

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3930-15T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

IGNAT SAFAROV,

Defendant-Respondent.

Submitted December 6, 2016 - Decided December 27, 2016

Before Judges Reisner and Koblitz.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 14-
09-2543.

Joseph D. Coronato, Ocean County Prosecutor,
attorney for appellant (Samuel Marzarella,
Chief Appellate Attorney, of counsel; and
William Kyle Meighan, Senior Assistant
Prosecutor, on the brief).

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

PER CURIAM

The State appeals from a May 12, 2016 order, denying its motion for reconsideration of an April 7, 2016 order admitting defendant Ignat Safarov to the Pre-trial Intervention Program (PTI) over the prosecutor's objection. Finding no gross and patent abuse of the prosecutor's discretion, we reverse. See State v. Roseman, 221 N.J. 611, 624 (2015).

Defendant was arrested and charged with violating N.J.S.A. 2C:40-26(b), a fourth-degree crime. The statute provides:

It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [N.J.S.A.]39:3-40, if the actor's license was suspended or revoked for a second or subsequent violation of [N.J.S.A.]39:4-50 [driving while intoxicated] or . . . [N.J.S.A.]39:4-50.4a [breath test refusal]. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

[Ibid.]

On this record, there is no dispute that defendant had multiple prior convictions for driving while intoxicated (DWI) and breath test refusal, as well as receiving multiple citations for driving during periods of license suspension for DWI.¹ In response

¹ The State's brief notes that two of defendant's prior episodes of driving while suspended for DWI occurred before N.J.S.A. 2C:40-26 was adopted. Hence, defendant was not criminally prosecuted for those incidents.

to our inquiry, the State confirmed, and defendant conceded, that at the time of his arrest in this case, defendant's driving privileges were suspended for driving during a ten-year period of license suspension for breath test refusal. Ten years is the mandatory suspension period for a third offense of breath test refusal or DWI. See N.J.S.A. 39:4-50.4a(a).

After the trial court issued the orders in this case, we decided State v. Rizzitello, ___ N.J. Super. ___ (App. Div. 2016), which is controlling here. Rizzitello held that there was no presumption against admission to PTI for violating N.J.S.A. 2C:40-26(b). Id. at ___ (slip op. at 13). However, we recognized the public safety concerns underlying section 26(b), as articulated in State v. Harris, 439 N.J. Super. 150, 160 (App. Div.), certif. denied, 221 N.J. 566 (2015). "'This public safety consideration is especially relevant in the case of a defendant who loses his or her driving privileges for DWI, but then continues to drive despite the license suspension.'" Rizzitello, supra, ___ N.J. Super. at (slip op. at 18) (quoting Harris, supra, 439 N.J. Super. at 160). We found that there were sufficient individual factors weighing against Rizzitello, such that his exclusion from PTI was not a gross and patent abuse of discretion. Those factors included "defendant's multiple instances of defiance of court-ordered suspensions of his driving privileges." Ibid.

While acknowledging Rizzitello's efforts to overcome his alcoholism, the court rejected that as a mitigating factor, noting that "defendant's alcohol addiction did not play any role in his decision to drive his car in defiance of a court-ordered ten-year suspension of his driving privileges for his third DWI conviction." Rizzitello, supra, __ N.J. Super. at __ (slip op. at 16). The court also noted the absence of evidence of any "unforeseen emergency" that may have "compelled" Rizzitello to drive on that occasion. Id. at __ (slip op. at 17).

In this case, the trial court, anticipating our holding in Rizzitello, correctly held that there was no presumption against PTI admission for a defendant accused of violating N.J.S.A. 2C:40-26(b). However, we conclude that, as in Rizzitello, it was not a gross and patent abuse of discretion to exclude this defendant from PTI due to his individual circumstances.

Defendant had an egregious history of driving while intoxicated, refusing breath tests, and driving while his license was suspended. That history included incidents that were not predicate offenses to the current charge. Further, defendant did not produce evidence of any emergency or other compelling need for him to be driving on this occasion. And he gave the police a false name and birth date in an attempt to avoid responsibility for his illegal activity. Based on those circumstances, it was

not a gross and patent abuse of the prosecutor's discretion to exclude him from PTI.

Accordingly, we reverse the trial court's orders admitting him to PTI and denying reconsideration, and we remand for further proceedings consistent with this opinion.

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