

**SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM PART K-6 - QUEENS COUNTY**

PRESENT:

HONORABLE ARTHUR J. COOPERMAN,

Justice

Ind. No.: 2617/90

THE PEOPLE OF THE STATE OF NEW YORK

Risk Level Assessment

- against -

RAY AGARD

Defendant

Laura Johnson, Esq.
For the Defendant

Lucinda Suarez, Esq., ADA
For the People

Upon the foregoing papers, and in the opinion of the Court herein, the defendant is assessed a Risk Level Two.

See accompanying memorandum decision attached hereto.

ARTHUR J. COOPERMAN, J.S.C.

DATE: January 13, 2005

MEMORANDUM

SUPREME COURT, QUEENS COUNTY

CRIMINAL TERM, PART K6

THE PEOPLE OF THE STATE OF NEW YORK: BY Arthur J. Cooperman, JSC

against : **DATED** January 13, 2005

RAY AGARD

Defendant : **IND. NO.** 2617/90

This matter appears before the Court for a judicial determination of the appropriate risk level classification under the Sex Offender Registration Act (Correction Law, Article 6-c).

Defendant is scheduled to be released from incarceration on January 28, 2005, having served his sentence following his conviction for Sodomy in the First Degree and Criminal Possession of a Weapon in the Third Degree. That indeterminate sentence of 10 to 20 years was imposed by this Court on February 25, 1991.¹

The Board of Examiners of Sex Offenders submitted a Risk Assessment Instrument indicating a Risk Factor point total of **85** that places the defendant in a Level Two

¹ Defendant was at liberty for approximately one and a half years after the Court of Appeals, 2nd Circuit reversed his conviction (*Portuondo v. Agard*, 117 F. 3d 696). The U.S. Supreme Court reinstated his conviction (*Portuondo v. Agard*, 529 U.S. 61) and his incarceration resumed.

(moderate) category. The Board recommended an upward departure to Risk Level Three (high).

It should be noted, however, that “[t]he Court.... is not bound by the recommendation of the Board and, in the exercise of its discretion, may depart from the recommendation and determine the sex offender’s risk level based upon the facts and circumstances that appear in the record” (*Matter of New York State Board of Examiners of Sex Offenders v. Ransom*, 249 AD2d 891[4th Dep’t 1998]).

A proceeding was held before this Court.² The People had the burden of proof to support the proposed risk level assessment by clear and convincing evidence (*People v. Hitt*, 7 AD3d 813 [2d Dep’t 2004]; *People v. Smith*, 5 AD3d 752 [2d Dep’t 2004]). The parties disputed four specific risk factor values assessed by the Board, as follows:

Under I. “Current Offense,” subd. 1, “Use of Violence,” a **15** point value was assessed for “Inflicted Physical Injury.” The People contended that within that category, “Armed with a Dangerous Instrument” - totaling **30** points - should be considered as well, because a gun was used during the incident; or in the alternative, the possession of a gun should serve as a basis for an upward departure from the Risk Level assessed.

The offender argued that because he was acquitted of Criminal Possession of a Weapon in the Second Degree (possession with intent to use) the Board properly did not assess a value under the “Armed with a Dangerous Instrument” classification. Additionally,

² After having been given notice of his right to be present, defendant waived his appearance in writing.

it is contended that no gun was used at the time of the crime.

Under II. “Criminal History,” subd. 11, “Drugs or Alcohol Abuse,” no points were assessed. The People urged that the **15** point value for that factor should have been scored by reason of the victim’s apparent condition at the time of the crime. The defendant pointed out that under that category, the offender’s history is to be considered, not the victim’s.

Under I. “Current Offense,” subd. 7, “Relationship with Victim, Stranger or established for the purpose of victimizing or professional relationship,” the offender argued that since a consensual sexual relationship had existed one week previously, the **20** point value assessed by the Board was in error.

The People contended that the relationship that existed between the offender and the complainant was established for the purpose of victimizing her.

Under III. “Post-Offense Behavior,” subd. 12, “Acceptance of Responsibility,” a **10** point value was assessed for “not accepted responsibility.” Counsel for the offender disputed this assessment and submitted documents³ demonstrating the fact that he had successfully completed programs while incarcerated, and by doing so, he had to have accepted responsibility for his crimes. She also submitted studies regarding recidivism rates of sex offenders with respect to age.

³Letter from offender, dated September 30, 2004, and attachments.

The People contended that the completion of such programs did not establish that the offender had accepted responsibility.

The offender does not dispute the proposed **15** point assessment in category #1 for “inflicted physical injury;” the proposed **25** point assessment in category #2 for “sexual intercourse, deviate sexual intercourse or aggravated sexual abuse;” and the proposed **15** point assessment in category #9 for “prior history/non-violent felony.”

FINDINGS OF FACT

Putting aside at this juncture the issue whether “armed with a dangerous instrument” should be considered under the “use of violence” category, the Board’s finding of **15** points for “inflicted physical injury” is not in dispute, as such. Therefore, **15** points are assessed.

The failure of the Board to assess any points for “Drug or Alcohol Abuse” was appropriate. Nothing in the record indicated that the offender had a history of drug or alcohol abuse. (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary 1997 ed. at 14). Therefore, no points should be scored for this category.

The Board assessed a **20** point value based upon the offender’s relationship with victim. However, the uncontested evidence adduced at the trial demonstrated that one week prior to the crime, the parties engaged in consensual sex. Although the People contended that the relationship that existed between the offender and the complainant was established for the purpose of victimizing her, that is not supported by the record. Significantly, the Board’s summary in support of its findings erroneously stated that the first contact between the parties occurred on the night before the incident. This account

apparently served as the sole basis for the assessment of the **20** points. Under the circumstances, no points should have been scored under this category.

The Board's scoring of **10** points under the "not accepted responsibility" category is supported by the record. The Board's Summary presented with the Risk Assessment Instrument, reads as follows:

"Agard completed a sex offender counseling program while in NYSDOCS in November 2003, however, he later told his Correction Counselor that the sex was consensual. He also had brief correspondence with a Parole Officer in 2001, after he was interviewed for Parole Board preparation and regarding the instant offense. The Parole Officer had written that Agard stated he was not willing to attend a sex offender program if he had to admit that he committed the crime. He later objected to this documented statement and others, and indicated to the Parole Officer that he wanted certain statements taken out of his parole summary. He also wrote that he could not make an admission of guilt for something he did not do. He also wrote the Board of Examiners a letter, dated September 30, 2004, wherein he indicates that the victim admitted to using marijuana, alcohol and cocaine, as if to mitigate against the severity of the offense."

The arguments of counsel notwithstanding, the Board properly gave no credit for accepting responsibility.

CONCLUSIONS OF LAW

Based upon the foregoing findings of this Court, which are supported by clear and convincing evidence, the offender is assessed a total risk score of **65** points. That score places him in the Level One classification. However, a departure from the risk level is warranted where “there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed.]).

“There must exist clear and convincing evidence of the existence of special circumstance to warrant an upward or downward departure” (*People v. Guaman*, 8 AD 3d 545 [2d Dep’t 2004]). The Board based its recommendation for upward departure from its Risk Level Two finding upon the offender’s continued denial of guilt and his earlier criminal contacts. This Court, however, is satisfied that the offender’s conviction for gun possession in the apartment where the victim was subsequently sodomized on the same day represents an aggravating factor not otherwise adequately taken into account by the guidelines. Even accepting the argument that the jury did not find him guilty of possessing the gun with the intent to use it, he possessed it, in his apartment, and forcibly sodomized the victim.

This Court finds that an upward departure from Risk Level One to Risk Level Two is demonstrated by clear and convincing evidence.

The defendant is designated as a Risk Level Two offender. He is also a Sexually Violent Offender based upon his conviction for Sodomy in the First Degree, Penal Law §

130.50.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this memorandum and order to the attorney for the defendant and to the District Attorney.

ARTHUR J. COOPERMAN. J.S.C.