitutes a "patent and gross" abuse of discretion. Baynes, 148 N.J. at 445; Caliguiri, 158 N.J. at 17.

Here, unlike in Baynes and Caliguiri, the prosecutor's rejection of defendant's application for PTI was predicated on enumerated statutory factors and considerations applicable to the facts of defendant's case. The prosecutor thoughtfully evaluated the factors and did not categorically exclude drug distribution offenses from consideration for PTI. The prosecutor next analyzed those factors in finding defendant was not suitable for PTI. Based on the record, we find defendant has not clearly and convincingly established that the prosecutor engaged in a patent and gross abuse of discretion when he denied defendant's application. Further, we cannot say that it was "'arbitrary, irrational or otherwise an abuse of discretion' for the prosecutor to have assigned as much weight to the gravity of the offense as [he] apparently did in this case." Wallace, 146 N.J. at 589. We discern no basis to disturb the rejection of plaintiff's application, and we affirm.

B.

Defendant next argues his sentence is excessive. He contends the trial judge gave undue weight to aggravating factor nine and failed to state his reasons on the record. We disagree and affirm. We apply a "deferential" standard in reviewing a trial court's sentencing determination. State v. Fuentes, 217 N.J. 57, 70 (2014). We must affirm the sentence unless:

(1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

We are not permitted to substitute our judgment for that of the trial judge if the sentencing court has not demonstrated a clear error of judgment or the sentence does not shock the judicial conscience. State v. Case, 220 N.J. 49, 65 (2014).

"In exercising its authority to impose [a] sentence, the trial court must identify and weigh all of the relevant aggravating factors that bear upon the appropriate sentence as well as those mitigating factors that are 'fully supported by the evidence.'" State v. Blackmon, 202 N.J. 283, 296-97 (2010)

(quoting State v. Dalziel, 182 N.J. 494, 504-05 (2005)). Applying these well-established principles, we find nothing in the record to suggest that the sentence was excessive or that the trial judge abused his discretion. The judge's weighing of the aggravating and mitigating factors was based upon competent and credible evidence in the record, and the sentence does not shock our judicial conscience. Case, 220 N.J. at 65.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION