

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

**445**

**KA 23-00648**

PRESENT: WHALEN, P.J., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

---

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VINCENT COLUNGA, DEFENDANT-APPELLANT.

---

JULIE CIANCA, 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 (Caroline E. Morrison, J.), entered January 12, 2023. 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.*). The risk assessment instrument prepared by the Board of Examiners of Sex Offenders assessed 30 points against defendant under risk factor 5, for the age of the victims, making him a presumptive level one risk. At the People's request, County Court assessed additional points under risk factor 3, for number of victims, and risk factor 7, for conduct directed at a stranger, making defendant a presumptive level two risk. The court thereafter denied defendant's request for a downward departure to a level one risk. We affirm.

Contrary to defendant's contention, the court did not err in assessing points against him under risk factor 5. The People provided clear and convincing evidence supporting an assessment of points for risk factor 5, properly relying on defendant's admission that he used a peer-to-peer network in order to obtain images of child pornography—including images of prepubescent children and images involving sadistic and masochistic conduct—in combination with evidence from his case summary and presentence investigation report that his computer contained thousands of images of child pornography and that he had deleted files with titles describing images of children under 10 years of age (*see People v Vasquez*, 149 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see generally*

Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571-572 [2009]). We thus reject defendant's claim that the People failed to prove by clear and convincing evidence that he possessed an unlawful image of a child who was age "10 or less."

We reject defendant's further contention that the court erred in denying his request for a downward departure. The court properly determined that defendant failed to meet his burden of establishing by a preponderance of the evidence the existence of an appropriate mitigating factor that is of a kind or to a degree not adequately taken into account by the risk assessment guidelines (see *People v Stevens*, 207 AD3d 1061, 1061 [4th Dept 2022], *lv denied* 39 NY3d 903 [2022]; see generally *People v Gillotti*, 23 NY3d 841, 853 [2014]). The court thus lacked the discretion to order a downward departure (see *Stevens*, 207 AD3d at 1061-1062; *People v Johnson*, 120 AD3d 1542, 1542 [4th Dept 2014], *lv denied* 24 NY3d 910 [2014]). Moreover, even assuming, arguendo, that defendant met his burden on the first two steps of the downward departure analysis (see generally *Gillotti*, 23 NY3d at 861), we conclude that the totality of the circumstances does not warrant a downward departure inasmuch as defendant's presumptive risk level does not represent an overassessment of his dangerousness and risk of sexual recidivism given, among other factors, the nature and volume of images possessed by defendant (see *Stevens*, 207 AD3d at 1062).