

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0807-07T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN MILLIGAN,

Defendant-Appellant.

Submitted December 9, 2009 - Decided January 6, 2010

Before Judges Stern and Lyons.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
06-12-2134.

Yvonne Smith Segars, Public Defender,
attorney for appellant (Jack L. Weinberg,
Designated Counsel, of counsel and on the
brief).

Edward J. De Fazio, Hudson County
Prosecutor, attorney for respondent (Nidara
Y. Rourk, Assistant Prosecutor, on the
brief).

PER CURIAM

Defendant Shawn Milligan appeals from an order denying his motion to compel his admission into a pre-trial intervention program (PTI). The relevant facts and procedural history

are as follows.

On September 12, 2006, at approximately 7:00 p.m., defendant was present at the home of his ex-girlfriend in Jersey City. At that time, the defendant was employed as a juvenile detention officer by the Hudson County Department of Corrections. He was twenty-eight years old, had no prior criminal record, and stood 6 feet, 2 inches tall, weighing 275 pounds. He had been living at the Jersey City home of his ex-girlfriend, together with their son, for approximately six or seven months prior to September 12, 2006. Approximately one week prior, defendant had left the home as a result of the parties' nine-year relationship ending.

Defendant had earlier spoken to his ex-girlfriend about bringing over some clothes for their son as well as some food. When defendant arrived at the ex-girlfriend's home, they stood on her porch and spoke. An argument ensued. The ex-girlfriend slammed the door on defendant, bringing the conversation to a close. Defendant, however, proceeded to break the front right window on the porch and forcibly entered the home. The ex-girlfriend picked up a knife and cut the defendant on his thumb. Defendant began to hit the victim's face and body with his hands and fists as well as kick her. In doing so, defendant broke furniture and left the apartment in disarray. Defendant, at

some point, stopped himself and left the home. The police were called. They took the ex-girlfriend, cut and bruised, to the hospital. Defendant was later arrested.

On December 14, 2006, defendant was indicted by a Hudson County Grand Jury and charged with burglary (Count One) pursuant to N.J.S.A. 2C:18-2 and criminal mischief (Count Two) pursuant to N.J.S.A. 2C:17-3a(1).

On January 5, 2007, defendant enrolled in an anger management program. He attended four sessions before he was forced to terminate his attendance due to his inability to pay for the sessions. On March 1, 2007, the Criminal Division Manager approved defendant's application to enter a PTI program. The recommendation stated that PTI is appropriate "based on the defendant's first offender status, his conduct was the result of circumstances unlikely to reoccur as the defendant has recognized the need to seek help with controlling his anger."

On March 8, 2007, the prosecutor advised defendant's counsel that he was refusing to consent to defendant's admission to PTI due to "(1) the nature of the offense; (2) violent nature of the offense; [and] (3) benefit of diversion to this defendant is outweighed by the need of society to prosecute crimes involving domestic violence." On April 26, 2007, the prosecutor filed a supplemental letter stating his reasons for his refusal

to consent to the admission of defendant into PTI. The prosecutor stated that the nature of the offense was a residential burglary. He noted that the "entry of a dwelling to commit an offense should not be minimized or excused." In addition, the prosecutor pointed out that the offense committed after entry was an assault, a violent offense. Lastly, the prosecutor concluded that the assault was committed "in the context of a domestic dispute" and, therefore, the "needs of society to prosecute this defendant outweigh the benefits of diversion to this defendant".

On June 5, 2007, the trial court entertained defendant's motion to compel admission to PTI. The trial court, after hearing the arguments of counsel, denied defendant's appeal. The court found that the prosecutor had not established a per se exclusion from PTI of domestic violence offenders. The court observed that the prosecutor addressed several issues in coming to his decision, such as the nature of the offense, the facts of the case, as well as the needs and interests of the victim and society. The trial court found that the prosecutor did not exhibit a "gross disregard of the rules and regulations."

On June 12, 2007, defendant entered a plea of guilty to Count Two of the Indictment charging fourth-degree criminal mischief. The prosecutor agreed to a recommendation of non-

custodial probation and that the State would dismiss Count One of the Indictment charging third-degree burglary as well as the dismissal of the disorderly person's offense of assault.

On June 19, 2007, the trial judge sentenced defendant in accordance with the negotiated plea agreement to two years' probation, together with the appropriate conditions and fines. This appeal ensued.

On appeal, defendant argues that:

THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT THE PROSECUTOR'S DECISION TO DENY THE DEFENDANT ADMISSION INTO THE PRE-TRIAL INTERVENTION PROGRAM CONSTITUTED A PATENT AND GROSS ABUSE OF DISCRETION.

Defendant argues that the denial of his admission to PTI effectively excludes all domestic violence offenders from PTI and that violates the goals of the PTI program. Defendant maintains that the incident here was an isolated one. Lastly, defendant contends that to uphold denial would subvert the goals of the PTI program.

The standards for reviewing this matter are well-established. Generally, a prosecutor has great discretion in selecting whom to prosecute and whom to divert to PTI. State v. Wallace, 146 N.J. 576, 582 (1996). If a defendant, however, can convincingly show that a prosecutor's refusal for PTI admission was based on a patent and gross abuse of discretion, a reviewing

court may overrule the prosecutor and admit the defendant to PTI. Ibid.; see State v. Nwobu, 139 N.J. 236, 239 (1995). A patent and gross abuse of discretion is a prosecutorial decision that "'has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention.'" Wallace, supra, 146 N.J. at 583 (quoting State v. Ridgway, 208 N.J. Super. 118, 130 (Law Div. 1985)). In State v. Bender, 80 N.J. 84, 93 (1979), the Court stated that an abuse of discretion may be indicated if the defendant can show: a) not all relevant factors were considered; b) that irrelevant or inappropriate factors were considered; or c) there was a clear error in judgment. There is a clear error of judgment when the rejection is "based on appropriate factors and rationally explained, but is contrary to the predominant view of others responsible for the administration of criminal justice." State v. Baynes, 148 N.J. 434, 444 (1997) (internal quotations and citation omitted). To rise to the level of patent and gross abuse, the defendant must further show that the prosecutorial error will clearly subvert the underlying goals of PTI. Bender, supra, 80 N.J. at 93. Given the deference accorded to the prosecutor, the Wallace Court noted that a prosecutor's decision to reject the PTI applicant rarely will be overturned. Wallace, supra, 146 N.J. at 585.

As we have recently stated in State v. Liviaz, 389 N.J. Super. 401, 403-05 (App. Div.), certif. denied, 190 N.J. 392 (2007),

[W]e take note of the general legal principles governing PTI. In deciding PTI applications, prosecutors must consider "an individual defendant's features that bear on his or her amenability to rehabilitation." Nwobu, supra, 139 N.J. at 255. And that evaluation "must be conducted in compliance with the criteria set forth in N.J.S.A. 2C:43-12e, and reinforced in Guideline 3 [of Rule 3:28]." State v. Negrán, 178 N.J. 73, 80-81 (2003). But prosecutors have "wide latitude" in their PTI decisions and our scope of review is "severely limited." Id. at 82. The judiciary's role is limited to checking "only the 'most egregious examples of injustice and unfairness.'" Ibid. (citing, among other cases, State v. Leonardis, 73 N.J. 360, 384 (1977)).

Generally, any defendant charged with a crime is eligible for enrollment in PTI, but where the crime was deliberately committed with violence or threat of violence against another person, a defendant's application should generally be rejected. Guideline 3(i)(3), R. 3:28. A defendant may present, under such circumstances, "any facts and materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a rejection would be arbitrary and unreasonable." Guideline 3(i), R. 3:28.

With regard to compelling reasons, the Court, in Nwobu, stated as follows:

It is true that one need not "be Jean Valjean" to establish compelling reasons for admission to 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.

[Nwobu, supra, 139 N.J. at 252 (internal citations omitted).]

Mindful of the scope of our review, and the discretion possessed by prosecutors in administering the PTI program, we find, after a careful review of the record, no error in the trial court's determination. The trial judge appropriately found pursuant to Guideline 3(i)(3) that, if a crime was "deliberately committed with violence or threat of violence against another person . . . , the defendant's application should generally be rejected." The prosecutor made it clear that he was concerned with the violent nature of defendant's actions. In addition, the prosecutor pointed out that this was a residential burglary that occurred in connection with a domestic violence matter. These relevant factors were heavily and appropriately considered by the prosecutor.

In reviewing the purposes of PTI, as outlined in Guideline 1(c) of Rule 3:28, we note that one purpose is "[t]o provide a mechanism for permitting the least burdensome form of prosecution for defendants charged with 'victimless' offenses." This crime, however, was not a "victimless" crime. In fact, following the assault, the victim involved was taken to the hospital for treatment.

In reviewing the factors outlined in N.J.S.A. 2C:43-12(e), the factors to be considered in evaluating a defendant's PTI eligibility, defendant contends that factors 1, 2, 3, 5, 6, and 11 all argue in favor of admission to PTI. The offense here involves a large, young man smashing through a window, and assaulting his ex-girlfriend. The nature and facts of this case, in our opinion, do not, therefore, support defendant's claim of eligibility. While defendant was relatively young, twenty-eight years old, he was working in a responsible criminal justice position and should have certainly had a more mature approach to a domestic dispute than that demonstrated here. It appears that the services he needs, anger management, are certainly available through probation and can be effectively provided through the probation system. Also, the prosecutor carefully considered the fact that this was a domestic violence offense, that such actions often lead to tragedy, and that

society must take appropriate action so that such violence is not considered minor or acceptable. The prosecutor, however, stated that his office was not instituting, nor did it have, a per se prohibition against admission to PTI for domestic violence offenses.

Defendant here did not demonstrate anything extraordinary, unusual, or idiosyncratic in his background which would present a compelling reason for admission into PTI. See Nwobu, supra, 139 N.J. at 253. While it was clear that defendant had led a blameless life until now, and that his employment may be adversely affected by the denial of his admission to PTI, the court appropriately did not find that these factors resulted in the prosecutor's decision being a clear error in judgment. The prosecutor's decision did not rise to the level of patent and gross abuse nor will it subvert the underlying goals of PTI. Defendant has failed to establish a compelling reason for admission to PTI.

Accordingly, we find no abuse of discretion in the trial court's determination and we, therefore, affirm.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION