

To: New Jersey Law Revision Commission
From: Adrian Altunkara
Re: Pre-Trial Intervention Admission and Denial
Date: May 8, 2017

MEMORANDUM

Executive Summary

The Commission Staff seek authorization to conduct additional research regarding New Jersey's admission criteria for the statewide pretrial intervention program. The Appellate Division in *State v. Austin* found that the term "supervisory treatment" found in N.J.S. 2C:43-12(g)(1) refers only to diversionary programs within the state and not to diversionary programs under the laws of other states.¹ Accordingly, the Court held that the prosecutor's reliance on previously dismissed or diverted charges from another state to deny defendant's admission into PTI in New Jersey amounted to an abuse of discretion.²

Statute

N.J. Stat. Ann. § 2C:43-12(g)(1)

Supervisory treatment may occur only once with respect to any defendant and any person who has previously received supervisory treatment under section 27 of P.L.1970, c. 226 (C.24:21-27), a conditional discharge pursuant to N.J.S. [A.] 2C:36A-1, or a conditional dismissal pursuant to P.L.2013, c. 158 (C.2C:43-13.1 et al.) shall not be eligible for supervisory treatment under this section.

Background

Defendant was indicted and charged with third-degree conspiracy to shoplift and third-degree shoplifting in violation of N.J.S. 2C:5-2 and N.J.S. 2C:20-11(b)(1).³ Defendant applied for PTI but was denied entry by the program director.⁴ The prosecutor drafted a letter agreeing with the Program Director's determination and opposed defendant's admission into the PTI program.⁵ The prosecutor noted that defendant was rejected because she has been previously enrolled in a conditional discharge program.⁶ In May 2001, defendant was accepted into Pennsylvania's Accelerated Rehabilitation Disposition Program (ARD) for offenses in

¹ *State v. Austin*, No. A-1046-14T3, 2016 WL 3004807, at *2 (App. Div. 2016).

² *Id.* at *3.

³ *Id.* at *1

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

connection with a retail theft and forgery.⁷ Further, the prosecutor argued at the motion hearing that the charges related to the ARD program would be crimes in this state and served as a bar to entry into PTI.⁸

The trial judge agreed with the prosecutor and denied defendant's admission into New Jersey's PTI program.⁹ Thereafter, defendant pled guilty to fourth-degree conspiracy to commit shoplifting in exchange for the State's agreement to dismiss Count Two of the indictment and to recommend defendant be sentenced to one year of non-custodial probation.¹⁰ In accordance with the plea agreement, the defendant was sentenced to one year of non-custodial probation for the charge in Count One, reduced to a fourth-degree offense.¹¹ Defendant appealed the order denying her motion to be admitted into PTI arguing that "rejection of defendant for PTI constituted a patent and gross abuse of discretion, necessitating reversal and remand for reconsideration and admission of defendant into PTI."¹²

Analysis

The policy of the State of New Jersey, under certain circumstances, is that "supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal offense under the laws of New Jersey when supervisory treatment would provide deterrence of future criminal or disorderly conduct by an applicant."¹³ N.J.S. 2C:43-12(g)(1) governs the limits on when an applicant to PTI may be denied based upon past participation. The statute bars anyone from admission into PTI who previously received supervisory treatment under N.J.S. 24:21-27 and anyone either previously enrolled in PTI or conditionally discharged pursuant to N.J.S. 24:21-27 or N.J.S. 2C:36A-1.¹⁴

In interpreting the statute, the Appellate Division in *Austin* found that the term "supervisory treatment" exclusively refers to diversionary programs within the State of New Jersey and not the diversionary programs of other states.¹⁵ While a defendant's prior out-of-state pretrial diversion cannot be taken into consideration when evaluating the defendant for admission into PTI, prior admission to an out-of-state diversionary program may only be considered as a factor in determining whether the defendant should be admitted and the extent to which an

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *2; N.J.S. 2C:43-12(a); *See also State v. Bell*, 217 N.J. 336, 348 (2014) (holding the purpose of PTI is to provide "an alternative to the full criminal justice mechanism of a trial").

¹⁴ *State v. O'Brien*, 418 N.J. Super. 428, 438 (App. Div. 2011).

¹⁵ *State v. McKeon*, 385 N.J. Super. 559, 571 (App. Div. 2006) ("We hold that the Legislative intent in enacting N.J.S.A. 2C:43-12(g), is to provide a single opportunity for a defendant to enroll in a PTI program in New Jersey, not to bar an otherwise eligible defendant from PTI solely because he was previously admitted to a pretrial diversionary program in another state");

applicant's crime demonstrates a continuing pattern of anti-social behavior.¹⁶ Because the prosecutor solely relied on defendant's past participation in an out-of-state diversionary program to bar her entry into PTI, the court held this amounted to an abuse of discretion, vacated the trial court's order, and remanded for reconsideration by the prosecutor.¹⁷

Conclusion

New Jersey's PTI admission criteria statute does not expressly prohibit a prosecutor from excluding a defendant from admission into PTI solely on the basis of past participation in a diversionary program under the laws of another state. The Appellate Division in *State v. Austin* held that Prosecutors may use evidence of past participation in diversionary programs as a factor in determining whether a defendant has exhibited a pattern of anti-social behavior but may not use that fact, standing alone, to deny entry into PTI.

Staff seek authorization to conduct additional research and outreach to determine whether clarification of the statutory language regarding the impact of participation in diversionary programs in another state could be of use by providing guidance under this statute.

¹⁶ Id.; N.J.S. 2C:43-12e(8); *See also State v. K.S.*, 220 N.J. 190, 202 (2015) (Holding that it is improper to rely on previously dismissed or diverted charges from another state to deny a defendant's admission into PTI).

¹⁷ *State v. Austin*, No. A-1046-14T3, 2016 WL 3004807, at *3 (N.J. Super. Ct. App. Div. May 26, 2016).