

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

D33069
O/kmb

_____AD3d_____

Argued - November 4, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2010-09251

DECISION & ORDER

People of State of New York, respondent, v
Hezekiah Malloy, appellant.

Steven Banks, New York, N.Y. (Lorca Morello of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Linda Breen of counsel), for respondent.

Appeal by the defendant, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Tomei, J.), dated September 15, 2010, as, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and the defendant is designated a level two sex offender.

“A court has the discretion to depart from the presumptive risk level based upon the facts in the record, but a departure from the presumptive risk level is warranted only 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’” (*People v Riley*, 85 AD3d 1141, 1141, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed.]; see *People v Cohen*, 73 AD3d 1003, 1003-1004; *People v Lyons*, 72 AD3d 776). “Further, inasmuch as the risk assessment instrument will generally result in the proper classification, ‘departures will be the exception—not the rule’” (*People v Riley*, 85 AD3d at 1141, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed.]; see *People v Cohen*, 73 AD3d at 1004; *People v Lyons*, 72 AD3d at 776). There must be clear and convincing evidence of a special circumstance to warrant an upward departure from the presumptive risk level (see *People v Wyatt*, ___ AD3d ___, ___ 2011 NY Slip Op 07404 [2d Dept 2011]; *People v Cohen*, 73 AD3d at 1004; *People v Lyons*, 72 AD3d at 776).

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Here, the only factor identified by the Supreme Court in support of its upward departure from the defendant's presumptive risk level two designation was the existence of a report of a child protective services agency of a prior uncharged allegation, which report had been deemed unfounded by the agency. Inasmuch as the report had been deemed unfounded, meaning that no credible evidence supported it (*see* Social Services Law § 412[7]), the Supreme Court's upward departure to a level three designation was not supported by clear and convincing evidence of an aggravating factor not adequately taken into account by the risk assessment instrument (*see People v Coffey*, 45 AD3d 658, 659; *People v Miranda*, 24 AD3d 909, 911). Accordingly, the defendant should have been designated a level two sex offender.

MASTRO, J.P., FLORIO, LOTT and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court