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

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_____AD3d_____ Submitted - March 27, 2018

CHERYL E. CHAMBERS, J.P.
LEONARD B. AUSTIN
ROBERT J. MILLER
JOSEPH J. MALTESE, JJ.

2017-06021 DECISION & ORDER

People of State of New York, respondent,
v Kevin C. Whitney, appellant.

Paul Skip Laisure, New York, NY (Meredith S. Holt of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, and Merri Turk Lasky of counsel; Victoria Randall on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Queens County (Stephanie Zaro, J.), dated May 15, 2017, 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 defendant was convicted, upon his plea of guilty, of promoting a sexual performance by a child. After a hearing pursuant to the Sex Offender Registration Act (Correction Law article 6-C; hereinafter SORA), the defendant was designated a level two sex offender based on the assessment of a total of 80 points on a risk assessment instrument completed by the People, under risk factors 3 (number of victims), 5 (age of victims), and 7 (victims were strangers).

The defendant failed to demonstrate that he was entitled to a downward departure due to mitigating circumstances. A number of factors he relied upon had already been taken into account by the SORA guidelines (*see* SORA: Risk Assessment Guidelines and Commentary [2006]; *People v Santiago*, 137 AD3d 762, 764).

Further, the defendant failed to demonstrate by a preponderance of the evidence that

he exhibited an exceptional response to sex offender treatment warranting a downward departure from the presumptive risk level (*see People v Santiago*, 137 AD3d at 764; *People v Dyson*, 130 AD3d 600, 600-601; *People v Torres*, 124 AD3d 744, 746; *People v Jackson*, 114 AD3d 739, 739-740). The defendant also failed to demonstrate by a preponderance of the evidence that his age, 43 years old at the time of his SORA hearing, constituted a basis for a downward departure. The studies relied upon by the defendant constituted inadmissible hearsay evidence, as they were not admitted into evidence at the hearing either through the testimony of an expert or through the cross-examination of an expert witness (*see* Jerome Prince, Richardson on Evidence § 7-312 at 477-478 [Farrell 11th ed.]; *see also People v Santiago*, 137 AD3d at 765).

Finally, although in some cases involving child pornography the assessment of points under risk factors 3 and 7 may result in an overassessment of a defendant's risk to public safety (*see People v Gillotti*, 23 NY3d 841, 858-860; *People v Johnson*, 11 NY3d 416, 421), a downward departure is not warranted under the circumstances of this case (*see People v Young*, 152 AD3d 628; *People v Rossano*, 140 AD3d 1042, 1043).

Accordingly, we agree with the Supreme Court's determination denying the defendant's application for a downward departure from the presumptive risk level.

CHAMBERS, J.P., AUSTIN, MILLER and MALTESE, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court