

**People v Liston**

2000 NY Slip Op 30006(U)

November 22, 2000

Sup Ct, Kings County

Docket Number: 6457-2009

Judge: Jr., Guy J. Mangano

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM: PART 13  
-----X  
PEOPLE OF THE STATE OF NEW YORK

Decision and Order  
Indictment No: 6457-2009

Joshua E. Horowitz, Esq.  
For the Defendant

-against-

James Magee, Esq.  
Assistant District Attorney  
For the People

ALEXIS LISTON  
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Hon. Guy J. Mangano, Jr.  
Dated: November 22, 2011

By notice of motion dated May 20, 2011, the People petition this Court for an order pursuant to Correction Law § 168-o (3), to upwardly modify defendant’s sexual offender risk level status from Level I to Level II.

**FINDINGS OF FACT**

The facts in this matter are gleaned from the court’s file, as well as the sworn testimony adduced at the trial presided over by this Court from March 29, 2011 to April 5, 2011.

On February 19, 1999, defendant pled guilty to one count of Sexual Abuse in the First Degree (Penal Law § 130.65) and one count of Endangering the Welfare of a Child (Penal Law § 260.10) under Indictment Number 10217-1998. The charges in that case alleged a two year sexual relationship between defendant and his younger half-sister, from September 1996 to September 1998, when defendant was between 16 and 18 years old and the victim was between 7 and 9 years old. Defendant repeatedly forced the victim to have sexual intercourse, as well as oral and anal sex. After each offense, defendant would threaten to kill the victim if she divulged the relationship to anyone. In October 1998, the victim informed her mother about defendant’s conduct and defendant was arrested and ultimately charged with two counts of Rape in the First Degree (Penal Law §

130.35), four counts of Course of Sexual Conduct Against a Child (Penal Law § 130.75), one count of Incest in the Third Degree (Penal Law § 255.25), two counts of Sexual Abuse in the First Degree (Penal Law § 130.65) and four counts of Endangering the Welfare of a Child (Penal Law § 260.10). Defendant admitted his guilt to one count of Sexual Abuse in the First Degree and one count of Endangering the Welfare of a Child, and he ascribed his motivation as a way of striking back at his father and stepmother. He was sentenced to six months of incarceration and five years of probation, and adjudicated as a Level I sex offender pursuant to section 168-n of the Correction Law (Sex Offender Registration Act [SORA]).

Defendant's additional contact with the criminal justice system includes a November 16, 2000 conviction for Criminal Possession of Burglar's Tools (Penal Law § 140.35), for which he received a sentence of ten days in jail. On January 12, 2001, defendant was convicted of Criminal Mischief in the Fourth Degree (Penal Law § 145.00) and was sentenced to one year of incarceration. Defendant was thereafter convicted of Criminal Possession of Stolen Property in the Third Degree (Penal Law § 165.50) on January 29, 2002, and sentenced to 1 ½ to 3 years of incarceration. On March 5, 2007, defendant was again convicted of Criminal Mischief in the Fourth Degree (Penal Law § 145.00) and sentenced to time served, and on November 20, 2007, he was convicted of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (Vehicle and Traffic Law § 511 [1]) and sentenced to a conditional discharge and a \$500 fine.

In the instant matter, defendant was charged with five counts of Rape in the Third Degree (Penal Law § 130.35), sixteen counts of Sexual Misconduct (Penal Law § 130.20), eleven counts of Criminal Sexual Act in the Third Degree (Penal Law § 130.40), nineteen counts of Sexual Abuse in the Third Degree (Penal Law § 130.55) and one count of Endangering the Welfare of a Child

(Penal Law § 260.10). These charges stem from then 29 year old defendant's "consensual" sexual relationship with the 16 year old victim, Shonda Blanks. It was alleged by the People that from March through July, 2009, defendant engaged in sexual intercourse, as well as oral and anal sex with the minor victim. Defendant was arrested after the victim outcried to a family friend who notified the victim's father of the relationship. After a jury trial presided over by this Court, defendant was found guilty on April 5, 2011, of Endangering the Welfare of a Child, a Class A Misdemeanor, and acquitted of all the felony sex crimes. Defendant has not yet been sentenced in this matter.

On April 7, 2011, Shonda Blanks, the victim in this matter, received text messages from an unknown telephone number asking her to call that number. According to the People's moving papers, after receiving several text messages from the unidentified person, Ms. Blanks called the number and defendant answered the phone. Defendant told Ms. Blanks that he still had feelings for her and what he said in court was a lie. On April 19, 2011, at approximately 2:00 a.m., Ms. Blanks received two additional text messages from defendant which stated:

Shonda just tell me if you do not want to ever talk to me again yes or no because I love you and I need to know please.  
Alex

and

Or of you have another boy friend just say so and I will never text or call you again if that is what you want just say so. maybe if I could explain.  
Alex

The victim reported the contact to the assigned assistant District Attorney, James Magee, who advised her to file a criminal complaint with the 75<sup>th</sup> Police Precinct. Based upon the complaint, defendant stands charged with one count of Criminal Contempt in the First Degree (Penal Law §

215.51), a Class E Felony, as well as one count of Criminal Contempt in the Second Degree (Penal Law § 215.50), two counts of Aggravated Harassment in the Second Degree (Penal Law § 240.30), Class A Misdemeanors, and one count of Harassment in the Second Degree (Penal Law § 240.26), a violation.

Upon receipt of the People's motion, this Court forwarded same to the Board of Examiners of Sex Offenders for the State of New York. By letter dated August 25, 2011, a Board Examiner interposed a response which supported the recommendation by the district attorney that defendant's risk assessment level be raised from Level I to Level II designation. Of note in the Board's response was its reference to a clinical evaluation of defendant which was completed on February 9, 1999, just prior to his sentencing for the sex crimes against his step-sister, at the Forensic Psychiatry Clinic for the Criminal and Supreme Courts, indicating that defendant had an anti-social personality disorder. The evaluation opined that defendant's inappropriate sexual behavior appeared to have been motivated by anger as opposed to a pathological attraction to young girls. Defendant appeared to lack genuine remorse for his action and his lengthy criminal record validated the personality disorder diagnosis.

#### **CONCLUSIONS OF LAW**

Pursuant to section 168-o(3) of the Correction Law,

[t]he district attorney may file a petition to modify the level of notification for a sex offender with the sentencing court . . . where the sex offender (a) has been convicted of a new crime, or there has been a determination after a proceeding pursuant to section 410.70 of the criminal procedure law or section two hundred fifty-nine-I of the executive law that the sex offender has violated one or more conditions imposed as part of a sentence of a conditional discharge, probation, parole or post-release supervision for a designated crime, and (b) the conduct underlying the new crime or the violation is of a

nature that indicates an increased risk of a repeat sex offense.

While the People reference the text messages made by defendant to the victim after the trial as a consideration for warranting upward modification, defendant has not yet been sentenced in the instant matter and therefore cannot legally violate a condition of sentence as contemplated by the statute. However, while this Court will not consider this subsequent communication with the victim, by virtue of the fact that defendant has been convicted of a new crime, this Court may entertain the People's application for upward modification.

To upwardly modify a sex offender's risk assessment level, the People bear the burden of proof by clear and convincing evidence that the underlying conduct of the new crime is of a nature that indicates an increased risk of recidivist behavior (see People v Wyatt, \_\_\_ AD3d \_\_; 931 NYS2d 85; People v Turpeau, 68 AD3d 1083, lv denied 14 NY3d 705; see also People v Greene, 83 AD3d 1304, lv denied 17 NY3d 706). Both the People and the Court must adhere to the statutory scheme set forth in section 168-o (3) and (4) of the Correction Law, including the requirements that the People file a petition with the Court, which the Court forwards to the Board of Examiners of Sex Offenders for that body's "recommendation pertaining to the sex offender," and the Court conducts an evidentiary hearing to determine the petition (see People v Damato, 58 AD3d 819).

Based upon the foregoing, the People and this Court correctly followed the statutory requirements for upward modification of defendant's sex offender risk level status. Moreover, since "[f]acts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence" (Correction Law § 168-n[3]; see also People v Wyatt, supra; People v Wright, 78 AD3d 1437, lv denied 11 NY3d 710; People v Rollins, 33 AD3d 398,

lv denied 8 NY3d 803), the need for any further evidentiary hearings is vitiated. This Court presided over the trial and heard all of the evidence. In finding defendant guilty of endangering the welfare of a child, the jury was satisfied beyond a reasonable doubt that defendant engaged in inappropriate physical contact with the then minor victim. While there is a gap in between defendant's first sexually offending criminal conduct and the instant matter, defendant spent a significant amount of that time incarcerated due to his six criminal convictions. Finally, despite the fact that this conviction does not qualify as a registerable sex offense (see Correction Law § 168-a [2] ), the nature of the underlying conduct toward the victim is sufficient to establish, by clear and convincing evidence (see Correction Law § 168-o [3] ), that defendant is at an increased risk of recidivism (see People v Green, supra). Defendant has demonstrated an inability to conform his behavior to society's laws and has re-offended sexually, despite previous detention and sanctions.

Accordingly, the People's petition is granted and defendant's Sex Offender Registration Act risk assessment status is hereby raised from Level I to Level II.

This shall constitute the Decision and Order of the Court.

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HON. GUY J. MANGANO, JR.  
JUSTICE OF THE SUPREME COURT