

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

D29294
C/kmb

_____AD3d_____

Submitted - November 15, 2010

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2006-06206

DECISION & ORDER

People of State of New York, respondent,
v Roy A. Martin, appellant.

Gary R. Eisenberg, New City, N.Y., for appellant.

William V. Grady, District Attorney, Poughkeepsie, N.Y. (Bridget Rahilly Steller of counsel), for respondent.

Appeal by the defendant from an order of the County Court, Dutchess County (Hayes, J.), dated May 31, 2006, 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 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). The Risk Assessment Guidelines and Commentary promulgated by the Board of Examiners of Sex Offenders “contain four ‘overrides’ that automatically result in a presumptive risk assessment of level 3” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3 [2006 ed.]). The People bear the burden of proving the applicability of a particular override by clear and convincing

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evidence (*see* Correction Law § 168-n[3]; *see also* *People v King*, 74 AD3d 1162; *People v Chandler*, 48 AD3d 770, 771-772; *People v Thompson*, 34 AD3d 661, 661-662).

Here, the County Court found that the People established the existence of the fourth override, that there exists “a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006 ed.]), thus automatically resulting in a presumptive risk assessment of level three. However, as the defendant correctly claims, in expressly finding that the People established the applicability of the fourth override by a preponderance of the evidence, the court failed to hold the People to the proper burden of proof, which is proof by clear and convincing evidence (*see* Correction Law § 168-n[3]; *see also* *People v King*, 74 AD3d 1162; *People v Chandler*, 48 AD3d at 771-772; *People v Thompson*, 34 AD3d at 661-662). Nonetheless, where, as here, the record is sufficient, this Court may make its own findings of fact and reach its own conclusions of law (*see* *People v King*, 74 AD3d 1162; *People v Rivera*, 73 AD3d 881; *People v Lyons*, 72 AD3d 776, 776; *People v McKee*, 66 AD3d 854, 854; *People v Ashby*, 56 AD3d 633, 633; *People v Liguori*, 48 AD3d 773). We find that the People established by clear and convincing evidence the applicability of the fourth override, that there has been “a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006 ed.]), and that, by operation of the override, the defendant was presumptively a level three sex offender. To the extent the defendant sought a downward departure from the level three determination resulting from the automatic override, the defendant failed to present clear and convincing evidence of the existence of special circumstances to warrant a downward departure.

RIVERA, J.P., DICKERSON, LOTT and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court