

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

D22329
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_____AD3d_____

Submitted - January 27, 2009

PETER B. SKELOS, J.P.
DAVID S. RITTER
ANITA R. FLORIO
HOWARD MILLER, JJ.

2007-07173

DECISION & ORDER

People of State of New York, respondent,
v Corey Townsend, appellant.

Steven Banks, New York, N.Y. (Karen M. Kalikow of counsel), for appellant.

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

Appeal by the defendant, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Garnett, J.), entered July 26, 2007, as, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

In establishing the appropriate risk level determination under the Sex Offender Registration Act (Correction Law art 6-C), the People bear the burden of proving the necessary facts by clear and convincing evidence (*see* Correction Law § 168-n[3]; *People v Hardy*, 42 AD3d 487, 487; *People v Lawless*, 44 AD3d 738). The facts may be proved, inter alia, by reliable hearsay: “the court shall review any victim’s statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the recommendation and any materials submitted by the board, and may consider reliable hearsay evidence submitted by either party, provided that it is relevant to the determinations” (Correction Law § 168-n[3]). Here, the Supreme Court properly considered, inter alia, the elements of the crime of which the defendant was convicted, statements by the victim and the defendant contained in the defendant’s presentence reports, and the victim’s statements to the assistant district attorney who signed the felony complaint. This evidence,

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considered in its entirety, established by clear and convincing evidence each of the court's assessments as to the applicable risk factors and supported the finding that the defendant was presumptively a level two offender. Moreover, the Supreme Court did not err in declining to downwardly depart from that presumptive risk level. "A departure from the presumptive risk level is generally 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'" (*People v Taylor*, 48 AD3d 775, 776, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [2006 ed] [hereinafter the Guidelines] at 10; see *People v Gochnour*, 50 AD3d 754, 755; *People v Burgos*, 39 AD3d 520). Inasmuch as the factor on which the defendant relies to support his argument that the court should have downwardly departed from the presumptive risk level is expressly addressed in the Guidelines themselves, a downward departure would not have been proper.

SKELOS, J.P., RITTER, FLORIO and MILLER, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer
Clerk of the Court