

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

D26247  
Y/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - November 12, 2009

WILLIAM F. MASTRO, J.P.  
ANITA R. FLORIO  
RUTH C. BALKIN  
JOHN M. LEVENTHAL, JJ.

2007-02164

DECISION & ORDER

People of State of New York, respondent,  
v Andre Sterling, appellant.

---

Kent V. Moston, Hempstead, N.Y. (Jeremy L. Goldberg and Argun M. Ulgen of counsel), for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Robert A. Schwartz and Joanna Hershey of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Nassau County (Kase, J.), dated January 19, 2007, which, after a hearing, designated him a sexually violent offender and a level three sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is modified, on the law, by deleting the provision thereof that the appellant was to “be designated a sexually violent offender and”; as so modified, the order is affirmed, without costs or disbursements.

Although the hearing court failed to make written findings of fact and conclusions of law as required by Correction Law § 168-n(3), this Court may make its own findings of fact and conclusions of law where, as here, the record is sufficient to do so (*see People v Britt*, 66 AD3d 853, *lv denied* 13 NY3d 716).

Contrary to the defendant’s contention, the hearing court’s determination to designate the defendant a level three sex offender is supported by clear and convincing evidence (*see* Correction Law §168-n[3]; *People v Mingo*, 12 NY3d 563; *People v Lewis*, 56 AD3d 447; *People v Warren*, 42 AD3d 593; *People v Dominie*, 42 AD3d 589). The hearing court properly assessed points for risk

March 2, 2010

Page 1.

factor 1 based on the defendant's and the victim's sworn statements and the defendant's testimony at his plea allocution and sentencing (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 7-8 [2006 revisions], hereinafter Guidelines). It also properly assessed points for risk factor 7 because he was a stranger to the victim (*see* Guidelines at 12) and risk factor 11, given his admission that he was using alcohol at the time of the offense (*see* Guidelines at 15; *People v Britt*, 66 AD3d 853).

However, as the People correctly concede, the Supreme Court erred in designating the defendant a sexually violent offender (*see* Correction Law §168-a[3], [7][b]).

The defendant's remaining contentions are without merit.

MASTRO, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

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

James Edward Pelzer  
Clerk of the Court