

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

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KA 15-01077

PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAMISO WOOTEN, DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated March 27, 2015. 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.). Contrary to defendant's contention, points may be assigned under risk factors 3 (number of victims) and 7 (relationship with victim) to a child pornography offender despite the fact that the offender had no contact with the victims (see *People v Gillotti*, 23 NY3d 841, 854-855; *People v Morel-Baca*, 127 AD3d 833, 833-834). We reject defendant's further contention that Supreme Court erred in denying his request for a downward departure from his presumptive risk level. Even assuming, arguendo, that defendant met his burden of establishing the existence of an appropriate mitigating factor by a preponderance of the evidence, we conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (see *People v Butler*, 129 AD3d 1534, 1535, lv denied 26 NY3d 904; *People v Worrell*, 113 AD3d 742, 742-743).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court