

**BY ORDER OF THE COURT**

**SUPERIOR COURT OF NEW  
JERSEY**



**FILED**

**JUL 28 2016**

Judge Diane Pincus

**State of New Jersey,**

**COUNTY OF MIDDLESEX  
LAW DIVISION**

**v.**

**CRIMINAL ACTION**

**Neal Pomper,**

**Ind. No.: 15-11-01323-I**

**Defendant.**

**ORDER**

**THIS MATTER** having been brought before the Court by Kimberly Yonta, Esq., Defense Counsel, on behalf of Neal Pomper, Defendant, on Motion to Compel Admission into the Pretrial Intervention Program (hereinafter, "PTI") in the above captioned matter with David Liston, Esq., Assistant Prosecutor, acting on behalf of the State. The Court, by way of review of Defense Counsel's brief and oral argument and the State's brief and oral argument, and the February 16, 2016, videotaped statement of co-Defendant Larissa Sufaru, makes the following findings of fact and conclusions of law:

**PROCEDURAL POSTURE**

On July 10, 2015, Defendant was charged by way of indictment, number 15-07-00831, with one count of third-degree Insurance Fraud, contrary to N.J.S.A. 2C:21-4.6(a) and N.J.S.A. 2C:21-4.6(b); one count of third-degree Attempted Theft by Deception, contrary to N.J.S.A. 2C:5-1 and N.J.S.A. 2C:20-4; one count of fourth-degree Uttering, contrary to N.J.S.A. 2C:21-1(a)(3); and one count of fourth-degree Forgery, contrary to N.J.S.A. 2C:21-1(a)(2).

After further investigation, on November 4, 2015, Defendant and co-Defendant, Larissa Sufaru, were charged in a superseding indictment, number 15-11-01323, with one count of third-degree Conspiracy to Commit Insurance Fraud, contrary to N.J.S.A. 2C:5-2, N.J.S.A. 2C:21-4.6(a), and N.J.S.A. 2C:21-4.6(b) and Conspiracy to Commit Theft by Deception, contrary to N.J.S.A. 2C:5-2 and N.J.S.A. 2C:20-4; one count of third-degree Insurance Fraud, contrary to N.J.S.A. 2C:21-4.6(a), N.J.S.A. 2C:21-4.6(b), and N.J.S.A. 2C:2-6; one count of third-degree Attempted Theft by Deception, contrary to N.J.S.A. 2C:5-1, N.J.S.A. 2C:20-4, and N.J.S.A. 2C:2-6; one count of fourth-degree Uttering, contrary to N.J.S.A. 2C:21-1(a)(3) and N.J.S.A. 2C:2-6; and one count of fourth-degree Forgery, contrary to N.J.S.A. 2C:21-1(a)(2) and N.J.S.A. 2C:2-6. Co-Defendant Sufaru was also charged with one count of fourth-degree False Swearing, contrary to N.J.S.A. 2C:28-2(a).

Defendant applied to PTI on June 5, 2015. On June 25, 2015, after reviewing Defendant's case, the PTI Program Director recommended that Defendant be admitted into PTI. Subsequently, in a letter dated July 20, 2015, the Middlesex County Prosecutor's Office denied Defendant's PTI application. Defense Counsel filed this appeal and submitted a brief on April 29, 2016. The State filed its response on May 27, 2016. This Court heard oral arguments in this matter on June 8, 2016.

#### **STATEMENT OF FACTS**

The underlying facts are taken from the PTI Recommendation Report and counsels' briefs.

On July 22, 2011, Selective Insurance Company ("Selective Insurance") received a document from Defendant in support of an insurance claim related to water damage at

Defendant's home. The document was an invoice from Rivera Remodeling for work that totaled \$14,000. The invoice was marked "Paid in Full."

Selective Insurance subsequently spoke to the owner of Rivera Remodeling, Steven Rivera. Mr. Rivera confirmed that he had worked on Defendant's residence in 2011, but further advised that the invoice Defendant submitted to Selective Insurance Company for \$14,000 in July 2011 was forged. Mr. Rivera told Selective Insurance that he had not issued the invoice nor had he performed the work detailed in the invoice.

On September 6, 2011, Selective Insurance denied the claim due to material misrepresentation and canceled Defendant's homeowner insurance policy, effective October 19, 2011. Defendant was subsequently indicted.

On August 27, 2015, Defendant's former legal assistant, co-Defendant Sufaru, gave a recorded statement to the Middlesex County Prosecutor's Office. Co-Defendant indicated that she had prepared and faxed the invoice in question to Selective Insurance. Defendant and co-Defendant were subsequently indicted via superseding indictment.

### ARGUMENTS

#### A. Defendant's Argument(s)

Defense Counsel argues that the State committed a patent and gross abuse of discretion by denying Defendant entry into PTI in that the State considered inappropriate factors, failed to consider positive information about Defendant, and failed to consider the specific facts of Defendant's case. Defense Counsel further argues that the State's decision to deny Defendant entry into PTI is a clear error in judgment that subverts the goals of PTI.

B. State's Argument(s)

The State argues that it considered all the PTI factors and favorable information about Defendant in making its decision regarding Defendant's PTI application.

**ANALYSIS**

The purposes, goals, and considerations relevant to the Pretrial Intervention Program are set forth in N.J.S.A. 2C:43-12, New Jersey Court Rule 3:28 and the Guidelines to Rule 3:28. PTI's aim is to "provide prosecutors an alternate method to dispose of charges levied against qualified applicants consistent with the interest of the applicant and the overall interests of society and the criminal justice system." State v. Brooks, 175 N.J. 215, 223 (2002).

A prosecutor's decision to reject a PTI applicant is afforded great deference and will rarely be overturned. State v. Baynes, 148 N.J. 434, 443-44 (1997) (quoting State v. Wallace, 146 N.J. 576, 585 (1996) and State v. Nwobu, 139 N.J. 236, 246 (1995)). In fact, the level of deference which is required is so high that it has been categorized as "enhanced deference" or "extra deference." Nwobu, 139 N.J. at 246. In order to overturn the Prosecutor's rejection of his application for PTI, Defendant must "clearly and convincingly establish that the prosecutor's decision constituted a patent and gross abuse of discretion." State v. Watkins, 193 N.J. 507, 520 (2008). "A patent and gross abuse of discretion is defined as a decision that 'has gone so wide off the mark sought to be accomplished by PTI that fundamental fairness and justice requires judicial intervention.'" Id. (quoting State v. Wallace, 146 N.J. 576, 582-83). In State v. Bender, 80 N.J. 84, 93 (1979), the Court held that a judge may find a "patent and gross abuse of discretion" 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 Pretrial Intervention.

Further, "absent evidence to the contrary, it is presumed that the prosecutor considered all relevant factors before rendering a decision." Id.

Additionally, judicial review of the prosecutor's decision is limited to the reasons the prosecutor offered to support his rejection of the application. State v. Dalglish, 86 N.J. 503, 509 (1981). When a court determines that the rejection of the application by the prosecutor was arbitrary or irrational, or otherwise an abuse of discretion but falls short of patent and gross abuse, a remand might be appropriate. Id. It is firmly established that a remand might serve a useful purpose, for example, where it has been clearly and convincingly shown by a defendant that the prosecutor failed to consider all relevant factors. State v. Wallace, 146 N.J. 576, 584 (1996); see e.g., State v. Burger, 222 N.J. Super. 336, 341-42 (App. Div. 1988).

The State based its decision on a balancing of the factors enumerated in N.J.S.A. 2C:43-12(e), giving the following factors significant weight:

- (1) The nature of the offense;
- (2) The facts of the case;
- (3) The motivation and age of the defendant;
- (4) The desire of the complainant or victim to forego prosecution;
- (5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;
- (6) The likelihood that the applicant's crime is related to a

condition or situation that would be conducive to change through his participation in supervisory treatment;

(7) The needs and interests of the victim and society;

(11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;

(14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution; and

(17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.

The State properly considered factors (1), the nature of the offense, and (2), the facts of the case, as reasons for denying Defendant's application. In this case, Defendant, an attorney, submitted a forged claim to Selective Insurance for \$14,000. While the Court acknowledges Defense Counsel's argument that Defendant never actually received a payment on this claim, the fact remains that Defendant sought to recover money for work that was not done to his home, and for which he did not pay.

As to Defense Counsel's contention that co-Defendant Sufaru admitted responsibility for creating and submitting the forged invoice, the Court acknowledges that co-Defendant Sufaru gave such a statement. However, the Court cannot ignore the fact that Defendant is an attorney and co-Defendant Sufaru is not an attorney, but rather Defendant's secretary of fourteen years. In fact, co-Defendant Sufaru told investigators on February 16, 2016, that Defendant requested her to "doctor" a couple of the proposals from Mr. Rivera. Co-Defendant Sufaru stated that she then used the doctored proposals to create the invoice that was submitted to Selective Insurance. Moreover, Defendant filed the initial insurance claim for which the invoice was created, and was

the conspirator who would receive the financial benefit of the fraud. Therefore, Defendant's contention that co-Defendant Sufaru's statement regarding her role in this case somehow relieves Defendant of any responsibility is disingenuous given that the plan to commit insurance fraud originated with Defendant and he would have been the one to benefit from the scheme.

As to factor (3), the motivation and age of Defendant, Defense Counsel argues that the State failed to consider all relevant information in weighing this factor against Defendant's admission into the PTI program. Specifically, Defense Counsel argues that Defendant is a law-abiding citizen, and this is his first interaction with the criminal justice system. Further, Defense Counsel argues that co-Defendant Sufaru's termination of employment will prevent an issue like this from happening again. Defense Counsel also argues that the State should have considered Defendant's numerous health issues in weighing this factor.

The State responded that it has considered Defendant's age, lack of prior criminal record, and health problems, including the medical records sent to the Assistant Prosecutor on April 25, 2016, but finds that the factors supporting denial of Defendant's application outweigh these considerations. Further, the State argues that although co-Defendant Sufaru was let go from her job as Defendant's legal assistant, there have been numerous other ethical violations and proceedings instituted against Defendant as an attorney. The State therefore argues that co-Defendant Sufaru's termination is not an adequate safeguard in preventing Defendant from repeating this type of behavior.

As to factor (3), the Court finds that the State appropriately considered Defendant's age, lack of prior record and that he had not engaged in a pattern of criminal conduct, as well as the other positive information submitted on behalf of Defendant. The Court acknowledges that this was a one-time occurrence. Further, while the State did not consider Defendant's medical

records in its initial determination, the State reported that it had done so prior to the date of the hearing in this matter. Moreover, the Court agrees with the State's assessment that co-Defendant Sufaru's termination from Defendant's employment will not necessarily prevent dishonest conduct by Defendant given that the idea to commit insurance fraud originated with Defendant.

As to factor (4), the desire of the complainant or victim to forego prosecution, while the State argued that the victims in this case extend well beyond Selective Insurance to all policyholders in New Jersey, it does not appear that the State actually placed reliance on this factor in making its determination and the Court does not give this factor any consideration in its analysis.

Defense Counsel argues that the State improperly considered factor (5), the existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment, and factor (6), the likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment. Defense Counsel argues that the State simply parroted the language of the statute and gave no specific reasons as to why these factors weigh against Defendant's admission into PTI. The Court agrees that the State gave minimal details regarding these factors, and therefore, the Court will not consider these factors in its analysis.

The State appropriately considered factor (7), the needs and interests of the victim and society, factor (11), consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act, factor (14), whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for

prosecution, and factor (17), whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.

The State has a significant interest in the traditional prosecution of people who commit insurance fraud so as to discourage Defendant and others from committing this crime. Given the State's interest in preventing this crime and recognizing that the cost of insurance fraud is passed on to all policyholders, traditional prosecution of this crime would benefit the needs and interests of society. Although Defense Counsel continues to argue, in mitigation, that Defendant did not receive payment as a result of submitting the invoice, the Court again emphasizes that this fact does not relieve Defendant of responsibility for his actions. The fact that Defendant did not receive any payment from Selective Insurance was not as a result of any honest actions taken by Defendant, but rather Selective Insurance's investigation, which uncovered the fraud.

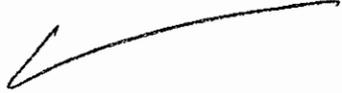
The Court notes that it has considered all the mitigating factors contained in Defense Counsel's thorough and cogent brief, including Defendant's health issues. The Court acknowledges that Defendant has volunteered his time for various community causes. The Court appreciates this information, but finds that the State also considered this information, and the Court cannot substitute its judgment for that of the State. State v. Wallace, 146 N.J. 576, 589 (1996).

Defense Counsel also argues that the State is improperly holding Defendant's status as a lawyer against him by holding him to a higher standard of conduct than other PTI applicants. However, the Court is in agreement with the State that Defendant's status as a lawyer was properly considered in this case. Attorneys are held to a high ethical standard both as part of the profession and in the administration of justice. Furthermore, Defendant's knowledge as an

attorney should have had significant deterrent value in that he was aware of the nature and consequences of his actions.

The Court finds that the State has presented sufficient facts, even with the exclusion of factors (4), (5), and (6), to sustain its decision to reject Defendant's PTI application. Based upon the factors considered by the State, the Court finds that the State did not make a clear error in judgment, such that remand is required. The State's decision to not admit Defendant into PTI did not clearly subvert the goals underlying the program. This Court finds that Defendant has not established by clear and convincing evidence that the State's decision to reject his PTI application was either a patent and gross abuse of discretion or arbitrary and irrational nor has Defendant presented compelling reasons for her entry into PTI. State v. Wallace, 146 N.J. 576, 589 (1996); State v. Caliguiri, 158 N.J. 28, 36 (1999).

IT IS THEREFORE ORDERED ON THIS 28<sup>th</sup> day of July 2016:  
Defendant's Motion to Compel Entry into the PTI Program is hereby **DENIED**.



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HONORABLE DIANE PINCUS, J.S.C.