

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

D33448
H/ct

_____AD3d_____

Submitted - December 12, 2011

DANIEL D. ANGIOLILLO, J.P.
PLUMMER E. LOTT
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2010-07401

DECISION & ORDER

People of State of New York, respondent,
v Juan Gonzalez, appellant.

Lynn W. L. Fahey, New York, N.Y. (William Kastin of counsel; Emma Brown-Bernstein on the brief), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Anthea H. Bruffee, and Adam M. Koelsch of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Brennan, J.), dated June 28, 2010, which, after a hearing, designated him a level two sex offender and a sexually violent offender pursuant to Correction Law article 6-C.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for a new risk level assessment hearing and a new determination thereafter, to be preceded by notice to the defendant in accordance with Correction Law § 168-d(3).

A sex offender facing risk level classification under the Sex Offender Registration Act (Correction Law art 6-C; hereinafter SORA) has a due process right to be present at the hearing (*see People v David W.*, 95 NY2d 130, 133; *People v Arrahman*, 83 AD3d 680; *People v Gonzalez*, 69 AD3d 819). “To establish whether a defendant, by failing to appear at a SORA hearing, has waived the right to be present, evidence must be shown that the defendant was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his or her absence” (*People v Arrahman*, 83 AD3d at 680, quoting *People v Porter*, 37 AD3d 797, 797).

Here, the record contains no evidence that the defendant received notice of the hearing date. Thus, as the People correctly concede, the defendant’s due process rights were

December 27, 2011

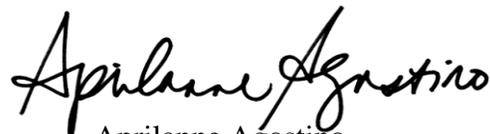
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violated, and the matter must be remitted to the Supreme Court, Kings County, for a new risk level assessment hearing and a new determination thereafter, to be preceded by notice to the defendant in accordance with Correction Law § 168-d(3) (*see People v Arrahman*, 83 AD3d at 680; *People v Distaffen*, 71 AD3d 1597, 1598; *People v Gonzalez*, 69 AD3d 819).

The defendant's remaining contention is not properly before this Court, since he failed to raise it before the Supreme Court.

ANGIOLILLO, J.P., LOTT, AUSTIN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court