

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

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_____AD3d_____

Submitted - February 13, 2018

ALAN D. SCHEINKMAN, P.J.
COLLEEN D. DUFFY
FRANCESCA E. CONNOLLY
LINDA CHRISTOPHER, JJ.

2014-02092

DECISION & ORDER

People of State of New York, respondent,
v Elijah Hesterbey, appellant.

Seymour W. James, Jr., New York, NY (Denise Fabiano of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove and Jean M. Joyce
of counsel; Ruby D. Andrade on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Guy James Mangano, Jr., J.), dated March 4, 2014, which, after a hearing, designated the defendant a level two sex offender pursuant to Correction Law article 6-C.

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

At a hearing pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C; hereinafter SORA), the defendant was assessed 100 points under the Risk Assessment Instrument, which placed him within the range for a presumptive level two designation.

The defendant contends that the Supreme Court improvidently exercised its discretion in denying his request for a downward departure from the presumptive risk level.

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*

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Gillotti, 23 NY3d 841, 861; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]).

Under the circumstances of this case, a downward departure was not warranted, as none of the factors proffered by the defendant, either singly or in combination with each other, showed that the presumptive risk level overassessed the risk of danger of reoffense (*see People v Torres*, 124 AD3d 744, 745-746; *People v Cabrera*, 91 AD3d 479, 480). Accordingly, the Supreme Court properly denied the defendant's request for a downward departure from the presumptive risk level.

SCHEINKMAN, P.J., DUFFY, CONNOLLY and CHRISTOPHER, 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