

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

384

KA 23-00871

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL A. BALENTINE, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), entered December 22, 2022. 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 ([SORA] Correction Law § 168 *et seq.*). Defendant was presumptively a level two risk based on the risk assessment instrument, but County Court determined that he is a level three risk based on the presumptive override for a prior felony sex crime conviction. We affirm.

Defendant failed to preserve for our review his contentions that the court violated his due process rights by accepting his letter waiving his right to appear at the SORA hearing (*see People v Poleun*, 119 AD3d 1378, 1378-1379 [4th Dept 2014], *affd* 26 NY3d 973 [2015]; *People v Turner*, 188 AD3d 1746, 1746 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]), and by allegedly failing to provide his counsel with certain documents within the statutorily prescribed time period prior to the hearing (*see* Correction Law § 168-n [3]; *People v Montanez*, 88 AD3d 1278, 1279 [4th Dept 2011]).

We reject defendant's contention that the court erred in treating the presumptive override as mandatory. Here, the court noted in its written decision that defendant was a presumptive level three risk based on the override, and also noted that a court "may depart from [the presumptive risk level] if special circumstances warrant." The court further considered defendant's request for a downward departure and determined that such a departure was not warranted. Contrary to

defendant's contention, the court applied the correct standard (see *People v Pace*, 121 AD3d 1315, 1316 [3d Dept 2014], *lv denied* 24 NY3d 914 [2015]; cf. *People v Jones*, 172 AD3d 1786, 1787-1788 [3d Dept 2019]; see generally *People v Edmonds*, 133 AD3d 1332, 1332-1333 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). Defendant's contention that his prior out-of-state conviction did not qualify as a prior sex felony conviction for purposes of applying the override is unpreserved for our review (see *People v Johnson*, 32 Misc 3d 138[A], 2011 NY Slip Op 51548[U], *1 [App Term, 2d Dept, 9th & 10th Jud Dists 2011]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel based on his counsel's performance at the SORA hearing. Although "[a] sex offender facing risk level classification under SORA has a right to . . . effective assistance of counsel" (*People v Root*, 216 AD3d 1435, 1436 [4th Dept 2023], *lv denied* 40 NY3d 904 [2023] [internal quotation marks omitted]; see *People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]), we conclude that, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of [the] representation, defendant received effective assistance of counsel" (*People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]; see *People v Hackett*, 198 AD3d 1323, 1324 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022]; see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).