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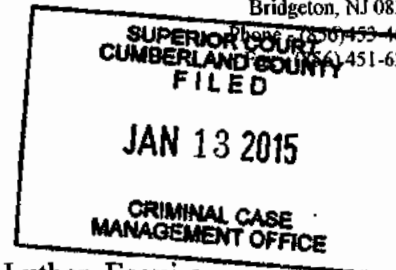
SUPERIOR COURT OF NEW JERSEY**CUMBERLAND / GLOUCESTER / SALEM VICINAGE**

ROBERT G. MALESTEIN, J.S.C.
Judge, Superior Court of New Jersey



January 13, 2015

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Re: STATE OF NEW JERSEY v. ALFRED VARGAS
Indictment No.: 14-05-435-I

Dear Counsel:

Defendant has filed a motion appealing his rejection for admission into the PTI Program by the Director and the Prosecutor. The Court entertained oral argument on the motion on Friday, January 9, 2015, and reserved decision at that time. This decision follows.

FACTS/PROCEDURAL POSTURE

For purposes of the present motion only, the Court finds the following facts:

On December 17, 2013, a seventeen-year old girl (M.M.), was at her friend's house and refused to come home or go to school for three days. Her mother instructed the Defendant, M.M.'s stepfather, to go to the house and pick her up. M.M. still refused to go home, so her mother attempted to pick her up. M.M. then reported that a year prior the Defendant had placed his penis in M.M.'s hand and the hand of a friend as they slept. Upon further questioning the mother of the victim indicated that the victim had told her about the incident right after it happened but they determined the Defendant had been extremely intoxicated at the time.

When M.M. was interviewed by authorities, she recounted the story of the Defendant placing his penis in the hands of her and her friend. However, she stated the two girls were both 14 years old at the time. E.W., the other victim, also confirmed that the incident was sometime in the Fall of 2010, and remembers the incident. M.M. also advised that the Defendant had exposed himself to her several times since that incident;

that was the reason why she did not want to return home from her friend's house. She also advised that the most recent occurrence was three weeks prior.

The Defendant was interviewed by police the following day. The Defendant is purportedly familiar with the criminal justice system because he has spent over 20 years as a corrections officer. After being Mirandized, he immediately confessed to the incident and stated that he was highly intoxicated during the night in question.

The Defendant was thereafter indicted in a four count indictment, alleging Second Degree Endangering the Welfare of a Child, in violation of N.J.S.A. 2C:24-4(a), Third Degree Aggravated Criminal Sexual Contact, in violation of N.J.S.A. 2C:14-3a, Third Degree Endangering the Welfare of a Child, in violation of N.J.S.A. 2C:24-4(a), and Fourth Degree Criminal Sexual Contact in violation of N.J.S.A. 2C:14-3(b).

The Defendant applied for admission into the Pre-trial Intervention program but was rejected because he was charged with a second degree crime. The Defendant submitted a compelling reasons letter soon thereafter to the Prosecutor and requested she affirmatively join in the Defendant's PTI Application. On November 3, 2014 the Prosecutor rejected the Defendant's PTI application pointing out, *inter alia*, that Guideline 3(i) presumptively bars admission into the PTI program for a second degree offense. In addition, the Prosecutor cited N.J.S.A. 2C:43-12e(1)(2)(14) and (17) as additional reasons for rejecting the Defendant's application.

On December 1, 2014 the Defendant filed a Notice of Appeal from the PTI rejection.

ANALYSIS

Pre-trial Intervention (PTI) is a discretionary program diverting criminal defendants from formal prosecution. N.J.S.A. 2C:43-12a(1); R. 3:28. PTI is governed by R. 3:28 and by statute, N.J.S.A. 2C:43-12 to -22. See State v. Watkins, 193 N.J. 507, 517 (2008).

Pursuant to N.J.S.A. 2C:43-12(e), prosecutors and program directors shall consider in formulating their recommendation of an applicant's participation in a supervisory treatment program, among others, the following criteria:

- (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;
- (8) the extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;
- (9) the applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others
- (10) whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;
- (11) consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;
- (12) the history of the use of physical violence toward others;
- (13) any involvement of the application with organized crime;
- (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;
- (15) whether or not the applicant's involvement with other people in the crime charged or in the other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;
- (16) whether or not the applicant's participation in pretrial intervention will adversely affect the prosecution of codefendants;
- (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.

Although these admission criteria are broad, defendants who have committed certain crimes are viewed as problematic from a rehabilitation perspective and are subject to special treatment. The official comments to R. 3:28 provide further guidelines. While it is possible to overturn a prosecutor's PTI rejection, actually overturning such a rejection is rare. Baynes, supra, 148 N.J. at 443. "Defendant generally has a heavy burden when seeking to overcome a prosecutorial denial of his admission into PTI." Watkins, supra, 194 N.J. at 520. (citing Nwobu, supra, 139 N.J. at 246-47). This burden tends to be so difficult to meet because the prosecutor's decision is given "enhanced deference" or "extra deference" in their decisions and judicial oversight should overturn "only the most egregious examples of injustice and unfairness." Nwobu, supra, 139 N.J. at 246 (quoting State v. Kraft, 265 N.J. Super. 106, 111-12 (App. Div. 1993). "In order to overturn 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, 194 N.J. at 520.

"To overcome the presumption against PTI, defendant must establish 'compelling reasons' for admission into PTI." Nwobu, supra, 139 N.J. at 252. "There must be a showing greater than that the accused is a first-time offender and has admitted or accepted responsibility for the crime." Ibid. A defendant who has no prior contact with law enforcement, and the primary motivation for their offense is to feed and clothe their children has not established compelling reasons for admission into PTI. See Sutton, supra, 80 N.J. at 118. A presumption against PTI admission may be overcome, where the defendant demonstrates the work effort undertaken to support her children, the absence of any prior contact with the criminal justice system or any history of drug or alcohol abuse, the non-violent nature of her transgression, the acknowledgement of guilt and the willingness to make restitution. Burger, supra, 222 N.J. Super. at 340-41 (remanding to prosecutor for consideration of all relevant factors).

A prosecutor or PTI Director need not be able to prove facts adverse to a defendant's application before taking them into account: it is sufficient that they have "a reasonable belief, grounded on reliable information, that certain aspects of the defendant's background will adversely affect the chances of rehabilitation should PTI enrollment be granted." State v. Maddocks, 80 N.J. 98, 107 (1979).

The defense takes issue with the offense charged because it is nearly identical to a lesser, 4th degree crime. There has been some discussion in the Appellate Division as to the prudence of having two nearly identical statutes with such a vast difference in the punishment. However, as it stands, N.J.S.A. 9:6-3 and N.J.S.A. 2C:24-4a are both still valid statutes, with valid terms of punishment.

The defense cites to the charging document as the main reason why the Defendant's PTI application was rejected. Under Guideline 3(i), second degree offenders are presumptively ineligible for PTI. The Defense argues that the Prosecutor exercised undue discretion in charging the Defendant with a 2nd, rather than a 4th degree crime, and then relied upon that exercise to reject the Defendant's application.

Both parties cite to State v. D.V. in their briefs. In that case, the court discussed the purposes of N.J.S.A. 9:6-3 and N.J.S.A. 2C:24-4a, how the two statutes lawfully coexist and the extent of prosecutorial discretion. State v. D.V., 348 N.J. Super. 107 (App.Div. 2002). The purpose of N.J.S.A. 9:6-3 is the protection of children whereas 2C:24-4a is focused on punishing criminal conduct. Id. at 115. Though prosecutorial discretion has its limits, a prosecutor may choose to prosecute the second degree crime because a defendant has committed a more egregious or repetitive offense. Ibid. Further, when specific conduct violates more than one statute there is a preference that the more serious offense will be pursued. Ibid. citing, State v. Eure, 304 N.J. Super. 469, 475 (App.Div. 1997).

Here, the victim has noted that the Defendant has taken part in repetitive, sexual conduct toward her. Though the initial offense happened once a few years prior to reporting, the victim stated that the Defendant regularly exposed and manipulated himself while standing at her bedroom door. Additionally, the facts of this case are sexual in nature. Therefore, this Court cannot find that the Prosecutor's choice to pursue this case under N.J.S.A. 2C:24-4a is an abuse of discretion. The Prosecutor exercised her discretion in charging the Defendant based upon the facts as presented to her. Under Guideline 3(i) defendants charged with 2nd degree crimes are presumptively ineligible for PTI; however, the program is broad enough to encompass all crimes. Though the Prosecutor may elect to allow the Defendant into the program, it is within their discretion to refuse. In the case at bar, the facts of the case (1) the nature of the crime (2) and the general well-being of the victim and State, (7) and (14) outweigh the Defendant's amenability to the PTI program. This is clearly set forth in the Prosecutor's decision. The Defendant is engaged in a pattern of sexually abusive behavior toward a minor which would lead the Prosecutor to believe that the Defendant may need more deterrence than the PTI program has to offer.

The defense argues a few qualities of this case that the defense believes should compel entry into PTI: the Defendant's record of military service, his career as a corrections officer (and the consequences of losing his pension if he is convicted of this crime), that he has no prior convictions, he supports two children, is power of attorney for his elderly parents and that the victim describes him as a "good guy." Though those factors paint a picture of a model citizen, it cannot be ignored that the behavior in question was part of a broader pattern. Though the indictment regards a single episode involving two victims, M.M. alleges that up until the accusation, the Defendant would, from time to time, stand at her bedroom door while fondling himself.

The defense also argues the facts of this case are not egregious because the Defendant did not touch either victim in a private area. However, he did force each victim to touch him in a private area, so this argument does not seem sufficient to negate the more troubling facts of this case. Though conviction for this crime would present a significant hardship to the Defendant, the hardship he faces do not extend beyond that which the justice system typically anticipates for any Defendant. Additionally, the Defendant's background as an officer and as a lawful citizen, though weighing in his

favor, does not overcome the prosecutor's discretionary decision because of the nature of the offense.

In her decision affirming the rejection of the application, the Prosecutor specifically sets forth the reasons for denial. She does not simply parrot the statutory language. She, likewise, considered the reasons set forth in Defendant's compelling reasons letter. Her decision was statutorily guided and is supported by the evidence. The Defendant faces an enormous burden. The Defendant has failed to clearly and convincingly establish that the Prosecutor's decision constitutes a patent and gross abuse of discretion.

The motion filed by Defendant is hereby denied. The Court has executed an Order consistent with this decision.

Very truly yours,



ROBERT G. MALESTEIN, J.S.C.

RGM/dbf
Encl.