

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 11-00057

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT J. FULLEN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered December 9, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level on the ground that his release from jail without supervision was mitigated by the fact that he did not serve a long prison sentence (*see People v Gilbert*, 78 AD3d 1584, 1585-1586, *lv denied* 16 NY3d 704; *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). In any event, there is no basis to disturb the court's determination inasmuch as defendant "failed to present clear and convincing evidence of special circumstances justifying a downward departure from his presumptive risk level" (*People v Ferrara*, 38 AD3d 1302, 1303, *lv denied* 8 NY3d 815).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court