

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

D55849  
T/htr

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - February 23, 2018

WILLIAM F. MASTRO, J.P.  
JOHN M. LEVENTHAL  
BETSY BARROS  
VALERIE BRATHWAITE NELSON, JJ.

---

2016-11228

DECISION & ORDER

People of State of New York, respondent,  
v Frank Pollaro, appellant.

---

Richard B. Stafford, Bohemia, NY, for appellant.

Timothy D. Sini, District Attorney, Riverhead, NY (Michael J. Brennan of counsel),  
for respondent.

Appeal by the defendant from an order of the County Court, Suffolk County (Barbara Kahn, J.), dated September 20, 2016, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the defendant is designated a level one sex offender.

On November 19, 2009, the defendant was arrested by federal law enforcement officials and charged with, inter alia, possession of child pornography. In 2011, in the United States District Court for the Eastern District of New York, the defendant entered a plea of guilty to one count of possession of child pornography. Thereafter, the New York State Board of Examiners of Sex Offenders (hereinafter the Board) evaluated the defendant for registration as a sex offender by preparing a risk assessment instrument and case summary. The defendant's score on the risk assessment instrument fell within the range of a level one sex offender. However, the Board recommended an upward departure to a level two designation. After a hearing to determine the defendant's risk level, the County Court granted the People's application for an upward departure, and designated the defendant a level two sex offender. The defendant appeals.

Contrary to the County Court's determination, the People failed to prove the existence of the claimed aggravating circumstances by clear and convincing evidence (*see People v Gillotti*,

June 27, 2018

Page 1.

23 NY3d 841, 862). In any event, the court should have refused to depart since, under the totality of the circumstances, to adjudicate the defendant as a level two sex offender would over-assesses the defendant's dangerousness and risk of sexual recidivism (*see id.* at 861).

In light of our determination, we need not reach the defendant's remaining contention.

MASTRO, J.P., LEVENTHAL, BARROS and BRATHWAITE NELSON, JJ., concur.

ENTER:

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

Aprilanne Agostino  
Clerk of the Court