

# RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1499-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

I.S.P.,<sup>1</sup>

Defendant-Appellant.

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Submitted May 9, 2022 – Decided May 24, 2022

Before Judges Sabatino and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 20-02-0217.

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

Lori Linskey, Acting Monmouth County Prosecutor, attorney for respondent (Monica do Outeiro, Special

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<sup>1</sup> We use initials to preserve the confidentiality of these proceedings. R. 1:38-3(c)(5).

Deputy Attorney General/Acting Assistant Prosecutor,  
of counsel and on the brief; Janine N. DeLucia, Legal  
Assistant, on the brief).

PER CURIAM

Defendant appeals from an October 8, 2020 Law Division order denying her motion for admission into a pretrial intervention (PTI) program after being rejected by the Monmouth County Prosecutor's Office (MCPO). We affirm.

The facts are taken from the motion record. After receiving a report regarding an unresponsive individual in a parked car, officers from the Howell Township Police Department commenced an investigation which revealed that the victim had overdosed from heroin purchased from defendant. The victim was taken to the hospital where she lapsed into a coma and has remained in a persistent vegetative state.

Once defendant was identified as the supplier of the heroin, an undercover officer purchased additional heroin from her on four separate occasions. Defendant was later arrested and stated she purchased the heroin from a neighbor and sold it on a number of occasions to a coworker. She was subsequently charged in a twenty-nine-count indictment related to her distribution, possession and conspiracy to distribute heroin.

Defendant pled guilty to a single count of third-degree conspiracy, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5(b)(3). In exchange, the State agreed to dismiss the remaining charges and recommend a three-year custodial term, without a period of parole ineligibility. In her factual basis supporting the third-degree charge, defendant admitted that she would coordinate the sale and distribution of heroin by acting as an intermediary between the purchaser and her neighbor, who was the primary supplier. She stated she was aware she was distributing a controlled dangerous substance and that doing so was illegal.

At the time of her plea, defendant indicated she intended to apply for PTI. The State acknowledged her intention but stated it could not take a position on any application until defendant formally applied to the diversionary program.

After defendant formally applied, the State rejected her application in a detailed, four-page letter dated June 25, 2020. The prosecutor initially noted that because defendant was charged with multiple second-degree offenses, including, possession with intent to distribute heroin within 500 feet of a public park, contrary to N.J.S.A. 2C:35-7.1, and five counts of distribution of heroin within 500 feet of a public park, contrary to N.J.S.A. 2C:35-7.1, all which carry a mandatory period of imprisonment, defendant was obligated to establish

extraordinary and compelling circumstances to justify her application under Rules 3:28-1(d)(1) and 3:28-3(b)(1).

The prosecutor stated it considered "the applicable discovery in conjunction with [defendant's] submission of compelling circumstances," and determined it would not consent to defendant's application. In doing so, the prosecutor specifically considered and rejected the four arguments defendant relied upon to establish extraordinary and compelling circumstances: (1) defendant was a single mother who had completed parenting classes; (2) she had no prior record other than a disorderly person's offense; (3) defendant maintained two jobs; and (4) she was not a violent offender. The prosecutor further explained that defendant pled guilty to conspiracy to distribute a controlled dangerous substance, it had recommended a three-year custodial term, and these facts "do not establish extraordinary and compelling circumstances to overcome the heavy presumption against PTI admission in this case."

Referencing State v. Nwobu, 139 N.J. 236, 252 (1995), the prosecutor further noted that nothing in defendant's background was so "extraordinary, unusual or idiosyncratic" to warrant admission into PTI. The prosecutor also considered defendant's minimal involvement with the criminal justice system

but stated the "mere fact that a person has no prior criminal record is insufficient to establish compelling justification for PTI acceptance." Similarly, the prosecutor evaluated defendant's personal situation and found "the fact that defendant is a single mother or maintains two jobs [does not] give rise to extraordinary and compelling circumstances."

The prosecutor also disagreed with defendant's contention she was "not [the] source of drugs" and presented "no risk of harm" to her community. Rather, the prosecutor concluded defendant presented a "grave risk to the public," for not only selling heroin to the victim, who was gravely injured and remains in a vegetative state, but also by continuing to sell heroin in the community as evidenced by her sales to an undercover officer on multiple occasions.

The prosecutor further maintained that the facts of the case revealed, contrary to defendant's characterization, that her sale of heroin was motivated by profit. According to the prosecutor, defendant was a "runner" for a heroin distributor and was not under the influence of heroin or motivated by its use. Under such circumstances the prosecutor was satisfied that PTI was inappropriate because defendant had "no regard for the dangers of trafficking

heroin across the community," and the "vegetative state the individual to whom she sold remains in is reflective of the danger defendant presents."

Thus, the prosecutor concluded:

The nature and facts of this particular case make it, thus, inappropriate for PTI. N.J.S.A. 2C:43-12e(1&2). The value of supervisory treatment is, therefore, outweighed by the need to protect the public and formally prosecute individuals who put our public at such grave risk. N.J.S.A. 2C:43-12(14). See State v. Seyler, 323 N.J. Super. 360, 370 (App. Div. 1999) ("The interests of society may justify the denial of an application for admission into PTI even though a defendant has led an exemplary life except for the conduct which forms the basis of the pending criminal charges.")

Moreover, there is a public need to deter people from engaging in the sale of illegal narcotics. N.J.S.A. 2C:43-12e(17). Recognizing the 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. Our Legislatures have recognized that "[d]espite the impressive efforts and gains of our law enforcement agencies, 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." N.J.S.A. 2C:35-5.1. To that same end, "the incidence of such offenses is directly related to the rate of other violent and non-violent crimes." Id. The public need for prosecution of this defendant who sold heroin, and would have continued but for police intervention, is far outweighed by the value of supervisory treatment. N.J.S.A. 2C:43-12e(17).

Finally, based upon the nature and circumstances of this case, the State extended a plea offer wherein it recommended a state-prison term. PTI is not a substitute for sentencing. Defendant needs to be sentenced accordingly.

Defendant appealed her rejection for PTI to the Law Division. After considering the parties' written submissions and oral arguments, Judge Jill Grace O'Malley, J.S.C., affirmed the prosecutor's denial in an October 8, 2020 order and accompanying oral decision. Judge O'Malley concluded defendant failed to establish that the prosecutor's decision was a patent and gross abuse of discretion as the State properly considered the appropriate statutory factors outlined in N.J.S.A. 2C:43-12 when it rejected defendant's application. The judge explained that defendant failed to submit compelling reasons warranting entry into PTI or to overcome the high burden required to reverse the State's decision. On this point, Judge O'Malley relied on State v. Lee, 437 N.J. Super. 555, 568 (App. Div. 2014), for the proposition that a defendant's lack of criminal record, youth, education or employment were not sufficiently compelling reasons to overcome the prosecutor's decision.

At defendant's subsequent sentencing proceeding, the court imposed a two-year probationary term, despite the State's recommendation for a custodial

sentence. The court also assessed applicable fines and penalties. On appeal, defendant raises the following arguments<sup>2</sup>:

## POINT I

### THIS COURT SHOULD REVERSE THE ERRONEOUS DENIAL OF DEFENDANT'S PTI APPLICATION

- A. [T]he Prosecutor's Reasoning Constituted a Patent and Gross Abuse of Discretion, this Court Should Compel Defendant's Admission Into PTI
- B. [T]he Prosecutor Inappropriately Applied a Per Se Bar Against Drug Distribution Offenses, a Remand is Necessary for Proper Consideration of All of the Relevant Factors
- C. [T]he Prosecutor Failed to Consider Several Relevant Factors That Weighed in Favor of Admitting Defendant into PTI, a Remand for Reconsideration is Necessary

We have considered defendant's contentions in light of the applicable law and the motion record and reject all of her arguments substantially for the reasons detailed in Judge O'Malley's thoughtful and well-reasoned oral decision. We provide the following comments to amplify our decision.

Our review of an appeal from denial of PTI is limited. State v. Negran, 178 N.J. 73, 82 (2003). We apply the same de novo standard of review of a

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<sup>2</sup> We have rearranged defendant's subheadings for purposes of clarity and so the arguments are identified in the order we address them in our opinion.



prosecutor's rejection of a PTI application as the trial court. State v. Waters, 439 N.J. Super. 215, 226 (App. Div. 2015). If a prosecutor's decision demonstrates consideration of all appropriate factors, it will not be disturbed absent a showing that it was a patent and gross abuse of discretion. State v. K.S., 220 N.J. 190, 200 (2015). We afford prosecutors "broad discretion to determine if a defendant should be diverted." Id. at 199. We address "only the 'most egregious examples of injustice and unfairness'" in reviewing a denial of PTI. Negran, 178 N.J. at 82 (quoting State v. Leonardis, 73 N.J. 360, 384 (1977)). A defendant rejected from PTI "must 'clearly and convincingly' show that the decision [to deny admission into PTI] was a 'patent and gross abuse of . . . discretion.'" K.S., 220 N.J. at 200 (quoting State v. Wallace, 146 N.J. 576, 582 (1996)).

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). 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." Nwobu, 139 N.J. at 255 (quoting State v. Sutton, 80 N.J. 110, 119 (1979)).

To establish an abuse of prosecutorial discretion, a defendant must demonstrate:

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 [PTI].

[State v. Roseman, 221 N.J. 611, 625 (2015) (first alteration in original) (quoting State v. Bender, 80 N.J. 84, 93 (1979)).]

"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). "The question is not whether we agree or disagree with the prosecutor's decision, but whether the prosecutor's decision could not have been reasonably made upon weighing the relevant factors." Nwobu, 139 N.J. at 254.

Applying these standards, we discern no abuse of discretion in the MCPO's denial of defendant's application, much less one that is "patent and gross." Although defendant had only disorderly persons offenses in her background, "the interests of society may justify the denial of an application for

admission into PTI even though a defendant has led an exemplary life except for the conduct which forms the basis of the pending criminal charges." State v. Seyler, 323 N.J. Super. 360, 370 (App. Div. 1999), aff'd o.b., 163 N.J. 69 (2000). Simply being "a first-time offender" who "admitted or accepted responsibility for the crime" is not enough. Waters, 439 N.J. Super. at 227 (quoting Nwobu, 139 N.J. at 252).

With respect to defendant's specific arguments in point I.A., we are satisfied the record fully supports the MCPO's denial of defendant's application based on its finding defendant was a willing participant in multiple sales of heroin for profit, where one resulted in the victim overdosing and suffering life-altering injuries. The MCPO acknowledged defendant's status as a single mother, her employment status, and lack of any significant prior criminal record, but concluded those facts clearly did not outweigh others that supported denial of her admission to PTI.

In point I.B., defendant argues we should remand the matter because the prosecutor failed to consider relevant statutory factors, and had it done so, they would have supported defendant's acceptance into PTI. She also argues the prosecutor incorrectly concluded certain statutory factors supported the denial of her application.

Defendant first maintains the court should have considered factors N.J.S.A. 2C:43-12(e)(9), (12) and (13), as she had no prior criminal convictions, involvement with organized crime, nor a violent history, and did not present a danger to others. Second, she argues because there was no "suggestion from the facts of the case or [her] personal background that this 'crime constitute[d] part of a continuing pattern of antisocial behavior,'" or the offense was in any way "assaultive or violent" or involved other crimes, the court should have considered N.J.S.A. 2C:43-12(e)(8), (10), and (15).

Third, she contends as her role in the offense was "relatively minor" compared to her codefendant, and no contraband was found in her home, the prosecutor erred in concluding N.J.S.A. 2C:43-12(e)(2) supported denial of her application. Fourth, defendant argues that N.J.S.A. 2C:43-12(e)(7), (14), and (17) supported her admission into PTI because, in light of the non-violent nature of her crime and her lack of a criminal history, the "interests of society" would be better served if she were afforded the "opportunity to re-enter society without a conviction that would hinder her ability to obtain meaningful employment." Finally, defendant claims her ultimate probationary sentence demonstrates custodial supervision was unnecessary and PTI would have provided her

adequate rehabilitative and supervisory services without the burden of a criminal conviction.

Although the prosecutor's letter did not cite to sections 2C:43-12(e)(7), (8), (9), (10), (12), (13), and (15) specifically, we are fully satisfied based on a fair reading of the June 25, 2020 letter, and the prosecutor's reliance on N.J.S.A. 2C:43-12(e)(1), (2), (14), and (17), that before denying plaintiff's application it fully considered all relevant factors, considered those applicable, and rejected others. "[U]nless and until a defendant demonstrates [the prosecutor failed to consider the seventeen factors listed in N.J.S.A. 2C:43-12(e)], our judges must presume that all relevant factors were considered and weighed prior to a prosecutorial veto." Lee, 437 N.J. Super. at 562 (first alteration in original) (quoting Bender, 80 N.J. at 94); see also Nwobu, 139 N.J. at 249 ("the prosecutor 'should note the factors present in defendant's background or the offense purportedly committed which led [the prosecutor] to conclude that admission should be denied.'" (alteration in original) (quoting Sutton, 80 N.J. at 117). Here, defendant did not rebut that presumption.

We also note that the prosecutor's letter, rather than a form correspondence indiscriminately noting the statutory factors, represented a tailored response to defendant's application and a specific rejection of all points

raised. See Nwobu, 139 N.J. at 249 (explaining the prosecutor must state the reasons for rejecting a PTI application with specificity). The prosecutor explained it had thoroughly reviewed all discovery and was clearly aware of the serious charges to which defendant was accused. The prosecutor was thus cognizant defendant was not a member of organized crime, and noted her limited criminal history but appropriately reasoned that defendant was nevertheless a danger to her community based on her actions here, which included directly causing another human being harm and selling heroin in the community on multiple occasions.

Defendant's criminal behavior cannot reasonably be considered "relatively minor." That the drugs were not found in defendant's house hardly warrants minimizing her role. Finally, we are satisfied that simply because defendant was ultimately sentenced to a generous probationary term in no way demonstrates that the prosecutor's denial of her PTI application constituted an abuse of discretion.

In point 1.C., defendant relies on State v. Baynes, 148 N.J. 434, 445 (1997), and State v. Caliguiri, 158 N.J. 28, 43-44 (1999) and argues the prosecutor abused its discretion in denying defendant's application because it improperly implemented an "impermissible per se bar against PTI admission for

drug distribution offenses." She specifically contends the reasoning behind the prosecutor's reliance on N.J.S.A. 2C:43-12(e)(1), (2), (14), and (17) would apply to almost every person charged with a drug distribution offense, as they are all "motivated by financial gain . . . , there is a public need to deter drug offenses, and drug offenses can be directly related to the commission of other crimes." We reject these arguments as they are entirely unmoored to the record.

First, we note that contrary to the defendants in Baynes and Caliguiri, who were charged with possession of heroin and possession of marijuana with intent to distribute, defendant here was charged with, among other offenses, conspiracy to distribute and the multiple sales of heroin to an undercover officer. Second, unlike in those cases, the prosecutor here did not base its decision to deny defendant's application solely on the nature of the offenses but instead considered the unique facts of the case, which included the multiple, serious offenses defendant faced, the third-degree charge to which she pled guilty, and the catastrophic injuries suffered by the victim as a result of defendant's criminal actions. Third, the prosecutor, as noted, fully considered defendant's personal condition as a single mother with a limited criminal history who, before the criminal conduct at issue, was making positive steps in her life. Simply put, to contend the prosecutor's thoughtful analysis supporting its rejection of

defendant's application constituted a per se bar on PTI requests involving CDS distribution offenses is without legal or factual support in the record.

We are therefore convinced that the trial court correctly determined the prosecutor's decision to deny defendant's application to PTI was not a patent and gross abuse of discretion. As such, the prosecutor's decision was not so wide of the mark of the goals of PTI that it requires our intervention.

To the extent we have not specifically addressed any of defendant's arguments, it is because we have concluded they 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