

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

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KA 08-00594

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAURICE BUSBY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Erie County Court (Thomas P. Amodeo, A.J.), entered December 20, 2007. 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.). We agree with defendant that County Court's assessment of 20 points under the risk factor based on the victim's alleged mental disability is not supported by clear and convincing evidence (*see generally* § 168-n [3]). We further conclude, however, that the court properly assessed 15 points under the risk factor based on defendant's history of drug and alcohol abuse. Contrary to defendant's contention, the People presented clear and convincing evidence of defendant's history of drug abuse (*see People v Ramos*, 41 AD3d 1250, *lv denied* 9 NY3d 809; *People v Vaughn*, 26 AD3d 776, 777), and defendant presented no evidence of prolonged abstinence "in recent years" (*Vaughn*, 26 AD3d at 777; *see Ramos*, 41 AD3d 1250). Even taking into account the 20 point reduction in the total risk factor score, we note that defendant is nevertheless 20 points above the threshold for a level three risk, and the court has already granted his request for a downward departure to a level two risk. It cannot be said that the court abused its discretion in refusing to grant defendant a further downward departure to a level one risk (*see generally People v Adams*, 52 AD3d 1237, *lv denied* 11 NY3d 705; *People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715; *People v Guaman*, 8 AD3d 545).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court