

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

D54885
N/hu

_____AD3d_____

Submitted - December 8, 2017

WILLIAM F. MASTRO, J.P.
SHERI S. ROMAN
SANDRA L. SGROI
JEFFREY A. COHEN, JJ.

2016-09690

DECISION & ORDER

People of State of New York, respondent, v
Christopher Wustrau, appellant.

Del Atwell, East Hampton, NY, for appellant.

William V. Grady, District Attorney, Poughkeepsie, NY (Kirsten A. Rappleyea of
counsel), for respondent.

Appeal by the defendant from an order of the County Court, Dutchess County (Craig
Stephen Brown, J.), dated September 8, 2016, which, after a hearing, designated him a level two sex
offender pursuant to Correction Law article 6-C.

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

The County Court properly denied the defendant's application for a downward
departure to a risk level one designation. A defendant seeking a downward departure from the
presumptive risk level has the initial burden of "(1) identifying, as a matter of law, an appropriate
mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger
to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account
by the [Sex Offender Registration Act (hereinafter SORA)] Guidelines; and (2) establishing the facts
in support of its existence by a preponderance of the evidence" (*People v Wyatt*, 89 AD3d 112, 128;
see People v Gillotti, 23 NY3d 841, 861; *see also* Sex Offender Registration Act: Risk Assessment
Guidelines and Commentary at 4 [2006]). Here, the circumstances identified by the defendant did
not constitute appropriate mitigating factors because they either did not tend to establish a lower
likelihood of reoffense or were adequately taken into account by the SORA Guidelines (*see People*
v MacCoy, 155 AD3d 897, 898; *People v Robinson*, 145 AD3d 805, 806; *People v Torres*, 124
AD3d 744, 745-746).

March 28, 2018

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“A sex offender facing risk level classification under SORA has a right to the effective assistance of counsel” (*People v Roache*, 110 AD3d 776, 777; see *People v Willingham*, 101 AD3d 979, 980; *People v Bowles*, 89 AD3d 171, 179-180). Here, contrary to the defendant’s contention, the record, viewed in totality, demonstrates that he was afforded the effective assistance of counsel (see *People v Roache*, 110 AD3d at 777; cf. *People v Willingham*, 101 AD3d at 980).

MASTRO, J.P., ROMAN, SGROI and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court