

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

D22839  
O/prt

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Submitted - March 9, 2009

REINALDO E. RIVERA, J.P.  
DANIEL D. ANGIOLILLO  
RANDALL T. ENG  
ARIEL E. BELEN, JJ.

2007-09572

DECISION & ORDER

People of State of New York, respondent,  
v Damon Jacobs, appellant.

Lynn W. L. Fahey, New York, N.Y. (Lisa Napoli of counsel), for appellant.

Daniel M. Donovan, Jr., District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart and Michael Shollar of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Richmond County (Rienzi, J.), dated September 11, 2007, which, after a hearing, designated him a level two 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 Derrico*, 55 AD3d 810, 811; *People v Walker*, 47 AD3d 692; *People v Guaman*, 8 AD3d 545). 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]; *see People v Derrico*, 55 AD3d 810; *People v Walker*, 47 AD3d 692). 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]; *see also People v Derrico*, 55 AD3d 810, 811; *People v Walker*, 47 AD3d 692, 693; *People v Guaman*, 8 AD3d 545). Such a determination must be supported by clear and convincing evidence (*see People v Derrico*, 55 AD3d 810; *People v Walker*, 47 AD3d 692, 693; *People v Guaman*, 8 AD3d 545).

Here, the defendant failed to demonstrate by clear and convincing evidence that there

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existed a mitigating factor of a kind or to a degree not otherwise taken into account by the guidelines that warranted a downward departure from his presumptive risk level designation. Thus, the Supreme Court providently exercised its discretion in denying such a departure.

RIVERA, J.P., ANGIOLILLO, ENG and BELEN, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court