

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1046-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NEIKIA K. AUSTIN, a/k/a
KIA, THE DIVA,

Defendant-Appellant.

Submitted March 7, 2016 – Decided May 26, 2016

Before Judges Fasciale and Higbee.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Indictment
No. 13-10-0978.

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

Sean F. Dalton, Gloucester County
Prosecutor, attorney for respondent (Joseph
H. Enos, Jr., Senior Assistant Prosecutor,
on the brief).

PER CURIAM

Defendant Neikia K. Austin's motion to be admitted into
pre-trial intervention (PTI) was denied based on her prior
admission into a Pennsylvania diversionary program in 2001. For

the reasons that follow, we reverse and remand for reconsideration of defendant's PTI application.

We discern the following facts and procedural history from the record. Defendant was indicted and charged with third-degree conspiracy to shoplift (Count One), N.J.S.A. 2C:20-11(b)(1) and N.J.S.A. 2C:5-2, and third-degree shoplifting (Count Two), N.J.S.A. 2C:20-11(b)(1). After applying for PTI, defendant was denied entry by the program director. The prosecutor filed a letter agreeing with the program director, and opposing defendant's admission into PTI. The reason provided for defendant's rejection was that she had been previously enrolled in a conditional discharge program. Specifically, defendant "was accepted into Pennsylvania's Accelerated Rehabilitation Disposition program (ARD)" in May 2001 for offenses in connection with a retail theft and forgery. The prosecutor also argued at the motion hearing that the charges related to the ARD would be crimes in New Jersey and therefore are a "bar" to entry into PTI.

The trial judge denied defendant's motion to be admitted into PTI because the Pennsylvania charges would be "crimes under New Jersey law" and therefore "a bar to her participation in [PTI]." Defendant thereafter pled guilty to the lesser offense of fourth-degree conspiracy to commit shoplifting. She admitted

to entering a store with two co-defendants with the intent to commit shoplifting of merchandise from the store valued at more than \$200. In exchange for the plea, the State agreed to dismiss Count Two and to recommend defendant be sentenced to one year of non-custodial probation. In accordance with the plea agreement, defendant was sentenced to one year of non-custodial probation for the charge in Count One, reduced to a fourth-degree offense.

Defendant appeals from the order denying her motion to be admitted into PTI, raising the following claim:

REJECTION OF DEFENDANT FOR PTI CONSTITUTED A
PATENT AND GROSS ABUSE OF DISCRETION,
NECESSITATING REVERSAL AND REMAND FOR
RECONSIDERATION AND ADMISSION OF DEFENDANT
INTO PTI.

Defendant further claims, "[a]t the very least, the rejection was an 'abuse of discretion,' necessitating a return of the matter to the prosecutor for reconsideration."

Judicial review of a prosecutor's decision to deny a defendant admission into PTI is "severely limited" and "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, 111-12 (App. Div. 1993)). "[A] prosecutor's decision to reject a PTI applicant will rarely be overturned." State v. Baynes, 148 N.J. 434, 443 (1997)

(quoting State v. Wallace, 146 N.J. 576, 585 (1996)). The level of deference afforded to the prosecutor "is so high that it has been categorized as 'enhanced deference' or 'extra deference.'" Ibid. (quoting Nwobu, supra, 139 N.J. at 246).

Generally, prosecutors have "broad discretion to determine if a defendant should be diverted." State v. K.S., 220 N.J. 190, 199 (2015). To compel a defendant's admission into PTI over the prosecutor's objection, "the defendant must 'clearly and convincingly' show that the decision [to deny him or her admission into PTI] was a 'patent and gross abuse of . . . discretion.'" Id. at 200 (second alteration in original) (quoting Wallace, supra, 146 N.J. at 582). A patent and gross abuse of discretion is a decision that "has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention." State v. Watkins, 193 N.J. 507, 520 (2008) (quoting Wallace, supra, 146 N.J. at 582-83).

In State v. Bender, the Supreme Court established a two-part test for evaluating whether a patent and gross abuse of discretion occurred. 80 N.J. 84 (1979). Initially, the defendant must show an "abuse of discretion" by demonstrating the 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." Id. at 93 (citation omitted). However, for the "abuse of discretion to rise to the level of 'patent and gross,'" the defendant must also show "the prosecutorial error complained of will clearly subvert the goals underlying [PTI]." Ibid.

The "policy of the State of New Jersey" is that under certain circumstances "supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal offense." N.J.S.A. 2C:43-12(a). See also State v. Bell, 217 N.J. 336, 348 (2014) (holding the purpose of PTI is to provide "an alternative to the full criminal justice mechanism of a trial"). In the event a "'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." K.S., supra, 220 N.J. at 200 (quoting State v. Dalqlish, 86 N.J. 503, 509 (1981)). Remand is proper if "the prosecutor considers inappropriate factors." K.S., supra, 220 N.J. at 200.

N.J.S.A. 2C:43-12(g)(1) provides the following limitation on PTI admission:

Supervisory treatment may occur only once with respect to any defendant and any person who has previously received supervisory treatment under section 27 of P.L. 1970, c.

226 (C.24:21-27), a conditional discharge pursuant to N.J.S.A. 2C:36A-1, or a conditional dismissal pursuant to P.L. 2013, c.158 (C.2C:43-13.1 et al.) shall not be eligible for supervisory treatment under this section.

However, "the term '[s]upervisory treatment,' found in N.J.S.A. 2C:43-12(g)(1) refers to diversionary programs [within New Jersey] . . . , not to diversionary programs under the laws of other states." State v. McKeon, 385 N.J. Super. 559, 569 (App. Div. 2006). Accord State v. O'Brien, 418 N.J. Super. 428, 438 (App. Div. 2011). Although prior out-of-state diversionary programs may be considered under N.J.S.A. 2C:43-12(e)(8) (continuing pattern of anti-social behavior), McKeon, supra, 385 N.J. Super. at 571, neither the prosecutor nor the trial court relied on this factor in denying defendant entry into PTI.

It is improper to rely on previously dismissed or diverted charges from another state to deny a defendant's admission into PTI. K.S., supra, 220 N.J. at 200, 202. See also McKeon, supra, 385 N.J. Super. at 571 (holding the Legislature did not intend to "bar an otherwise eligible defendant from PTI solely because he was previously admitted to a pretrial diversionary program in another state").

Here, the prosecutor relied solely on defendant's out-of-state diversionary program to justify denying defendant entry into PTI under N.J.S.A. 2C:43-12(g)(1). This amounts to an

abuse of discretion. Therefore, we vacate the trial court's order denying defendant entry into PTI and remand for reconsideration by the prosecutor in accordance with K.S. and McKeon.

Reversed 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