

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

D33151  
C/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - November 10, 2011

MARK C. DILLON, J.P.  
DANIEL D. ANGIOLILLO  
ANITA R. FLORIO  
THOMAS A. DICKERSON, JJ.

2010-08612

DECISION & ORDER

People of State of New York, respondent, v  
Kenneth Reynolds, appellant.

Marianne Karas, Armonk, N.Y., for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Jason R. Richards of counsel;  
Jonathan G. Krug on the brief), for respondent.

Appeal by the defendant from an order of the County Court, Nassau County (Calabrese, J.), entered August 11, 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.

At the initial hearing to determine the defendant's risk level pursuant to the Sex Offender Registration Act (*see* Correction Law article 6-C [hereinafter SORA]), the County Court designated the defendant a level three sex offender based on a presumptive override for a prior felony conviction of a sex crime, holding that the override resulted in a "mandatory" level 3 designation. On the appeal from that order, this Court reversed and remitted to the County Court for a new hearing and determination, affording the defendant an opportunity to present mitigating circumstances in support of an application for downward departure (*see People v Reynolds*, 68 AD3d 955, 956). Upon remittal, the defendant presented evidence and arguments in support of an application for a downward departure to risk level two. The County Court determined that the defendant failed to establish a mitigating factor warranting the departure and designated him a level three sex offender. We affirm.

December 6, 2011

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Contrary to the defendant's contention, the County Court applied the correct standard in considering his application for a downward departure (*see People v Wyatt*, \_\_\_ AD3d \_\_\_, 2011 NY Slip Op 07404, \*8 [2d Dept 2011]). The defendant failed to satisfy the threshold condition of identifying an appropriate mitigating factor which tends to establish a lower likelihood of his reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines (*id.* at \_\_\_; *see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* at 4 [2006 ed.]). Further, the defendant's prior conviction of a felony sex crime was properly used as both an override factor and as a basis upon which to add 30 points for risk factor nine on the risk assessment instrument (*see e.g. People v Gilbert*, 78 AD3d 1584, 1585; *People v Barrier*, 58 AD3d 1086, 1087).

The defendant's contention that the County Court unfairly precluded his father from addressing the court after it had rendered its determination at the SORA hearing is unpreserved for appellate review (*see People v Windham*, 10 NY3d 801, 802), and in any event, is without merit. The court did not deny the defendant his right to present relevant evidence at the hearing (*see Correction Law* § 168-n[3]).

The defendant was afforded meaningful representation at the SORA hearing (*see People v Baldi*, 54 NY2d 137, 147; *People v Bowles*, \_\_\_ AD3d \_\_\_, \_\_\_, 2011 NY Slip Op 07826, \*5 [2d Dept 2011]).

DILLON, J.P., ANGIOLILLO, FLORIO and DICKERSON, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court