SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, PART H92
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THE PEOPLE OF THE STATE OF NEW YORK

Indictment No. 939/2016
Decision and Order

-against-

HECTOR HERNANDEZ,
Defendant.
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FABRIZIO, J.

The question before the Court is whether the People have established by clear and convincing evidence that the defendant was a "stranger" to the victim at the time of the rape of which he stands convicted. The answer will determine whether the defendant will be a Level 2 sex offender. Based on the facts presented, the Court finds clear and convincing evidence that the defendant was a stranger to the victim at the time of the rape.

On February 21, 2017, the defendant pled guilty to Rape in the Third Degree, pursuant to Penal Law § 130.25(3). He was sentenced, pursuant to a plea and sentence bargain approved by this Court, to a period of incarceration of one and one half years in state prison, followed by six years post release supervision. He is scheduled to be released from state prison on June 20, 2017. The Board of Examiners of Sex Offenders recommends this Court adjudicate defendant a Level 2 sex offender based on a number of factors in the Risk Assessment Instrument (RAI). Only one risk factor is specifically challenged by the defendant: the twenty points the Board assessed under Risk Factor Seven, which is the relationship between the defendant and the victim at the time of the crime. Defendant introduced a complaint follow-up report into evidence at the Sex

Offender Registration Act (SORA) hearing, and argues that the facts stated in that report show that he and the victim were already acquainted at the time of the rape, and were therefore not strangers for the purposes of assessing his sex offender risk level. The defendant is wrong.

Although the People introduced no additional evidence of their own at the hearing, they agree with the statements in the police document and argue that those facts show the defendant was a stranger to the victim. Those facts also appear in the case summary in the RAI. According to the complaint follow-up report, and the RAI, the victim was thirteen years old at the time of the crime. The defendant was twenty five years old. The victim was registered to attend a remedial class in English Language Arts on Saturdays at a local public school. On Saturday, March 21, 2015, the victim and a school mate named Anayeli decided they would not attend class. Instead, they took the subway to Parkchester, in the Bronx. Anayeli's "male friend," the defendant, lived in that neighborhood. The compliant follow-up report does not indicate that the victim told the police the defendant's name; the perpetrator is only referred to as the "subject" of the police investigation in that document. Anayeli took the victim there to "meet" the defendant. At first, the three of them "hung out" in the staircase area. Then, the defendant invited the victim into his apartment. "[S]he stayed briefly" in the apartment, and returned to the staircase. The defendant then told the victim he telephoned another "male friend" and asked him to come over. That individual turned out to be Anayeli's ex-boyfriend. Anayeli indicated she wanted to speak privately with her ex-boyfriend, and the victim and the defendant went back inside the defendant's apartment. They went to the defendant's bedroom. Once inside, the victim told the defendant she was thirteen

years old. “They talked about family, [the defendant’s] drawings and tattoo hobbies.” They also “listened to music.” Suddenly, the defendant “put the victim on the bed, and asked “te gusta?”[1] He then “ripped” off the victim’s shirt and pants, and placed his “penis to [her] vagina for about five minutes.” Anayeli interrupted the rape when she knocked on the apartment door. The victim “went to the bathroom to dress” as the defendant spoke with Anayeli at the apartment door. The victim then left the building, and took the subway home with Anayeli. The next day, the victim told her friend, Walter, about the rape, and Walter informed the victim’s parents.

Relying on People v. Johnson, 93 AD3d 1323 (4th Dept 2012), the defendant argues that since the victim met him through a mutual acquaintance, they could not legally be considered “strangers.” In that case, the decision reports that, “[p]ursuant to the pre-sentence report, defendant ‘was *acquainted* with [the victim] as a consequence of going to church with [the victim’s] mother and aunt.’” Id. at 1324 (italics in original). The defendant argues that since he had been a friend of the victim’s classmate in this case prior to the day of the rape, the victim should legally be considered his acquaintance. In other words, he argues that since he already was a friend of her friend, he could not be considered a stranger.

The argument that a person you never met before and then rapes you could still be considered an acquaintance for SORA purposes merely because you share a friend in common seems at odds with RAI Guidelines. Those guidelines define a stranger as “not an actual acquaintance of the victim.” SORA: Risk Assessment Guidelines and

[1] This Spanish phrase translates to “You Like?”

Commentary, at 12 (2006). The guidelines recognize that a stranger can even be a person who lives in your own apartment building if "the relationship between the offender and the victim is limited to their passing in the hallway or sharing an elevator." Id. Under the guidelines, then, a person whom the victim has never before met, but is understood to be a "friend of a friend," would certainly qualify as the friend's acquaintance. But that does not automatically make them the victim's acquaintance.

The Court obtained the People's and the Defendant's briefs in the Johnson case, to ascertain from the record the extent of the victim's acquaintanceship with the defendant in that case. According to the portions of the record cited in that defendant's brief, the People agreed that prior to the sexual assault, "the defendant met the victim through church." (Brief for Defendant at page 4). Not only did that defendant attend the same church as the victim, but the victim's family members established a relationship with the defendant in order to convert the defendant to their religion. Id . Over time, that defendant did convert. Thus, according to the record, there was "religious and social contact between" that defendant, the victim, and the victim's family long prior to the sexual assault. (Brief for Defendant at page 5). In the People's brief, they conceded that the record showed "the defendant became acquainted with the victim by attending church with the victim's mother and aunt." (People's Brief at page 5). Thus, when the court echoed the People's concession in its own decision, it did not hold that the defendant and the victim were acquainted merely because they had acquaintances in common; it held that they became personally acquainted long prior to the sexual assault through mutual religious and social connections.

Here, the defendant was only a friend or acquaintance of the victim's friend,

Anayeli, prior to the morning when the defendant raped the victim shortly after meeting the victim. Not only did Anayeli know the defendant; she knew where he lived. However, there is no evidence that the victim ever met the defendant prior to that day, or knew anything at all about him. She only learned of the defendant through Anayeli that morning. The evidence cited in the RAI and the complaint follow-up report demonstrates that Anayeli introduced them only that morning.

That introduction did not turn defendant into the victim's acquaintance for SORA purposes under the facts of this case. "The term 'acquaintance' spans a range of social interactions." People v. Helmer, 65 AD3d 68, 70 (4th Dept 2009). Thus, where a 35 year old defendant met a 16 year old victim in a restaurant in November, 2010, and they exchanged telephone numbers that day, and thereafter communicated almost daily via text message for four months, they could hardly be considered strangers for purposes of a sex offender risk assessment. People v. Birch, 114 AD3d 1117, 1118 (3rd Dept 2014). Similarly, where a defendant and a sex crimes victim had "extensive communication through electronic means over a period of weeks," and exchanged personal information including name, address and, age, they were not considered strangers for sex offender risk assessment purposes. Helmer, 65 AD3d at 69-70. However, where the extent of the contact between two individuals who had never met before consisted of only "three days of Internet exchange, [it] did not rise to the level of any manner of acquaintanceship" and the defendant and the victim were properly found to have been SORA strangers at the time of the sex crime. People v. Tejada, 51 AD3d 472 (1st Dept 2008). Most relevant to this case, where the "defendant and the victim met for the first time the night before the assault [and] . . . the victim knew the

defendant's name [but] there was no evidence that either knew anything else about the other," they were considered strangers. People v. Serrano, 61 AD3d 946, 947 (2nd Dept 2009); see also People v. Gaines, 39 AD3d 1212 (4th Dept 2007).

Here, the clear and convincing evidence demonstrates the defendant and the victim met on the same day as, and only a short time before, the rape. The case summary indicates that the rape occurred at about 11:00 am; the defendant and her friend had skipped a Saturday class that same day. Prior to the rape, the defendant and victim only casually conversed about drawings, music and tattoos, hardly a significant exchange of personal information. In addition, in the case summary, the defendant's mother indicated that defendant "was a stranger to her daughter and they met on the day of the instant offense." This is a type of reliable hearsay information that adds to the clear and convincing evidence that the defendant was a stranger to the rape victim for SORA risk assessment purposes. See People v. Lewis, 45 AD 3d 1381 (4th Dept 2007). In fact, the defendant's own statements to the Department of Probation, cited in the RAI case summary, also constitute evidence that the victim could not be considered his acquaintance. "He stated that he did not know the victim's age." Although this contradicts the victim's statement, it is evidence that, even as far as the defendant was concerned, the conversations between the two were not the type where he was interested in learning personal information about the adolescent girl he just met. [2]

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[2]The People argued that the evidence shows that the defendant established a relationship with the victim "for the primary purpose of victimization." While the facts submitted suggest that the defendant was likely interested in raping the victim if she did not agree to have sex with him, the People offered no evidence, such as grand jury minutes, statements of the defendant, information from Anayeli, or through the introduction of other police documents, to support this claim. Thus, they have failed to meet their burden on this score by clear and convincing

Thus, the Court finds that clear and convincing evidence is present to assess 20 risk factor points based on the fact that the defendant's relationship with the victim was that of a stranger at the time of the rape. When added to all the other factors assessed, which are conceded by the defendant to be correct and which the Court agrees are supported by clear and convincing evidence, the defendant meets the threshold for a Level 2 sex offender.

The defendant further argues that this Court should grant him a downward departure to make him a Level 1 sex offender. He claims that since the number of points assessed is 75, the bottom of the Level 2 range, that he is somehow entitled automatically to a downward departure. There is no such presumption or requirement. In People v. Filkins, 107 AD3d 1069, 1070 (3rd Dept 2013), cited by the defendant, the court remitted the case to Supreme Court for the judge to make requisite findings of fact and conclusions of law as to whether the defendant was entitled to a discretionary downward departure, noting in passing that there was "only a five point discrepancy between defendant's score (75 points) and a risk level 1 classification." In that case, the hearing judge did not make the requisite findings needed to explain the reasons for assessing any of the 75 points. This Court, through this written decision as well as through the record at the SORA hearing, is stating its findings of fact and conclusions of law. In order to merit a downward departure, the defendant now bears the burden of showing mitigating facts that would justify this Court exercising its discretion and order a downward departure in this case. People v. Torres, 120 AD3d 1126, 1127 (1st Dept

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evidence. See People v. Cook, 2017 N.Y. LEXIS 724 (Court of Appeals, March 30, 2017).

2014). The defendant has failed to meet that burden.

The defendant argues that such a departure is warranted because he is also "subject to the sexual assault reform act because the [victim] here was less than 18 years old." The fact that another statute provides the same or even additional safeguards directing where the defendant may or may not live, such as within 1000 feet of a school, is not a mitigating factor to justify a downward departure from his risk level. After all, this defendant brutally raped a thirteen year old girl by forcible compulsion. According to the case summary, he grabbed her from behind, threw her onto a bed, and held the victim's wrists above her head with his hands. She could not even push him off her. The victim begged him, "Please do not do anything, I don't want you to." The defendant prevented his victim from crying out by placing his hand over her mouth. He ripped her pants, pushed up her shirt and bra, and inserted his penis into her vagina. The victim was so traumatized that her mother reported that she was afraid to go to school, would cry all the time, and even avoided her friends. As with many sex crimes victims, she only began to heal with the aid of a therapist. "One of the principle goals in enacting SORA was 'to prevent the public from the danger of recidivism posed by sex offenders.'" Cook, 2017 NY LEXIS 723, *4 (citations omitted). The risk of this defendant re-offending is best protected by his having to register and be monitored and report during his lifetime as a Level 2 sex offender. The Court has considered the defendant's arguments and, in an exercise of its discretion, denies his request for a downward departure from the protections afforded by his Level 2 designation. See Torres, 120 AD3d at 1127.

This constitutes the findings of fact and the legal decision and order of this Court.

Dated: June 2, 2017

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Hon. Ralph Fabrizio