

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

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KA 08-01802

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GERALD GREEN, 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 July 28, 2008. 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.). Contrary to the contention of defendant, County Court's assessment of 15 points against him under the risk factor for drug or alcohol abuse is supported by clear and convincing evidence (see § 168-n [3]). "An assessment of 15 points is warranted under that risk factor where 'an offender has a substance abuse history or was abusing drugs and or alcohol at the time of the offense' " (*People v McClam*, 63 AD3d 1588, 1589, lv denied 13 NY3d 704, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006]). Here, the record establishes that defendant has a history of drug and alcohol abuse, including three prior convictions for driving while ability impaired and several relapses following substance abuse treatment. In addition, the victim of the underlying offense reported that defendant was "drunk or high" when he committed the offense. In any event, defendant's presumptive classification as a level two risk would not change even if those points were deducted, and the court properly concluded that a downward departure from that risk level was not warranted (see *People v Vaughn*, 26 AD3d 776).

Entered: March 19, 2010

Patricia L. Morgan
Clerk of the Court