

RECORD IMPOUNDED

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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0611-15T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

BRANDON J. GILL,

Defendant-Respondent.

Argued February 6, 2017 – Decided September 8, 2017

Before Judges Sabatino, Nugent and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
14-07-0807.

Brian D. Gillet, Deputy First Assistant
Prosecutor, argued the cause for appellant
(Andrew C. Carey, Middlesex County Prosecutor,
attorney; Mr. Gillet, of counsel and on the
brief).

David R. Oakley argued the cause for
respondent (Anderl & Oakley, PC, attorneys;
Mr. Oakley, of counsel and on the brief).

PER CURIAM

The State appeals from a September 29, 2015 order denying its
motion for reconsideration. The State had asked the trial court

to reconsider its decision granting defendant's motion to be admitted into the Pretrial Intervention Program (PTI) over the State's objection. For the reasons that follow, we reverse and remand for further consideration – by the prosecutor in the first instance – the PTI decision concerning defendant.

These are the facts. Defendant, a Florida resident, established a virtual relationship with a New York City resident (his "girlfriend").¹ The duration of their relationship is unclear, however, their exchange of text messages indicates the one-year anniversary of their first online meeting was approaching in April 2014. In anticipation of their anniversary, defendant and his girlfriend planned to meet in person.

Their March 2014 text message exchanges demonstrate defendant and his girlfriend were enamored with one another. Defendant's girlfriend was looking forward to their in-person meeting as much as defendant. In fact, as late as the night of April 22, 2014, she exchanged amorous, intimate text messages with defendant. That changed the morning of April 23, 2014, the day before defendant left for their in-person meeting.

¹ The record is not entirely clear, but defendant and his girlfriend might have communicated by phone as well as by text messages.

That morning, though defendant's girlfriend professed she missed him, she revealed she had been at a party where she talked and danced with another man. The other man laughed when she said she had a boyfriend. During a dance, the man groped her and pinned her against a wall. In a text message to defendant, his girlfriend said she did not push the other man off when he touched her. She also said she was drunk and did not remember the incident.

Defendant's responsive text messages reveal he was angry about what had occurred between his girlfriend and the other man. Defendant believed the other man had no respect for defendant's relationship. Defendant's girlfriend texted defendant that she would tell the other man to back off when she saw him later. The text message exchange then reverted to amorous professions.

Later that afternoon, defendant's girlfriend disclosed in a text message she had kissed the other man. Although she insisted "it was the liquor," defendant texted her, "I don't want you talking to him, hang[ing] around him, [texting] him, or none of that cause that shit just crossed the line right there." Defendant's girlfriend thought defendant was overreacting, repeating "it was the liquor." Defendant replied: "Lucky I'm not there to fuck his ass up and you know I'll do it if I see his trifflin ass."

Defendant said he would "let it go" because he was "not going to let [it] mess up" his day or time together with his girlfriend. He apologized for overreacting and accepted his girlfriend's explanation that "it was the liquor."

Defendant's girlfriend went to the other man's house on the afternoon of April 23, 2014, where they shared pizza and watched a movie. When she returned home, she exchanged many text messages with defendant. In some, the virtual couple professed their love for one another, but the focus of the exchanges returned to defendant's girlfriend's interaction with the other man.

Then, late on the night of April 23, after defendant had packed for the drive to New York, his girlfriend became angry about something he posted on Facebook. The content is not clear from their text message exchange. Her anger escalated, however, because she believed the Facebook content was an attempt to make her look stupid. She told defendant to leave her alone. She said repeatedly it was not the first time he had done things to make her look stupid to his friends.

On the morning of April 24, 2014, as defendant prepared to leave for New York, he asked his girlfriend for her address. She texted him to forget it and to have fun, a message she repeated several times. Although she never provided her address, defendant drove to New York. As defendant drove up the East Coast, he

continued to text his girlfriend in anticipation of meeting her. The content and tone of the messages was that he loved her and would not let anything prevent him from meeting her. Defendant's girlfriend mostly ignored his text messages. She made it clear, however, she did not want to spend time with him.

When defendant was approximately two hours from New York, he texted his girlfriend and asked if he could stay with her because he had no place to go. She replied he should put that message on his Facebook to see what his friends thought about it. Later that night, at 10:50 p.m., defendant told his girlfriend he was at Central Park and asked if they could meet. By 1:05 a.m. on April 25, 2014, defendant still had not heard from his girlfriend, and he told her he would be sleeping in his car.

At approximately 6:58 a.m. on April 25, defendant's girlfriend finally texted defendant and asked where he was. Defendant responded he was in Jersey City, and again requested to see her. She refused, declining to provide defendant her home or school address. At 7:14 p.m. on April 25, defendant texted his girlfriend he was at the South Brunswick Police Station "getting locked up." The following day, at 5:48 a.m., he explained to her in a text message: "I had a gun [in] my car and I wasn't aware of the gun laws in Jersey so I told them what I had and they searched my car [and] didn't find anything."

According to the arresting officer's investigation report, on April 25, 2014, at approximately 2:56 p.m., he was dispatched to a shopping center to investigate a suspicious vehicle that had been parked for eight hours with its engine running. He and another officer approached the vehicle, asked the driver for his credentials, and identified the driver as defendant. Defendant told the officers he left Florida the day before to meet friends in New York City, arriving at 3:00 a.m. after traveling the entire day. Defendant stated after meeting his friends, he left New York City at 5:00 a.m. to travel home.

The officers found defendant's story suspicious, and noticed defendant became increasingly nervous as their interaction continued. They requested defendant step out of his vehicle, and as defendant did so, one of the officers asked whether defendant had weapons in his possession. Defendant replied he had a "'Glock 9MM' handgun in his glove compartment along with an extra loaded magazine, a collapsible baton, and a knife." The police secured the weapons, uncovering the fully loaded handgun and an additional magazine, both containing hollow-point ammunition, the baton, and the knife. The officers placed defendant under arrest and took him to the police station.

The next day, on April 26, 2014, at 1:13 a.m., defendant told his girlfriend his friend bailed him out of jail, and again asked

whether they could meet. At 5:30 a.m., defendant's girlfriend finally told defendant "this is so over" and to go home. Defendant replied he had a court appearance in a few days and wished to stay with her until then. Defendant's girlfriend refused to see him, telling defendant to return home.

Following defendant's arrest, a Middlesex County grand jury returned an indictment charging him with second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and fourth-degree possession of a prohibited device, hollow-point ammunition, N.J.S.A. 2C:39-3(f). Defendant applied for admission into PTI in October 2014. As part of his application, he submitted character letters from his parents, his pastor, and people in his community; proof of his private employment and service with some distinction in the United States Army Reserve; and the text messages between himself and his online girlfriend. Additionally, defendant submitted a letter from a friend who stated he gave the handgun to defendant as a gift in 2013.

The Middlesex County Criminal Case Manager (CCM) recommended the denial of defendant's application. Defendant provided the prosecutor with additional information in December 2014, and January and February 2015. The information included an expert's report citing Florida statutes authorizing the transport of handguns in a vehicle's glove compartment and possession of hollow

point bullets. On February 18, 2015, an assistant prosecutor rejected defendant's PTI application. Defendant appealed.

On appeal, the trial court found the State's rejection letter "conclusory" and determined the State should have considered the Attorney General's 2014 guidelines with respect to out-of-state weapons offenders. The court remanded the matter to the prosecutor, directing the prosecutor "reference each factor and each fact that relates to that factor so that [the] [c]ourt [could] understand the State's reasoning and not just its conclusions."

On April 13, 2015, the prosecutor filed its second rejection letter, analyzing all seventeen criteria set forth in N.J.S.A. 2C:42-12(e) as they pertained to defendant's case. The prosecutor also considered the Attorney General's 2014 guidelines in its second rejection letter. Thereafter, the trial court issued a written opinion admitting defendant into PTI over the State's objection.

Following defendant's entry into PTI, the State moved for reconsideration of the trial court's decision. The court denied the State's motion in an oral decision, finding the State presented "no new facts" in its application. The State now appeals the trial court's decision admitting defendant into PTI, raising the following argument:

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING DEFENDANT INTO PTI OVER THE STATE'S OBJECTION, BECAUSE DEFENDANT FAILED TO SHOW THAT THE PROSECUTOR'S REJECTION AMOUNTED TO A PATENT AND GROSS ABUSE OF DISCRETION. THE STATE PROPERLY CONSIDERED THE 2014 AG'S CLARIFICATION IN MAKING THAT DECISION.

The criteria for admission into PTI, as well as the procedures concerning the program, are set forth in N.J.S.A. 2C:43-12 to -22 and Rule 3:28. The Legislature's declaration of public policy underlying PTI is found in N.J.S.A. 2C:43-12(a) and summarized in Rule 3:28, Guideline 1. "Eligibility for PTI is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur." R. 3:28, Guideline 2. Importantly, "[e]ach applicant for supervisory treatment shall be entitled to full and fair consideration of his application." N.J.S.A. 2C:43-12(f). When prosecutors and program directors decide whether to recommend a defendant for PTI, they are required to consider, among others, the factors enumerated in N.J.S.A. 2C:43-12(e)(1) through (17).

Our review of a prosecutor's decision to deny a defendant admission into PTI is "severely limited." State v. Negran, 178 N.J. 73, 82 (2003) (citations omitted). Judicial review of a PTI application exists "to check only the most egregious examples of injustice and unfairness." State v. Nwobu, 139 N.J. 236, 246

(1995) (quoting State v. Kraft, 265 N.J. Super. 106, 111 (App. Div. 1993)). Absent evidence to the contrary, a reviewing court must assume that "the prosecutor's office has considered all relevant factors in reaching the PTI decision." Id. at 249 (citing State v. Dalqlish, 86 N.J. 503, 509 (1981)).

Nonetheless, "[i]f a defendant can 'clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of . . . discretion,' . . . a reviewing court may overrule the prosecutor and order a defendant admitted to PTI." State v. Wallace, 146 N.J. 576, 582 (1996) (first alteration in original) (quoting State v. Leonardis, 73 N.J. 360, 382 (1977)). Generally, a defendant can establish a prosecutor has abused his or her discretion by showing:

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 Pretrial Intervention.

[Id. at 583 (citations omitted).]

Additionally, if a "reviewing court determines that the 'prosecutor's decision was arbitrary, irrational, or otherwise an

abuse of discretion, but not a patent and gross abuse' of discretion, the reviewing court may remand to the prosecutor for further consideration." State v. K.S., 220 N.J. 190, 200 (2015) (quoting Dalqlish, supra, 86 N.J. at 509). Thus, if a prosecutor does not consider factors that should be considered, or does consider factors that should not be considered, a remand is appropriate. Ibid. "A remand to the prosecutor affords an opportunity to apply the standards set forth by the court 'without supplanting the prosecutor's primacy in determining whether [Pretrial Intervention] is appropriate in individual cases.'" Ibid. (alteration in original) (citation omitted).

Here, we agree with the trial court that the prosecutor considered factors that should not have been considered in the rejection of defendant's PTI application. We disagree, however, with the trial court's remedy, namely, admitting defendant into PTI over the prosecutor's objection. Rather, we conclude the prosecutor's reliance on inappropriate factors constituted an abuse of discretion but not a patent abuse of discretion. For that reason, we remand to afford the prosecutor the opportunity to apply the applicable standards without supplanting the prosecutor's primacy in determining whether PTI is appropriate.

In the second letter explaining the decision not to admit defendant into PTI, after detailing the facts in defendant's email

exchanges and the arresting officer's report – with emphasis on defendant's threats concerning the other man his girlfriend was seeing – the assistant prosecutor reviewed each of the required statutory criteria. She noted the rebuttable presumption against admitting defendants charged with second-degree crimes into PTI, Rule 3:28, Guideline 3(i), and rejected the notion defendant had shown compelling reasons to overcome the presumption.

One theme of the assistant prosecutor's decision – which she repeated and emphasized throughout her letter – was that before leaving Florida, defendant loaded the gun and ammunition into his car. The assistant prosecutor also repeatedly asserted that defendant's nervousness, shaking hands, and evasive answers when confronted by police in the parking lot "strongly show he knew that he [did not] have the misimpression that the gun was lawfully being possessed by him and also clearly makes suspect his motive for having [the] weapons." The assistant prosecutor stressed defendant "previously worked for a security company and is in the military. Both occupations have rules and regulations regarding firearms and the need to know and comply with them." The assistant prosecutor declared "there is no way . . . defendant believed honestly that his possession under those circumstances was lawful, given his age, his prior military experience, and security job experience."

The assistant prosecutor also addressed the Attorney General's September 24, 2014 letter regarding "Clarification of 'Graves Act' 2008 Directive with Respect to Offenses Committed by Out-of-State Visitors From States Where Their Gun-Possession Conduct Would Have Been Lawful" ("Clarification"). The Clarification applies to Graves Act cases where the defendant is an out-of-state resident who produces proof that: 1) the firearm had been lawfully acquired in another jurisdiction, 2) defendant's possession would have been lawful in his or her home jurisdiction, and 3) defendant was under the misimpression that such possession was lawful in New Jersey.

The assistant prosecutor acknowledged defendant produced proofs the handgun was obtained lawfully and his possession of it would have been lawful in his home jurisdiction. She did not feel, however, defendant satisfied the third criteria, namely, he was under the misimpression that such possession was lawful in New Jersey. She found "clear evidence to the contrary" – defendant did not immediately volunteer to the police that he had a gun in the glove compartment; defendant's "nervousness and evasive answers strongly show he knew that he [did not] have the misimpression that the gun was being lawfully possessed by him and also clearly makes suspect his motive for having these weapons"; and "[i]t was only after [the police] asked [defendant] out of the

vehicle and asked him if there were any weapons in there that he told them there were."

The trial court issued a written opinion rejecting the State's reasoning and ordered defendant be admitted into PTI. After recounting the facts, setting forth the procedural history, and citing controlling precedent, the court concluded "this is one of those rare cases that require reversal because the prosecutor has so inappropriately weighed the relevant factors that the decision amounts to a 'patent and gross abuse of discretion.'" The court noted it was viewing the State's reasons "through the lens of the Attorney General's [Clarification]."

The court began:

While the prosecutor is not required to accept the defendant's explanation given in furtherance of a PTI application, neither is the prosecutor free to assume facts not found in the record to justify the [S]tate's PTI rejection. The April 13, 2015 rejection letter repeatedly assumes that the defendant specifically loaded the gun and ammunition into the glove compartment as part of his preparations for his trip to New York City. The State also implies that the defendant took the gun and ammunition as a direct consequence of and in response to the text messages about [the girlfriend's] revelations of her interactions with another man. There is nothing in the record to give credence to these assumptions by the State. It is just as likely that the gun and ammunition were always kept in the glove compartment and were not put in the car as part of preparation for this trip. In fact, at no time during the

prolonged text exchanges between [defendant] and [his girlfriend] after [his girlfriend's] rejection did threats of violence occur. There were only the plaintive supplications of a lovesick and disappointed suitor interspaced with an accusation expression of anger. Thus, the State's rejection letter completely mischaracterized the defendant's motivation. The State, in describing the nature of the offense, also refers to the knife and baton in the glove compartment. In fact, the defendant was never charged with any crime that related to the presence of these items nor is there any suggestion that the possession of these items was in any way unlawful.

Concerning the assistant prosecutor's assertion that defendant's prior employment as a security guard and current military service "somehow indicat[ed] . . . defendant should have known about the restrictions of New Jersey's gun laws," the court explained:

This statement, in addition to having no basis in the record, demonstrates a complete inability or unwillingness to consider this case in light of the Attorney General's September 24, 2014 memorandum. The very thrust of that memorandum is that cases, such as this one, which primarily arise due to an out-of-state defendant's lack of familiarity with the strictures of New Jersey's gun laws, should be fairly considered for PTI as they fall outside the "heartland" of cases that are subject to the Graves Act. To state that being employed as a security guard in Florida or as an Army Reservist based in Florida somehow causes one to be charged with special knowledge of New Jersey's gun laws is inexplicable and in no way represents a

logical and considered analysis of this defendant's PTI application.

Similarly, the court noted that when discussing "the assaultive or violent nature of the crime," the assistant prosecutor "again makes assumptions that are prejudicial to the defendant and, more importantly, not supported by any evidence." The court continued: "[t]he State simply contends that the defendant consciously loaded his gun for the purpose of going to New York to seek out his rival for the affections of [his girlfriend]. The State characterizes the defendant and his conduct as 'obvious[ly] jealous, obsessive, [and] vindictive.'" (Alterations in original). The court determined "[t]he facts do not in any way provide any support for these assertions."

After pointing out other assertions by the assistant prosecutor that the court found unsupported by the record, the trial court stated:

This lack of thoughtful and reasoned consideration throughout the prosecutor's rejection letter amounts to a patent and gross abuse of discretion. Even after a remand by the court, the State has only set forth conclusions and assertions unsupported by the record. Even the initial program rejection did not attribute any of the nefarious conduct or motive to the defendant that appears for the first time in the rejection letter. The program describes [defendant] as a "family-oriented individual who has led a law abiding life for a substantial period of time." Without any seeming basis in fact, the State

seeks to paint a far more sinister portrait to justify its rejection of this defendant for PTI.

The court opined "defendant and the facts of this case fit squarely into the four corners of [the Attorney General's Clarification]." The court found defendant to be a law abiding citizen of Florida who stopped while driving through New Jersey to rest and get needed sleep, and defendant's possession of the handgun and ammunition were lawful in his home state. The court noted the letter from the person who gave defendant the gun as a gift. The court also noted defendant's "text messages at the time of his arrest clearly demonstrated . . . he had no idea that his possession was unlawful in New Jersey." The court explained that while stopping in a parking lot "was not as fleeting a contact as merely transiting the [S]tate on an interstate highway, it was no greater contact than stopping at a Turnpike rest area while passing through." According to the court, the gun "was always in the glove compartment in a holster. There is no indication that the defendant ever planned to remove the gun from the holster or the glove compartment. This offense was aberrational and isolated."

Explaining it was "undisputed that the defendant was in fact a productive and law abiding member of society, serving his country in a commendable manner," the court concluded:

If the case at bar is not the case contemplated for PTI enrollment both with an appropriate weighing of the statutory factors, so as not to engage in a patent and gross abuse of discretion, and under the special factors set forth in the Attorney General's [Clarification], then it is virtually impossible to contemplate what set of facts would constitute an appropriate case for enrollment.

We agree with the trial court that the assistant prosecutor's determination was based in large part on inappropriate and speculative factors. For example, one of the primary considerations for the assistant prosecutor's refusal to admit defendant into PTI was that he deliberately loaded his gun and ammunition into his glove compartment before leaving Florida, after having recently made threats against the other man his girlfriend had seen. As the trial court correctly pointed out, there is no factual evidence in the record to support this speculation. Rather, the evidence established defendant was given the gun as a gift and that it was legal in Florida to carry a gun and ammunition in a glove compartment.²

Equally speculative is the assistant prosecutor's statement that defendant's previous employment as a security guard and current military service somehow make him knowledgeable about gun

² The assistant prosecutor conceded these facts in her second letter denying defendant's admission into PTI. The State has not cited any Florida precedent to the contrary.

laws in New Jersey and, by extension, knowledgeable about the gun laws in every state. The assistant prosecutor cited no employment regulations or manuals, or military regulations or manuals, from which defendant should have derived such knowledge.

The assistant prosecutor's third thematic assumption – that defendant's nervousness and shaking hands constitute strong evidence that he knew possession of the gun in his glove compartment was illegal – is also suspect. According to the police report, which is part of the appellate record, defendant was a twenty-five year old African American at the time of his arrest. One could just as readily speculate that when confronted by police in a faraway state, for doing nothing more than apparently sleeping in a parking lot, a young black man might become nervous. His hands might even shake.

These were not the only instances of unfounded suppositions made by the assistant prosecutor. Other statements by the assistant prosecutor also raise concerns about whether she fairly considered placing defendant into PTI. For example, on page four of her letter, after asserting defendant posted a retaliatory "something" on Facebook and his girlfriend thereafter refused to give him her address, the assistant prosecutor stated defendant "loaded his gun, took along extra ammo, a collapsible baton and knife and left Florida to go to New York via other states as well

as New Jersey." After reiterating defendant drove through "the remaining states" with his loaded gun not knowing where his girlfriend lived, and then parked for eight hours in a shopping center in New Jersey, the assistant prosecutor stated: "Not only does this indicate an existence of a personal problem, but a certain character trait that relates to his ego and need to carry weapons which were presumably for a pure social visit . . . which he refused to believe or accept . . . was cancelled." The assistant prosecutor has cited no authority for the psychology underlying her assertions about character trait, ego and the need to carry weapons.

In any event, it is readily apparent the assistant prosecutor made a decision "based upon a consideration of irrelevant or inappropriate factors," Wallace, supra, 146 N.J. at 583, thus calling into serious question whether defendant received "full and fair consideration of his application." N.J.S.A. 2C:43-12(f). We therefore conclude the assistant prosecutor abused her discretion with respect to the reasons she cited in her decision.

Having said that, we disagree with the trial court that the prosecutor's abuse of discretion was patent and gross, or that the remedy must be admission into PTI. We reach this conclusion for several reasons. First and foremost, defendant was charged with a second-degree offense and was presumptively ineligible for PTI.

Defendant was thus required to demonstrate compelling reasons to overcome the presumption. In addition, there are many factors in this case that, when objectively weighed and balanced, could tip the scale in either direction. For example, in evaluating whether, under the Attorney General's Clarification, there was minimal exposure of the firearm to persons in New Jersey, the evidence appears to indicate defendant kept the gun and ammunition in his vehicle at all times and did not carry the gun on his person outside the vehicle. Moreover, defendant's travel in New Jersey was transitory, although he admittedly did stop to sleep.

On the other hand, the handgun was loaded and defendant kept it in the glove compartment rather than in the trunk. Defendant's failure to explain why the loaded gun and extra ammunition were in the glove compartment may be a legitimate consideration against his PTI admission.

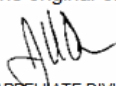
In short, unlike the trial court, we are unable to conclude on this record whether a full and fair consideration of defendant's PTI application – which presupposes the absence of speculation or consideration of inappropriate factors – will result in the denial of defendant's admission into PTI. More importantly, when a prosecutor has considered inappropriate factors, calling into question whether defendant received full and fair consideration, "[a] remand to the prosecutor affords an opportunity to apply the

standards set forth by the court without supplanting the prosecutor's primacy in determining whether [Pretrial Intervention] is appropriate in individual cases." K.S., supra, 220 N.J. at 190 (alteration in original) (citation omitted).

For the foregoing reasons, we reverse the trial court's order admitting defendant into PTI. We remand this matter to the prosecutor who shall afford defendant the opportunity to submit current evidence in support of his PTI application. If defendant is aggrieved by the prosecutor's decision, he may seek the relief from the trial court provided by the applicable statute and court rules. We intimate no views on the appropriate outcome which will be based on an updated and fuller record and which must adhere to the proper legal criteria as outlined in this opinion.

Reverse and remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION