

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

D32565
G/prt

_____AD3d_____

Submitted - September 30, 2011

WILLIAM F. MASTRO, A.P.J.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2009-08708

DECISION & ORDER

People of State of New York, respondent,
v Manuel Fernandez, appellant.

Lynn W. L. Fahey, New York, N.Y. (Lisa Napoli of counsel), for appellant.

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

Appeal by the defendant from an order of the Supreme Court, Kings County (Firetog, J.), dated September 10, 2009, which, after a hearing, designated him a sexually violent offender and a level two sex offender pursuant to Correction Law article 6-C.

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

The defendant contends that the Supreme Court erred in denying his request for a downward departure from his presumptive level two risk assessment.

A downward departure from the presumptive risk level is generally only warranted where there exists a mitigating factor of a kind, or to a degree, that is not otherwise adequately taken into account by the Sex Offender Registration Act (hereinafter SORA) Guidelines (*see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* at 4 [2006 ed]; *People v Martin*, _____ AD3d _____, 2011 NY Slip Op 09105 [2d Dept 2011]). Here, the factor upon which the defendant relied to support his request for a downward departure was his participation in a sex offender treatment program. However, the record before us in this case establishes that the defendant failed to demonstrate the existence of any special circumstances not adequately taken into account by the SORA Guidelines (*see People v Wyatt*, 89 AD3d 112, 129-130, *lv denied* _____ NY3d

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_____, 2012 NY Slip Op 60595 [2012]; cf. *People v Migliaccio*, _____ AD3d _____, 2011 NY Slip Op 09296 [2d Dept 2011]).

The defendant's contention that several other factors warrant a downward departure is unpreserved for appellate review, as he failed to raise these factors at the SORA hearing (*see People v Spring*, 83 AD3d 1028; *People v Iorio*, 74 AD3d 1306, 1307; *People v Moore*, 16 AD3d 190, 190-191). In any event, the defendant's contention is without merit.

Accordingly, the Supreme Court correctly denied the defendant's request for a downward departure.

MASTRO, A.P.J., ANGIOLILLO, BELEN and LOTT, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court