

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

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KA 20-01368

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH HICKS, DEFENDANT-APPELLANT.

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.

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered September 25, 2020. 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends, and the People correctly concede, that County Court erred in assessing five points against him under risk factor 9 based on a misdemeanor marijuana conviction from Florida. The People failed to establish by "the requisite clear and convincing evidence" (*People v Wilson*, 186 AD3d 1066, 1067 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]) that the crime for which defendant was convicted in Florida is "tantamount to a crime under New York law" (*People v Perez*, 35 NY3d 85, 87 [2020], *rearg denied* 35 NY3d 986 [2020]; *see generally People v Bean*, 190 AD3d 622, 622 [1st Dept 2021], *lv denied* 36 NY3d 913 [2021]). Our deduction of five points from defendant's score on the risk assessment instrument does not affect his presumptive risk level, which remains at level one.

Defendant next contends that the court, in granting the People's request for an upward departure to risk level two, failed to consider all of the alleged mitigating factors that he cited at the SORA hearing. We reject that contention. Although the court noted two of defendant's proffered mitigating factors in its decision and did not expressly reference the third, it does not necessarily follow that the court failed to consider all three factors when it granted the People's request. We conclude that the court properly determined that

the People established by clear and convincing evidence the existence of aggravating factors not adequately taken into account by the risk assessment guidelines, that the aggravating factors outweighed the mitigating factors, and that the totality of the circumstances warranted an upward departure to avoid an under-assessment of defendant's dangerousness and risk of sexual recidivism (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court