

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

D16906  
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Submitted - October 23, 2007

ROBERT A. SPOLZINO, J.P.  
GABRIEL M. KRAUSMAN  
EDWARD D. CARNI  
THOMAS A. DICKERSON, JJ.

2005-01291

DECISION & ORDER

People of State of New York, respondent,  
v Robert P. Coffey, appellant.

Kerry Sloane Bassett, Central Islip, N.Y., for appellant.

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

Appeal by the defendant from an order of the County Court, Suffolk County (Braslow, J.), dated January 11, 2005, which, after a hearing, designated him a level three 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 two sex offender.

Although a court is empowered to exercise its discretion and depart from the presumptive risk level based upon the facts in the record (*see People v Hines*, 24 AD3d 524, 525; *People v Girup*, 9 AD3d 913; *People v Guaman*, 8 AD3d 545), it has been recognized that “utilization of the risk assessment instrument will generally ‘result in the proper classification in most cases so that departures will be the exception not the rule’” (*People v Guaman*, 8 AD3d 545, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed]; *see People v Burgos*, 39 AD3d 520; *People v Inghilleri*, 21 AD3d 404). A departure from the presumptive risk level is warranted only where “there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed]; *see People v Burgos*, 39 AD3d at 520; *People v Hegazy*, 25 AD3d 675; *People v Inghilleri*, 21 AD3d at 404; *People v*

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*Guaman*, 8 AD3d 545). There must be clear and convincing evidence of a special circumstance to warrant a departure from the presumptive risk level (see *People v Burgos*, 39 AD3d at 520).

Here, the court improperly considered, inter alia, as a factor justifying its upward departure from the defendant's presumptive risk level, a charge that was ultimately dismissed in the underlying criminal action. The court's upward departure to a level three classification, therefore, is not supported by clear and convincing evidence of an aggravating factor not adequately taken into account by the risk assessment instrument (see *People v Burgos*, 39 AD3d at 520; *People v Fuller*, 37 AD3d 689; *People v Ruddy*, 31 AD3d 517; *People v Hegazy*, 25 AD3d at 675; *People v Inghilleri*, 21 AD3d 404; *People v Guaman*, 8 AD3d at 545). Accordingly, the defendant must be reclassified as a level two sex offender.

SPOLZINO, J.P., KRAUSMAN, CARNI and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court