

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

1172

KA 08-02464

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NICHOLAS SAWYER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered November 7, 2006. 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 (Correction Law § 168 et seq.), defendant contends that he was entitled to a downward departure from his presumptive risk level. We reject that contention. "A departure from the presumptive risk level is warranted where 'there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by . . . [the Risk Assessment Guidelines of the Sex Offender Registration Act].' There must exist clear and convincing evidence of the existence of special circumstance[s] to warrant an upward or downward departure" (*People v Guaman*, 8 AD3d 545). Here, defendant failed to establish his entitlement to a downward departure from the presumptive risk level. Contrary to defendant's contention, a downward departure is not warranted on the ground that the minor victims were not strangers. The risk assessment instrument adequately addressed that factor and assessed no points for it (see *People v Barnett*, 71 AD3d 1296, 1297). Finally, defendant contends that 25 points should not have been assessed for sexual contact with the victims because "the victim[s'] lack of consent is due only to inability to consent by virtue of age and . . . scoring 25 points in [that] category result[ed] in an over-assessment of [defendant's] risk to public safety" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 9 [2006]). It cannot be said that the 25 points assessed for sexual contact with the victims "result[ed] in

an over-assessment" of defendant's risk to public safety (*id.*), nor did defendant " 'present clear and convincing evidence of special circumstances justifying a downward departure' " (*People v Clark*, 66 AD3d 1366, 1367, *lv denied* 13 NY3d 713).

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court