

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

D33596
W/K/mv

_____AD3d_____

Submitted - April 12, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
PLUMMER E. LOTT
LEONARD B. AUSTIN, JJ.

2010-04060

DECISION & ORDER ON MOTION

People of State of New York, respondent,
v Ruben Martinez, appellant.

Motion by the appellant for leave to reargue an appeal from an order of the County Court, Suffolk County, dated March 23, 2010, which was determined by decision and order of this Court dated May 10, 2011.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted and, upon reargument, the decision and order of this Court dated May 10, 2011, is recalled and vacated, and the following decision and order is substituted therefor:

Robert C. Mitchell, Riverhead, N.Y. (James H. Miller III of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Edward A. Bannan of counsel), for respondent.

Appeal by the defendant from an order of the County Court, Suffolk County (Kahn J.), dated March 23, 2010, which, after a hearing pursuant to Correction Law article 6-C, designated him a level three sex offender.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the County Court, Suffolk County, for further proceedings consistent herewith.

February 28, 2012

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Inasmuch as the County Court held, as a legal matter, that sex offender treatment is adequately taken into account in the Sex Offender Registration Act Risk Assessment Guidelines, it did not assess whether the defendant's response to treatment was exceptional and, if so, whether, as a discretionary matter, a downward departure from his presumptive risk level was appropriate (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006 ed]). We therefore remit the matter to the County Court, Suffolk County, for the court to make that assessment, on the existing record, and, in the event the County Court determines that the defendant's response to treatment was exceptional, to determine whether, in the court's discretion, a downward departure is warranted. We express no opinion as to either issue.

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

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court