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APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0703-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN FRANCO,

Defendant-Appellant.

Submitted November 29, 2017 – Decided December 15, 2017

Before Judges Fuentes and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
16-01-0089.

Joseph E. Krakora, Public Defender, attorney
for appellant (Marcia Blum, Assistant Public
Defender, of counsel and on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Kerry J. Salkin,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Kevin Franco appeals from an order of the Law
Division denying his admission to the Pretrial Intervention
Program (PTI). As we conclude the appellate record is inadequate

for purpose of our review, we remand to the Law Division. We add only the following.

Franco was indicted by a Hudson County Grand Jury on second-degree attempting to disarm a police officer, N.J.S.A. 2C:12-11(a) (counts one and three), and third-degree resisting arrest by physical force, N.J.S.A. 2C:29-2(a) (count two). Pursuant to a negotiated plea agreement, Franco pled guilty to the resisting charge in exchange for which, the State dismissed the two second-degree charges. The agreement also permitted Franco to apply to PTI.

Upon Franco's application, the criminal division manager recommended admission to PTI predicated upon an individualized assessment of Franco's eligibility. R. 3:28(h). Without submitting the required individualized assessment, the prosecutor noted an objection by referencing a prior denial in its reply brief on Franco's PTI appeal. See State v. Roseman, 221 N.J. 611, 621-22 (2015).

We criticized this practice in State v. Rizzitello, 447 N.J. Super. 301, 311 (App. Div. 2016). In Rizzitello, we held the prosecutor's failure "to perform this important, legally required evaluation" was "unacceptable." Ibid. Here, as in Rizzitello, the method of objection employed by the prosecutor precludes meaningful appellate review.

Similarly, we are hampered in our review by the lack of a transcript of the plea proceedings. While Franco was permitted to apply to PTI pursuant to the plea, we are uninformed whether, for purpose of eligibility, the dismissed second-degree charges could still be considered as a factor in Franco's admission.

As such, we are constrained to remand to the Law Division for a de novo hearing after compliance by the prosecutor with the individualized assessment mandate of Rule 3:28(h). In reaching our decision, we express no view regarding the remand proceeding's outcome.

Remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION