

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

People v. Orlopp

2021 NY Slip Op 00739 (App. Div. 2021) · No. 992 KA 19-01363 · Decided February 5, 2021

SUMMARY

The New York Supreme Court, Appellate Division, Fourth Department affirmed an order classifying Bradley B. Orlopp as a level three sex offender under the Sex Offender Registration Act. The court held that assessing points under risk factors 5 and 6 did not constitute impermissible double counting because the victim's age and physical helplessness were distinct considerations. The court also rejected the downward-departure and ineffective-assistance claims.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Carni, J.P.; Lindley, J.; Curran, J.; Winslow, J.; DeJoseph, J.
JURISDICTION	New York
DECIDED	February 5, 2021
DOCKET	992 KA 19-01363
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from an order of Wayne County Court determining that he was a level-three risk under the Sex Offender Registration Act.
STANDARD OF REVIEW	The court reviewed the SORA risk-factor assessment and related legal contentions on appeal. It also applied preservation principles to the downward-departure claim and evaluated ineffective assistance by considering the evidence, law, and circumstances of the representation in totality and as of the time of representation.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Bradley B. Orlopp v. The People of the State of New York

TOPICS

- criminal procedure
- appellate procedure
- preservation of error
- ineffective assistance
- standard of review

PRACTICE AREAS

criminal law

sex offender registration

criminal appellate practice

QUESTIONS PRESENTED

1. Whether assessing points under both SORA risk factor 5, concerning the victim's age, and risk factor 6, concerning the victim's physical helplessness, constituted impermissible double counting.
2. Whether defendant preserved and established entitlement to a downward departure from the presumptive SORA risk level.
3. Whether defendant was denied effective assistance of counsel during the SORA risk-level classification proceeding.

HOLDINGS

1. Assessing points for the victim's age under risk factor 5 and for her physical helplessness because she was asleep under risk factor 6 did not constitute impermissible double counting where the victim's physical helplessness was independent of and not connected with her age.
2. Defendant's downward-departure claim was unpreserved because counsel made only legal arguments and did not ask the court to exercise its discretion to depart from the Board's recommendation. In any event, defendant failed to prove by a preponderance of the evidence a mitigating factor not adequately accounted for by the guidelines.
3. Defendant received effective assistance of counsel.

KEY QUOTATIONS

*“The assessment of points for both the age of the victim under risk factor 5 and the fact that she was asleep and therefore physically helpless under risk factor 6 did not constitute impermissible double counting” (*1)*

*“A person who is asleep or unable to communicate as a result of voluntary intoxication is considered to be physically helpless” (*1)*

*“failed to prove, by a preponderance of the evidence, a 'mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines'” (*1)*

*“viewing the evidence, the law and the circumstances of this case in totality and as of the time of representation, defendant received effective assistance of counsel” (*1)*

FACTUAL BACKGROUND

Defendant was classified under SORA based in part on the victim's age and the fact that she was asleep and physically helpless because of intoxication when the sexual contact occurred. Defendant argued that assessing points under both risk factor 5 and risk factor 6 constituted impermissible double counting. He also sought a downward departure based on the absence of prior sex-offense convictions, the lack of forcible compulsion, and the victim's initial statement to police that the encounter was consensual.

PROCEDURAL HISTORY

Wayne County Court entered an order dated August 22, 2018, determining that defendant was a level-three risk under SORA. Defendant appealed, challenging the assessment of points under risk factors 5 and 6, denial of a downward departure, and the effectiveness of counsel. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- People v. Augsburg, 156 AD3d 1487, 1488 (4th Dept 2017), lv denied 31 NY3d 903 (2018)
- People v. Bjork, 105 AD3d 1258, 1260 (3d Dept 2013), lv denied 21 NY3d 1040 (2013), cert denied 571 US 1213 (2014)
- People v. Edison, 167 AD3d 769, 770-771 (2d Dept 2018), lv denied 33 NY3d 947 (2019)
- People v. Caban, 61 AD3d 834, 835 (2d Dept 2009), lv denied 13 NY3d 702 (2009)
- People v. Edwards, 93 AD3d 1210, 1211 (4th Dept 2012)
- People v. Fisher, 22 AD3d 358, 358-359 (1st Dept 2005)
- People v. Johnson, 11 NY3d 416, 421 (2008)
- People v. George, 141 AD3d 1177, 1178 (4th Dept 2016)
- People v. Cox, 181 AD3d 1184, 1186 (4th Dept 2020), lv denied 35 NY3d 909 (2020)
- People v. Gillotti, 23 NY3d 841, 861-862 (2014)
- People v. Willingham, 101 AD3d 979, 979 (2d Dept 2012)
- People v. Russell, 115 AD3d 1236, 1236 (4th Dept 2014)

OPINION

PER CURIAM.

People v Orlopp (2021 NY Slip Op 00739) People v Orlopp 2021 NY Slip Op 00739 Decided on February 5, 2021 Appellate Division, Fourth Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on February 5, 2021 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ. 992 KA 19-01363 [*1]THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, vBRADLEY B. ORLOPP, DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR DEFENDANT-APPELLANT. MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT. Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), dated August 22, 2018.

The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act. It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs. Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 et seq.), defendant contends that County Court erred in assessing points under both risk factor 5 and risk factor 6.

We reject that contention. "The assessment of points for both the age of the victim under risk factor 5 and the fact that she was asleep and therefore physically helpless under risk factor 6 did not constitute impermissible double counting" (People v Augsbury, 156 AD3d 1487, 1488 [4th Dept 2017], lv denied 31 NY3d 903 [2018] [internal quotation marks omitted]).

"A person who is asleep or unable to communicate as a result of voluntary intoxication is considered to be physically helpless" (People v Bjork, 105 AD3d 1258, 1260 [3d Dept 2013], lv denied 21 NY3d 1040 [2013], cert denied 571 US 1213 [2014]; see generally Penal Law § 130.00 [7]; People v Edison, 167 AD3d 769, 770-771 [2d Dept 2018], lv denied 33 NY3d 947 [2019]).

Inasmuch as the evidence showed that the victim was asleep due to intoxication at the time defendant engaged in sexual contact with her, the People established that "the victim's physical helplessness was not the result of, or in any way connected with, her age" (People v Caban, 61 AD3d 834, 835 [2d Dept 2009], lv denied 13 NY3d 702 [2009]; see e.g. Augsbury, 156 AD3d at 1488; People v Edwards, 93 AD3d 1210, 1211 [4th Dept 2012]; cf. People v Fisher, 22 AD3d 358, 358-359 [1st Dept 2005]).

Defendant further contends that the court should have granted him a downward departure from his presumptive risk level because he did not have any prior sex offense convictions, the instant offense did not involve forcible compulsion, and the victim initially told the police that the sexual encounter was consensual.

As a preliminary matter, we conclude that defendant's contention is not preserved for our review. Although defense counsel challenged risk factor determinations, he "never asked [the] [c]ourt to use its discretion to depart from the Board's recommendation. He made only legal arguments, directed at the interpretation of the Guidelines" or whether the People met a particular burden of proof (People v Johnson, 11 NY3d 416, 421 [2008] [emphasis added]; cf. People v George, 141 AD3d 1177, 1178 [4th Dept 2016]).

In any event, we conclude that defendant "failed to prove, by a preponderance of the evidence, a 'mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines' " (People v Cox, 181 AD3d 1184, 1186 [4th Dept 2020], lv denied 35 NY3d 909 [2020]; see Augsbury, 156 AD3d at 1487-1488; see generally People v Gillotti, 23 NY3d 841, 861-862 [2014]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Although "[a] sex offender facing risk level classification under SORA has a right to the effective assistance of counsel" (People v Willingham, 101 AD3d 979, 979 [2d Dept 2012]), we conclude that, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of representation, defendant received effective assistance of counsel" (People v Russell, 115 AD3d 1236, 1236 [4th Dept 2014]).

Entered: February 5, 2021 Mark W. Bennett Clerk of the Court