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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4543-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DOUGLAS J. HOGAN a/k/a
DOUGLAS JOHN HOGAN,
DOUG J. HOGAN and
DOUG JOHN HOGAN.

Defendant-Appellant.

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Submitted January 5, 2022– Decided April 29, 2022

Before Judges Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 19-07-1006.

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

Lori Linskey, Acting Monmouth County Prosecutor, attorney for respondent (Carey J. Huff, Special Deputy Attorney General/Acting Assistant Prosecutor, of

counsel and on the brief; Janine N. DeLucia, Legal Assistant, on the brief).

PER CURIAM

Defendant Douglas J. Hogan, who pleaded guilty to fourth-degree stalking, N.J.S.A. 2C:12-10(b), appeals an order denying his motion for entry into the pretrial intervention program (PTI) and his subsequent conviction, arguing his admission into PTI was denied based on improper consideration of old restraining orders and current charges and a failure to consider other relevant factors. He also appeals his five-year probationary-term sentence, arguing it was unwarranted and excessive given the time he already had served in jail pretrial and under pretrial monitoring. Perceiving no abuse of discretion, we affirm.

I.

Over the course of five weeks, defendant initiated numerous unwanted interactions with a postal worker – including coming to her post office at closing time, waiting for her in the lobby or parking lot, trying to give her flowers on Valentine's Day, calling and texting her multiple times, leaving her multiple messages, and following her in his vehicle. Defendant's conduct led the postal worker to report to police that defendant's actions had made her fear for her life. After defendant had appeared again at her post office, police officers arrested defendant and obtained a search warrant for his vehicle, which defendant had left

in the back of a dark parking lot, next to a wooded area. The officers discovered in defendant's vehicle lights that "resembled [those] of an unmarked police car" and a switchboard that could be used to activate the vehicle's lights and siren, making defendant's car look like an emergency vehicle. Additionally, police officers found "electrical tape, an unopened package of vinyl gloves, a duffel bag, a piece of cardboard with the [postal worker's] address on it, and a fleet key which allows access to several police cars."

A grand jury indicted defendant for fourth-degree stalking, N.J.S.A. 2C:12-10, and fourth-degree possession of a motor-vehicle master key, N.J.S.A. 2C:5-6(a). After initially ordering a competency evaluation, a trial judge denied the State's pretrial-detention motion and released defendant subject to certain conditions, including reporting bi-monthly to pretrial-services staff and having no contact with the postal worker. By the time of his release, defendant had spent 170 days in custody.

Defendant applied for admission into PTI. During an interview with a PTI investigator, defendant said he did not know why he had been charged with stalking. Defendant explained he had two post office boxes and asserted he went to the post office only to "conduct postal business." He denied knowing anyone with the initials of the victim referenced in the indictment but conceded he had

had contact with the postal worker. He denied harassing or stalking her. Defendant told the investigator he had purchased his car at an automobile auction and had received the master key at the time of purchase.

The PTI investigator recommended against admitting defendant to PTI because of his lack of remorse and prior history with the legal system, concluding defendant was better suited for probation where he could be "more closely monitored." An assistant prosecutor agreed and issued a PTI Rejection Memorandum in which she outlined the circumstances leading to defendant's arrest and provided information regarding his prior history with the justice system.

> Defendant has four disorderly persons convictions, for criminal mischief (2007) and harassment (2007, 2013, 2013), and two borough ordinance violations, for throwing snow in the street (2011) and maintenance of grounds/property (2013). A final restraining order was entered against him in 1994, which remains active today . . . . Defendant also has had several final restraining orders entered against him (1994, 1997, 2003), which subsequently were vacated or dismissed (victim D.H. [a female relative]). Defendant was convicted of contempt in 1994 and sentenced to one year of probation.

Defendant does not disagree with this recital of his history. He acknowledges he was the subject of several temporary restraining orders (TROs) for which final restraining orders (FROs) were subsequently issued and that all

but one of those FROs were subsequently dismissed. Defendant asserts on appeal he also was the subject of three TROs that were subsequently dismissed on February 21, 1996, October 29, 1996, and June 24, 1997. Defendant faults the assistant prosecutor for considering them. However, while she expressly referenced defendant's subsequently-dismissed FROs, she did not reference the three subsequently-dismissed TROs.

The assistant prosecutor stated she had "considered and balanced the positive and negative factors presented by defendant's application and [found] the latter preponderate[d]." She stated her "rejection relie[d] heavily" on certain factors listed in N.J.S.A. 2C:43-12(e): (1) "[t]he nature of the offense"; (2) "[t]he facts of the case"; (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 (9) "[t]he applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others."

She explained:

> Defendant engaged in repetitive conduct, which could reasonably be viewed as threatening and which caused the victim to be "fearful for her life." The items found in defendant's car, along with the victim's address, are

> extremely concerning. Defendant's PTI application identifies no mental health or other issue that could be thought to mitigate his offense; his refusal to admit any wrongdoing or empathy for the victim demonstrates a lack of insight inimical to successful rehabilitation. These facts, along with defendant's record of harassment convictions and temporary and final restraining orders, lead me to conclude that defendant "may present a substantial danger" to the victim and others.

She concluded she "wholly agreed" with the PTI investigator that defendant was a better candidate for probation and rejected his application.

Defendant moved to appeal the denial of his PTI application. During oral argument, neither party referenced the dismissed TROs. Defense counsel argued the court should not consider defendant's history of restraining orders and municipal-court harassment convictions because all but one of them involved neighbors or a relative. After hearing oral argument, a judge denied defendant's motion in a decision she placed on the record and in an order she issued later that day. The motion judge reviewed the record, including defendant's court history. She did not reference the subsequently-dismissed TROs in her description of his history. The motion judge found "all relevant factors and no inappropriate factors were considered in denying defendant's application." Accordingly, the motion judge held the denial of defendant's application was not a patent and gross abuse

of the prosecutor's discretion requiring reversal. Additionally, the motion judge found the denial was not arbitrary, capricious or unreasonable.

The motion judge concluded:

> Given the circumstances of this case[,] defendant's extensive history of criminal harassment, and multiple TRO's, and a current FRO, the State . . . was justified in being concerned. Defendant's persistence [in] communicat[ing] with the victim, even after being told to stop, shows defendant has little regard for the comfort safety or wishes of others.
>
> What is even more concern[ing] to this court is that in a short amount of time defendant's actions became more intrusive, more dangerous. In addition to calling the victim multiple times, showing up at her place of employment, waiting for her in the parking lot and following her onto the highway, these actions became more dangerous, and reasonably cause[d] the victim fear. The presence of the victim's address in defendant's car infers an even greater intrusion into . . . her personal space and property. Even if the victim had willingly communicated with the defendant in the past, that prior communication does not justify or permit his persistent and escalating intrusive behavior. Overall, this defendant requires a higher level of supervision th[a]n PTI can provide.
>
> The seriousness of the offense and necessity for a high level of supervision for this defendant renders judicial prosecution appropriate. . . . The prosecutor relied on relevant facts in rejecting the PTI application along with pertinent statutory criteria.

Following the denial of defendant's PTI appeal and pursuant to a negotiated plea agreement, defendant pleaded guilty to fourth-degree stalking, N.J.S.A. 2C:12-10(b), and the State dismissed the master-key charge. At the plea hearing, defendant confirmed his understanding of the plea agreement, including that the State would ask for a five-year probationary sentence and his attorney could ask for a shorter term, but ultimately the sentencing judge would determine what sentence to impose. He also confirmed he understood that without the plea agreement he could be sentenced to eighteen months in prison for the stalking charge if convicted.

At the sentencing hearing, defense counsel argued defendant should be sentenced to a shorter probationary term, given his "good behavior." After placing a detailed and comprehensive opinion on the record in which she considered the facts of the case and aggravating and mitigating factors, the sentencing judge imposed a five-year term of probation, conditioned on his obtaining a mental-health evaluation and following all treatment recommendations. Defendant also was required to abide by the conditions set forth in a permanent restraining order, requiring he have no contact with the victim.

II.

On appeal, defendant argues:

POINT I

THE PROSECUTOR'S REJECTION OF DEFENDANT'S ADMISSION INTO [PTI] WAS BASED ON A FAILURE TO CONSIDER RELEVANT FACTORS, AND LARGELY ON THE IMPROPER CONSIDERATION OF OLD, DISMISSED, TEMPORARY AND FINAL RESTRAINING ORDERS AND A SINGLE FINAL RESTRAINING ORDER FROM 1994, AND THEREFORE, WARRANTS REVERSAL.

POINT II

THE IMPOSITION OF A FIVE-YEAR PROBATIONARY TERM ON A FOURTH-DEGREE OFFENSE WAS UNWARRANTED, AND EXCEEDED THE MAXIMUM PROBATIONARY TERM AFTER DEFENDANT SPENT 170 DAYS IN JAIL AND 328 DAYS UNDER PRETRIAL MONITORING.

Unpersuaded by these arguments, we affirm.

A.

PTI "is a 'diversionary program through which certain offenders are able to avoid criminal prosecution by receiving early rehabilitative services expected to deter future criminal behavior.'" State v. Johnson, 238 N.J. 119, 127 (2019) (quoting State v. Roseman, 221 N.J. 611, 621 (2015)). Deciding whether to

permit diversion to PTI is "a quintessentially prosecutorial function," State v. Wallace, 146 N.J. 576, 582 (1996), because "PTI is essentially an extension of the charging decision," Roseman, 221 N.J. at 624. "Prosecutorial discretion in this context is critical for two reasons. First, because it is the fundamental responsibility of the prosecutor to decide whom to prosecute, and second, because it is a primary purpose of PTI to augment, not diminish, a prosecutor's options." State v. Kraft, 265 N.J. Super. 106, 111 (App. Div. 1993); see also State v. Nwobu, 139 N.J. 236, 246 (1995). Accordingly, courts give prosecutors "broad discretion" in making the PTI-diversion determination. State v. K.S., 220 N.J. 190, 199 (2015).

In determining whether a defendant should be diverted into PTI, a prosecutor must make an "individualized assessment of the defendant," Roseman, 221 N.J. at 621-22, considering the defendant's "amenability to correction" and potential "responsiveness to rehabilitation," N.J.S.A. 2C:43-12(b); see also State v. Watkins, 193 N.J. 507, 520 (2008). In making that assessment, prosecutors are required to consider the seventeen non-exclusive factors listed in N.J.S.A. 2C:43-12(e). State v. Lee, 437 N.J. Super. 555, 562 (App. Div. 2014). The weight given to the various factors is left to the prosecutor's discretion. Wallace, 146 N.J. at 585-86. A court presumes a prosecutor considered "all relevant factors" when

making a PTI determination unless the defendant demonstrates otherwise. Id. at 584.

The prosecutor's discretion, however, "is not unbridled." Id. at 582. A court may overturn a prosecutor's denial of a PTI application if a defendant establishes clearly and convincingly the denial was "a patent and gross abuse" of prosecutorial discretion. Watkins, 193 N.J. at 520; see also State v. Maguire, 168 N.J. Super. 109, 115 n.1 (App. Div. 1979) (finding abuse of discretion occurs when a decision "has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require court intervention"). A defendant meets that standard by proving the PTI denial "(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); see also Johnson, 238 N.J. at 129.

Given the amount of prosecutorial discretion involved, the scope of our review of a PTI rejection "is severely limited" and "serves to check only the 'most egregious examples of injustice and unfairness.'" State v. Negran, 178 N.J. 73, 82 (2003) (quoting State v. Leonardis, 73 N.J. 360, 384 (1977)); see also State v. Chen, 465 N.J. Super. 274, 284 (App. Div. 2020). But when "the prosecutor has made a legal error, there is a relatively low threshold for judicial intervention

because '[t]hese instances raise issues akin to questions of law, concerning which courts should exercise independent judgment in fulfilling their responsibility to maintain the integrity and proper functioning of PTI as a whole.'" Watkins, 193 N.J. at 520-21 (quoting State v. Dalglish, 86 N.J. 503, 510 (1981)); see also State v. Maddocks, 80 N.J. 98, 104 (1979) (finding "[i]ssues concerning the propriety of the prosecutor's consideration of a particular [PTI] factor are akin to 'questions of law'").

Defendant contends the rejection of his PTI application was "based on an improper inference of guilt as to the sixteen to twenty-five-year-old TROs and FROs that, with the exception of one, were dismissed, a failure to consider factors relevant to his amenability to rehabilitation, and an overemphasis of the circumstances surrounding the charged offenses." We disagree.

In his argument about the TROs and FROs, defendant relies extensively on K.S., 220 N.J. 190. In K.S., the prosecutor denied the defendant's PTI application because his "arrest" history, which consisted only of dismissed charges and one juvenile arrest, demonstrated the defendant had "a violent history" and that the latest alleged assault was "part of a continuing pattern of anti-social behavior," N.J.S.A. 2C:43-12(e)(8). K.S., 220 N.J. at 196, 200-01. The Court held "[f]or the prior dismissed charges to be considered properly by a prosecutor in

connection with [a PTI] application, the reason for consideration must be supported by undisputed facts of record or facts found at a hearing" and "when no such undisputed facts exist or findings are made, prior dismissed charges may not be considered for any purpose." Id. at 199.

FROs and TROs are not mere charges or arrests; they are orders entered by a judge based on findings of fact and applicable law. Entry of a temporary restraining order under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, requires a court to find the TRO "necessary to protect the life, health or well-being of a victim," N.J.S.A. 2C:25-28(f), and entry of an FRO requires a finding of "a predicate act of domestic violence" and that the order is necessary for the victim's protection. C.C. v. J.A.H., 463 N.J. Super. 419, 429 (App. Div. 2020). To dismiss an FRO, the moving party must show good cause based on factors demonstrating a change in the parties' circumstances from when the FRO was issued. See G.M. v. C.V., 453 N.J. Super. 1, 12-13 (App. Div. 2018) (explaining a "party asking to modify or dissolve the FRO . . . must show 'substantial changes in the circumstances' from what existed at the final hearing for the court to 'entertain the application for dismissal'" (quoting Kanaszka v. Kunen, 313 N.J. Super. 600, 608 (App. Div. 1998))); Carfagno v. Carfagno, 288 N.J. Super. 424, 435 (Ch. Div. 1995) (identifying factors to be considered such

as whether the victim still fears the defendant, the nature of the current relationship between the parties, whether the defendant since the FRO has engaged in counseling or other violent acts, and whether defendant currently is using drugs or alcohol).

Focusing on the parties' current circumstances, a subsequent dismissal of an FRO does not invalidate the findings that supported the court's entry of the order. Given that, unlike the mere arrests at issue in K.S., the FROs and TROs required findings of fact, we perceive no error in the prosecutor's or motion judge's consideration of them here. We do not address defendant's argument about the dismissed TROs because the assistant prosecutor in her rejection memorandum and the motion judge in her decision did not reference the dismissed TROs or appear to consider or rely on them and defendant did not raise the issue with the motion judge. See State v. Alexander, 233 N.J. 132, 148 (2018) (declining to address arguments not raised in the trial court and noting issues not raised in the trial court are ordinarily not considered on appeal).

We also see no abuse of discretion in considering the restraining orders due to age or subject matter. Defendant concedes the restraining orders were based on harassment. Given that subject matter and the circumstances of the stalking offense, it was not an abuse of discretion to consider them. That the restraining

orders involved neighbors and a relative – victims personally known by defendant – does not render them irrelevant to the stalking offense. Considering they were issued when defendant was an adult in his twenties and thirties and that one FRO remains in effect, we also see no abuse of discretion based on the age of the restraining orders.

Defendant faults the prosecutor for failing to consider other factors enumerated in N.J.S.A. 2C:43-12(e), such as defendant's non-involvement with organized crime, N.J.S.A. 2C:43-12(e)(13), and his lack of a co-defendant, N.J.S.A. 2C:43-12(e)(15)-(16). In Wallace, our Supreme Court instructed courts reviewing a PTI determination to "presume that a prosecutor considered all relevant factors, absent a demonstration by the defendant to the contrary." 146 N.J. at 584; see also State v. Waters, 439 N.J. Super. 215, 233 (App. Div. 2015). Defendant has not demonstrated anything to the contrary. The assistant prosecutor's written objection makes clear she considered other relevant factors. She stated that in rejecting defendant's application, she relied "heavily" but not exclusively on subparagraphs (1), (2), (5), and (9) of N.J.S.A. 2C:43-12(e). Moreover, she expressly referenced considerations addressed in other subparagraphs of N.J.S.A. 2C:43-12(e), such as defendant not identifying any mental health or other issue; his refusal to admit wrongdoing and lack of empathy

for the victim, demonstrating a lack of insight that would impair any rehabilitation effort; and the more appropriate monitoring provided in a probationary term, see N.J.S.A. 2C:43-12(e) (6), (11), (14), and (17).

That the assistant prosecutor gave more weight to the nature of the offense and facts of the case than to his non-involvement with organized crime and lack of co-defendants was within her discretion. And in relying on the nature of the offense and facts of the case, the assistant prosecutor did nothing wrong. She did not make a blanket declaration that because defendant was accused of stalking, he could not participate in PTI. Instead, she considered expressly the particular facts of this case and information about defendant, thereby fulfilling her obligation to make an "individualized assessment[]." Johnson, 238 N.J. at 127.

B.

We review a trial court's sentencing decision under an abuse-of-discretion standard. State v. R.Y., 242 N.J. 48, 73 (2020). We do "not substitute [our] judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). We apply the deferential standard so long as the sentencing court "follow[ed] the Code and the basic precepts that channel sentencing discretion." State v. Case, 220 N.J. 49, 65 (2014); see also State v. Trinidad, 241 N.J. 425, 453 (2020). Thus, we affirm a sentence "unless (1) the sentencing guidelines

were violated; (2) the aggravating and mitigating factors found were not 'based upon competent 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.'" State v. Rivera, 249 N.J. 285, 297-98 (2021) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). The same standard applies to sentences "result[ing] from guilty pleas, including those guilty pleas that are entered as part of a plea agreement." State v. Sainz, 107 N.J. 283, 292 (1987); see also Rivera, 249 N.J. at 297-98 (applying abuse-of-discretion standard to review sentence imposed based on guilty plea entered pursuant to a plea agreement).

Defendant argues the sentencing judge, by failing to consider the time defendant had spent in jail while detained pretrial and under pretrial monitoring, imposed an unlawfully excessive sentence when she sentenced him to a five-year probationary term – the maximum probationary term authorized by N.J.S.A. 2C:45-2(a). Defendant's argument is not supported by the law of this state. Moreover, the sentencing judge gave detailed reasons for accepting the parties' negotiated disposition, and we find no basis to disturb the sentence she imposed pursuant to their agreement. Accordingly, we affirm the sentence.

A sentence is illegal if it "exceeds the maximum penalty provided in the Code for a particular offense" or was "not imposed in accordance with law." State v. Murray, 162 N.J. 240, 247 (2000); see also State v. Drake, 444 N.J. Super. 265, 271 (App. Div. 2016). Under N.J.S.A. 2C:45-2(a), a five-year term is the maximum probationary sentence a court can impose. Thus, based on the face of the statute, defendant's sentence did not exceed the maximum penalty and was not illegal.

Defendant asks us to look beyond that clear, statutory language and credit to his probationary term the time he served in custody while detained pretrial and the time he was subject to pretrial monitoring. The Legislature did not include pretrial jail time or pretrial monitoring time in the probationary period when it enacted N.J.S.A. 2C:45-2, N.J.S.A. 2C:43-2 (the statute authorizing a court to impose a probationary sentence), N.J.S.A. 2C:45-1 (the statute enabling a court to impose conditions on a probationary sentence), or any other applicable statute. We cannot graft that language onto a statute. See State v. Munafo, 222 N.J. 480, 488 (2015) ("[A] court may not rewrite a statute or add language that the Legislature omitted."). Defendant's reliance on N.J.S.A. 2C:44-5(f)(3) and (4) and N.J.S.A. 2C:45-1(e) is misplaced. N.J.S.A. 2C:44-5(f)(3) and (4) apply "[w]hen a defendant is sentenced for more than one offense or a defendant already

under sentence is sentenced for another offense committed prior to the former sentence." N.J.S.A. 2C:44-5(f). N.J.S.A. 2C:45-1(e) applies when a court requires a person who has been convicted of a crime and sentenced to probation to serve a term of imprisonment as an additional condition of its order. None of those circumstances is present here.

In addition to the fact that no statute provides the relief defendant seeks, no court rule provides for it. Rule 3:21-8 provides a defendant shall receive "credit on the term of a custodial sentence of any time served in custody in jail or in a state hospital between arrest and the imposition of sentence." The Rule does not give credit on a probationary sentence for time served in custody or time in pretrial supervision. See State v. DiAngelo, 434 N.J. Super. 443, 458 (App. Div. 2014) ("'[I]mposition of sentence' set forth in . . . Rule [3:21-8] means a 'custodial sentence,' which by definition would exclude a non-custodial probationary one." (quoting State v. Hernandez, 208 N.J. 24, 36 (2011))).

With no New Jersey court rule, statute, or case supporting his argument, defendant invokes the fundamental fairness doctrine. The fundamental fairness doctrine is derived from due-process guarantees embedded in Article I, Paragraph 1 of the New Jersey Constitution. State v. Melvin, 248 N.J. 321, 347 (2021). "The 'one common denominator' in [the Court's] fundamental fairness

jurisprudence is 'that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.'" State v. Njango, 247 N.J. 533, 548-49 (2021) (quoting Doe v. Poritz, 142 N.J. 1, 109 (1995)). The doctrine "promotes the values of 'fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals.'" State v. Vega-Larregui, 246 N.J. 94, 132 (2021) (quoting State v. Saavedra, 222 N.J. 39, 68 (2015)). Courts apply the fundamental fairness doctrine "'sparingly' and only when the 'interests involved are especially compelling.'" Njango, 247 N.J. at 549 (quoting Saavedra, 222 N.J. at 67).

We see nothing unfair about defendant's sentence. If defendant had not entered into the plea agreement, he risked serving eighteen months in jail if convicted. Defendant had no expectation he would receive credit for the time he spent in custody or under pretrial monitoring. Defendant does not contend he understood or was led to believe he would receive credit for the time he served in custody or under pretrial monitoring nor did he seek to withdraw his plea on that basis. See State v. Mastapeter, 290 N.J. Super. 56, 61 (App. Div. 1996) (if defendant had understood he would receive credit for time he spent in pretrial monitoring, he might have a basis to withdraw his plea). Defendant's sentence was the result of a negotiated plea arrangement in which the parties agreed the

State would request a five-year probationary term and defendant could argue for a shorter term. The record makes clear defendant understood he was exposed under the plea agreement to a five-year probationary term and, with that understanding, chose to enter a guilty plea, thereby avoiding the risk of serving eighteen months in jail if convicted.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION