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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3224-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FILIPPO G. TABILE,

Defendant-Appellant.

Submitted September 19, 2022 – Decided March 30, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 20-12-1065.

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

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Maura M. Sullivan, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, Filippo G. Tabile, was charged with bias intimidation and terroristic threats. He appeals from the trial court's denial of his motion to compel his admission into the Pre-Trial Intervention (PTI) program over the prosecutor's objection. Because the trial court correctly determined that the prosecutor's decision was not a patent and gross abuse of discretion, we affirm.

I.

The undisputed events which led to the charges against defendant stemmed from threatening phone calls he made to a Jewish Community Center (JCC) on two different dates. During those calls, he used vile, offensive, and threatening language grounded in antisemitism. Defendant made his first call to the JCC on September 13, 2020. He spoke to an employee there. During the call, defendant stated, "Jews are brainwashing everyone," and concluded the call by saying "your time is coming, tell everyone you know." Defendant made his second call three days later and spoke with another JCC employee. In the second call, he identified a different answering JCC employee by her first name and stated that he was part of a hate group that planned to attack the JCC. Defendant called her a "bitch" and asked the victim why she thought her race was superior. Defendant also told the second employee he was "going to fuck [her] up and [her] children."

In the course of investigating these matters and apprehending defendant, the Cherry Hill police learned that defendant had been diagnosed with two severe mental health conditions. He was receiving ongoing medical care for these conditions.

A grand jury indicted defendant on two counts of fourth-degree bias intimidation, N.J.S.A. 2C:16-1(a)(1), second degree terroristic threats, N.J.S.A. 2C:12-3(a), and two counts of first-degree bias intimidation, N.J.S.A. 2C:16-1(a)(1). Defendant next applied for admission into PTI. The Camden County Prosecutor's Office objected to defendant's application in a letter dated December 23, 2020, citing Rule 3:28-1(d)(1). In the letter, the prosecutor's office explained that they were withholding consent to consideration of defendant's application because he was charged with crimes for which there was a presumption of incarceration or a mandatory period of parole ineligibility. The letter noted that defendant was charged with one second degree crime and two first-degree crimes. The prosecutor's office also noted that defendant failed to submit a statement of "extraordinary and compelling circumstances" to justify consideration of the application despite defendant's presumption of incarceration or parole ineligibility. The prosecutor took the position that defendant's application was essentially defective due to absence of the required

statement. Defendant refiled the application and included the missing statement. The prosecutor objected to the amended application in a nine-page letter dated February 11, 2021, and a two-page supplement dated February 17, 2021, which detailed the victim's position regarding PTI.

The prosecutor cited Rule 3:28-4(b), additional factors to consider in assessing applications and noted that the threat of violence was present in this case and that presence of this factor weighed in favor of rejection.

The prosecutor went on to analyze, on a qualitative and quantitative basis, each of the seventeen factors under N.J.S.A. 2C:43-12(e). They found ten factors weighed against defendant's admission to PTI, while five factors supported admission and two factors were not applicable.

Under subsection (e)(1), the prosecutor found the nature of the offenses, first and second-degree crimes, weighed against defendant's admission. The prosecutor also took the position that if defendant faced only third-degree charges, they would still object to the application. They argued the second victim perceived defendant's calls as a credible threat, noting that he threatened harm to the victim and her family.

Under subsection (e)(2), the prosecutor concluded that the calls from defendant, which ranged from general hate comments about the Jewish

community to specific threats of harm to the victim and her family, weighed against admission.

Considering defendant's age and motivation under subsection (e)(3), the prosecutor accounted for defendant's mental health history. This history included his medication regimen, and well as his COVID-19 related physical isolation, which he contended led to his becoming radicalized by viewing hate websites. The prosecutor found defendant, who was twenty-seven years old at the time of his crimes, twice called the JCC, and went far enough to identify a specific individual by name. They found defendant's age and motivation should weigh against admission, and also noted that the victim opposed admission under subsection (e)(4).

Subsection (e)(5), whether defendant's personal problems and character traits, particularly his mental health history, are not treatable in the criminal justice system, weighed in favor of admission.

Subsection (e)(6) required the prosecutor to consider the likelihood that defendant's crimes are related to a condition conducive to change through participation in supervisory treatment. The prosecutor was not persuaded defendant's participation in PTI was "sufficient to address [defendant's] situation" given his lack of compliance with treatment. The prosecutor found

subsection (e)(7), consideration of the needs of the victim and society, weighed against admission.

Subsections (e)(8) and (e)(9) weighed in favor of admission, as defendant neither had a continuing pattern of anti-social behavior nor a criminal record. Furthermore, subsections (e)(10) and (e)(11) weighed against defendant's admission as his charges were violent in nature and they concluded that prosecution would not exacerbate the social problems which led to defendant's actions. The prosecutor found subsections (e)(12) and (e)(13) weighed in favor of admission as defendant neither had a history of domestic violence nor involvement with organized crime.

As to subsection (e)(14), the prosecutor found the public need for prosecution outweighed the value of supervisory treatment. They based their conclusion on defendant's actions in taking calculated and deliberate steps, not once, but twice, to contact an organization based on its religious affiliation and communicate threats to a specific victim within that organization. The prosecutor found pursuit of traditional prosecution would serve notice on would-be imitators that they will be held accountable for similar acts. Subsection (e)(15) weighed in favor of defendant's admission as no others were charged in the indictment, and subsection (e)(16) did not apply.

The prosecutor found subsection (e)(17) weighed against admission as they balanced the harm to society by abandoning the criminal prosecution with the benefits to society of channeling defendant to supervisory treatment. They noted defendant had been able to commit these acts on two occasions and concluded this factor weighed against admission.

Defendant filed a motion to compel his entry into PTI over the prosecutor's objections, contending they represented a patent and gross abuse of discretion. He made several contentions, including that: he had successfully managed his mental health issues for years prior to the pandemic; the pandemic compromised his in-person treatments and made accessing medications difficult; and his antisemitic thoughts and statements were fueled by his consumption of internet hate websites. He contended the prosecutor's failed to properly consider his arguments.

Judge Kathleen Delaney found that defendant did not meet his burden to show the prosecutor committed patent and gross abuse of discretion in its analysis by clear and convincing evidence. The judge found that the State did account for the mental health history of defendant while conducting a "thorough analysis" of all of the factors under N.J.S.A. 2C:43-12. After denial of the motion, defendant pled guilty to second-degree terroristic threats and the State

dismissed the remaining charges. Defendant was sentenced to a five-year term of non-custodial probation conditioned upon him receiving mental health treatment and having no contact with the victims.

Defendant contends on appeal:

THE PROSECUTOR'S REJECTION OF
DEFENDANT'S ADMISSION INTO THE [PTI]
PROGRAM WAS AN ARBITRARY, PATENT, AND
GROSS ABUSE OF DISCRETION[,] WHICH MUST
BE CORRECTED BY THIS COURT.

II.

"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. Oguta, 468 N.J. Super. 100, 107 (App. Div. 2021) (quoting State v. Nwobu, 139 N.J. 236, 240 (1995)). The program is governed by N.J.S.A. 2C:43-12 and Rule 3:28. "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." Oguta, 468 N.J. Super. at 107 (quoting State v. Johnson, 238 N.J. 119, 128 (2019)). Both the statute and the court rule call for prosecutors to consider the nature of the offense. See N.J.S.A. 2C:43-12(e)(1); R. 3:28-4(b)(1). "If the crime was . . . deliberately committed

with violence or threat of violence against another person . . . the defendant's application should generally be rejected." R. 3:28-4(b)(1).

Deciding whether to permit diversion into PTI "is a quintessentially prosecutorial function." State v. Wallace, 146 N.J. 576, 582 (1996). Accordingly, "prosecutors are granted broad discretion to determine if a defendant should be diverted" into PTI instead of being prosecuted. State v. K.S., 220 N.J. 190, 199 (2015); see also State v. Negran, 178 N.J. 73, 82 (2003) (stating courts "allow prosecutors wide latitude in deciding whom to divert into . . . PTI"). Accordingly, "the scope of [judicial] review is severely limited." Negran, 178 N.J. at 82 (citing Nwobu, 139 N.J. at 246). "To overturn a prosecutor's rejection, a defendant must clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion." State v. Watkins, 390 N.J. Super. 302, 305 (App. Div. 2007) (citing Negran, 178 N.J. at 82). "A patent and gross abuse of discretion . . . 'is a prosecutorial decision that "has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention.'"" Id. at 306 (quoting Wallace, 146 N.J. at 582-83).

III.

Defendant contends the prosecutor's objection to his admission to PTI was a gross and patent abuse of discretion. Specifically, defendant claims the prosecutor's rejection: wasn't based on an individualized assessment of his amenability to rehabilitation and relied too heavily on the nature of the offense; incorrectly concluded PTI would not provide an appropriate level of supervision; and gave "short shift" to the role defendant's mental health condition played in both his crimes and his amenability to treatment. Having reviewed the record and the governing law, we conclude defendant failed to show by clear and convincing evidence that the prosecutor patently abused its discretion, and we affirm. We make the following brief comments.

The prosecutor considered each and every statutory factor in their written objection to defendant's application for admission, finding some factors weighed in favor of admission. The decision was amply supported by the evidence in the record. Defendant twice called the JCC, first making offensive comments to an individual at the front desk, but then just days later called back, seeking out a specific person. He then used words to threaten violence against that person and her children, a threat she believed to be credible.

Pursuant to Rule 2:6-11(d), defendant points us to State v. E.R., 471 N.J. Super. 234 (App. Div. 2022). There, we found the prosecutor failed to "detail the level of supervision defendant required;" failed to "explain how the level of supervision defendant would receive on PTI differed significantly from the level she would receive on probation and why the necessary level of supervision could not be afforded to her through PTI;" and "failed to address why defendant's lack of criminal history and compliance with mental health treatment were not weighed in favor of her entry into PTI." Id. at 244. Defendant contends the errors we identified in E.R. should be applied to these facts. We are not persuaded.

In E.R., the defendant was charged with fourth-degree aggravated assault and two counts of third-degree aggravated assault, meaning E.R. was eligible for PTI without the State's consent. Id. at 243. Unlike defendant, she was compliant with her mental health treatment regimen at the time she was charged. Id. at 244. Here, defendant was charged with, among other offenses, second-degree terroristic threats and two counts of first-degree bias intimidation, which, under Rule 3:28-1(d)(1), meant defendant was ineligible for PTI without the prosecutor's consent. The record also shows the prosecutor's written objection adequately addressed defendant's mental health conditions, noting the criminal

acts he committed while being non-compliant with his mental health treatment. It was not a patent and gross abuse of discretion for the prosecutor to conclude, on this record, that the public need for prosecution outweighed the value of supervisory treatment of defendant in PTI.

Finally, we note the parties' eventual negotiation of a non-custodial sentence does not undermine the prosecutorial decision to object to PTI admission. Wallace, 146 N.J. at 588-89. For these reasons, we are unconvinced Judge Delaney abused her discretion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION