

State v. Molino, Not Reported in A.2d (2007)

2007 WL 2026628

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Appellant,
v.

Joseph M. MOLINO, Jr., Defendant-Respondent.

Submitted July 3, 2007. | Decided July 16, 2007.

On appeal from the Superior Court of New Jersey, Law
Division, Ocean County, 06-05-00721 and 06-05-00801.

Attorneys and Law Firms

Marlene Lynch Ford, Ocean County Prosecutor, attorney
for appellant (Marc E. Roessler, Assistant Prosecutor, of
counsel and on the brief).

David A. Semanchik, attorney for respondent (Brian J. Di
Stefano, of counsel and on the brief).

Before Judges AXELRAD and WINKELSTEIN.

Opinion

PER CURIAM.

*1 The Ocean County Prosecutor appeals from a Law
Division order admitting defendant, Joseph Molino, into
the Pretrial Intervention Program (“PTI”) over his
objection. Since defendant failed to clearly and
convincingly establish that the Prosecutor’s decision was
a patent and gross abuse of his discretion, we reverse the
order and remand the case for processing in the ordinary
course.

On May 9, 2006, an Ocean County Grand Jury returned
indictment number 06-05-721, charging defendant with
four counts of third-degree burglary, *N.J.S.A. 2C:18-2*;
and two counts of theft, *N.J.S.A. 2C:20-3*, one of which is
a fourth-degree crime and the other a third-degree crime.
On May 23, 2006, an Ocean County Grand Jury returned

indictment number 06-05-801, charging defendant with
one count of third-degree possession of CDS
(Alprazolam), *N.J.S.A. 2C:35-10a(1)*.

The crimes charged against defendant are as follows. On
August 31, 2005, defendant committed a burglary and a
third-degree theft by unlawfully entering the home of
Amanda and Michael Schatek, at Pinehurst Drive in Little
Egg Harbor Township, and stealing a variety of
specifically identified items. According to defendant’s
confession, he stole bottles of liquor and the two people
who accompanied him, Phil Surace and “Kevin,” who
were not charged, stole jewelry, a play station, and pills.
The Schateks sent a victim statement expressing feelings
of fear and anger, and further commenting:

We feel the person or persons
responsible for this violation of our
lives, should definitely do jail time
and pay back the loss of our
personal items and maybe lots of
counseling to straighten out his life
before it’s too late or before there
are more victims.

On January 27, 2006, defendant was arrested by a Little
Egg Harbor police officer for underage possession of
alcohol after the vehicle he was operating was stopped for
weaving on the highway and the officer observed
unopened and opened bottles of beer in the car. The
officer also seized a marijuana cigarette located in the
ashtray and a pill on defendant’s person, which later
tested positive for Alprazolam, a schedule IV drug.

Defendant admitted that on February 12, 2006, he
committed his second burglary by breaking a window and
unlawfully entering the home of Joseph Forti at Kansas
Road in Little Egg Harbor Township with Devon Ewert
and a juvenile, S.S. According to defendant, they could
not find anything worth stealing and left. They then
unlawfully entered Eileen Mika’s residence located at
Iowa Court in Little Egg Harbor Township. In addition to
the burglary, defendant and Ewert were also indicted for
fourth-degree theft for stealing fishing poles and half a
case of Snapple Iced Tea from the residence, most of
which were returned to the victim. On February 15, 2006,
defendant, Ewert and three male juveniles were
apprehended inside the residence of Diane and Walter
Winterbottom, located at Overlook Drive in Little Egg

State v. Molino, Not Reported in A.2d (2007)

Harbor Township, after entering without permission. The aforementioned indictments ensued.

*2 On June 26, 2006, defendant applied for entry into the PTI program. On August 10, 2006, the PTI Director recommended nineteen-year-old defendant for enrollment into the PTI program, noting he “appears to be a good candidate ... due to his lack of prior contact with the judicial system and willingness to comply with the conditions of the PTI program.”

By letter of September 21, 2006, the prosecutor rejected defendant’s application for PTI stating, in pertinent part:

The reasons for rejecting the defendant’s application for PTI are as follows:

Multiple crimes and cases

Nature of the offense, *N.J.S.A. 2C:43-12e(1)*

Facts of the case, *N.J.S.A. 2C:43-12e(2)*

Motivation of the defendant, *N.J.S.A. 2C:43-12e(3)*

The victims do not wish to forego prosecution, *N.J.S.A. 2C:43-12e(4)*

Needs and interests of the victims and society, *N.J.S.A. 2C:43-12e(7)*

Crimes constitute part of a continuing pattern of anti-social behavior, *N.J.S.A. 2C:43-12e(8)*

Value of supervisory treatment is outweighed by the public need for prosecution, *N.J.S.A. 2C:43-12e(14)*

Harm done to society by abandoning criminal prosecution outweighs the benefits to society from channeling this defendant into PTI, *N.J.S.A. 2C:43-12e(17)*

Specifics and general deterrent concerns

PTI is for people who are motivated to lead a law-abiding life. It is clear that the defendant lacks this motivation. On February 15, 2006, the defendant was caught in the act of burglarizing residence. This residential burglary occurred a mere fifteen days after the defendant was arrested for possession of alprazolam on January 27, 2006. Obviously, the defendant’s C.D.S. arrest had little or no deterrent value.

The defendant’s lack of motivation to live a law-abiding life is also demonstrated by the fact that the defendant continued to break the law on a weekly basis by smoking marijuana and engaging in underage drinking even after he was arrested on the burglary charge. Additionally, the defendant denies having a substance abuse problem and has failed to receive treatment for such.

The defendant’s substance abuse history also leads this Office to conclude that these crimes constitute part of a continuing pattern of anti-social behavior.

Moreover, the State considered the impact these crimes have had upon the victims. As a result of the defendant’s crimes, the victims were inconvenienced, upset, suffered a loss, scared, and no longer felt secure in their homes. See the Schatek letter which is included in the PTI Director’s packet and the attached three letters from Winterbottom and letter from Mika.

The State also gave weight to the fact that there has been victim opposition to the defendant’s entry into PTI. See the above referenced Schatek letter. Mika orally informed Assistant Prosecutor Deborah Hanlon-Schron of her objection.

In rejecting this defendant from PTI, the State was also mindful of the nature of most of these crimes, residential burglaries, which are serious crimes and worthy of vigorous prosecution. That said, however, it is noted that the Ocean County Prosecutor’s Office does not have a per se rule against admitting defendants charged with residential burglaries into PTI. Indeed, codefendant, Devon D. Ewert, who was also indicted for residential burglaries, has been accepted into PTI.

*3 For the foregoing reasons, this Office rejects the defendant’s application for PTI.

Defendant timely appealed the prosecutor’s rejection to the trial court, arguing, in part, that the prosecutor failed to set forth reasons for the apparent disparate treatment of co-defendants. The prosecutor submitted a letter brief in opposition dated November 1, 2006, which, in pertinent part, explained why Ewert’s application for PTI was accepted while defendant’s was rejected, as follows:

Concerning co-defendant Devon D. Ewert’s acceptance into PTI, there are several important differences between Mr. Ewert and the defendant. First, unlike the defendant, Mr. Ewert was not charged for the Schatek

State v. Molino, Not Reported in A.2d (2007)

burglary and theft which occurred more than six months before the other crimes set forth in Indictment 06-05-721. Second, unlike the defendant, Mr. Ewert, does not have another pending indictment against him. Third, unlike the defendant, getting arrested and charged in this matter appears to have had a positive impact on Mr. Ewert in that he stopped using drugs and alcohol about the time he was arrested. Fourth, unlike the defendant, Mr. Ewert recognized his substance abuse problem and voluntarily sought treatment. Mr. Ewert's attendance at treatment has been regular, his attitude has been very positive, and he has four negative urine screens. Two things in common between the defendant and Mr. Ewert are their age and lack of a criminal record.

For the reasons expressed in the State's September 21, 2006 letter and this letter, the State respectfully requests that the Court deny the defendant's motion to appeal his rejection from PTI.

At the conclusion of oral argument of the PTI appeal hearing on November 3, 2006, the trial judge granted defendant's motion, providing the following statement of reasons:

I think your strongest argument, Mr. DiStefano [defense counsel], and I am constrained to agree with that argument is the disparity of the treatment. I am concerned that only one out of five people is going to be saddled with the full responsibility for this event without being given an opportunity to succeed in a probationary or pretrial intervention type of program.

I believe that although Mr. Ewert is involved in therapy, certainly even the Prosecutor admits that his substance abuse was more overwhelming of an issue than perhaps it is for Mr. Molino. Although I don't think that Mr. Molino has convinced the State that he's made significant strides, I certainly would point out that we have a situation where he is in night school and he is working full-time.

There had better have been money put aside for that because as part of his pretrial intervention, he's going to have to make a substantial payment toward the restitution here. These victims need to be made whole as quickly as possible and I'm not going to have some sort of \$10-a-week scheme of restitution as part of the pretrial.

Based upon the fact that we have juveniles and we have one adult who's also involved with the PTI program and that Mr. Molino would be singled out I find that in this particular case that it satisfies this Court that that is a patent and gross abuse of discretion and I will set aside the Prosecutor's rejection or overrule the Prosecutor's objection and support the admission in the program as indicated by the program director; however, if there is the slightest, the slightest inability on the part of this defendant to comply with all conditions of pretrial intervention, he will be standing in front of me or another judge and looking at a jury on these cases and if convicted will suffer the appropriate consequences.

*4 The prosecutor appealed, contending the trial court's order should be reversed because the prosecutor's decision to reject defendant's application for PTI and accept co-defendant's application was supported by sufficient reasons and was not a patent and gross abuse of discretion. Appellant relies on the enhanced deference given to a prosecutor's PTI decision, his explanation as to why Ewert presented a different risk profile than defendant, and his consideration only of relevant factors set forth in the Guidelines bearing on defendant's amenability to rehabilitation. We agree that defendant has failed to sustain the heavy burden necessary to overcome the prosecutorial veto of his admission to PTI and that the trial court erred in substituting its judgment for that of the prosecutor.

In deciding PTI applications, prosecutors must consider "an individual defendant's features that bear on his or her amenability to rehabilitation." *State v. Nwobu*, 139 N.J. 236, 255 (1995). 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. Negran*, 178 N.J. 73, 80-81 (2003). Prosecutors, however, have "wide latitude in deciding whom to divert into the PTI program and whom to prosecute through a traditional trial." *Id.* at 82. A prosecutor's decision whether to admit a defendant into PTI should be given "enhanced deference," *State v. DeMarco*, 107 N.J. 562, 566 (1987), based on "[t]he need to preserve prosecutorial discretion in deciding whether to divert a particular defendant from the ordinary criminal process," *State v. Dalglis*, 86 N.J. 503, 509 (1981).

A prosecutor's decision respecting PTI "rarely will be overturned." *State v. Leonardis*, 73 N.J. 360, 380 n. 10 (1977) (*Leonardis II*). As a result, a trial and appellate

State v. Molino, Not Reported in A.2d (2007)

court's scope of review, although necessary, is "severely limited," *State v. Bender*, 80 N.J. 84, 89 (1979), and the reviewing court should not substitute its own discretion for the prosecutor's even when that decision seems harsh, *State v. Kraft*, 265 N.J.Super. 106, 112-13 (1993). The judiciary's role is limited to checking "only the 'most egregious examples of injustice and unfairness.'" *State v. Negran*, *supra*, 178 N.J. at 82 (citing, among other cases, *Leonardis II*, *supra*, 73 N.J. at 384)). "A defendant attempting to overcome a prosecutorial veto must clearly and convincingly establish that the prosecutor's refusal to sanction admission into a PTI program was based on a patent and gross abuse of his [or her] discretion..." *Ibid.* (internal quotations omitted). To meet the standard of "patent and gross abuse of discretion," a defendant must show the prosecutor's decision failed to consider all relevant factors, was based on irrelevant or inappropriate factors, constituted a clear error in judgment, and the error will clearly subvert the goals underlying PTI. *State v. Bender*, *supra*, 80 N.J. at 93.

*5 Here, the judge did not find the prosecutor failed to consider relevant factors or he considered irrelevant factors, or his decision denying PTI constituted a clear error in judgment and the error clearly subverted the goals underlying PTI. Rather, the court's sole basis for finding a "patent and gross abuse of discretion" by the prosecutor was that there were juveniles involved in some of the incidents and that co-defendant Ewert, who was only involved in the February 2006 incident, was admitted to PTI. That ground is insufficient to overcome the enhanced

deference afforded the prosecutorial veto of PTI to defendant.

The prosecutor adequately explained in his November 1, 2006 letter and at oral argument the important differences between Ewert and defendant and the reasons why Ewert received PTI and defendant was rejected from the diversionary program. *See State v. Maldonado*, 314 N.J.Super. 539, 544-45 (App.Div.1998) (holding that a prosecutor must set forth reasons why one defendant received PTI and a co-defendant was rejected from PTI). In addition to the fact that defendant was charged with more crimes than Ewert and over a longer period of time, defendant continued to engage in illegal behavior by smoking marijuana and drinking alcohol while underage even after he was arrested and charged with the underlying crimes. We are satisfied the prosecutor articulated an adequate rational basis to differentiate defendant from Ewert and also set forth sufficient reasons under the Guidelines to support its determination. Although the prosecutor's decision to deny defendant PTI might be viewed as debatable, particularly in view of the multiple crimes, and their serious nature, being residential burglaries, it cannot reasonably be said such decision was an "egregious example of injustice and unfairness" or a patent and gross abuse of discretion.

Reversed and remanded.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.