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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-2648-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

CARTER ROBERTS,

Defendant-Respondent.

Submitted January 8, 2018 - Decided February 21, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment
No. 16-06-1003.

Andrew C. Carey, Middlesex County
Prosecutor, attorney for appellant (Patrick
F. Galdieri, II, Assistant Prosecutor, of
counsel and on the brief).

Wronko Loewen Benucci, attorneys for
respondent (James R. Wronko, on the brief).

PER CURIAM

The State of New Jersey appeals from a February 24, 2017 order admitting defendant Carter Roberts into the Pre-Trial Intervention Program (PTI) over the prosecutor's objection. The State contends the circumstances do not clearly and convincingly

establish its refusal to permit defendant's diversion to PTI was a patent and gross abuse of the prosecutor's discretion. Having reviewed the record, we agree, and conclude the trial judge substituted his judgment for the prosecutor's on several points, requiring reversal of the order admitting defendant into PTI. We also find, however, the prosecutor failed to consider whether defendant's crimes were related to a condition or situation conducive to change through participation in supervisory treatment. N.J.S.A. 2C:43-12(e)(6). Because that factor is critical to judging a defendant's amenability to correction and responsiveness to rehabilitation, N.J.S.A. 2C:43-12(b)(1), we deem a remand to the prosecutor appropriate.

Following a tip from a confidential informant, an undercover detective with the Middlesex County Prosecutor's Office Narcotics Task Force made four purchases of marijuana from defendant during February, March and April 2016. All four purchases were made in defendant's apartment in New Brunswick, where the detective observed a computer displaying four images of the streets outside the building. Executing a search warrant in April, officers recovered the food saver machine defendant used to seal the detective's purchases, a safe box and plastic bags containing marijuana residue and \$5135 in cash, \$4440 of which consisted of \$20 bills.

Defendant was indicted on four counts of fourth-degree distribution of marijuana, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(12); one count of third-degree distribution of marijuana, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(11); and one count of third-degree maintaining a fortified structure for drug distribution, N.J.S.A. 2C:35-4.1(c); and charged in a complaint-summons with the disorderly persons offense of possession of drug paraphernalia, N.J.S.A. 2C:36-2. Defendant applied for PTI and was interviewed by a probation officer in June 2016.

Defendant reported he was twenty-four years old, having just graduated from Rutgers after six years with a degree in economics and minors in art history and psychology. He acknowledged having smoked marijuana daily for the past five years and that he drinks rum on the weekends (three glasses). He stated he was in good physical and mental health and not been prescribed any medications. Defendant reported taking a job with Bankers Life in Tinton Falls upon his graduation but resigned after four weeks because "he did not like how the company worked." He claimed to be actively seeking other employment. He also said he has a real estate license.

Defendant reported he was financially supported by his parents and had been employed by his father's construction

company for the last three months at a \$1000 a week. Defendant declined to comment about the crimes with which he was charged. When asked why he should be considered for PTI, defendant said:

I have no priors, I am trying to live a productive life and trying to look for work. I am concern[ed] if [I] find a potential job this issue will come up. I just want to get my life back on track, keep going in the direction I was going.

The Criminal Division Manager recommended defendant's admission into PTI, based on the probation officer's conclusion that

Given this is the defendant's first arrest as an adult,^[1] his willingness to cooperate with supervision, his age, being he is gainfully employed, a college graduate, presumably he would be a suitable candidate for PTI supervision. Although, the defendant reported past marijuana use. It is a concern as he reported weekly alcohol use, possibly to the point of intoxication. Therefore, as a condition of PTI the defendant should submit to a substance abuse treatment, comply with all recommendations until medically discharged, submit to random urine screens, and maintain employment.

Defendant's counsel submitted a letter to the prosecutor in support of his admission to PTI, claiming "[a] criminal conviction would essentially wipe out four years of college and

¹ Defendant's juvenile record consisted of one offense in 2005, successfully diverted following three hours of community service.

prevent [defendant] from obtaining a job opportunity in his field of economics." Contrary to defendant's report to probation, counsel claimed defendant had been diagnosed with a serious mental condition for which he had been prescribed medication, and that his "involvement with marijuana was an attempt to self-medicate and ease the racing thoughts in his mind as a result of his illness."

Counsel also claimed, again contrary to defendant's report to probation, that defendant only quit his job at Banker's Life after he became concerned about the effect of the indictment on his prospects for obtaining an insurance license. Counsel claimed defendant's real passion was "[a]rchitecture and design," and "he would consider a degree in architecture in hope of starting his own real estate management and development firm." Counsel claimed defendant managed the apartment building he lived in based on "the prerequisite" of his real estate license, "but that is also in jeopardy given his current situation."

The prosecutor declined defendant's application for PTI. In a three-page letter referencing each of the seventeen criteria of N.J.S.A. 2C:43-12(e), an assistant prosecutor concluded those factors taken as a whole, and especially subsections (e)(1), (2), (7), (8), (14) and (17), weighed

strongly against defendant's admission in the program. The assistant prosecutor concluded although "defendant has no prior criminal record, his actions constituted a continuing pattern of antisocial activity and the seriousness of the offense and the public need for prosecution outweigh the positive factors that have been presented."

Defendant appealed and the Law Division judge ordered defendant admitted to the program over the prosecutor's objection. In a written opinion, the judge found the State combined factor one, "[t]he nature of the offense," and factor two, "[t]he facts of the case," and "simply recited the factual allegations" of the four controlled buys. The judge concluded the prosecutor having weighed these factors against defendant with "nothing more . . . by way of a qualitative or substantive evaluation" amounted to "a reflexive denial . . . simply based upon the nature of the charges against him." The judge opined "[a]t best, these two factors are weighted neutral as they factor into the Defendant's application, given the State's failure to conduct the requisite individualized assessment."

As to factor three, "[t]he motivation and age of defendant," the judge noted the State recognized defendant's age and that he sought admission to PTI based on his lack of criminal record and efforts "to live a productive life" and

"look for work," and was concerned "his charges will affect any potential job prospect" and that he wished to "get his life back on track." The judge found, however, that as with factors one and two,

the State counted this factor against the Defendant's admission in reflexive fashion despite the fact that their observations clearly speak to the Defendant's recognition of the rehabilitative opportunity presented to him by PTI, his repentance concerning his involvement in these crimes, and his motivation for successfully completing the program so as to salvage his future and remain the law abiding individual he had been for his entire life prior to his engagement in these offenses.

The judge found factor three weighed in favor of defendant's admission to PTI. He reasoned

[t]he Defendant is [a] twenty-four-year-old college graduate with a degree in Economics and a double minor in Psychology and Art History, who is looking to start his career in his chosen field. The Defendant has no prior indictable offenses. A conviction for any of the distribution charges would seriously impact his future and derail many of his future plans. Such is a high price to exact from this particular Defendant, given these personal qualifiers surrounding his candidacy for admission, when combined with the nature of this case and the purposes of diversion via admission into the PTI Program. Being given an opportunity to salvage his professional future through admission and successful completion of PTI is something the Defendant is aware of and, as a result of admission, a strong

motivation to ensure his successful completion of this supervision program.

"Of even more concern" to the Law Division judge was the State's pursuit of the third-degree distribution charge, which the judge acknowledged was "premised upon aggregation allowed in certain instances by N.J.S.A. 2C:35-5(c)." The judge found "the State appears undecided about the approach to take in this case, charging the Defendant with both four (4) instances of narcotics distribution and an aggregation of the same in a separate and distinct count of a higher degree crime." The judge found

[t]his aggregation of charges within the Indictment, when coupled with the additional four separate incidents charged individually, represents a double-counting of criminal conduct the effect of which is to portray the Defendant in a more nefarious light, skewing the true nature of this case against the Defendant so as to place him in a more villainous and nefarious light in order to influence the assessment of his application to his detriment. Should the defendant be convicted at trial of both the lesser graded distribution charges and the count of the indictment premised upon an aggregation of these charges, he would still be eligible for a presumptive probationary sentence given that these charges would all merge into the count of the indictment premised upon the aggregation.

Although purportedly recognizing "that aggregation of quantity under N.J.S.A. 2C:35-5(c) is appropriate where

narcotics distribution activity is akin to a scheme or course of conduct," the judge opined

the amounts transacted within the controlled buys in this case were not of significant amounts, as each involved a quantity barely enough to qualify as a disorderly person's possessory offense. As a result, there is a reasonable assessment to be made characterizing the Defendant's conduct more fairly as separate and disjointed instances of narcotics distribution, the sole catalyst for which was solicitation by the State, rather than some common purpose or scheme engaged in with the Defendant to create a consistency in relationship with the State. In the end, the [c]ourt is left to raise these concerns without solution nor finality of judgment given the cursory assessment afforded Factors (1), (2), and (3) by the State, contrary to the requisite individualized assessment expected by the standards governing consideration of applicants for PTI admission.

The judge noted the State combined factor five, "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," and factor six, "the likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment," and weighed them

against defendant "because '[t]here are no "personal problems" or "character traits" which are unique to this defendant for which services would only be available outside the criminal justice system.'" The judge noted the prosecutor further determined because "'defendant has never been subject to supervisory treatment there is no way to tell whether he would be conducive to change if given the opportunity.'"

The judge found the absence of prior supervisory treatment "true of every applicant for PTI admission, making this rationale specious and unsustainable as standing against the Defendant's application." He noted the State

faile[d] to recognize . . . that if the Defendant had been in "supervisory treatment" prior to his application so as to be able to ameliorate the State's concerns regarding his amenability to PTI supervision, that supervision would have, in and of itself, disqualified the Defendant from admission into PTI given that PTI is not available to those who have already been subjected to "supervisory treatment."

The judge found while defendant's "lack of prior experience in 'supervisory treatment' . . . affects the State's ability to assess [his] amenability to PTI supervision, these factors cannot be weighted in favor of rejecting the Defendant's application as they do not lead to a conclusion that the Defendant would, as a result, be resistant to said supervision."

The judge concluded he could not "rely on the limited, cursory review of these factors by the State to subscribe to [its] arguments in rejecting the admission of an otherwise PTI-eligible defendant from PTI."

Reviewing factor seven, "[t]he needs and interests of the victim and society," the judge found the prosecutor's conclusion that "communities suffer as a result of narcotics trafficking generally unassailable." Nevertheless, the judge concluded the prosecutor's assessment of the factor "deficien[t] . . . in its failure to indicate how, . . . as it relates to this particular Defendant, the needs and interests of society are undermined by allowing the Defendant's admission into PTI beyond [the prosecutor's] conclusory statements."

With regard to factor eight, "[t]he extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior," and factor nine, "[t]he applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others," the judge noted

the State again considered them jointly to both acknowledge[e] that the Defendant has no prior criminal record, then inexplicably conclude that the four (4) controlled purchases in this case exhibit a ". . . pattern of antisocial behavior . . ." as evidenced by the Defendant having engaged in these transactions within a three (3) month period.

The judge rejected the prosecutor's assessment of the four controlled buys as constituting a "pattern of antisocial behavior." He instead concluded the

case against the Defendant is squarely premised on a foundation of four (4) separate transactions involving marijuana between February 9, 2016 and April 14, 2016, solicited by the State in each instance, the quantities of which in each instance represented approximately half of what would be necessary to move the possession of said marijuana beyond a disorderly person's offense into the jurisdiction of the Superior Court as felonious activity. No analysis is made to explain how these are a more than a series of aberrant behaviors within a limited time frame, the catalyst for which was the State and its efforts to engage in narcotics interdiction.

The judge also rejected the prosecutor's observation that arrest had failed to deter defendant's use of marijuana, based on defendant's own report that he smoked after having been arrested. Instead, the judge concluded defendant's "admitted drug problem which arguably led to these events outweigh[s] any assessment that his conduct rises to a level of criminality warranting traditional prosecution outside of PTI admission."

In assessing the prosecutor's consideration of factor fourteen, whether "'the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution,'" and factor seventeen, whether "'the harm done

to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program," the judge took umbrage at the prosecutor's conclusion that

[c]hanneling this particular offender into the PTI program would harm society by sending a message which would minimize and trivialize the severity of defendant's actions. Any benefit to the defendant from acceptance into the PTI program would be far outweighed by the harmful message sent to society that such offenses merit a diversionary program.

The judge noted "[p]articipation in the PTI program is not trivial, nor does it minimize the Defendant's actions." The judge found

[t]he State fails to point to any tangible benefit to society by denying the Defendant admission into PTI, given his personal qualifications and educational background. There is little to nothing in either to suggest a risk of recidivism when the Defendant's motivation is coupled with the supervision and the rehabilitative services available within PTI. The State's rejection is premised on little, if anything, specifically addressing how they assessed these two factors against the Defendant, other than being part of their own reflexive approach towards weighting them against his admission.

The judge further found

[d]enying this Defendant admission into PTI would simply create another felon bearing all of the attendant collateral consequences

associated with a criminal conviction which would follow him for much, if not all of his life. There is no tangible benefit to society having this Defendant saddled with this type of conviction given the promise he shows through his educational achievement and the law abiding lifestyle he has led for the vast majority of his life. Furthermore, there is no significant harm to be protected from denying him admission into PTI. The reasoning employed by the State in weighing Factors (14) and (17) against the Defendant's admission are conclusory in nature and devoid of any appropriate substantiation, as the State's statement made in its analysis can apply to any criminal statute.

The judge concluded the prosecutor's reliance on factors one, two, three, five, seven, eight, fourteen and seventeen in denying defendant admission to PTI was "misplaced." He found it "unclear as to whether or not the State considered the purposes of PTI" in assessing defendant's application, but apparent "the State failed to engage in the individualized assessment of the factors identified in Guideline 3 of R. 3:28." The judge concluded defendant "is the exact type of defendant PTI was envisioned for" and denying him "admission [was] a clear error in judgment on the prosecutor's part."

Having read the Law Division judge's written opinion, it is abundantly clear that had the judge been the prosecutor, defendant would have been admitted to PTI. The cases, however, are legion holding a reviewing court is not to evaluate the case

"as if it stood in the shoes of the prosecutor." State v. Wallace, 146 N.J. 576, 589 (1996). As the Supreme Court has repeatedly reminded, "PTI is essentially an extension of the charging decision, therefore the decision to grant or deny PTI is a 'quintessentially prosecutorial function.'" State v. Roseman, 221 N.J. 611, 624 (2015) (quoting Wallace, 146 N.J. at 582). "[B]ecause it is the fundamental responsibility of the prosecutor to decide whom to prosecute," State v. Kraft, 265 N.J. Super. 106, 111 (App. Div. 1993), "the prosecutor has great discretion in selecting whom to prosecute and whom to divert to an alternative program, such as PTI." Wallace, 146 N.J. at 582.

We are to afford the prosecutor's decision on diversion to PTI an "enhanced" or "extra" level of deference, State v. Baynes, 148 N.J. 434, 443 (1997), in accord with the Court's "expectation that 'a prosecutor's decision to reject a PTI applicant will rarely be overturned,'" ibid. (quoting Wallace, 146 N.J. at 585) (internal quotation marks omitted). Accordingly, the scope of judicial review "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)). "A defendant attempting to overcome a prosecutorial veto must 'clearly and convincingly establish that the prosecutor's

refusal to sanction admission into a PTI program was based on a patent and gross abuse of his discretion' before a court can suspend criminal proceedings under Rule 3:28 without prosecutorial consent." Negran, 178 N.J. at 82 (quoting State v. Nwobu, 139 N.J. 236, 246 (1995)) (internal quotation marks omitted). The Court has counseled that

[o]rdinarily, an abuse of discretion will be manifest if defendant can show 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.

[State v. Bender, 80 N.J. 84, 93 (1979).]

Applying those standards to this record makes clear the judge was without authority to suspend criminal proceedings against defendant and order him admitted to PTI over the prosecutor's objection. The judge's comments regarding the prosecutor's decision to secure an indictment aggregating the quantities of marijuana in the four controlled buys as permitted by N.J.S.A. 2C:35-5(c) are particularly concerning.

Accusing the prosecutor of "double-counting" and "skewing the true nature of this case . . . so as to place [defendant] in

a more villainous and nefarious light in order to influence the assessment of his application to his detriment," appears wholly unwarranted from our perspective. Further, the prospect of a probationary sentence, which the judge deemed likely even were defendant convicted of both the fourth-degree distribution charges and the third-degree aggregation count, and which apparently fueled the aspersions leveled against the prosecutor, "does not retrospectively impugn the soundness of a previous prosecutorial decision that criminal prosecution rather than pretrial diversion is the appropriate disposition of the charges against the defendant." Wallace, 146 N.J. at 588-589 (holding "[t]o permit that line of attack would unfairly undermine an otherwise well-founded decision to deny PTI" and "discourage efforts by the State to enter into a negotiated plea agreement that seeks to accommodate a defendant's condition, need for treatment, amenability to supervision, and likelihood for rehabilitation").

As apparent from the affidavit in support of the search warrant, defendant came to the attention of the narcotics task force through a reliable confidential informant who claimed defendant was selling drugs out of his apartment in New Brunswick. Utilizing the cell phone number for defendant provided by the informant, an undercover officer made contact

with defendant, visited his apartment, where she observed a video surveillance system, and reported purchasing drugs from him on four different occasions over the course of three months.

Based on the small quantities purchased, which the judge characterized as "barely enough to qualify as a disorderly person's possessory offense," the judge rejected the prosecutor's view that defendant was regularly engaged in selling marijuana. The facts, in the judge's view, permitted "a reasonable assessment . . . characterizing the Defendant's conduct more fairly as separate and disjointed instances of narcotics distribution, the sole catalyst for which was solicitation by the State, rather than some common purpose or scheme." That, of course, ignores that defendant came to the State's attention on a report that he was selling drugs from his apartment. More important, that the judge views the facts differently from the prosecutor does not suggest a "clear error of judgment" on the prosecutor's part. See Wallace, 146 N.J. at 589.

We also reject the judge's view that four sales over three months cannot support a finding of a "continuing pattern of anti-social behavior." Although we agree that factor is "ordinarily . . . predicated on more long-standing criminal involvement," the Court in Nwobu found a series of thefts by a

first-time offender over a six-week period "suggest[ed] more than a momentary loss of moral resolve." Nwobu, 139 N.J. at 254. More important for our purposes, however, is the Nwobu Court's clear directive that "[t]he 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." Ibid.

We cannot say the prosecutor's decision to weigh against defendant the nature of the offense, the facts of the case, the needs of society, that the conduct constituted a continuing pattern of anti-social behavior and that the harm done to society by diversion would outweigh the benefits, constituted a clear error of judgment on this record. Despite defendant's unwillingness to comment on the offenses, indicate any need or desire for drug treatment and expressing only his lack of prior record, his concern about the effect of a conviction on his future job prospects and the desire to "just . . . get [his] life back on track, keep going in the direction [he] was going," the judge found defendant recognized "the rehabilitative opportunity presented to him by PTI, his repentance concerning his involvement in these crimes, and his motivation for successfully completing the program so as to salvage his future."

As Judge Pressler noted, a defendant need not "be Jean Valjean in order to qualify" for PTI. State v. Mickens, 236 N.J. Super. 272, 279 (App. Div. 1989). "He must, however, acknowledge his error, be sincerely remorseful, be willing to make amends for it outside the criminal justice system, and have the capacity to do so." Ibid. The Law Division judge found those qualities in defendant while the prosecutor did not. We find the judge erred by interjecting himself into the process of weighing applicable factors pertinent to the PTI application. He predicated his decision on his own assessment of the factors, rather than confining himself to whether the prosecutor considered all relevant factors, considered inappropriate factors or made a clear error in judgment. Bender, 80 N.J. at 73. We accordingly reverse the order admitting defendant into PTI.

Although we find no patent and gross abuse of the prosecutor's discretion, the Law Division judge identified one instance in which the prosecutor's decision could be characterized as arbitrary. In assessing factor six, "the likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment," the prosecutor wrote "since the defendant has never been subject to supervisory

treatment there is no way to tell whether he would be conducive to change if given the opportunity."

As the judge correctly noted, the absence of prior supervisory treatment is "true of every applicant for PTI admission." It does not permit the prosecutor to sidestep an assessment of whether the crime is related to a condition, here possible drug addiction, "that would be conducive to change through his participation in supervisory treatment." Because the likely value of supervisory treatment is critical to judging a defendant's amenability to correction and responsiveness to rehabilitation, N.J.S.A. 2C:43-12(b)(1), we deem a remand to the prosecutor to reconsider defendant's application appropriate. See State v. Dalqlish, 86 N.J. 503, 509-10 (1981). Given the passage of time, the review should be ab initio and defendant may bring any pertinent information bearing on his PTI application to the attention of the prosecutor. See State v. Coursey, 445 N.J. Super. 506, 512-13 (App. Div. 2016).

The order admitting defendant into PTI is reversed, the prosecutor's decision rejecting defendant from PTI is vacated and the matter is remanded to the prosecutor for reconsideration in accordance with this opinion. 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