

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

D28719
G/kmg

_____AD3d_____

Submitted - October 5, 2010

MARK C. DILLON, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
SHERI S. ROMAN, JJ.

2008-07753

DECISION & ORDER

People of State of New York, respondent, v
Edward Lee, appellant.

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

Daniel M. Donovan, Jr., District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart
of counsel; Anthony Ameduri on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Richmond County (Rienzi, J.), dated August 1, 2008, which, after a hearing to redetermine the defendant's sex offender risk level pursuant to the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456), 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 has the discretion to depart from the presumptive risk level, as determined by use of the risk assessment instrument, based upon the facts in the record (*see People v Bowens*, 55 AD3d 809, 810; *People v Taylor*, 47 AD3d 907, 907; *People v Burgos*, 39 AD3d 520, 520; *People v Hines*, 24 AD3d 524, 525). 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 Bowens*, 55 AD3d at 810; *People v Taylor*, 47 AD3d at 908; *People v Burgos*, 39 AD3d at 520; *People v Hines*, 24 AD3d at 525). A departure from the presumptive risk level is warranted where "there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006 ed]; *see People*

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v Bowens, 55 AD3d at 810; *People v Taylor*, 47 AD3d at 908; *People v Burgos*, 39 AD3d at 520; *People v Hines*, 24 AD3d at 525). Further, there must be clear and convincing evidence of the existence of a special circumstance to warrant such a departure (see *People v Bowens*, 55 AD3d at 810; *People v Burgos*, 39 AD3d at 520; *People v Agard*, 35 AD3d 568, 568; *People v Ventura*, 24 AD3d 527, 527; *People v Dexter*, 21 AD3d 403, 404).

Here, the Supreme Court providently exercised its discretion in denying the defendant's request for a downward departure, as the defendant failed to present clear and convincing evidence of special circumstances warranting a departure from his presumptive risk level two designation (see *People v Lynk*, 74 AD3d 929, *lv denied* 15 NY3d 708).

DILLON, J.P., FLORIO, BALKIN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court