

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

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**KA 17-01782**

PRESENT: SMITH, J.P., CARNI, LINDLEY, NEMOYER, AND CURRAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSHUA A. UERKVITZ, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered June 6, 2017. 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: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant appeals from an order, *inter alia*, classifying him as a level three risk after his conviction of a federal sex offense arising from his possession and attempted possession of child pornography (*see* 18 USC § 2252A [a] [5] [B]; [b] [2]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for a downward departure to a level two risk. We conclude that defendant "failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines" (*People v Lewis*, 156 AD3d 1431, 1432 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]).

Moreover, even assuming, *arguendo*, that defendant established facts that might warrant a downward departure from his presumptive risk level, we conclude upon examining all of the relevant circumstances, including defendant's previous conviction for sexual abuse in the first degree (Penal Law § 130.65 [3]) and the fact that defendant committed the present offense while under probation supervision for that prior offense, that the court providently exercised its discretion in denying defendant's request for a downward departure (*see People v Villafane*, 168 AD3d 408, 408 [1st Dept 2019]; *People v Iverson*, 90 AD3d 1561, 1562 [4th Dept 2011], *lv denied* 18

NY3d 811 [2012]; *see also* *People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]).

Entered: April 26, 2019

Mark W. Bennett  
Clerk of the Court