

**RECORD IMPOUNDED**

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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-0868-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

U.S.G.,

Defendant-Appellant.

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Argued December 14, 2017 - Decided March 5, 2018

Before Judges Simonelli and Rothstadt.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment No. 15-  
12-2991.

Patrick P. Toscano, Jr. argued the cause for  
appellant (The Toscano Law Firm, LLC,  
attorneys; Patrick P. Toscano, Jr., on the  
brief).

Tiffany M. Russo, Special Deputy Attorney  
General/Acting Assistant Prosecutor, argued  
the cause for respondent (Robert D. Laurino,  
Acting Essex County Prosecutor, attorney;  
Tiffany M. Russo, of counsel and on the  
brief).

PER CURIAM

Defendant, U.S.G., appeals from the trial court's upholding of the prosecutor's rejection of defendant's application for entry into the Pre-trial Intervention Program (PTI). N.J.S.A. 2C:43-12; R. 3:28.<sup>1</sup> Defendant was alleged to have struck a man changing a tire on the Garden State Parkway (GSP) and leaving the scene without helping him, even though she saw he was seriously injured. She was charged in an indictment with fourth-degree aggravated assault by auto, N.J.S.A. 2C:12-1(c)(1), fourth-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(1), third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2, and third-degree leaving the scene of an accident, N.J.S.A. 2C:12-1.1. Defendant applied for PTI, and the Criminal Division Manager recommended defendant's admission, but the prosecutor objected,<sup>2</sup> based upon her evaluation of each of the criteria set forth in N.J.S.A. 2C:43-12(e) and the Rule 3:28 Guidelines. Defendant appealed and the trial court

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<sup>1</sup> "PTI is a 'diversionary program through which certain offenders are able to avoid criminal prosecution by receiving early rehabilitative services expected to deter future criminal behavior.'" State v. Roseman, 221 N.J. 611, 621 (2015) (quoting State v. Nwobu, 139 N.J. 236, 240 (1995)). In 1970, PTI was established by Rule 3:28. Ibid. "PTI programs are 'governed simultaneously by the Rule and the statute which 'generally mirror[ ]' each other.'" Ibid. (quoting State v. Watkins, 193 N.J. 507, 517 (2008)). See also State v. Wallace, 146 N.J. 576, 582 (1996).

<sup>2</sup> "Pursuant to the procedures and guidelines established by Rule 3:28 and N.J.S.A. 2C:43-12, acceptance into PTI is dependent upon an initial recommendation by the Criminal Division Manager and consent of the prosecutor." Roseman, 221 N.J. at 621.

sustained the prosecutor's objections, finding that the prosecutor's decision was not a patent and gross abuse of her discretion.

On appeal from the trial court's decision, defendant argues:

POINT I

THE PROSECUTOR'S REJECTION OF THE DEFENDANT'S APPLICATION FOR PTI, WHICH WAS APPROVED BY THE PTI DIRECTOR, IS A PATENT AND GROSS ABUSE OF DISCRETION AND SHOULD NOT HAVE BEEN AFFIRMED BY THE TRIAL COURT. . . .

We have considered defendant's argument in light of the record and the applicable legal principles. We reverse and remand.

The allegations leading to defendant's arrest, indictment and the rejection of her PTI application are summarized from the record as follows. While driving a rented vehicle, defendant struck the victim while he was changing a tire along the side of the GSP. The collision resulted in defendant losing her vehicle's side view mirror at the scene. When defendant realized she hit something on the road and lost her mirror, she stopped, parked her vehicle in the shoulder, and exited the car to look for her mirror.

When defendant got out of her car, she heard her victim crying in pain for help. She walked over to the victim, who was extremely agitated and in pain, touched his leg where he was severely injured

and, when the victim began to yell, she got up, retrieved her mirror, returned to her vehicle and drove away.

According to defendant, she attempted to call 911, but blocked her number from being seen, which prevented the call from going through. Defendant made no further effort to call 911 or the police and, when she passed through a toll booth, she did not alert anyone there about the accident or the victim laying on the side of the road. Fortunately for the victim, other drivers stopped and rendered assistance and alerted emergency services.

When defendant returned the car to the rental agency, she advised them that the vehicle had been damaged while it was parked in Brooklyn, New York, rather than disclose the accident that occurred on the GSP. She reported the same story to police when they located her six days after the accident. However, after being questioned about her vehicle hitting the victim, she changed her story, and admitted to being involved in the accident.

In response to defendant's ensuing PTI application, the Criminal Division Manager, in his role as PTI director, issued a report, recommending defendant's admission. The report observed defendant had no prior criminal record, holds a master's degree and is a PhD, she was employed as professor at a New York State university, and contributed to a technical journal. The report also noted that, according to defendant's driver's abstract, she

was involved in an accident the month before the subject accident and was cited for unsafe operation of a vehicle. The report concluded that "it appears that the defendant could benefit from the PTI program. Therefore, admission into the PTI program is recommended."

On March 15, 2016, the prosecutor issued a nine-page letter, rejecting defendant's application and setting forth her reasons. The letter began with a review of defendant's background, the charges stated in her indictment and the facts that gave rise to her arrest. It then identified the factors set forth in N.J.S.A. 2C:43-12(e) that the prosecutor found to be aggravating. Those factors were the nature and facts of the case, the victim's interest in pursuing a prosecution, the needs and interest of the victim and society, the violent nature of defendant's actions "or in the possible injurious consequences of such behavior," whether the "value of supervisory treatment would be outweighed by the public need for prosecution," and whether "the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from" admitting defendant to PTI. The prosecutor also identified as the mitigating factors she considered defendant's background, including her age, motivation, lack of criminal history and use of violence, and lack of involvement with organized crime.

In her consideration of the nature of the offense under N.J.S.A. 2C:43-12(e)(1), the prosecutor stated that, applying "Guideline 3(i) of R[ule] 3:28," defendant was "presumptively ineligible for PTI" because she was "charged with crimes of violence or potential violence." (Emphasis added). Citing to Nwobu, 139 N.J. at 252,<sup>3</sup> the prosecutor explained it was therefore defendant's burden to establish "compelling reasons," which she identified as more than the fact that defendant did not have a criminal record and took responsibility for her actions. The prosecutor concluded that defendant did not meet this "heavy burden."

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<sup>3</sup> In Nwobu, the Court explained the heavier burden. It stated:

It is true that one need not "be Jean Valjean," State v. Mickens, 236 N.J. Super. 272, 279 (App. Div. 1989), to establish compelling reasons for admission into PTI, but there must be a showing greater than that the accused is a first-time offender and has admitted or accepted responsibility for the crime. To forestall imprisonment a defendant must demonstrate something extraordinary or unusual, something "idiosyncratic," in his or her background. State v. Jabbour, 118 N.J. 1, 7 (1990). In the case of first- and second-degree crimes, something of this nature must be presented to establish compelling reasons for admission into PTI.

[Nwobu, 139 N.J. at 252-53 (emphasis added).]

After applying the presumption against enrollment and weighing all of the factors, the prosecutor concluded she could not consent to defendant's admission. She stated:

Although the State recognizes that there are several mitigating factors here, such as defendant's age, education, employment and absence of any criminal history, she has not established anything "idiosyncratic" or "unusual" in her background justifying her admission into a diversionary program. The State also recognizes that ordinarily an applicant charged with third and fourth degree crimes and no prior criminal record might indeed be an appropriate candidate for rehabilitation and the PTI Program.

However, the State simply cannot admit defendant into the PTI Program given the violent nature and circumstances of this aggravated assault, which resulted in a seriously injured victim, and the victim's well placed opposition to her entry into PTI. Defendant simply cannot overcome that as a result of her actions she crashed into an innocent man, severely injuring him, and leaving him helpless on the side of the road "like an animal." As indicated, defendant is frankly lucky that the victim was not killed due to her actions. There can be no excuse, justification or defense of her abysmal behavior. The State must be permitted to deter these types of actions by the defendant and others via the strongest means necessary.

[Emphasis added.]

Defendant appealed the prosecutor's decision to the trial court, arguing that the denial of her application was a gross abuse of the prosecutor's discretion. On April 5, 2016, the prosecutor submitted a thirteen-page written response to defendant's

contentions that made clear that the State did not change its position from that which was stated in the prosecutor's March 15, 2016 rejection letter. Rather, the letter stated that the State's position remained "steadfast" and it "incorporated" its reasons from the earlier correspondence. Significantly, the letter did not modify the prosecutor's earlier argument that defendant's application was subject to a presumption against acceptance.

The court conducted a hearing on May 20, 2016, where it considered counsels' oral arguments. After considering the arguments, it concluded that defendant did not "clearly and convincingly establish[] that the Prosecutor's refusal . . . was based upon a patent and gross abuse of discretion" or the result of "a clear error of judgment."

The court entered an order denying defendant's application on May 20, 2016. After the trial court and this court denied defendant's applications for a stay, she pled guilty on October 25, 2016, to one count of third-degree endangering an impaired, helpless person, N.J.S.A. 2C:12-1.2, and one count of third-degree knowingly leaving the scene of an accident resulting in serious bodily injury, N.J.S.A. 2C:12-1.1. The trial court dismissed the remaining charges and sentenced defendant to two concurrent, two-year terms of non-custodial probation. This appeal followed.



"The scope of judicial review of PTI decisions is 'severely limited[,] and interference by reviewing courts is reserved for those cases where needed 'to check [] the "most egregious examples of injustice and unfairness."' " State v. Lee, 437 N.J. Super. 555, 563 (App. Div. 2014) (quoting State v. Negran, 178 N.J. 73, 82 (2003)). "[O]n appeal, [we] review[] PTI decisions with 'enhanced deference.'" Ibid.

The court's review of a prosecutor's PTI determination is limited because of the nature of the decision being made. "PTI is essentially an extension of the charging decision, therefore the decision to grant or deny PTI is a 'quintessentially prosecutorial function.'" Roseman, 221 N.J. at 624 (quoting Wallace, 146 N.J. at 582). Prosecutors are granted "wide latitude in deciding whom to divert into the PTI program and whom to prosecute through a traditional trial." Negran, 178 N.J. at 82.

A prosecutor must evaluate PTI applications by considering the factors defined by statute and court rule and conduct an "individualized assessment" of the applicant. The Supreme Court explained the evaluation process as follows:

The assessment of a defendant's suitability for PTI must be conducted under the Guidelines for PTI provided in Rule 3:28, along with consideration of factors listed in N.J.S.A. 2C:43-12(e). These factors include "the details of the case, defendant's motives, age, past criminal record, standing in the community, and employment performance[.]"

Watkins, 193 N.J. at 520; see N.J.S.A. 2C:43-12(e). Additionally, a PTI determination requires that the prosecutor make an individualized assessment of the defendant considering his or her "'amenability to correction' and potential 'responsiveness to rehabilitation.'" Watkins, 193 N.J. at 520 (quoting N.J.S.A. 2C:43-12(b)).

[Roseman, 221 N.J. at 621-22.]

A trial court "may overrule a prosecutor's decision to accept or reject a PTI application only when the circumstances 'clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of . . . discretion.'" Roseman, 221 N.J. at 624-25 (quoting Wallace, 146 N.J. at 582). "Where a defendant can make that showing, a trial court may admit a defendant, by order, into PTI over the prosecutor's objection." Roseman, 221 N.J. at 625.

A patent and gross abuse of discretion occurs when

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 judgement. . . . 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 [PTI].

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

Defendant argues that a patent and gross abuse of discretion occurred here because the prosecutor improperly viewed the

offenses with which defendant was charged as creating a presumption against enrollment in PTI. We agree.

"PTI Guideline [3(i)<sup>4</sup> establishes] a presumption against PTI eligibility for defendants charged with crimes of violence, organized crime, breach of the public trust, or with some of the most serious drug-related offenses." State v. Coursey, 445 N.J. Super. 506, 510 (App. Div. 2016). "Guideline 3(i), by its terms, applies to violent offenses and other 'serious or heinous crimes.'"

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<sup>4</sup> The guideline provides in pertinent part:

Any defendant charged with [a] crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in reviewing the application. If the crime was . . . (3) deliberately committed with violence or threat of violence against another person . . . the defendant's application should generally be rejected. . . . However, in such cases, the applicant shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the applicants' amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable.

[Pressler & Verniero, Current N.J. Court Rules, Guideline 3(i), following R. 3:28 at 1193 (2017) (emphasis added); see also State v. K.S., 220 N.J. 190, 198 (2015).]

Ibid. (quoting Watkins, 193 N.J. at 514). "The enumerated offenses 'represent a legislative decision to prevent serious offenders from avoiding prosecution in ordinary circumstances.'" Ibid. (quoting State v. Caliguiri, 158 N.J. 28, 42 (1999)). When a defendant is charged with a crime listed in Guideline 3(i), he or she "faces a significant hurdle to PTI admission, which other applicants need not surmount." Id. at 512. "Accordingly, the mistaken application of Guideline 3(i) to a defendant not charged with one of the included crimes constitutes a gross and patent abuse of the prosecutor's discretion." Ibid. (citing Roseman, 221 N.J. at 627); accord Bender, 80 N.J. at 93.

The prosecutor here never identified the charge that she considered to be a crime of violence that warranted the imposition of the presumption against enrollment. Rather, the prosecutor identified the four charges made against plaintiff and stated that "[d]ue to the serious nature of this offense," (emphasis added), defendant had to meet the heavier burden where the presumption applies. We cannot discern from the comment whether the prosecutor meant all or one of the offenses. However, our assessment of all the offenses leads us to conclude that none of them rose to the level of deliberately committed crimes of violence contemplated by Guideline 3(i)(3).

Turning first to the charge of hindering her own apprehension, N.J.S.A. 2C:29-3(b)(1), by its express terms, there is nothing violent about the offense that would give rise to the presumption. Fourth degree aggravated assault with an automobile, N.J.S.A. 2C:12-1(c)(1), while violent in nature, does not connote a deliberate act as required by Guideline 3(i)(3) because it is defined by a defendant's reckless versus intentional conduct. N.J.S.A. 2C:12-1(c)(1).<sup>5</sup> Knowingly leaving the scene of an accident resulting in serious bodily injury in the third degree, N.J.S.A. 2C:12-1.1, has as an element that includes the knowing act of leaving the scene of an accident "under circumstances that violate the provisions of [N.J.S.A.] 39:4-129," a motor vehicle offense. Despite the "knowing" requirement, this is not a violent offense. While a second-degree assault with an automobile can be a violent offense, it occurs before the offense of leaving the scene of an accident occurs, which is not a violent crime, but instead is a violation of the motor vehicle law that requires drivers involved in accidents to remain at an accident scene. It is not a deliberately committed crime of violence, only a violation of a reporting duty.

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<sup>5</sup> The Guideline would have applied had defendant been charged with second-degree aggravated assault with an automobile, which requires proof she intentionally assaulted her victim with her car.

Finally, a charge of endangering an injured victim not only requires that the defendant must have knowingly caused injury to the victim, but also that the defendant must have "le[ft] the scene of the injury knowing or reasonably believing that the injured person is physically helpless, mentally incapacitated or otherwise unable to care of himself." N.J.S.A. 2C:12-1.2(a); see also N.J.S.A. 2C:2-2(c)(3) (establishing a "knowing" state of mind element in criminal statutes where the specific act does not set forth a mens rea). "The section criminalizes the act of leaving the scene with knowledge that the victim is helpless." Cannell, N.J. Criminal Code Annotated, cmt. to N.J.S.A. 2C:12-1.2 (2017). There is no deliberate act of violence.

As none of the charges against defendant involved deliberate crimes of violence, the prosecutor's belief that there was a presumption against defendant's enrollment in PTI required the trial court to reject the prosecutor's refusal to admit her and remand her application for reconsideration without reliance upon the presumption. See K.S., 220 N.J. at 200 ("Remand is the proper remedy when, for example, the prosecutor considers inappropriate factors").

We are, therefore, constrained to reverse the denial of defendant's appeal from the prosecutor's rejection and remand the matter for entry of an order, directing the prosecutor to

reconsider defendant's application, "ab initio," within thirty days, without applying any presumption against enrollment. Coursey, 445 N.J. Super. at 512. If that results in defendant's admittance to the program, the trial court shall vacate her conviction and admit defendant to PTI. If the prosecutor rejects the application again, defendant is free to pursue her challenge anew.

Reversed and remanded for further proceedings consistent with our 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