

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

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Submitted - April 5, 2018

WILLIAM F. MASTRO, J.P.  
REINALDO E. RIVERA  
LEONARD B. AUSTIN  
HECTOR D. LASALLE, JJ.

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2016-06558

DECISION & ORDER

People of State of New York, respondent,  
v McKiever Garner, appellant.

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The Legal Aid Society, New York, NY (Bonnie C. Brennan of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Morgan J. Dennehy, and Daniel Berman of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Michael J. Brennan, J.), dated May 17, 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.

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]). If the defendant makes that twofold showing, the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an over-assessment of the defendant’s dangerousness and risk of sexual recidivism (*see People v Gillotti*, 23 NY3d at 861; *People v Champagne*, 140 AD3d 719, 720).

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The defendant argues that the victim's lack of consent was due only to an inability to consent by virtue of her age. "The Board [of Examiners of Sex Offenders] or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [under risk factor 2 of the risk assessment instrument] results in an over-assessment of the offender's risk to public safety" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 9 [2006]; see *People v Anderson*, 137 AD3d 988). Here, a downward departure is not warranted on this ground considering, among other things, the age disparity between the then 19-year-old defendant and the then 11-year-old victim (see *People v Quirindongo*, 153 AD3d 863, 863-864; *People v Anderson*, 137 AD3d at 988; *People v Fryer*, 101 AD3d 835, 836). Moreover, none of the other factors alleged by the defendant warrant a downward departure from the presumptive risk level.

The defendant's remaining contention is without merit.

Accordingly, we agree with the Supreme Court's determination denying his request for a downward departure from the presumptive risk level and designating him a level two sex offender.

MASTRO, J.P., RIVERA, AUSTIN and LASALLE, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court