

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

D20802
G/prt

_____AD3d_____

Submitted - October 2, 2008

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
WILLIAM E. McCARTHY
JOHN M. LEVENTHAL, JJ.

2007-03164

DECISION & ORDER

People of State of New York, respondent,
v Laquan Derrico, appellant.

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

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Marion M. Tang of counsel),
for respondent.

Appeal by the defendant from an order of the County Court, Suffolk County (Hinrichs, J.), dated March 26, 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.

A court is empowered to exercise its discretion and depart from the presumptive risk level determined by the risk assessment instrument based upon the circumstances in the record (*see People v Taylor*, 47 AD3d 907, 908; *People v Inghilleri*, 21 AD3d 404). However, “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, 545, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [1997 ed]). 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 guidelines” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed]). Furthermore, such a determination must be supported by clear and convincing evidence (*see People v Guaman*, 8 AD3d 545; *People v Hampton*, 300 AD2d 641).

October 21, 2008

Page 1.

The mitigating factors alleged by the defendant were taken into account by the guidelines and do not warrant a departure. The defendant has failed to meet his burden of establishing that a downward departure is appropriate. Accordingly, the County Court properly found that the presumptive risk level accurately assessed the defendant's likelihood of reoffending and, thus, properly declined to depart from that risk level assessment.

FISHER, J.P., COVELLO, McCARTHY and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, prominent initial "J".

James Edward Pelzer
Clerk of the Court