

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1766-15T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

HEATHER McDONALD,

Defendant-Respondent.

Submitted August 9, 2016 – Decided August 15, 2016

Before Judges Sabatino and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-03-0517.

Esther Suarez, Hudson County Prosecutor, attorney for appellant (John R. Mulkeen, Assistant Prosecutor, on the brief).

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

PER CURIAM

The State appeals from the trial court's December 11, 2015 order allowing defendant Heather McDonald to enter into the pre-trial intervention program ("PTI") over the State's objection and after defendant had pled guilty to the fourth-degree crime

of child abuse, N.J.S.A. 9:6-1 and 6-3. For the reasons that follow, we reverse.

At the relevant time of the charged offenses, defendant was nineteen years old and employed in a daycare facility. In August 2012, J.R., then a four-month-old infant, attended the daycare facility where defendant worked. On August 11, 2012, J.R. was taken to the hospital, where it was discovered that he had a non-displaced fracture of his left tibia.

During the ensuing investigation, defendant was interviewed several times. Initially, she denied any involvement with or knowledge of an injury to J.R. After failing a polygraph test,¹ however, defendant admitted that she had squeezed J.R.'s leg while changing his diaper and while she was under stress because other infants were crying at the same time. During her subsequent guilty plea, defendant admitted to putting "to[o] much" pressure to J.R.'s leg while changing his diaper. Defendant also admitted that she became aware that J.R. had suffered an injury, she did not tell anyone about that injury,

¹ We do not rely in any fashion upon the polygraph results for purposes of our analysis, and simply mention the test as part of the chronology. See State v. A.O., 198 N.J. 69, 83-84 (2009) (reiterating our courts' long-standing policy to exclude polygraph test results from criminal cases except where agreed to by the parties).

and she knew that the lack of medical care created the potential for further medical problems for J.R.

A grand jury indicted defendant for four crimes: second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); fourth-degree child abuse, N.J.S.A. 9:6-1 and 6-3; and fourth-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(4). After over two years of pretrial proceedings, the State and defendant negotiated a plea agreement under which defendant agreed to plead guilty to fourth-degree child abuse and the State agreed to dismiss the other charges and recommend a sentence of non-custodial probation. Defendant noted on the plea form that she reserved her right to apply for PTI, but the State did not agree to that reservation.

Following the court's acceptance of her guilty plea, defendant applied for PTI. The Assistant Criminal Division Manager rejected her application, as did the prosecutor.

On defendant's motion, the Law Division judge, who was the same judge who had accepted defendant's guilty plea, granted defendant's application and ordered that she be accepted into PTI over the State's objection. The judge conditioned PTI on defendant being prohibited from working with children or the elderly in any capacity. His order also went on to provide that

those conditions "survive the PTI term and serve as an indefinite restriction upon the defendant."

In his written opinion in support of the decision, the trial judge emphasized that defendant had no prior criminal record and committed no offenses following this incident. The judge perceived that defendant had failed to notify her daycare employer "out of fear" and that her motivation, although "irresponsible[,]" was "not willfully malicious." The judge also cited the fact that the child's mother, who had originally wanted defendant incarcerated, had ultimately deferred to the State's recommendation of a non-custodial sentence. The judge further noted that defendant was young, had maintained employment, and had no history of physical violence.

On appeal, the State argues (1) it was not a patent and gross abuse of discretion for the prosecutor to deny PTI; (2) the prosecutor duly considered defendant's youth, lack of criminal record, and other mitigating factors; and (3) admission to PTI over the prosecutor's objection after the guilty plea had already been accepted was "procedurally inappropriate." We concur with these first two arguments and need not reach the third.

As established by the Legislature in N.J.S.A. 2C:43-12 to -22, and as implemented in our criminal courts under Rule 3:28,

PTI is fundamentally a discretionary program. Subject to judicial review, admission into PTI requires a positive recommendation from the program director and also the consent of the prosecutor. State v. Nwobu, 139 N.J. 236, 246 (1995). The prosecutor's assessment is guided by seventeen factors enumerated in the PTI statute. N.J.S.A. 2C:43-12(e)(1)-(17). For suitable defendants who are selected for admission, "PTI is a diversionary program specifically designed to avoid a trial and the stigma accompanying a verdict of guilt to any criminal offense." State v. Bell, 217 N.J. 336, 347 (2014).

Because of "the close relationship of the PTI program to the prosecutor's charging authority, courts allow prosecutors wide latitude in deciding whom to divert into the PTI program and whom to prosecute through a traditional trial." State v. Negran, 178 N.J. 73, 82 (2003) (citing Nwobu, supra, 139 N.J. at 246). That deference to the prosecutor has been described as "'enhanced' or 'extra' in nature." Ibid. (quoting State v. Baynes, 148 N.J. 434, 443-44 (1997)).

We must be mindful that the scope of judicial review of a prosecutor's objection to a defendant's admission into PTI is severely limited. Ibid.; see also Nwobu, supra, 139 N.J. at 246; State v. Hermann, 80 N.J. 122, 128 (1979). As the Court noted in Negran, judicial review of PTI denials "serves to check

only the 'most egregious examples of injustice and unfairness.'" Negran, supra, 178 N.J. at 82 (quoting State v. Leonardis, 73 N.J. 360, 384 (1977)); see also State v. DeMarco, 107 N.J. 562, 566 (1987).

In accordance with these principles,

[a] defendant attempting to overcome a prosecutorial veto [of PTI admission] 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 [or her] discretion' before a court can suspend criminal proceedings under Rule 3:28 without prosecutorial consent.

[Negran, supra, 178 N.J. at 82 (quoting Nwobu, supra, 139 N.J. at 246); see also State v. K.S., 220 N.J. 190, 199-200 (2015) (reaffirming a defendant's "clear and convincing" burden to show a "patent and gross abuse" of a prosecutor's discretion in denying PTI).]

The trial court strayed from these principles in granting defendant into PTI over the prosecutor's objection. The court's written opinion made no finding that the prosecutor's decision was a "patent and gross abuse of discretion," the severely limited standard of review that governs motions to set aside a prosecutor's denial. The judge did point out several mitigating facets of this matter, including defendant's youth and lack of criminal history. But there are several offsetting factors weighing against her application, including her initial denials


of involvement in injuring the child, her failure to report the child's condition to her employer, the nature of the injury, the interests of the minor victim, and the need to deter other daycare workers from abuse or neglect.

It is not the court's function to substitute its judgment for that of the prosecutor in these matters. We also note that defendant received a quite favorable outcome in the plea negotiations, avoiding potential incarceration that presumptively would be imposed under the two second-degree counts if defendant went to trial and was convicted of those charges.

Applying the appropriate narrow scope of review, we accordingly reverse the December 11, 2015 order admitting defendant to PTI and remand for sentencing. Our disposition makes it unnecessary to address the State's final and alternative argument that defendant's admission to PTI was procedurally barred, an issue that was not squarely addressed in the Supreme Court's opinion in Bell, supra, 217 N.J. at 349 (holding that a defendant may not apply to PTI post-trial after a jury has rendered a guilty verdict).

Reversed.

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


CLERK OF THE APPELLATE DIVISION