

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

D57707
Q/htr

_____AD3d_____

Submitted - November 28, 2018

REINALDO E. RIVERA, J.P.
SANDRA L. SGROI
SYLVIA O. HINDS-RADIX
LINDA CHRISTOPHER, JJ.

2014-05793

DECISION & ORDER

People of State of New York, respondent,
v Billy Dixon, appellant.

The Legal Aid Society, New York, NY (Steven J. Miraglia of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove and Jean M. Joyce of counsel; Javon Henry on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Elizabeth Foley, J.), dated May 27, 2014. The order, 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 Supreme Court assessed the defendant 105 points on the risk assessment instrument, within the range for a presumptive designation as a level two sex offender. The court denied the defendant's request for a downward departure from his presumptive risk level, and designated him a level two sex offender. On appeal, the defendant challenges the denial of his request for a downward departure.


A defendant seeking a downward departure from a 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 or factors to determine whether the totality of the circumstances warrants a departure to avoid an overassessment 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 Supreme Court's denial of the defendant's request for a downward departure from his presumptive risk level.

RIVERA, J.P., SGROI, HINDS-RADIX and CHRISTOPHER, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court