

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

D32797
C/prt

_____AD3d_____

Submitted - June 6, 2011

DANIEL D. ANGIOLILLO, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
JEFFREY A. COHEN, JJ.

2010-02718

DECISION & ORDER

People of State of New York, respondent,
v Joseph S. McDonnell, Jr., appellant.

Thomas N. N. Angell, Poughkeepsie, N.Y. (Steven Levine of counsel), 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 (Dolan, J.), dated March 4, 2010, 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.

In this proceeding under the Sex Offender Registration Act (*see* Correction Law article 6-C), the Board of Examiners of Sex Offenders (hereinafter the Board) prepared a risk assessment instrument (hereinafter the RAI) assessing points under various risk factors for a total score within risk level two. The Board’s point assessment was supported by clear and convincing evidence of the applicable risk factors, thus rendering a presumptive risk level two designation (*see* Correction Law § 168-d[3]; *People v Pettigrew*, 14 NY3d 406, 408-409). The defendant was properly designated a “predicate sex offender” subject to lifetime registration based upon his previous convictions of sex offenses (Correction Law § 168-a[2], [7][c]; § 168-h[2]).

The defendant contends that the County Court erred in granting the People’s application, upon the recommendation of the Board, for an upward departure to risk level three. A court may exercise its discretion and depart upward from the presumptive risk level where “it concludes that there exists an aggravating . . . factor of a kind, or to a degree, that is otherwise not

November 9, 2011

Page 1.

adequately taken into account by the guidelines” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed.]). There must be clear and convincing evidence of the existence of the aggravating factor to warrant the court’s exercise of discretion (*see* Correction Law § 168-n[3]; *People v Wyatt*, ___ AD3d ___, 2011 NY Slip Op 07404 [2d Dept 2011]; *People v Walker*, 67 AD3d 760, 761). Contrary to the defendant’s contention, the People demonstrated by clear and convincing evidence the existence of an aggravating factor that was not adequately taken into account by the guidelines (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 14 [2006 ed.]) and, on the record presented, the Supreme Court providently granted the People’s application for an upward departure (*see People v Walker*, 67 AD3d at 761; *People v Hill*, 50 AD3d 990; *People v Agard*, 35 AD3d 568; *People v Hines*, 24 AD3d 524).

The defendant’s remaining contention is without merit.

ANGIOLILLO, J.P., BALKIN, DICKERSON and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court