Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Submitted - November 27, 2006

STEPHEN G. CRANE, J.P.
ROBERT A. SPOLZINO
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN, JJ.

2006-04475 DECISION & ORDER

People of State of New York, appellant,
v Clint Davenport, respondent.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Karla Lato of counsel), for appellant.

Robert C. Mitchell, Riverhead, N.Y. (James H. Miller III of counsel), for respondent.

Appeal by the People from an order of the County Court, Suffolk County (Weber, J.), dated March 3, 2006, which, after a hearing, designated the defendant a level two sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the defendant is reclassified as a level three sex offender.

The risk assessment instrument prepared by the Board of Examiners of Sex Offenders (hereinafter the Board) assessed the defendant 135 points, thereby indicating that he should presumptively be classified a level three sex offender. However, the County Court concluded that the Board had improperly assessed the defendant points for certain risk factors, including 20 points for committing a sex offense against a victim who was physically helpless, and 15 points for his release without supervision. Upon deducting points for these risk factors, the court classified the defendant a level two sex offender. We reverse and reclassify the defendant a level three offender.

The court should not have deducted the points which the Board assigned to the defendant for sexually assaulting a physically helpless victim. Correction Law § 168-n(3) provides, inter alia, that "facts previously proven at trial . . . shall be deemed established by clear and convincing

evidence and shall not be relitigated." Here, the defendant was convicted after a jury trial of one count of sodomy in the first degree, and two counts of sexual abuse in the first degree predicated upon the physical helplessness of the victim. In a decision and order dated April 15, 2002, this court affirmed the defendant's conviction, finding that the evidence presented at trial was legally sufficient to establish his guilt of the counts of sodomy and sexual abuse, predicated upon the victim's physical helplessness, and that the verdict was not against the weight of the evidence (*see People v Davenport,* 293 AD2d 625). Accordingly, the physical helplessness of the victim is a fact which the court should have deemed established pursuant to Correction Law § 168-n(3). The defendant's contention that the assessment of points against him based upon the victim's physical helplessness constituted improper "double counting" because he was also assessed points based upon the victim's age is unpreserved for appellate review and, in any event, without merit (*see People v Vaughn,* 26 AD3d 776).

It was also improper for the court to deduct the 15 points which the Board assigned to the defendant because he was being released back into the community without any form of parole or probation supervision (*see People v Hyson,* 27 AD3d 919; *People v Swackhammer,* 25 AD3d 892). Regardless of whether an offender has served his maximum sentence, the absence of such supervision is a risk factor for re-offending which must be taken into account pursuant to the Risk Assessment Guidelines.

In the absence of evidence of special circumstances warranting a departure from the presumptive risk level determined by the risk assessment instrument (*see People v Morales, supra; People v Davis,* 26 AD3d 364; *People v Masters,* 19 AD3d 387), we reclassify the defendant a level three offender.

In view of our determination, we need not reach the People's remaining contentions.

CRANE, J.P., SPOLZINO, KRAUSMAN and GOLDSTEIN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court