

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

D57222
L/htr

_____AD3d_____

Submitted - May 29, 2018

RUTH C. BALKIN, J.P.
LEONARD B. AUSTIN
HECTOR D. LASALLE
ANGELA G. IANNACCI, JJ.

2016-11126

DECISION & ORDER

People of State of New York, respondent,
v James Braxdton, appellant.

Paul Skip Laisure, New York, NY (Caitlin Halpern 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 (Michael J. Brennan, J.), dated October 19, 2016, which, after a hearing, designated him a level three 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 Supreme Court assessed the defendant 115 points on the risk assessment instrument, within the range for a presumptive designation as a level three sex offender. The court denied the defendant's request for a downward departure, and it designated him a level three 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* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). If the defendant makes

November 7, 2018

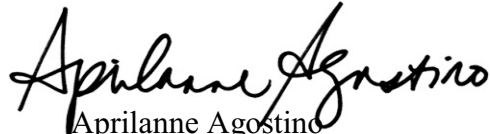
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that twofold showing, the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an over-assessment of the defendant's dangerousness and risk of sexual recidivism (*see People v Gillotti*, 23 NY3d at 861; *People v Champagne*, 140 AD3d 719, 720). Here, the defendant failed to identify the existence of any such mitigating factor (*see People v Curry*, 158 AD3d 52, 61-62). Accordingly, the Supreme Court lacked the discretion to downwardly depart, and we agree with its determination to deny the defendant's request for a downward departure (*id.* at 62).

BALKIN, J.P., AUSTIN, LASALLE and IANNACCI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court