

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K6

THE PEOPLE OF THE STATE OF NEW YORK : BY: Arthur J. Cooperman, JSC
against :
WILSON BAILEY : DATED: April 8, 2005
Defendant : IND. NO.: 1785/1992

This matter appears before the Court for a judicial redetermination of the appropriate risk level classification under the Sex Offender Registration Act (Correction Law, Article 6-c) under a Consent Decree issued in *Doe v Pataki* (3 F. Supp. 2d 456 [S.D.N.Y.1998]).

Defendant was released from incarceration on August 5, 1999, having served his sentence following his conviction for Rape in the Third Degree, Sexual Abuse in the First Degree and Endangering the Welfare of a Child. The indeterminate consecutive sentence totaled 5 ½ to 11 years and was imposed by this Court on January 27, 1993.

Prior to defendant's release, the Board of Examiners of Sex Offenders submitted a Risk Assessment Instrument and Summary recommending a Risk Level Three (high) category.

"The court, however, is not bound by the recommendation of the Board and, in the exercise of its discretion may depart from that 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]).

However, on June 29, 1999, this Court agreed with the Board's recommendation

and assessed defendant at a Risk Level Three.

JUDICIAL REDETERMINATION HEARING

Pursuant to *Doe v Pataki*, a redetermination hearing was held before this Court on March 11, 2005.

The People contended that of the four possible overrides that would result in a presumptive Risk Level Three determination, one was applicable to this case: (1) prior felony conviction for a sex crime.

It was urged, therefore, that this circumstance would place the offender presumptively at a Risk Level Three.

Additionally, the People contended that even under the individual risk level assessment by points attributed to various risk level factors, Mr. Bailey would still reach a Risk Level Three category.

Counsel for the offender argued that irrespective of the Risk Level Three finding, a downward departure to a Risk Level Two was appropriate because Mr. Bailey had engaged in no further untoward behavior since his last conviction, except for a misdemeanor conviction, that he participated in programs, including a sex offender program and that he successfully completed parole.

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 burden then shifted to the offender to produce mitigating factors to support his request for a downward departure (*People v Guaman*, 8 AD3d 545 [2d Dep't 2004]).

The People's contentions were uncontroverted and a matter of record.

The Risk Assessment Instrument submitted by the Board of Examiners of Sex Offenders in 1999 indicated the existence of an override and therefore did not assess a point value for individual risk factors. The offender's prior felony conviction for a sex

crime constituted the basis for the override and the Risk Level Three determination at that time.

Although that Risk Assessment Instrument did not assess a point value, this Court, relying upon the record with respect to the offender's two felony convictions,¹ over which this Court presided, and the case summary submitted by the Board at the earlier determination² set forth the applicable point value determinations, as follows:

Under I. "Current Offense," subd. 1, "Use of Violence," a **10** point value was assessed for "Used Forcible Compulsion" (based upon the offender's conviction for Sexual Abuse in the First Degree, of which use of forcible compulsion was an element of the crime).

Under subd. 2, "Sexual Contact with Victim," a **10** point value was assessed for "Contact under clothing" (based upon the offender's conviction for Sexual Abuse in the First Degree, touching the victim's breast with his hand).

Under subd. 5, "Age of Victim," a **20** point value was assessed (because the victim was 14 years old).

Under subd. 7, "Relationship with Victim," a **20** point value was assessed for "Stranger or Established for Purpose of Victimizing" (offender picked up the victim on the street and enticed her to return home with him).

Under II. "Criminal History," subd. 9, "Number and Nature of Prior Crimes," a **30** point value was assessed for "Prior violent felony or misdemeanor sex crime" (offender had previous convictions in both categories).

Under subd. 10, "Recency of Prior Offense," a **10** point value was assessed for "Less than 3 years" (on April 29, 1991, defendant had been convicted of a class D

¹ Certificate of Convictions in both cases were submitted to the Court at the hearing.

² See, *People v Mitchell*, 300 AD2d 377 [2d Dep't 2002], *lv denied* 99 NY2d 510 [2003].

felony, Sexual Abuse in the First Degree, within three years of his second Sexual Abuse in the First Degree conviction).

Under III. "Post-Offense Behavior," subd.12, "Acceptance of Responsibility," a **10** point value was assessed for "not accepted responsibility" (this Court so found when he was sentenced on January 27, 1993).

CONCLUSION

Based upon the foregoing, which is supported by clear and convincing evidence, this Court assessed the offender a total risk score of **110** points, placing him in the Risk Level Three classification.

An override is applicable here. The offender was convicted following his guilty plea before this Court of Sexual Abuse in the First Degree, a felony sex crime, on May 17, 1991. This fact warrants a presumptive Risk Level Three assessment.

The only issue to be determined then, is whether a downward departure is appropriate here. "There must exist clear and convincing evidence of the existence of special circumstances to warrant an upward or downward departure" (*People v Guaman, supra*; see, *People v Hampton*, 300 AD2d 641 [2d Dep't 2002]; *People v Bottisti*, 285 AD2d 841 [3d Dep't 2001]).

To some extent, his participation in programs is a positive sign. However, the offender was incarcerated for much of the time since his last felony conviction. Additionally, he sustained another conviction, albeit a misdemeanor, since his release. He has been convicted of three separate sex crimes.³ Under all the circumstances, the offender has not demonstrated the existence of any factor that would warrant a downward departure.

This Court cannot find that a downward departure from Risk Level Three to Risk Level Two is established by clear and convincing evidence.

The defendant is designated as a Risk Level Three offender.

³ There was a conviction for sexual misconduct, a misdemeanor.

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.