

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

683

KA 08-01879

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARL STEWART, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO 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 (Michael F. Pietruszka, J.), entered September 4, 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: On appeal from an order determining that he is a level two risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in refusing to deduct 10 points assessed by the Board of Examiners of Sex Offenders for forcible compulsion because it is not an element of the crimes of which he was convicted. We reject that contention (*see People v Feeney*, 58 AD3d 614; *People v LaRock*, 45 AD3d 1121, 1122-1123). We conclude, based on the case summary and the presentence report, that the assessment of points under that risk factor is supported by clear and convincing evidence (*see People v Richards*, 50 AD3d 1329, *lv denied* 10 NY3d 715; *LaRock*, 45 AD3d at 1123). In any event, the presumptive classification of defendant as a level two risk would not change even in the event that those points were deducted, and the court properly rejected the contention of defendant that a downward departure was warranted based either upon his age (*see People v Mothersell*, 26 AD3d 620, 621), or his postrelease conduct (*see People v Hamelinck*, 23 AD3d 1060).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court