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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1761-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIE E. GRADY 3RD,

Defendant-Appellant.

Submitted March 14, 2023 – Decided May 12, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 19-07-1821.

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

Theodore N. Stephens, III, Acting Essex County Prosecutor, attorney for respondent (Caitlinn Raimo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Willie E. Grady III appeals from his guilty plea conviction for unlawful possession of a handgun. He contends the prosecutor committed a patent and gross abuse of discretion by rejecting his application for pretrial intervention (PTI). The gravamen of defendant's argument is that the prosecutor improperly applied a presumption against PTI and accorded too much weight to the seriousness of the Graves Act¹ offense with which he was charged, placing too much emphasis on the danger to public safety that is associated with unlawfully carried firearms. After carefully reviewing the record in light of the governing legal principles, we affirm substantially for the reasons explained by Judge Nancy Sivilli in her oral decision rejecting defendant's appeal of the prosecutor's denial of PTI.

I.

The record shows that in the early morning hours of May 12, 2019, defendant crashed his vehicle into a utility pole. An Irvington police officer responded to the crash site where defendant's vehicle was on the sidewalk with the downed utility pole lying across it. Defendant told the officer that he had

¹ The "Graves Act," N.J.S.A. 2C:43-6(c), refers to certain gun crimes that carry a mandatory minimum term of imprisonment and parole ineligibility. In this instance, the prosecutor agreed to waive the statutorily prescribed forty-two-month period of parole ineligibility pursuant to N.J.S.A. 2C:43-6.2.

been cut off by another motorist. The officer detected the odor of alcohol emanating from defendant, who had difficulty standing, staggered as he walked, and had bloodshot, watery eyes. Defendant informed the officer that he was an armed security guard and that a handgun was inside the crashed vehicle. The officer recovered a loaded nine-millimeter handgun from behind the rear seats.² Defendant did not have a permit to carry the weapon. See N.J.S.A. 2C:58-4. Defendant was not on duty or wearing his uniform at the time of the crash.

In July 2019, defendant was charged by indictment with second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(b). He also was charged with various motor vehicle offenses, including driving while intoxicated (DWI). Defendant applied for entry into the PTI program. The prosecutor consented to have the Criminal Division Manager accept the application as required by Rule 3:28-1(d).

In accordance with Rule 3:28-3(b)(1), defendant submitted a statement of compelling reasons to justify his admission to PTI. In that statement, defendant explained that he had no prior contact with the criminal justice system; he is a college graduate and has maintained steady employment since his graduation;

² Defendant does not challenge the lawfulness of the police entry of the vehicle to retrieve the handgun.

and he continued to live with his parents, providing financial support as well as care to his mother, who suffers from multiple sclerosis. He further argued that he had not exhibited violence, there was no evidence he was intoxicated,³ and that the firearms crime with which he was charged was "victimless."

The prosecutor denied defendant's application after evaluating the relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:43-12(e) and Rule 3:28-4. Judge Sivilli found the State "completely and properly" reviewed defendant's application, considered all the evidence, and determined the aggravating factors outweighed the mitigating factors. Defendant thereafter pled guilty to unlawful possession of a firearm and DWI pursuant to a plea agreement in which the State recommended non-custodial probation, see supra note 1. Judge Christopher S. Romanyshyn sentenced defendant in accordance with the plea agreement to an eighteen-month term of probation and suspended defendant's driver's license for three months.

Defendant raises the following contention for our consideration:

THE PROSECUTOR APPLIED A PRESUMPTION
AGAINST ADMISSION THAT DOES NOT EXIST,
MISTAKENLY WEIGHED SOME PTI FACTORS,
AND DID NOT CONSIDER OTHER APPLICABLE
FACTORS, AND HER REJECTION OF
[DEFENDANT]'S ADMISSION INTO THE PRE-

³ We note that defendant has since pled guilty to DWI.

TRIAL INTERVENTION PROGRAM WAS AN
ARBITRARY, PATENT AND GROSS ABUSE OF
DISCRETION.

II.

We begin our analysis by acknowledging the legal principles governing this appeal. "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)). The "primary goal" of PTI is the "rehabilitation of a person accused of a criminal offense." State v. Bell, 217 N.J. 336, 346 (2014). "It is designed 'to assist in the rehabilitation of worthy defendants, and, in the process, to spare them the rigors of the criminal justice system'" State v. Randall, 414 N.J. Super. 414, 419 (App. Div. 2010) (quoting State v. Watkins, 193 N.J. 507, 513 (2008)).

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. Our Supreme Court has consistently rejected categorical prohibitions against admission to PTI based on the offense charged. See State v. Caliguri, 158 N.J. 28, 39 (1999); State v. Baynes, 148 N.J. 434, 445 (1997). Thus, "PTI decisions are '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 (1994) (quoting State v. Sutton, 80 N.J. 110, 119 (1979)).

When making that individualized assessment, prosecutors are required to consider a non-exhaustive list of factors enumerated in N.J.S.A. 2C:43-12(e):

(1) The nature of the offense; (2) The facts of the case; (3) The motivation and age of the defendant; (4) The desire of the complainant or victim to forego prosecution; (5) The 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; (6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his [or her] participation in supervisory treatment; (7) The needs and interests of the victim and society; (8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior; (9) The applicant's record of criminal and penal violations and the extent to which he [or she] may present a substantial danger to others; (10) Whether 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; (11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act; (12) The history of the use of physical violence toward others; (13) Any involvement of the applicant with organized crime; (14) Whether or not the crime is of such a nature that the value of supervisory

treatment would be outweighed by the public need for prosecution; (15) Whether 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 [or her] case through traditional criminal justice system procedures; (16) Whether or not the applicant's participation in pretrial intervention will adversely affect the prosecution of codefendants; and (17) Whether 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.

Importantly for purposes of this appeal, our Supreme Court has stressed that PTI decisions are a "quintessentially prosecutorial function." State v. Wallace, 146 N.J. 576, 582 (1996). Accordingly, our review of a prosecutor's denial of a PTI application 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 (Leonardis II), 73 N.J. 360, 384 (1977)). A reviewing court may overturn a prosecutor's rejection of a PTI application only when a defendant "'clearly and convincingly establish[es]' that the decision rejecting his or her application was 'a patent and gross abuse of discretion.'" State v. Lee, 437 N.J. Super. 555, 563 (App. Div. 2014) (quoting Watkins, 193 N.J. at 520). A patent and gross abuse of discretion occurs when "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.'" Ibid. (quoting State v. Bender, 80 N.J. 84, 93 (1979)).

III.

We next apply these general principles to the present matter. Defendant argues the State subverted the goals of the PTI program because its rejection of defendant's admission was not based on an individualized assessment of his amenability to rehabilitation. Rather, defendant asserts the prosecutor improperly relied on a presumption against admission based on the seriousness of the gun charge and on general concerns regarding gun violence that, defendant stresses, did not come to fruition in this case.

We first address defendant's contention the prosecutor mistakenly relied on a presumption against admission. Rule 3:28-1(d) provides in pertinent part:

The following persons . . . shall be ineligible for pretrial intervention without prosecutor consent to consideration of the application:

(1) Certain Crimes. A person who is charged with a crime, or crimes, for which there is a presumption of incarceration or a mandatory minimum period of parole ineligibility.

Defendant was charged with a second-degree crime, which carries a presumption of imprisonment, N.J.S.A. 2C:44-1(d). That gun possession crime also is subject to a mandatory minimum period of parole ineligibility, N.J.S.A.

2C:43-6(c). See supra note 1. As we have noted, the prosecutor consented to defendant filing an application with the PTI program director. Defendant contends it was inappropriate for the program director and prosecutor thereafter to refer to and rely upon a presumption against admission. We are not persuaded.

The circumstances that render a defendant ineligible for PTI without prosecutor consent under Rule 3:28-1(d)(1) do not evaporate when the prosecutor gives consent to file an application. Were it otherwise, prosecutors might be chilled from giving consent to apply for PTI for fear that the gradation and seriousness of the charged crime could not be fully taken into account when reviewing the application on its merits. Nor do the public safety concerns that undergird the Graves Act evaporate when a prosecutor affords a defendant an opportunity to apply.

Rule 3:28-3(b)(1) provides, "[a]n application that requires prosecutor consent pursuant to Rule 3:28-1(d)(1) and (d)(2) shall include a statement of the extraordinary and compelling circumstances that justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged." (Emphasis added). The highlighted language suggests the presumption of ineligibility based on the nature of the crime charged does

not simply disappear the moment a prosecutor consents to the filing of an application. In this instance, defense counsel submitted a letter on defendant's behalf captioned as a "Statement of Compelling Reasons For Admission into PTI." Having thus acknowledged the need to file a statement of compelling reasons, defendant is hard pressed to claim the prosecutor patently and grossly abused her discretion by referring to the presumption that necessitated the submission of such a statement. See also Nwobu, 139 N.J. at 254 ("PTI is presumptively unavailable for second-degree offenders.").

Nor are we persuaded by defendant's contention the prosecutor improperly weighed the applicable aggravating and mitigating factors, including especially the "nature of the offense," N.J.S.A. 2C:43-12(e)(1). We need only briefly address defendant's novel argument that "the nature of the crime here was less serious in light of the United States Supreme Court's recent decision in N.Y. State Rifle & Pistol Ass'n v. Bruen, [597 U.S. ___, 142 S. Ct. 2111] (2022)." Defendant goes so far as to suggest that in view of Bruen, it was improper for the prosecutor to consider the "'nature' of this specific offense as a reason to deny entry into PTI."

Defendant's reliance on Bruen is misplaced as he misconstrues that opinion and its significant, but limited, impact on New Jersey's gun laws. In

Bruen, the United States Supreme Court addressed whether New York's firearms permitting scheme, which required applicants to show a "special need" for concealed carry, violated the Second Amendment. Bruen, 142 S. Ct. at 2122. The Court struck down New York's special need requirement. Id. at 2156. The Court also explicitly noted that New Jersey's "justifiable need" requirement, then codified at N.J.S.A. 2C:58-4(d),⁴ was analogous to New York's unconstitutional standard. Id. at 2124 n.2.

The day after Bruen was decided, the New Jersey Attorney General issued guidance on this subject. See Directive Clarifying Requirements for Carrying of Firearms in Public (June 24, 2022) (Directive 2022-7). That directive acknowledges that Bruen "prevents us from continuing to require a demonstration of justifiable need in order to carry a firearm, but it does not prevent us from enforcing the other requirements in our law." Id. at 1.

Although Bruen precipitated a significant change to the criteria used to determine whether to issue a firearm carry permit in this state, it did not eliminate the need to obtain a permit before carrying a loaded handgun in public. Rather, as we recently explained, Bruen eliminated only the requirement to

⁴ N.J.S.A. 2C:58-4 has since been amended to delete the justifiable need provision rendered unconstitutional in Bruen. L. 2022, c. 131, § 3.

demonstrate a "justifiable need" for obtaining any such permit. See In re M.U.'s Application for a Handgun Purchase Permit, ____ N.J. Super. ____, ____ (2023) (slip op. at 35) (citing Bruen, 142 S. Ct. at 2131 n.9). The record is clear, defendant did not have a permit at the time of the present offense.

We likewise reject defendant's contention that Bruen supports the proposition that gun possession crimes are somehow "less serious" by reason of the Court's new interpretation of the Second Amendment. The United States Supreme Court is, of course, the final arbiter on the meaning and scope of the Second Amendment.⁵ See id. at 30 n.8 (noting "the United States Supreme Court is the final arbiter on all questions of federal constitutional law" (quoting State v. Coleman, 46 N.J. 16, 34 (1965))). However, it is for the New Jersey Legislature to set the gradation and sentencing consequences of state law crimes.

In January 2008, the Legislature upgraded the gun possession offense for which defendant was charged to a second-degree crime, L. 2007, c. 284, §1, thus invoking a strict presumption of incarceration, N.J.S.A. 2C:44-1(d). The Legislature provided further sentencing enhancement by significantly

⁵ There is no analogue in the New Jersey Constitution to the Second Amendment as there is, for example, to the First Amendment, see N.J. Const. art. I, ¶¶ 4, 6, 18, and the Fourth Amendment, see N.J. Const. art I, ¶ 7.

expanding the scope of the Graves Act, prescribing a mandatory minimum term of parole ineligibility upon conviction for simple possession of a handgun, L. 2007, c. 341, § 5.⁶

Putting aside defendant's unavailing Bruen argument, we also reject his contention that the prosecutor focused too much on the dangers posed by unlawful gun possession. We acknowledge defendant was not charged with possession of a gun for an unlawful purpose, N.J.S.A. 2C:39-4(a), or with committing any act of violence. But the focus on individualized PTI assessments required by Roseman, 221 N.J. at 621–22, does not require prosecutors to put on blinders as to the dangers posed generally by those who unlawfully carry a loaded firearm in public. We reiterate and emphasize that, as Judge Sivilli found, the prosecutor submitted a detailed and thorough analysis of all applicable aggravating and mitigating factors before concluding that defendant was not a suitable candidate for PTI. We see nothing in this exercise of prosecutorial discretion that approaches an egregious injustice or unfairness as to warrant our intervention. See Negran, 178 N.J. at 82.

⁶ Prior to the 2008 amendment, which took effect on January 13, 2008, the Graves Act's mandatory minimum term of imprisonment and parole ineligibility applied only when a person was convicted of possessing or using a firearm while in the course of committing specified predicate crimes, or possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a).

To the extent we have not specifically addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant 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