

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

D56659  
G/htr

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Submitted - April 30, 2018

RUTH C. BALKIN, J.P.  
ROBERT J. MILLER  
VALERIE BRATHWAITE NELSON  
LINDA CHRISTOPHER, JJ.

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2017-01664

DECISION & ORDER

People of State of New York, respondent,  
v Edmund Reed, appellant.

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Laurette D. Mulry, Riverhead, NY (Kirk R. Brandt of counsel), for appellant.

Timothy D. Sini, District Attorney, Riverhead, NY (Rosalind C. Gray of counsel),  
for respondent.

Appeal by the defendant from an order of the County Court, Suffolk County (Barbara Kahn, J.), dated January 6, 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.

In this proceeding pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C; hereinafter SORA), the County Court assessed the defendant 95 points on the risk assessment instrument (hereinafter RAI), within the range for a presumptive designation as a level two sex offender. The court denied the defendant's request for a downward departure, and designated him a level two sex offender. On appeal, the defendant challenges only the denial of his request for a downward departure.

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 [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* SORA: 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).

The defendant failed to identify the existence of any such mitigating factor (*see People v Young*, 158 AD3d 829, 830). Accordingly, we agree with the County Court's determination to deny the request for a downward departure and to designate the defendant a level two sex offender.

BALKIN, J.P., MILLER, BRATHWAITE NELSON and CHRISTOPHER, JJ., concur.

ENTER: 

Aprilanne Agostino  
Clerk of the Court