

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

D34207
C/prt

_____AD3d_____

Submitted - February 14, 2012

MARK C. DILLON, J.P.
DANIEL D. ANGIOLILLO
ANITA R. FLORIO
JEFFREY A. COHEN, JJ.

2009-04297

DECISION & ORDER

People of State of New York, respondent,
v Albert Olin, appellant.

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

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

Appeal by the defendant from an order of the Supreme Court, Kings County (Dowling, J.), dated April 27, 2009, which, after a hearing, designated him a level three sexual predator pursuant to Correction Law article 6-C.

ORDERED that the order is modified, on the law, by deleting the provision thereof designating the defendant a sexual predator and substituting therefor provisions designating the defendant a sexually violent offender and a predicate sex offender; as so modified, the order is affirmed, without costs or disbursements.

The only proper procedural vehicle for challenging a determination that an out-of-state conviction subjects an offender to the registration requirements of the Sex Offender Registration Act (*see* Correction Law art 6-C) is a CPLR article 78 proceeding against the Board of Examiners of Sex Offenders (*see People v Reitano*, 68 AD3d 954; *People v Teagle*, 64 AD3d 549, 550). Accordingly, on this appeal from the Supreme Court's order designating the defendant a level three sexual predator, the defendant's contention that he should not have been required to register as a sex offender in New York based on a prior conviction in California is not properly before this Court (*see People v Reitano*, 68 AD3d at 954-955; *People v Teagle*, 64 AD3d at 550).

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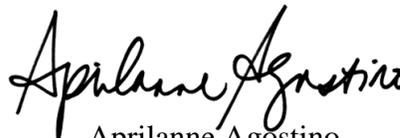
The People established, by clear and convincing evidence, that the defendant had previously been convicted of a felony sex offense. Therefore, he was presumptively a level three sexually violent offender pursuant to an automatic override addressing prior felony convictions for sex crimes, irrespective of the points scored on the risk assessment instrument (*see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, at 3–4 [2006 ed.]; *People v Carter*, 85 AD3d 995; *People v Fareira*, 80 AD3d 589, 590; *People v King*, 74 AD3d 1162, 1163).

“A departure from the presumptive risk level is warranted where ‘there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines’” (*People v Bussie*, 83 AD3d 920, 920-921, quoting *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, at 4 [2006 ed.]; *see People v Alston*, 86 AD3d 553, 554). Here, the Supreme Court properly determined that the defendant was not entitled to a downward departure and, thus, properly designated the defendant a level three sex offender (*see People v Alston*, 86 AD3d at 554; *People v Flowers*, 35 AD3d 690, 691).

However, as the People correctly concede, the Supreme Court improperly classified the defendant as a sexual predator rather than a sexually violent offender and a predicate sex offender. Therefore, we modify the order accordingly.

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

ENTER:



Aprilanne Agostino
Clerk of the Court