

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

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_____AD3d_____

Submitted - October 18, 2007

REINALDO E. RIVERA, J.P.
PETER B. SKELOS
STEVEN W. FISHER
DANIEL D. ANGIOLILLO, JJ.

2006-02828

DECISION & ORDER

People of State of New York, respondent, v
Phillip Turner, appellant.

(Index No. 2905/86)

Steven Banks, New York, N.Y. (Michael C. Taglieri of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Anthea H. Bruffee, and Morgan J. Dennehy of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Marrero, J.), dated March 7, 2006, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is affirmed, without costs or disbursements.

Contrary to the defendant's contention, the prosecution presented clear and convincing evidence to support a risk level three classification, including the risk assessment instrument and case summary prepared by the Board of Examiners of Sex Offenders (*see* Correction Law § 168-n[3]; *People v Arnold*, 35 AD3d 827; *People v Overman*, 7 AD3d 596, 597; *People v Burgess*, 6 AD3d 686). In any event, even if the defendant's total score under the risk assessment instrument fell below the threshold score for designation as a level three sex offender, an upward departure to level three was warranted (*see People v Fredlund*, 38 AD3d 636).

"A departure from the presumptive risk level is warranted where 'there exists an aggravating or mitigating factor of a kind or to a degree not otherwise taken into account by the

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guidelines" (*People v Inghilleri*, 21 AD3d 404, 406, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed.]; *People v Mount*, 17 AD3d 714, 715; *People v Girup*, 9 AD3d 913; *People v Guaman*, 8 AD3d 545). Here, an upward departure was warranted based upon the defendant's 2005 conviction of rape in the first degree (*see People v Fredlund*, 38 AD3d 636; *People v Graeber*, 31 AD3d 517; *People v White*, 25 AD3d 677).

The defendant's remaining contention is without merit.

RIVERA, J.P., SKELOS, FISHER and ANGIOLILLO, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court