



State of New Jersey v. Lamar B. Burno

2012 | Cited 0 times | New Jersey Superior Court | January 19, 2012

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted December 6, 2011

Before Judges Simonelli and Hayden.

Defendant Lamar Burno appeals from the decision of the Law Division judge denying his appeal of the State's rejection of his application for entry into the Pretrial Intervention (PTI) program, Rule 3:28, following his indictment for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b.¹ Following the denial of his appeal, defendant pled guilty to the charge and, pursuant to a plea agreement, was sentenced to a two-year probationary term with minimal supervision and the condition that he forfeit his handgun and expired police badges. On appeal, defendant argues that the State's rejection of his PTI application was arbitrary and constituted a gross abuse of discretion. We affirm.

The facts relevant to this appeal are as follows. On May 4, 2008, defendant had a dispute with his then-girlfriend in their hotel room in Atlantic City. The girlfriend went to the front desk of the hotel and asked that the police be summoned. When the police confronted defendant, he consented to a search of his duffle bag, which produced an unloaded handgun, separately stored ammunition, expired Philadelphia School District police officer credentials, and a military police badge on a chain. The police officers on the scene reported that defendant stated that he was a police officer.

In a November 5, 2008 rejection letter, the prosecutor denied defendant's application because this matter involved a second degree Graves Act² offense to which the presumption of PTI ineligibility applies. The prosecutor invited defendant to submit additional information for consideration. Defendant supplied additional information including that he was licensed to carry a firearm in several states, had been a Philadelphia School District police officer as well as a military police officer, had no felony criminal history, was a community activist serving as president of his local chapter of the Guardian Angels, and was self-employed as a bodyguard.

In a February 19, 2009 rejection letter, the prosecutor again denied defendant's application, stating as follows:

Although [defendant] had a license to carry in the State of Pennsylvania, that license is not valid in New Jersey and in any event does not authorize him to falsely represent himself to be a police officer.



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The fact that he kept the credentials which should have been returned over five years earlier . . . and also was in possession of another badge which hung from a chain as if to be used in an undercover capacity, indicates to me that [defendant] needs more than short-term rehabilitation. There is no reason to possess such identification unless it is to falsely identify oneself as a law enforcement officer as, indeed, [defendant] did in this situation. He has not only one false identification, but two. Being armed with a pistol and being able to identify oneself as a police officer carries with it a high potential for violence. . . .

In sum, it is not merely the possession of the weapon that causes me to conclude that PTI is inappropriate; rather, it is the circumstances under which it was possessed and the attempt to perpetrate a fraud upon law enforcement in this State and perhaps elsewhere that causes me to conclude that your client is in need of something more than short term rehabilitation.

The Law Division judge denied defendant's appeal, concluding that the prosecutor considered all relevant factors, did not consider inappropriate factors, and his position was not "grossly and patently incorrect." This appeal followed.

"The primary purpose of [PTI] is to assist in the rehabilitation of worthy defendants, and, in the process, to spare them the rigors of the criminal justice system." *State v. Watkins*, 193 N.J. 507, 513 (2008). PTI, an alternative to criminal prosecution, provides supervisory treatment in lieu of criminal sentencing for defendants whose criminal activity can be deterred through such supervisory treatment. *Id.* at 517-18. PTI is regulated by N.J.S.A. 2C:43-12 and Rule 3:28. To effectuate the purpose of PTI, "[e]ligibility is broad and includes all defendants who demonstrate the will to effect necessary behavioral change" *Watkins*, *supra*, 193 N.J. at 513.

Nonetheless, N.J.S.A. 2C:43-12 and Rule 3:28 recognize that not all defendants are appropriate candidates. *Ibid.* "Defendants who have committed certain crimes are viewed as problematic from a rehabilitation perspective." *Id.* at 519. A person charged with a first or second-degree offense "should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the prosecutor." R. 3:28, Guideline 3(i). Thus, this Guideline creates a "presumption against acceptance" into PTI for defendants whose crimes fall into the enumerated categories. *State v. Baynes*, 148 N.J. 434, 442 (1997). However, this presumption may be overcome if a defendant establishes "compelling reasons" for admission. *State v. Nwobu*, 139 N.J. 236, 252 (1995).

Diversion of candidates into PTI is a prosecutorial function and the prosecutor is endowed with great discretion in deciding whether to prosecute or divert defendants. *State v. Wallace*, 146 N.J. 576, 582 (1996). Consequently, judicial review of a decision to reject a PTI application is severely limited. *Nwobu*, *supra*, 139 N.J. at 246. Interference in that decision by the courts is reserved for those cases in which it is needed "to check . . . the 'most egregious examples of injustice and unfairness.'" *State v. Negran*, 178 N.J. 73, 82 (2003) (citing *State v. Leonardis*, 73 N.J. 360, 384 (1977)).



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In order to successfully challenge a prosecutor's rejection, a defendant must "clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion." *Watkins*, supra, 193 N.J. at 520 (internal quotation marks omitted). This is a heavy burden for any defendant to fulfill. *State v. Mosner*, 407 N.J.Super. 40, 55 (App. Div. 2009). Our Supreme Court has defined the test for a patent and gross abuse of discretion:

Ordinarily, an abuse of discretion will be manifest if defendant can show that 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 judgment. 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]. [*State v. Bender*, 80 N.J. 84, 93 (1979) (citations omitted).]

Based upon the above principles, we are satisfied that the prosecutor's rejection of defendant's PTI application did not constitute a patent and gross abuse of discretion. The record demonstrates that the prosecutor, even after his initial rejection, evaluated further information concerning defendant and his individual circumstances. Nevertheless, positive information about defendant does not negate the fact that he committed a second-degree crime and misrepresented himself as a police officer. Thus, defendant has not met his heavy burden of showing a compelling reason to overcome the presumption against PTI admission.

Additionally, we are satisfied that the prosecutor considered all factors set forth in N.J.S.A. 2C:43-12 and Rule 3:28. Consequently, we conclude based upon the record before us that the prosecutor's rejection of defendant's PTI application was consistent with the statutory requirements and the PTI Guidelines, and did not constitute an abuse of discretion. See *State v. Hoffman*, 399 N.J. Super. 207, 217 (App. Div. 2008).

Affirmed.

1. Although the indictment erroneously denoted the crime as third degree unlawful possession of a weapon, that clerical mistake was subsequently corrected to reflect the appropriate degree.

2. N.J.S.A. 2C:43-6c.

