

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

D33748
G/kmb

_____AD3d_____

Submitted - January 9, 2012

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2010-11431

DECISION & ORDER

People of State of New York, respondent,
v Tracy J. Henry, appellant.

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

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

Appeal by the defendant, as limited by his brief, from so much of an order of the County Court, Suffolk County (Kahn, J.), dated October 28, 2010, as, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

“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 factor or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [Sex Offender Registration Act (hereinafter SORA)] guidelines’” (*People v Riley*, 85 AD3d 1141, 1141, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed.]; see Correction Law art 6-C; *People v Cohen*, 73 AD3d 1003, 1004; *People v Lyons*, 72 AD3d 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*, 89 AD3d 112, 120, *lv denied* _____NY3d_____, 2012 NY Slip Op 60595 [2012]; *People v Cohen*, 73 AD3d at 1004; *People v Lyons*, 72 AD3d at 776).

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Here, the underlying crime involved the defendant and another man kidnapping the victim at gunpoint, handcuffing her, and driving her for hours to a remote location where they took turns raping her before holding her for hours longer in captivity until she jumped into a river to escape. Under the circumstances, contrary to the defendant's contention, the County Court properly determined that there were aggravating factors not adequately taken into account by the SORA guidelines (*see People v Ray*, 86 AD3d 435; *People v Rios*, 57 AD3d 501, 502; *People v Miller*, 48 AD3d 774, 774-775; *People v Joslyn*, 27 AD3d 1033, 1034-1035). Upon making such a determination, the County Court providently exercised its discretion in granting the People's application for an upward departure (*see People v Wyatt*, 89 AD3d at 123).

RIVERA, J.P., ENG, LOTT and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court