

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

614

KA 10-00357

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DENNIS TOOLEY, DEFENDANT-APPELLANT.

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JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated January 28, 2010. The order determined that defendant is a level three 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 three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly determined that an upward departure from his presumptive risk level was warranted. During the presentence investigation interview, defendant admitted that he had previously sexually abused two other individuals who were not victims with respect to the underlying conviction, and that aggravating factor was not adequately taken into account by the risk assessment guidelines. Thus, the upward departure that resulted in defendant's classification as a level three risk is supported by the requisite clear and convincing evidence (*see* § 168-n [3]; *People v Farrell*, 78 AD3d 1454, 1455; *People v McCollum*, 41 AD3d 1187, *lv denied* 9 NY3d 807; *see also People v Cummings*, 81 AD3d 1261).

Entered: May 6, 2011

Patricia L. Morgan  
Clerk of the Court