

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 30, 2024

534073

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

JOHN STAMMEL,

Appellant.

Calendar Date: April 25, 2024

Before: Egan Jr., J.P., Aarons, Fisher, McShan and Mackey, JJ.

Stephen W. Herrick, Public Defender, Albany (James A. Bartosik Jr. of counsel),
for appellant.

P. David Soares, District Attorney, Albany (Erin N. LaValley of counsel), for
respondent.

Fisher, J.

Appeal from an order of the County Court of Albany County (Andra Ackerman, J.), rendered July 6, 2021, which classified defendant as a risk level three sex offender pursuant to the Sex Offender Registration Act.

In 2006, defendant pleaded guilty to the federal crime of transportation of child pornography and was sentenced to 210 months in prison followed by a lifetime of supervised release. In anticipation of his release from federal custody, the Board of Examiners of Sex Offenders prepared a risk assessment instrument (hereinafter RAI) that presumptively classified defendant as a risk level one sex offender. In so doing, the Board

assessed 30 points under risk factor 5 (age of victim) and sought an upward departure to a risk level two classification. The People submitted their own RAI assessing an additional 30 points under risk factor 3 (number of victims) and an additional 20 points under risk factor 7 (relationship to victim). Although the cumulative score (80 points) resulted in a presumptive risk level two classification, the People sought an override to a risk level three classification based upon defendant being diagnosed with pedophilia or, in the alternative, an upward departure to a risk level three classification.

At the ensuing hearing, defendant challenged only the points assessed under risk factors 3 and 7 and, failing that, sought a downward departure to a risk level one classification. County Court upheld the 80 points assessed under the People's RAI, resulting in a presumptive risk level two classification, and granted the People's request for an override to a risk level three classification based upon defendant's 2005 diagnosis of pedophilia. The court also declined defendant's request for a downward departure to a risk level one classification and noted that, had it not determined that the automatic override was warranted, it would have granted the People's request for an upward departure to a risk level three classification. This appeal by defendant ensued.

"The People bear the burden of establishing the appropriate risk level classification by clear and convincing evidence" (*People v Huether*, 205 AD3d 1233, 1234 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 39 NY3d 901 [2022]; *see People v Salerno*, 224 AD3d 1016, 1017 [3d Dept 2024]) and, in so doing, may submit reliable hearsay evidence including – as relevant here – the RAI, the federal presentence investigation report (hereinafter PSR) and the Board's case summary (*see People v Huether*, 205 AD3d at 1234; *People v Conrad*, 193 AD3d 1187, 1188 [3d Dept 2021]). Defendant initially contends that the assessment of 30 points under risk factor 3 and 20 points under risk factor 7 resulted in an overestimation of his risk to public safety. We disagree. "Children depicted in pornographic images count as separate victims for purposes of risk factor 3 and points may be assessed under risk factor 7 when the victimized children portrayed in the images possessed by the defendant were strangers to him or her" (*People v Smith*, 211 AD3d 1127, 1128 [3d Dept 2022] [internal quotation marks and citations omitted]; *see People v Howland*, 211 AD3d 1189, 1190 [3d Dept 2022]; *People v Scrom*, 205 AD3d 1238, 1239 [3d Dept 2022], *lv denied* 38 NY3d 914 [2022]). Although the Court of Appeals has recognized that, in the context of child pornography cases, the assignment of points under risk factors 3 and 7 may result in an overstatement of an offender's risk level classification (*see People v Gillotti*, 23 NY3d 841, 860 [2014]), "the assessment of points under these risk factors has been upheld where, as here, the record supports the assessments in a manner consistent with the

statutory scheme and guidelines" (*People v Pulsifer*, 210 AD3d 1210, 1211 [3d Dept 2022], *lv denied* 39 NY3d 908 [2023]; *see People v Glowinski*, 208 AD3d 1392, 1393 [3d Dept 2022]; *People v Scrom*, 205 AD3d at 1239-1240). Here, the record reflects that defendant possessed numerous pornographic images and videos depicting children – including infants and toddlers – engaged in sex acts with, among others, adult males, and there is no indication that defendant knew any of the victims. Under these circumstances, we are satisfied that the assignment of points under risk factors 3 and 7 is supported by clear and convincing evidence and, therefore, find no issue with the presumptive classification of defendant as a risk level two sex offender.

Defendant next contends that the People failed to demonstrate that a risk level three classification was warranted via either an automatic override or, alternatively, an upward departure. Again, we disagree. "Although an offender's risk level classification presumptively is based upon the points assessed on the [RAI], there are four overrides that will result in a presumptive risk level three classification, including – as relevant here – a clinical determination that the offender suffers from an abnormality that decreases his or her ability to control impulsive sexual behavior" (*People v Dorvee*, 203 AD3d 1413, 1414 [3d Dept 2022] [internal quotation marks, brackets and citations omitted]; *see People v Schiavoni*, 107 AD3d 773, 773 [2d Dept 2013], *lv denied* 21 NY3d 864 [2013]; *see generally People v Barr*, 205 AD3d 741, 742 [2d Dept 2022], *lv denied* 38 NY3d 914 [2022]). "The People bear the burden of proving the applicability of a particular override by clear and convincing evidence" (*People v Schiavoni*, 107 AD3d at 773 [citations omitted]; *see People v Long*, 129 AD3d 687, 687 [2d Dept 2015], *lv denied* 26 NY3d 903 [2015]).

Here, the PSR reflects that defendant underwent a psychological evaluation in 2005 and was diagnosed with pedophilia and fetishism. Notably, the forensic psychologist who evaluated defendant opined that "[t]here [was] a great risk that [defendant would] continue to act out his paraphilias through the computer and more covert activities" and that defendant – described by the psychologist as "immature and very impressionable" – was in need of sex offender treatment. Despite that recommendation, defendant did not begin to engage in sex offender treatment until 2021 – less than two months before the hearing. Although defendant contends that these diagnoses were too far remote to be applicable at his hearing, he only offered a letter from his treatment provider acknowledging his weekly attendance at therapy sessions – which was noticeably silent on his present diagnoses (*see general People v Stein*, 194 AD3d 1201, 1203 [3d Dept 2021], *lv denied* 37 NY3d 913 [2021]). Additionally, during the course of the federal presentence investigation interview, defendant indicated that "he initially was not looking

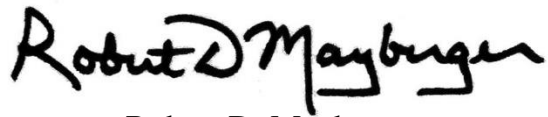
for child pornography, but once he received it, he became 'hooked on it' and wanted more and more of it." In light of the foregoing, we are satisfied that the People met their burden of demonstrating – by clear and convincing evidence – that defendant has a psychological abnormality, i.e., pedophilia, "that decreases his ability to control impulsive sexual behavior" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]) and, hence, an override to a presumptive risk level three classification was warranted (*see People v Grief*, 223 AD3d 917, 919 [2d Dept 2024]; *People v Dorvee*, 203 AD3d at 1414; *People v Strong*, 196 AD3d 707, 708-709 [2d Dept 2021], *lv denied* 37 NY3d 917 [2022]; *People v Schwartz*, 145 AD3d 1548, 1548 [4th Dept 2016]; *People v Lagville*, 136 AD3d 1005, 1006 [2d Dept 2016]; *People v Long*, 129 AD3d at 687-688; *People v Ledbetter*, 82 AD3d 858, 858 [2d Dept 2011]; *lv denied* 17 NY3d 702 [2011]).

Finally, with respect to defendant's request for a downward departure to a risk level one classification, "defendant was required to demonstrate, by a preponderance of the evidence, the existence of mitigating factors not adequately taken into consideration by the risk assessment guidelines" (*People v Salerno*, 224 AD3d at 1017 [internal quotation marks and citations omitted]; *see People v Adams*, 216 AD3d 1376, 1378 [3d Dept 2023], *lv denied* 40 NY3d 904 [2023]). The crux of defendant's argument on this point centers upon a claim that we have already rejected, i.e., that the assessment of points under risk factors 3 and 7 overestimated defendant's dangerousness and risk of recidivism. To the extent that defendant relied at the hearing upon his lack of a prior criminal history, his acceptance of responsibility and his participation in sex offender treatment since 2021, we note that these factors were adequately taken into account in the People's RAI in that no points were assessed under risk factors 9 and 12 (*see e.g. People v Salerno*, 224 AD3d at 1017; *People v Pulsifer*, 210 AD3d at 1212; *People v Glowinski*, 208 AD3d at 1393-1394). Under these circumstances, and given "the abhorrent and graphic nature of the images possessed by defendant" as described in the PSR and case summary (*People v Smith*, 211 AD3d at 1128-1129), County Court did not abuse its discretion in denying defendant's request for a downward departure (*see id.* at 1129; *People v Scrom*, 205 AD3d at 1240-1241; *see also People v Stein*, 194 AD3d at 1203). Defendant's remaining arguments, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Egan Jr., J.P., Aarons, McShan and Mackey, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court