

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

D20668
Y/hu

_____AD3d_____

Submitted - September 16, 2008

ROBERT A. SPOLZINO, J.P.
ANITA R. FLORIO
HOWARD MILLER
JOHN M. LEVENTHAL, JJ.

2007-05141

DECISION & ORDER

People of State of New York, etc., respondent,
v Nicholas Robinson, appellant.

Robert C. Mitchell, Riverhead, N.Y. (Robert B. Kenney of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Edward A. Bannan and Glenn Green of counsel), for respondent.

Appeal by the defendant from an order of the County Court, Suffolk County (Hinrichs, J.), dated March 13, 2007, 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 .

The County Court's designation of the defendant as a level three sex offender under the Sex Offender Registration Act (hereinafter SORA) is supported by clear and convincing evidence (*see* Correction Law art 6-C; *People v Dong V. Dao*, 9 AD3d 401, 401-402; *People v Smith*, 5 AD3d 752; *People v Moore*, 1 AD3d 421). Contrary to the defendant's contentions, the People established by clear and convincing evidence that he had a history of substance abuse, and based on his own admissions was using marijuana and/or alcohol at the time of the underlying incidents (*see* SORA: Risk Assessment Guidelines and Commentary [2006 ed] [hereinafter the SORA Guidelines] at 5; *People v Goodwin*, 49 AD3d 619, 620-621; *see generally People v Mingo*, 49 AD3d 148, 150; *People v Dong V. Dao*, 9 AD3d at 401-402). Moreover, as the County Court correctly opined, the SORA Guidelines expressly provides for an addition of 15 points for factor No. 11 [drug or alcohol abuse] “if an offender has a substance abuse history *or was abusing drugs and or alcohol at the time of the offense*” (SORA Guidelines at 15 [emphasis added]).

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In addition, the County Court providently exercised its discretion in denying the defendant's request for a downward departure from his presumptive level three sex offender status (*see People v Pietarniello*, 53 AD3d 475; *People v Taylor*, 47 AD3d 907, 908, *lv denied* 10 NY3d 709; *People v Adams*, 44 AD3d 1020, *lv denied* 9 NY3d 818). The defendant did not demonstrate mitigating factors of a kind or to a degree not otherwise taken into account by the SORA Guidelines that warranted such a departure (*see* SORA Guidelines at 4; *People v Pietarniello*, 53 AD3d 475; *People v Taylor*, 47 AD3d 907, 908, *lv denied* 10 NY3d 709; *People v Adams*, 44 AD3d 1020, *lv denied* 9 NY3d 818).

SPOLZINO, J.P., FLORIO, MILLER and LEVENTHAL, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court