

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

411

KA 13-01959

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARYLL J. CLARK, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (John Lewis DeMarco, J.), entered October 3, 2013. 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: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not abuse its discretion in refusing to grant him a downward departure from his presumptive risk level. "A defendant seeking a downward departure has the initial burden of . . . identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account" by the risk assessment guidelines (*People v Watson*, 95 AD3d 978, 979). Here, defendant asserted as mitigating factors that the statutory rape of which he was convicted does not usually result in a level three risk assessment and that the risk assessment instrument yielded the minimum amount of points to qualify as a level three risk, and we conclude that those are not "appropriate mitigating factor[s]" (*id.*; *cf. People v Smith*, 122 AD3d 1325, 1326; *People v Martinez-Guzman*, 109 AD3d 462, 462, *lv denied* 22 NY3d 854). With respect to defendant's contention that a downward departure was warranted by his success in treatment, we agree that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]). "Even assuming, arguendo, that defendant established facts that his response to treatment was exceptional so as to warrant a downward departure, we

conclude upon examining all of the relevant circumstances that the court providently exercised its discretion in denying defendant's request for a downward departure" (*Smith*, 122 AD3d at 1326; see *People v Worrell*, 113 AD3d 742, 743).

Entered: March 27, 2015

Frances E. Cafarell
Clerk of the Court