

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

D17133
C/kmg

_____AD3d_____

Submitted - November 2, 2007

ROBERT W. SCHMIDT, J.P.
REINALDO E. RIVERA
ANITA R. FLORIO
RUTH C. BALKIN, JJ.

2006-03240

DECISION & ORDER

People of State of New York, respondent,
v Vincent King, appellant.

Steven Banks, New York, N.Y. (Steven J. Miraglia 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 and upon the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456), designated him a level 3 sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is reversed, on the law and in the exercise of discretion, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for a new hearing and, thereafter, a new determination on the issue of whether an upward departure from the defendant's presumptive risk level 2 classification is warranted.

“In establishing an offender's appropriate risk level assessment under [the Sex Offender Registration Act, hereinafter SORA], the People have ‘the burden of proving the facts supporting the determinations sought by clear and convincing evidence’ (Correction Law § 168-n[3]; [internal citations omitted])” (*People v Hardy*, 42 AD3d 487, 487, *lv denied* _____NY3d_____ [Nov. 20, 2007]; *see People v Lawless*, 44 AD3d 738). Contrary to the defendant’s contention, the proof presented by the People was sufficient to show, by clear and convincing evidence, both that the defendant used a dangerous instrument in the commission of the subject crimes and that the victim was a "stranger" to the defendant within the meaning of the SORA Guidelines for risk factors 1 and

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7. Accordingly, the Supreme Court properly assessed the defendant 30 points under risk factor 1 and 20 points under risk factor 7 (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 7, 12 [2006 ed]; *People v Hardy*, 42 AD2d 497, *lv denied* _____NY3d_____ [Nov. 20, 2007]).

However, as correctly conceded by the People in their brief, the Supreme Court improperly assessed the defendant 10 points under risk factor 10, “Recency of prior felony or sex crime.” Without those 10 points, the defendant’s total score is 105, making the defendant a presumptive level 2 sex offender, rather than a level 3 sex offender, as he was originally assessed, and finally determined to be by the Supreme Court. Since the Supreme Court did not rule on the People’s request, in effect, for an upward departure in the event that the defendant would not have otherwise been found to be a level 3 sex offender, it is appropriate to remit the matter to the Supreme Court, Kings County, for a new hearing and determination (*see People v Costello*, 35 AD3d 754).

SCHMIDT, J.P., RIVERA, FLORIO and BALKIN, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court