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Revenge Porn Cases Make Poor Candidates For Diversionary Program In New Jersey

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The Pre-Trial Intervention diversionary program allows certain offenders the once-in-a-lifetime opportunity to avoid criminal prosecution under certain circumstances, the most important of which is the consent of the prosecutor.

A recent decision from the New Jersey Superior Court, Appellate Division, reaffirms the broad discretion afforded to the prosecutor to decide which cases and which defendants are appropriate for diversionary programs. The case should also serve as a warning to those who may breach the trust of a paramour by posting nude photographs, even those taken with consent, on the Internet.

In the recently issued opinion in *State* v. *Chow*, the State appealed from the trial judge's decision to enroll the defendant into the Pre-Trial Intervention Program over the State's objection. The defendant and the victim were involved in a short term consensual relationship, and during the course of that relationship, the victim sent the defendant several nude photographs. Sometime after the relationship ended, the victim discovered that the nude photographs had been posted on the Internet. Believing that the defendant had posted the nude photographs without her permission, the victim confronted the defendant through an instant messaging application, and during the course of their exchange of communications, the defendant admitted that he had posted the pictures, and apologized for having done so. The victim ended up reporting the matter to the police, and criminal charges for invasion of privacy were filed.

Because the defendant had no prior criminal record, was employed and asserted that his misconduct in the case could be appropriately deterred through a diversion, he applied for Pre-Trial Intervention Program consideration.

The prosecutor rejected the application, relying heavily on the objections of the victim and a strong public policy interest favoring criminal prosecution in order to deter others from posting nude photographs in public forums without the consent of the individuals depicted in them.

As permitted by statute and court rule, the defendant appealed the Pre-Trial Intervention rejection to the court, and argued several factors, including the fact that he had received the photo directly from the victim and that it was taken with her obvious consent, his motivation not to commit any future offenses of any type, his college education, and his steady record of employment. His attorney also argued that "he is a member of a new generation wherein the lines are blurred with the explosion of social media." He admitted to a huge lapse in judgment and expressed willingness to receive counseling to help him better conform his future behaviors.

The trial court granted the appeal, and ordered the defendant placed into the diversionary program over the prosecutor's objection. The State then appealed. The Appellate Division reversed the trial court, and reinstated the prosecutor's rejection of defendant's Pre-Trial Intervention application. The appellate court noted the longstanding legal principle that a trial court may not overrule a prosecutor's decision to reject a Pre-Trial Intervention application unless the court finds that the prosecutor's refusal to approve the application was based on a "patent and gross abuse of discretion." Relying heavily on the impact that the defendant's conduct had on the victim, and the fact that the defendant had not come forward with sufficient evidence to establish his amenability to rehabilitation, the Appellate Division concluded that the prosecutor's rejection of the diversionary

program application could not be considered as a patent and gross abuse of discretion, and it was therefore reversible error for the trial court to have substituted its judgment for that of the prosecutor.

Two lessons may be learned here. First, the posting of intimate or nude photos for others to see, even when those photos were supplied with the consent of the person depicted in them, is not a victimless crime, and the Internet (public?) posting of nude photographs without the consent of the person depicted has the capacity to inflict great mental anguish and harm. It is precisely for these reasons that New Jersey's Invasion of Privacy laws have been broadened in recent years to permit criminal prosecution in cases such as this one. The second lesson is that people who violate these statutes should not expect to be treated leniently by prosecutors or the courts, and may find their careers and futures in jeopardy following a criminal conviction. The decisions of prosecutors about which cases and which offenders are suitable for diversionary programs will not be lightly disturbed by the courts. Any effort to seek consideration for Pre-Trial Intervention in cases such as *State* v. *Chow* should be supported by detailed and compelling evidence to demonstrate why consideration for diversion is appropriate.

For more information about diversionary programs and criminal law questions, please phone Darren Gelber or any member of Wilentz's criminal law team at 732-855-6100.

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