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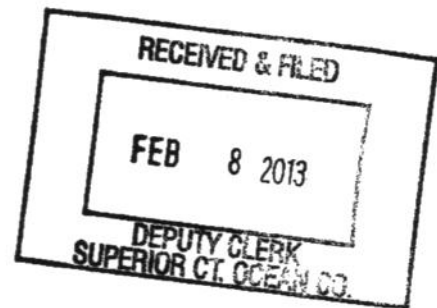
February 8, 2013

Honorable [REDACTED], J.S.C.

Ocean County Courthouse

100 Hooper Avenue

Toms River, NJ 08754-2191



Re: State v. [REDACTED]

Ind./Accus. No.: 10-08-1518; 11-06-987;

11-10-1783; 11-12-2132-A; 11-12-2133-A; 12-07-1418; 12-03-588

12-03-651; 12-04-715

Case No.: 12-08-3310

Your Honor:

Please accept this letter brief appealing [REDACTED]
legal rejection from Drug Court.

STATEMENT OF FACTS

██████████ has no prior record of convictions. See Exhibit A (page one of four-page court history). He stands accused of and is pending sentence for a variety of third and fourth degree offenses. Id. at 3-4. With regard to Indictment 10-08-1518, he is pending sentence for fourth degree joyriding. Id. at 3. Regarding Indictment 11-06-987, he is pending sentence for one count of third-degree theft by deception and two counts of third-degree fraudulent use of a credit card. Id. at 3-4. Concerning Indictment 11-10-1783, ██████████ is pending sentence for third-degree theft by deception. Id. at 4. With regard to Accusation 11-12-2132, he is pending sentence for third-degree theft. Id. at 4. Regarding Accusation 11-12-2133, he is pending sentence for third-degree theft. Id. at 4.

Regarding Indictment 12-03-588, ██████████ stands accused of third-degree shoplifting on January 9, 2012. Id. at 4. With regard to Indictment 12-03-651, he stands accused of third-degree shoplifting on December 15, 2011. Id. at 4. Concerning Indictment 12-04-715, ██████████ stands accused of fourth-degree shoplifting on December 30, 2011. Concerning Indictment 12-07-1418, ██████████ stands accused of third-degree bail jumping. See Exhibit B. Regarding case number 12-08-3310, he stands accused of fourth degree shoplifting. See Exhibit C. Various third degree, fourth degree, and disorderly person's theft and drug offenses are pending dismissal. Exhibit A (pages 3 and 4).

On December 5, 2011, ██████ pleaded guilty to the offenses for which he is pending sentence. See Exhibit D. While pending sentence, four additional indictments (12-03-588, 12-03-651, 12-04-715, and 12-07-1418) and a complaint (12-08-3310) were issued against him. See Exhibits E through G, B and C.

Brown submitted an application to the drug court program on November 26, 2012. See Exhibit H. On or about December 26, 2012, the State rejected ██████'s application. See Exhibit I. On December 29, 2012, the defense filed a notice of motion to appeal the rejection. See Exhibit J.

██████ was interviewed for a TASC evaluation on or about January 17, 2013. See Exhibit K. On that date, ██████ tested positive for THC. Id. at 1. ██████'s cannabis dependency was identified by his substance abuse evaluator. Id. at 3, 8. He was under the influence of drugs when committing the offenses at issue. Id. at 4-5. He identified his sister, a current drug court participant, as a potential part of his support network. Id. at 6. ██████ meets the DSM-IV-TR criteria for cannabis dependence with physiological dependence and opioid abuse. Id. at 8. He is appropriate for Level III.5 Clinically Managed High-Intensity Residential Treatment. Id.

██████ has been charged with controlled substance offenses and at least three occasions, including a March 20, 2011 arrest involving pending charges of possession of under 50 grams of marijuana and use of drug paraphernalia. Exhibit A (pages 3 and 4). In rejecting

██████'s application, The State alleged that ██████ has no prior or pending charges for controlled substance offenses. Exhibit I (page 3 of 3).

The State also claimed the following reasons for rejecting ██████'s application:

"profit motive", "Significant threat to the community", "Deft. is career thief w/ 12 pending files thefts & S/L", "has 5 felony convictions", "He was also adjudicated delinquent at least 3 times, twice for Resisting Arrest", "has 12 open files in Ocean County", and "He has been charged with at least 16 felony crimes including Prohibited Weapons, Burglary, Bail Jumping, Theft, etc." Id. at 2-3.

██████ has never been convicted of or even charged with an offense that would preclude Drug Court participation. Exhibit A. His fourth degree prohibited weapons (brass knuckles) charge is scheduled for dismissal. Exhibit A (page 4 of 4). ██████ has promised to provide the State with truthful testimony against the co-defendant who is responsible for that offense. See Exhibits L and M (three pages).

██████'s February 2, 2006 juvenile resisting arrest charge was dismissed. Exhibit A (page 2 of 4). There is no indication that ██████'s June 11, 2007 adjudication for resisting arrest involved any threat of violence. Id. He has never been charged with simple assault, aggravated assault, or any offense that would preclude drug court participation. Id.

LEGAL ARGUMENT

- I. IT WOULD BE AN ABUSE OF DISCRETION FOR THE COURT TO REJECT [REDACTED] FROM DRUG COURT BASED UPON THE STATE'S ALLEGATIONS.

A functional approach to determining an abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue. Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002). The court shall give priority to a person who has moved to be sentenced to special probation over a person who is being considered for a sentence to special probation on the court's own motion or in accordance with the provisions of 2C:35-14.2. N.J.S.A. 2C:35-14(a).

- A. It was inappropriate¹ to allege "profit motive" and "no charges prior or pending for CDS offenses" as justification for ██████'s rejection.

A required condition of Drug Court participation is that the Court find that the offense at issue "was committed while the person was under the influence of a controlled dangerous substance, controlled substance analog or alcohol or *was committed to acquire property or monies in order to support the person's drug or alcohol dependency.*" N.J.S.A. 2C:35-14 (a)(3) (emphasis added). Since an applicant is required to have been under the influence or have had a "profit motive" at the time of the offense, it was inappropriate to consider that factor in rejecting ██████'s application. The appropriate inquiries are whether ██████ was under the influence of a controlled substance at the time of the offenses and/or whether the alleged "profit motive" was related to the support of ██████'s drug dependency.

These inquiries have since been answered by ██████'s January 17,

¹ A gross and patent abuse of discretion exists where the prosecution's decision was based upon a consideration of inappropriate factors. State v. Hester, 357 N.J. Super. 428, 443 (App. Div. 2003). With the recent deletion of N.J.S.A. 2C:35-14(c), the "gross and patent abuse of discretion" standard no longer applies. Even under that outdated and unduly restrictive standard, the prosecutor's consent was not required for Brown, or any defendant facing third and fourth degree charges. The term "inappropriate" is used here since "a gross and patent abuse of discretion" logically constitutes an "abuse of discretion", the applicable standard. See State v. Wallace, 146 N.J. 576, 582-83 (1996).

2013 T.A.S.C. evaluation. See Exhibit D. [REDACTED] tested positive for THC on the date of his evaluation. Id. at 1. His cannabis dependency was identified by the substance abuse evaluator. Id. at 3, 8. [REDACTED] was under the influence of drugs when committing the offenses at issue. Id. at 4-5. He identified his sister, a current drug court participant, as part of his support network. Id. at 6. [REDACTED] meets the DSM-IV-TR criteria for cannabis dependence with physiological dependence and opioid abuse. Id. at 8. He is appropriate for Level III.5 Clinically Managed High-Intensity Residential Treatment. Id.

Additional objective evidence indicates that [REDACTED] is a drug dependent person. He has been charged with controlled substance offenses on at least three occasions, including a March 20, 2011 arrest involving pending charges of possession of under 50 grams of marijuana and use of drug paraphernalia. Exhibit A. Therefore, the State's proposed rejection is not only based on inappropriate assertions, but also on the patently false claim that he has no prior or pending drug charges.

- B. It was inappropriate to allege "Significant threat to the community", "Deft. is career thief w/ 12 pending files thefts & S/L", "has 5 felony convictions", "He was also adjudicated delinquent at least 3 times, twice for Resisting Arrest", "has 12 open files in Ocean County", and "He has been charged with at least 16 felony crimes including Prohibited Weapons, Burglary, Bail Jumping, Theft, etc." as justification for [REDACTED]'s rejection.

Where the accused did not possess weapons in any of his convictions and where there is no other evidence of a dangerous capacity in society, the prosecutor's claim that he is "a threat to the community," is unsupported. State v. Dawson, 2011 N.J. Super. Unpub. at 8 attached pursuant to R. 1:36-3).² Brown has never been convicted of or even charged with an offense that would preclude Drug Court participation. See N.J.S.A. 2C:35-14(a)(7) and Exhibit A.

There is no evidence that he presents a dangerous capacity in society. While [REDACTED] was charged with the minor offense³ of fourth degree prohibited weapons (brass knuckles), that charge is scheduled for dismissal. See Exhibit A (page 4 of 4). This charge is being dismissed because it is meritless. This is evidenced by the fact that the State secured [REDACTED]'s testimony against the co-defendant who is actually responsible for the offense. See Exhibit B. It appears

² Unlike [REDACTED], the defendant in Dawson was facing more serious charges, the presumption of incarceration, and the outdated and unduly restrictive "gross and patent abuse of discretion" standard. Id. at 2. Nevertheless, the Trial Court and Appellate Division held that the State's reasoning there constituted a gross and patent abuse of discretion. Id. at 1-2.

³ All fourth degree offenses are minor offenses. N.J.S.A. 2C:6-1.

that the sole reason for the indictment against ██████ was to leverage him to testify against the responsible party. See Exhibit C (three pages).

With regard to the allegation that ██████ has two juvenile adjudications for resisting arrest, the State mischaracterizes the February 2, 2006 dismissed charge as an adjudication. Exhibit A (page 2 of 4). Moreover, there is no indication that ██████'s June 11, 2007 adjudication for resisting arrest involved any threat of violence, as opposed to passively resisting or resisting by flight. See N.J.S.A. 2C:29-2. The fact that he was charged with eluding (which was dismissed), indicates that the adjudicated charge involved flight, as opposed to a threat of violence. Exhibit A (page 2 of 4). Otherwise, he would have been charged with aggravated assault. See N.J.S.A. 12-1b (5) (a).

With regard to the State's inappropriate citing to additional charges which do not preclude drug court participation, it is judicially noticeable that drug court has had participants who were charged with each of the cited offenses (theft, shoplifting, resisting arrest, prohibited weapons, burglary, and bail jumping).

In a strained effort to find a basis for rejection, the State triple-counted ██████'s pending "16 felony crimes", with his "12 open files" and what is erroneously described as "five felony convictions." ██████'s "16 felony crimes" refer to his pending charges from his "12 open files". The majority of those pending

charges are scheduled for dismissal. Furthermore, the State mischaracterizes the offenses for which [REDACTED] is pending sentence as "five felony convictions." While [REDACTED] is pending sentence for various offenses, he has no prior superior court convictions.

Exhibit A. A defendant is not "convicted" until he is sentenced.

Ball v. United States, 470 U.S. 856, 862 (1985).

CONCLUSION

In light of the foregoing, the Court should not adopt the State's reasons for rejection and [REDACTED] should be legally accepted for drug court participation.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'F. Sisto', written in a cursive style.

Frederick P. Sisto, Esq.

Copy: Client

[REDACTED] Esq.