

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1245-17T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILLIAM GERENA,

Defendant-Respondent.

Submitted April 17, 2018 – Decided April 25, 2018

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
17-01-0038.

Esther Suarez, Hudson County Prosecutor,
attorney for appellant (Erin M. Campbell,
Assistant Prosecutor, on the brief).

Joseph E. Krakora, Public Defender, attorney
for respondent (Stephen P. Hunter, Assistant
Deputy Public Defender, of counsel and on the
brief).

PER CURIAM

We granted the State leave to appeal from an order overruling
the prosecutor's objection to defendant's application for

admission into the drug-court program. The prosecutor had legally rejected defendant's Track Two application concluding he was a significant threat to the community. Without making any findings about whether admitting defendant into drug court would result in a "danger to the community," the judge entered the order subject to sentencing on unrelated pending charges in other counties. Thus, the judge has not sentenced defendant to drug court, he only issued the order, which we stayed. Consequently, because the judge has not entered a judgment of conviction, he did not impose a purportedly illegal sentence, as the State contends. Nevertheless, we remand for further proceedings because the judge failed to make the requisite findings of fact and conclusions of law.

On appeal, the State argues for the first time that the judge ignored the Manual for Operation of Adult Drug Courts (Manual) promulgated by the Administrative Office of the Courts.¹ According to the State, defendant violated the deadlines in the Manual by filing an untimely appeal to the judge. The State contends that compliance with the deadlines in the Manual is mandatory. As to

¹ Administrative Office of the Courts, Manual for Operation of Adult Drug Courts in New Jersey (July 2002).

the timeliness of defendant's appeal to the judge, the State may raise that contention in the first instance on remand.

The State also contends the holding in State v. Hyland, 452 N.J. Super. 372 (App. Div. 2017) does not preclude this appeal.² In Hyland, the appellate panel held the State was unable to appeal from the imposition of a drug-court sentence of a Track One defendant, an individual who the State contended was a danger to the community. Id. at 379-83. Here, the State argues the judge abused his discretion by failing to make any findings that danger to the community is likely to result from defendant's admission into the drug-court program. The State contends that our review of the order is required to safeguard the public.

A grand jury indicted defendant with one count of third-degree theft by unlawful taking (cash registers), N.J.S.A. 2C:20-3(a). In a separate incident, the police arrested defendant and charged him with carjacking, which the State amended to third-degree theft. Defendant pled guilty to both third-degree theft charges expecting the State to recommend concurrent five-year

² The State's petition for certification is pending.

prison sentences. Defendant applied to drug court on the same day he pled guilty to the theft charges.³

On a defendant's appeal to a judge from the State's rejection of his drug-court application, the judge, not the prosecutor, makes the final determination regarding defendant's eligibility for admission into drug court. State v. Maurer, 438 N.J. Super. 402, 414 (App. Div. 2014). On this appeal, we review the judge's order overruling the prosecutor's rejection for abuse of discretion. Id. at 418. The failure to make findings and conclusions of law has hampered our ability to determine whether the judge erred.

"Drug Courts are specialized courts within the Superior Court that target drug-involved 'offenders who are most likely to benefit from treatment and do not pose a risk to public safety.'" State v. Meyer, 192 N.J. 421, 428-29 (2007) (quoting Manual at 3). There are two general ways for admission into the drug court. See State v. Clarke, 203 N.J. 166, 174 (2010).

³ Defendant did not plead guilty to second-degree carjacking. This is important because defendant's guilty pleas to the third-degree theft offenses did not carry a presumption of imprisonment, which would have implicated the consequences of the repeal of N.J.S.A. 2C:35-14(c) (repealed 2012) and the related potential applicability of N.J.S.A. 2C:44-1(f)(2). As a result, Hyland is not exactly on point.

The first path to drug court involves defendants, unlike here, who are subject to sentencing with a presumption of imprisonment and who satisfy the nine separate factors embodied in N.J.S.A. 2C:35-14(a). Those individuals, like the defendant in Hyland, are assigned to Track One and are required to serve a period of "special probation" pursuant to N.J.S.A. 2C:35-14(a). Clarke, 203 N.J. at 175. Defendant does not fall under this path because he pled guilty to two separate third-degree theft offenses, which unlike second-degree offenses, do not carry a presumption of imprisonment.

The second path involves defendants, like here, with drug abuse problems who are not subject to a presumption of imprisonment. These people are assigned to Track Two and are eligible for Drug Court under the general sentencing provisions of the Criminal Justice Code. Id. at 175-76 (citing Meyer, 192 N.J. at 432). An applicant under this track is ineligible for admission into the drug court if, among other things, "danger to the community is likely to result from the person being placed on probation." Meyer, 192 N.J. at 432 (quoting Manual at 16).

The State maintains defendant is inappropriate for drug court because he is violent and a danger to the community. To show his violent tendencies, the State pointed to the carjacking incident, where defendant accelerated the vehicle and dragged the owner

along the roadway. The State argues his criminal history is further evidence that he is violent and a danger to the community. The history includes, but is not limited to, convictions for resisting arrest, assaults, burglaries, and thefts; pending charges (including robbery) in four counties; bench warrants for failing to appear in multiple municipal courts; and approximately forty arrests in Florida, including arrests for assault and battery, resisting arrest, burglary, and numerous violations of probation. Moreover, while defendant resided in Florida, he failed to complete numerous attempts at drug treatment facilities. And according to the assistant prosecutor, after defendant returned to New Jersey, he picked up thirteen additional arrests.

At the outset of the argument before the judge on defendant's appeal from the prosecutor's rejection of his drug-court application, the judge stated that "the issue . . . to be addressed is [whether defendant] is . . . a significant danger to the community." The assistant prosecutor argued to the judge that in addition to his criminal history of violent offenses, defendant suffers from mental health issues and takes three different types of medication.

Although the judge did not make specific findings as to whether "danger to the community is likely to result from the person being placed on probation," he acknowledged defendant had

assault convictions. The judge expressed particular concern about the underlying facts of the carjacking incident, which the judge said was "troubling" and "disturb[ing]." The judge questioned the soundness of the State's decision to amend the carjacking charge to third-degree theft. He characterized defendant as having "a load of problems," including "polysubstance abuse" and "psychiatric issues." Without making further findings, the judge stated "I'm going to give [defendant] the opportunity on drug[-] court probation if he gets admitted into drug[-]court probation from the[] other counties [in which he had pending charges]." (Emphasis added).

Finally, we address briefly the State's contentions as to Hyland and its right to appeal. We emphasize that the State has not appealed from a judgment of conviction in the aftermath of a drug-court sentence. Rather, we granted leave to appeal from the order overruling the State's rejection of defendant's application. Nevertheless, in Hyland, 452 N.J. Super. at 379-80, the parties disputed whether the State could appeal from a law division order admitting a Track One defendant into drug court over the State's objection. Here, the judge did not sentence defendant to drug court, he entered an order essentially concluding that defendant is legally eligible for admission into the program.

The parties in Hyland focused on whether the sentencing judge imposed an illegal sentence by failing to apply N.J.S.A. 2C:35-14(a)(9) correctly. Ibid. The parties also disputed whether N.J.S.A. 2C:44-1(f)(2) authorized the State to appeal from the Hyland order. Id. at 383. Here, we are not dealing with a Track One applicant or an underlying crime of the second degree. Defendant pled guilty to the third-degree theft offense involving the stolen register from a store, and he pled guilty to a separate amended charge of third-degree theft, rather than to the second-degree carjacking offense. Hyland is legally and factually distinguishable.

Here, we are dealing with a Track Two applicant. In Hyland, 452 N.J. Super. at 388-89, that panel held the repeal of N.J.S.A. 2C:35-14(c) deprived the State of the right to appeal from the imposition of a special probationary drug-court sentence for a Track One defendant over the State's objection. Before the Legislature repealed Subsection (c), a law division judge was unable to place a Track One person on special probation over the prosecutor's objection unless that judge found a gross and patent abuse of prosecutorial discretion. Id. at 387-89. The repeal of Subsection (c) altered eligibility procedures for Track One defendants.

The repealed Subsection (c) eliminated the application of a higher standard of review under circumstances where a sentencing judge imposed drug court for a Track One defendant over the prosecutor's objection. The repeal also clarified that now a sentencing judge, not the prosecutor, makes the final determination regarding a Track One applicant's eligibility for drug court. Maurer, 438 N.J. Super. at 414. Defendant was not a Track One applicant.

Here, our focus is not whether the repeal of Subsection (c) prevents the State from appealing from an order imposing a drug-court sentence for a Track One defendant over the prosecutor's objection. Rather, we are dealing with whether the judge abused his discretion by failing to make findings that danger to the community is likely to result from defendant being placed on probation. In other words, we are addressing whether the judge abused his discretion by entering the order, which the State argues would lead to the imposition of a sentence, contrary to the law.

Track Two applicants are eligible for drug court under the general sentencing provisions of the Criminal Justice Code pursuant to N.J.S.A. 2C:45-2. Clarke, 203 N.J. at 174-76 (citing Meyer, 192 N.J. at 432-33). Here, the State argues defendant's expected sentence will be illegal because defendant is a violent offender and the judge failed to determine whether the imposition

of drug court would result in a danger to the community. The State asserts therefore that the order will lead to the imposition of an illegal sentence. As we said in Hyland, 452 N.J. Super. at 381 (alterations in original):

Our "Code of Criminal Justice, N.J.S.A. 2C:1-1 to 2C:104-9 [] does not define the term 'illegal sentence,'" but "does specify the sentence or penalty for each offense and the authorized dispositions. N.J.S.A. 2C:43-2." State v. Murray, 162 N.J. 240, 246, 744 A.2d 131 (2000). Our Supreme Court has defined "an illegal sentence [as] one that 'exceeds the maximum penalty provided in the Code for a particular offense' or a sentence 'not imposed in accordance with law.'" State v. Acevedo, 205 N.J. 40, 45, 11 A.3d 858 (2011) (quoting Murray, 162 N.J. at 247, 744 A.2d 131). A sentence "not imposed in accordance with law" includes a "disposition [not] authorized by the Code." Murray, 162 N.J. at 247, 744 A.2d 131.

An applicant under Track Two is eligible for drug-court sentencing if, among other things, "no danger to the community is likely to result from the person being placed on probation." Meyer, 192 N.J. at 432 (quoting Manual at 16). On this record, without any findings by the judge, we are unable to determine if he abused his discretion by entering the order overruling the State's rejection of defendant's application.

Remanded for further proceedings consistent 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.

