

People v Melillo

2013 NY Slip Op 34057(U)

September 17, 2013

Supreme Court, New York County

Docket Number: 2012-1302

Judge: Susan Cacace

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT: WESTCHESTER COUNTY
STATE OF NEW YORK

FILED
AND
ENTERED
ON 9/18, 2013

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MATTHEW MELILLO,

SEP 18 2013
COUNTY OF WESTCHESTER

DECISION & ORDER

SCI No.: 2012-1302

Defendant.

SUSAN CACACE, J.:

On April 9, 2013, the defendant, Matthew Melillo, pleaded guilty to the crime of Attempted Disseminating Indecent Material to Minors in the first degree, Penal Law § 110/235.22.

In accordance with the terms of the plea agreement, the defendant was sentenced on July 9, 2013, to one day time served and a term of probation of five years. He now stands before this court for classification pursuant to the Sex Offender Registration Act, see Correction Law Art. 6-C.

The Office of the District Attorney assessed the defendant as a level one offender based on its evaluation of the risk factors with no recommendation of an override or departure.

In order to determine the appropriate classification for the defendant, a hearing was held before this court on September 17, 2013.

The parties agree and the court concurs that no points are warranted under

factors: one, use of violence, two, sexual contact with victim; three, number of victims; four, duration of offense conduct with victim; six, other victim characteristics; eight, age at first sex crime; nine, number and nature of prior crimes; ten, recency of prior offense; eleven, drug or alcohol abuse; twelve, acceptance of responsibility; thirteen, conduct while confined/supervised; fourteen, supervision and fifteen, living/employment situation.

The People urge the Court to assess 20 points for factor five, age of victim being between eleven and sixteen years of age and 20 points should be assessed against the defendant for factor seven, relationship with victim. In support, they rely on the Superior Court Information, the plea voir dire, the pre-sentence report and the affidavit of the undercover investigator, all of which indicate that the defendant believed that he was communicating with a fifteen year old female. The defendant does not object to the assessment of points under these factors.

The People have established by clear and convincing evidence that the defendant did engage in an on-line "chat" with an undercover officer who he believed was less than sixteen years of age and who was a stranger to the defendant. Thus, pursuant to the holding of the Appellate Division, Second Department in *People v. DeDona*, 2012 NY Slip Op 07647, the defendant is assessed 20 points under factor five, age of victim and 20 points under factor seven, relationship with victim.

The sum of these points equals 40, within the parameters for a Level one offender. The People do not seek an override or departure.

The court is the ultimate arbiter of the defendant's risk level classification, see *People v Douglas*, 18 AD3d 967, 968 (3rd Dept), *leave denied* 5 NY3d 170 (2005), citing *People v Stephens*, 91 NY2d 270, 276 (1998), it may exercise its discretion to depart from the recommended level only upon the existence of clear and convincing evidence that special circumstances exist. See *Douglas*, 18 AD3d at 968 (citations omitted.) The standard of proof to be applied to a defendant's application for a downward departure is that of "preponderance of the evidence." *People v. Wyatt*, 89 AD 3d 112, 128. Furthermore, with respect to departures, the Sex Offender Guidelines: Commentary provides that "[t]he ability to depart is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case[]" and that "[g]enerally, the Board or court may not depart from the presumptive risk level unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines[.]" citing 18 USC § 3553 (federal sentencing guidelines departure provision.) Accord *People v Turner*, 45 AD3d 747 (2nd Dept 2007), *leave denied* 10 NY3d 704 (2008). In the matter at bar, the court finds that the facts and circumstances do not justify an override or departure.

The defendant is thus certified as a Level one sex offender. Accordingly, the defendant is directed to comply with all appropriate registration provisions, including, but not limited to, those outlined in the Sex Offender Registration Act, see Correction Law Art. 6-C. No additional designations apply.

The foregoing opinion shall constitute the decision and order of the court.

Enter.

Dated: September 17, 2013
White Plains, NY



County Court Judge

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