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JUL 18 2017

HON. ALBERTO RIVAS, A.J.S.C.

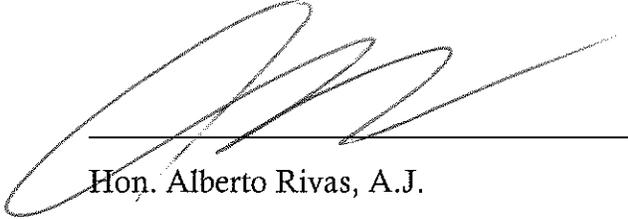
Hon. Alberto Rivas, A.J.
Middlesex County Superior Court
Criminal Division
56 Paterson Street
New Brunswick, NJ 08903

STATE OF NEW JERSEY	:	SUPERIOR COURT OF NEW JERSEY
	:	MIDDLESEX COUNTY
Plaintiff	:	LAW DIVISION-CRIMINAL PART
	:	Indictment No. 15-11-1323
v.	:	
NEAL POMPER	:	
	:	ORDER
Defendant	:	

THIS MATTER having come before the Court on May 12, 2017 on a Motion for Reconsideration of PTI Denial, by Kimberly Yonta, attorney for defendant and AP David Liston, Esq., appearing for the State; and the Court having read the documents; and the Court having considered the argument of counsel; and for good cause being shown:

IT IS ON THIS 18TH DAY OF JULY 2017, ORDERED AS FOLLOWS:

1. ORDERED that defendant, Neal Pomper, shall be enrolled in PTI without the condition that he voluntarily agree to relinquish his law license.
2. ORDERED that a copy of the within Order shall be served upon the parties by the Court.



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Plaintiff	:	LAW DIVISION-CRIMINAL PART
	:	Indictment No. 15-11-1323
v.	:	
NEAL POMPER	:	
	:	OPINION
Defendant	:	

ATTORNEYS: AP David Liston, Esq. for the State and
Kimberly A. Yonta, Esq., for the defendant

BEFORE: Hon. Alberto Rivas, P.J.Cr.

DECIDED: May 12, 2017

PROCEDURAL HISTORY

Defendant, Neal Pomper (hereinafter "Mr. Pomper"), is an attorney and member of the New Jersey Bar. Before the Court is the motion on behalf of Mr. Pomper seeking admission into the Pretrial Intervention Program (hereinafter "PTI"). Mr. Pomper was charged with third and fourth degree fraud charges related to an insurance claim he filed regarding alleged property damage to his home. As a first time offender, he applied to the PTI program and was admitted at the program level on June 25, 2015. The Prosecutor's office denied him admission. Mr. Pomper appealed the denial and on July 28, 2016, the original judge handling the matter denied the appeal. A motion for reconsideration was also denied on September 14, 2016. On March 10, 2017, the judge handling the matter granted a motion for recusal and the case was reassigned.

On April 3, 2017, this court conferenced the case and inquired about the possibility of resolving the matter without the necessity of a trial. When the State was questioned why PTI was not a suitable alternative, the Prosecutor responded that the State would entertain PTI, but under certain conditions. The State required a conditional plea, an agreement for jail time for any violation of the PTI conditions, and for Mr. Pomper to consent to voluntary disbarment. (April 3, 2017 Transcript, pp. 9). Mr. Pomper acceded to all the conditions except one, the requirement that he consent to disbarment. He argued that this condition exceeds the authority of the Prosecutor and constituted a patent and gross abuse of discretion. Mr. Pomper has moved for an order enrolling him into PTI.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 22, 2011, Selective Insurance Company (“Selective”) received an invoice marked, “Paid in Full” from Mr. Pomper regarding \$14,000 of remodeling work done at his home. (DA 2-3). The invoice indicated that Rivera Remodeling completed the remodeling. (DA 3). Mr. Pomper’s former legal assistant and co-Defendant, Larissa Sufaru, stated that she had had prepared and sent the invoice to Selective Insurance. (DA 3).

After contacting Rivera Remodeling, Selective Insurance discovered that the invoice was forged because Rivera Remodeling did not issue the invoice or perform the work contained in the invoice. (DA 3). Selective Insurance denied the claim and the co-defendants were subsequently indicted via a superseding indictment. (DA 3).

On July 10, 2015, Mr. Pomper was charged 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). (DA 2). On November 4, 2015, following further investigation, Mr. Pomper and co-defendant, Larissa Sufaru, were charged in a superseding indictment with one count of third-degree Conspiracy to Commit 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.

On June 5, 2015, Mr. Pomper applied to PTI and on June 25, 2015, the PTI director recommended that he be admitted to the PTI program. (DA2). Contrary to the recommendation, on July 20, 2015, the Middlesex Prosecutor's Office denied Mr. Pomper's application (DA2). Mr. Pomper appealed the prosecutor's denial, alleging that the State did not consider his individual circumstances. (DA 3). On July 28, 2016, the judge denied the appeal. (DA 1-10). Mr. Pomper then filed a Motion for Reconsideration of the court's decision denying the PTI appeal. On September 14, 2016, the judge denied the motion for reconsideration.

On November 22, 2016, Mr. Pomper filed a Motion to Recuse the assigned judge and filed a Motion for a bench, waiving his right to a jury trial. On March 10, 2017, the judge granted Mr. Pomper's request to waive his right to a jury trial and granted the Motion for

Recusal. (DA 15-22). On April 3, 2017, the parties appeared for the pre-trial conference before Judge Rivas.

DEFENDANT'S ARGUMENTS

The defense argues that the Prosecutor's requirement that Mr. Pomper voluntarily disbar himself as a condition of admission into PTI is a "patent and gross abuse of discretion." First, Mr. Pomper asserts that the State is holding him to a higher standard, which is contrary to the Guidelines that require applicants to be considered on an equal basis. N.J.S.A. 2C:43-12a. Second, Mr. Pomper asserts that because the offense does not "involve or touch upon" his position as an attorney, the State improperly applied the presumption against admission into PTI to impose the condition to require permanent disbarment. Mr. Pomper argues that the permanent disbarment condition is a "patent and gross abuse of discretion."

STATE'S ARGUMENTS

The State argues that it was not a "patent and gross abuse of discretion" to hold Mr. Pomper in a higher regard because the State was "merely considering defendant's status as a fact that is relevant to its assessment of this PTI applicant." In its consideration of Mr. Pomper's status, the State argued that because lawyers are held in a higher regard, the offenses committed by Mr. Pomper were "egregious", and therefore, the State is justified in imposing the condition that he permanently disbar himself in order to be admitted to PTI.

LEGAL ANALYSIS

There are certain basic principles that are part of the PTI program. The consent of the Prosecutor is required before admission into PTI. R.3:28(c)(1). There are seventeen factors that must be analyzed and evaluated by the Prosecutor in making its decision. See N.J.S.A.

2C:43-12(e)(1)-(17) and State v. Negran, 178 N.J. 73, 85 (2003). If the Prosecutor denies admission into PTI, a written response is required setting forth the reasons for the denial. State v. Bender, 80 N.J. 84, 90 (1979). The decision of the Prosecutor with respect to admission or denial of admission into the PTI program is to be accorded a high level of deference. The Supreme Court in State v. Nwobu described it as “enhanced deference.” State v. Nwobu, 139 N.J. 236, 246 (1995) (citations omitted).

Though the Prosecutor has a great of influence in determining who is admitted into PTI, the discretion accorded the Prosecutor is not boundless. A person denied admission into PTI may file an appeal with the Court to have the decision of the Prosecutor reviewed. For a defendant to be admitted to PTI over the objections of the Prosecutor, the defendant must “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.” State v. Leonardis, 73 N.J. 360, 382 (1977). A defendant can establish abuse of discretion if the defendant can show that the “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.” Bender, 80 N.J. at 93. For the abuse of discretion to reach “patent and gross,” the defendant must show that the prosecutorial error “will clearly subvert the goals underlying Pretrial Intervention.” Bender, 80 N.J. at 93. In determining whether the standard of review has been breached, the court can only consider the reasons provided by the prosecutor. Bender, 80 N.J. at 94.

In the present case, Mr. Pomper asserts that the State’s requirement that he be permanently disbarred as a condition of PTI constitutes a “patent and gross abuse of discretion” that clearly subverts the goals underlying PTI. His position is supported by the

case law because the offense for which he seeks PTI admission did not touch or concern his position as an attorney. Imposing the condition of disbarment on an attorney simply because of his status as an attorney exceeds prosecutorial authority and constitutes an improper factor.¹

While the Prosecutor has a great deal of deference with respect to admission into PTI, that discretion has some limits. The Prosecutor's discretion is governed by the seventeen factors it must take into consideration as set forth in N.J.S.A. 2C:43-12(e)(1)-(17). Here, the Prosecutor conditioned admission into the PTI program on Mr. Pomper relinquishing his professional livelihood, despite the fact the conduct that brought him to the attention of the Prosecutor did not involve or touch upon any activity related to his law practice. This is an irrelevant and inappropriate factor beyond the scope of the Prosecutor's authority in making admission decisions into PTI. Bender, 80 N.J. at 93

Case law supports this view of the scope of the Prosecutor's authority under the PTI program. See State v. DeMarco, 107 N.J. 562, 569 (1987); State v. Blessing, NO. A-1306-10T1, 2011 N.J. Super. Unpub. LEXIS 2762, at *13-14 (App. Div. Nov. 4, 2011)(citing N.J.S.A. 2C:51-2(d)); and State v. Hupka, 203 N.J. 222, 239 (2009)).

In State v. DeMarco, an off-duty police officer attacked a man whom he thought was vandalizing the neighborhood. DeMarco, 107 N.J. at 564. Although the facts surrounding the encounter are disputed, the defendant did have his badge, service weapon, and nightstick on his person and the defendant used his nightstick to attack the man he believed was vandalizing

¹ Although the Prosecutor cannot require disbarment, the Office may properly make a referral to the Office of Attorney Ethics and provide them with information about this incident and let OAE make its own determination what, if any, discipline should be imposed on Mr. Pomper.

the neighborhood. DeMarco, 107 N.J. at 564. The PTI program director recommended the defendant be admitted to the program. DeMarco, 107 N.J. at 565. Initially, the Prosecutor wanted to deny the defendant's admission into PTI on three grounds (1) the violent nature of the offense; (2) the defendant's insistence that he was justified in his actions; and (3) because the offense constituted a breach of the public's trust. DeMarco, 107 N.J. at 565-66. Due to these concerns, the Prosecutor conditioned the defendant's entry into the program upon his resignation as a Lieutenant in the City of Newark Police Department. DeMarco, 107 N.J. at 567. In reviewing the Appellate Division's decision to reverse the trial court's decision to admit the defendant into PTI, the Supreme Court found that the defendant's employment as a police officer was "particularly relevant because the offense involves the misuse of authority and the commission of violence against a member of the public." DeMarco, 107 N.J. at 569. Because the offense was directly related to the defendant's position as a police officer, the court found that the Prosecutor's condition did not "subvert the goals underlying PTI and does not constitute a 'patent and gross' abuse of discretion." DeMarco, 107 N.J. at 569. The requisite nexus found in DeMarco to justify the denial of PTI admission between the offense and his position as a law enforcement officer is clearly absent in this case. In this case, Mr. Pomper did not rely, represent or reveal his position as a lawyer in undertaking the actions attributed to him that resulted in the criminal charges. The Court in DeMarco focused on relevance. Id. at 569.

In State v. Hupka, supra, an off-duty police officer sexually assaulted a female victim while she was unconscious. Hupka, 203 N.J. at 226. The Defendant pled guilty to a fourth-degree criminal sexual contact. Hupka, 203 N.J. at 226. As a part of the plea agreement, the State conditioned that the defendant must never seek employment as a police officer and that

the Defendant would be permanently disqualified from public employment. Hupka, 203 N.J. at 226-27. In reviewing the Appellate Division's decision to reverse the trial court's order of permanent forfeiture, the Supreme Court reasoned that the offense to which the Defendant pled guilty was not related to his position as a police officer because he was off duty; he was in the private home of someone he knew; and he did not use his position to commit the offense. Hupka, 203 N.J. at 239 (citing State v. Hupka, 407 N.J. Super. 489, 509-10 (App. Div. 2009)). The Supreme Court affirmed the lower court's decision that the defendant could not be compelled to permanently forfeit public office because the offense did not involve his position as a police officer. Hupka, 203 N.J. at 243.

Although unpublished, State v. Blessing is instructive on the need for relevance to justify a forfeiture of office in the PTI context. This was a case prosecuted by this Prosecutor's Office wherein it sought to have a teacher forfeit her teaching license and relinquish the right to hold public office. In Blessing, a swim coach, who also worked as public school teacher, engaged in sexual relationship with an underage victim whom she was coaching. Blessing, 2011 N.J. Super Unpub. LEXIS 2762 at *2-3. The Appellate Division held that the State could not require the defendant to forfeit the right to hold public employment as a condition of PTI because the offense did not "involve or touch upon" the defendant's position as a school teacher. Blessing, 2011 N.J. Super Unpub. LEXIS 2762 at *14 (citing N.J.S.A. 2C:51-2(d)). The court explained that the offense did not "involve or touch upon" the defendant's position as a school teacher because, the victim was not connected to the school district where the Defendant worked as a school teacher; the Defendant did not use the her position to commit the offense; and, the offense would have occurred regardless of whether she was a school teacher. Blessing, 2011 N.J. Super Unpub. LEXIS 2762 at *13-14.

The Prosecutor in this case is seeking the same kind of forfeiture it previously was advised by the Appellate Division in Blessing as being unavailable. The alleged wrongdoing was not connected to Mr. Pomper's status as a lawyer, he did not use his position as a lawyer to commit or facilitate the commission of the offense, and his position as a lawyer was completely irrelevant to the charged conduct.

This does not mean that the Prosecutor cannot vindicate the interest it alleges is the basis for seeking the forfeiture of Pomper's law license. The Prosecutor is appropriately concerned about lawyers who engage in wrongful behavior. Under the Rules of Professional Conduct, the Prosecutor may make a referral to the Office of Attorney Ethics, who may impose discipline up to and including suspension or disbarment, if warranted by the facts. What it may not do is require a candidate for PTI to forfeit their livelihood where the circumstances giving rise to the criminal charges do not implicate or relate to the candidate's status as a lawyer. It exceeds the boundaries of the discretion accorded Prosecutors under the PTI framework and constitutes a "patent and gross" abuse of discretion.² State v. Bender, *supra*, 80 N.J. at 93. This decision, in this context, subverts the goals of PTI. As a result, Mr. Pomper should be admitted into PTI without the condition that he voluntarily agree to the Prosecutor's demand that he relinquish his law license. A form of Order is attached.

² If the Superior Court "lacks jurisdiction over the regulation of the Bar and matters that intrude on the disciplinary process." Robertelli v. New Jersey Office of Att'y. Ethics, 244 N.J. 240, 470 (2016), it stands to reason that the Prosecutor's authority is similarly limited unless tied to a specific criminal statute.