

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

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KA 09-00292

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL MONTALVO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 8, 2009. 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 (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points under the risk factor for failure to accept responsibility and refusal of treatment. The case summary indicated that defendant believed that the victim fabricated the accusations and that defendant was removed from the sex offender treatment program for disciplinary reasons. The court properly relied on the case summary, "rather than upon the defendant's statements to the contrary, in finding that the prosecution proved by clear and convincing evidence that the defendant not only failed to accept responsibility for his crime, but also that he refused treatment" (*People v Mitchell*, 300 AD2d 377, 377, *lv denied* 99 NY2d 510). Even assuming, arguendo, that the court erred in assessing points under that risk factor, we conclude that defendant's presumptive classification as a level three risk would not change (*see People v Clark*, 66 AD3d 1366, *lv denied* 13 NY3d 713). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level and, in any event, that contention lacks merit (*see id.* at 1366-1367; *People v Regan*, 46 AD3d 1434, 1435).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court