

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

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KA 19-02170

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON RICHARDSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Christopher S. Ciaccio, J.), entered August 23, 2019. 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 risk factors 11 and 12, and that after subtracting those points he should be classified as a level two risk. We reject that contention, and thus we affirm.

Initially, we note that, although defendant contended at the SORA hearing that he was entitled to a downward departure to a level two risk from the presumptive level three risk yielded by his total point score on the risk assessment instrument, he has not raised that contention on appeal, and thus it is deemed abandoned (*see People v Liddle*, 159 AD3d 1286, 1287 n [3d Dept 2018], *lv denied* 32 NY3d 905 [2018]; *People v Encarnacion*, 138 AD3d 1497, 1498 [4th Dept 2016]).

Pursuant to the SORA Risk Assessment Guidelines and Commentary (2006) (Guidelines), "offenders are assessed 15 points under risk factor 11 if they have a history of drug or alcohol abuse or if they were abusing drugs or alcohol at the time of the sex offense" (*People v Palmer*, 20 NY3d 373, 376 [2013]; *see People v Turner*, 188 AD3d 1746, 1746-1747 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *People v Kunz*, 150 AD3d 1696, 1697 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]). Here, although there is no evidence that defendant used drugs during the offense at issue, the People introduced evidence that

he was convicted of criminal possession of a controlled substance and possession of marihuana, that he admitted using alcohol, marihuana, acid and crack cocaine at other times, that he sought treatment for substance abuse and that, after a period of sobriety, he returned to using drugs and alcohol. The People also established that defendant admitted using alcohol to self-medicate during bouts of depression and anxiety and that, although he said that he "would benefit from intervention," he refused to participate in substance abuse counseling in prison. Thus, the court properly assessed points under risk factor 11 because the People established, by clear and convincing evidence, a "pattern of drug or alcohol use in . . . defendant's history" evincing substance abuse (*People v Kowal*, 175 AD3d 1057, 1057 [4th Dept 2019] [internal quotation marks omitted]; see *Turner*, 188 AD3d at 1746-1747).

Next, points are properly assessed under risk factor 12 where, as here, an offender has refused sex offender treatment, because "such conduct is powerful evidence of the offender's continued denial and his [or her] unwillingness to alter his [or her] behavior" (*People v Ford*, 25 NY3d 939, 941 [2015] [internal quotation marks omitted]; see *People v Loughlin*, 145 AD3d 1426, 1427 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). "Refusal contemplates an intentional explicit rejection of what is being offered" (*Ford*, 25 NY3d at 941). Furthermore, the Guidelines "do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment" (*People v Graves*, 162 AD3d 1659, 1660 [4th Dept 2018], *lv denied* 32 NY3d 906 [2018] [internal quotation marks omitted]). Here, defendant failed to introduce any evidence to support his assertion that the facility in which he was confined did not provide sex offender treatment. In any event, he admitted that he was unwilling to transfer to a correctional facility where he could participate in such treatment, thereby establishing an "intentional explicit rejection of what [was] being offered" (*Ford*, 25 NY3d at 941).