

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

D30832
O/kmb

_____AD3d_____

Submitted - March 25, 2011

JOSEPH COVELLO, J.P.
RANDALL T. ENG
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2009-10766

DECISION & ORDER

People of State of New York, respondent, v
Keith Sivells, appellant.

Steven Banks, New York, N.Y. (Joanne Legano Ross of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Morgan J. Dennehy of counsel; Gamaliel Marrero on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Firetog, J.), dated November 16, 2009, which, after a hearing, designated him a level three sex offender and a sexually violent offender pursuant to Correction Law article 6-C.

ORDERED that the order is affirmed, without costs or disbursements.

The Supreme Court providently exercised its discretion in denying the defendant's application for a downward departure from his presumptive risk level status. The party seeking a downward departure from the presumptive risk level has the burden of demonstrating that there are mitigating factors "of a kind, or to a degree, that [are] otherwise not adequately taken into account" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006 ed.]) by the guidelines (*see People v Mendez*, 79 AD3d 834, *lv denied* 16 NY3d 707; *People v Johnson*, 77 AD3d 897, *lv denied* 16 NY3d 704; *People v Maiello*, 32 AD3d 463). Here, the defendant failed to demonstrate that there existed mitigating factors of a kind or to a degree not otherwise taken into account by the guidelines.

COVELLO, J.P., ENG, HALL and ROMAN, JJ., concur.

ENTER: 
Matthew G. Kiernan
Clerk of the Court

April 26, 2011

PEOPLE OF STATE OF NEW YORK v SIVELLS