

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

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KA 08-01192

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEONARD A. LEOPOLD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO 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 Supreme Court, Erie County (John L. Michalski, A.J.), entered March 27, 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 under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his present contention that the Board of Examiners of Sex Offenders erred in failing to compare his California offense with New York law (*see generally People v Windham*, 10 NY3d 801; *People v Smith*, 17 AD3d 1045, *lv denied* 5 NY3d 705). We agree with defendant that Supreme Court failed to set forth the requisite findings of fact and conclusions of law upon which it based its risk assessment determination (*see* § 168-n [3]). Nevertheless, we conclude that the record before us is sufficient to enable us to make our own findings of fact and conclusions of law (*see People v Pardo*, 50 AD3d 992, *lv denied* 11 NY3d 703), and we conclude that the upward departure determining that defendant is a level two risk is supported by clear and convincing evidence (*see People v Thomas*, 307 AD2d 759).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court