

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

1395

KA 10-00827

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRENTON L. IVERSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 29, 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 ([SORA] Correction Law § 168 *et seq.*). Defendant was previously classified a level one risk pursuant to SORA, and he contends that the People were required to file a petition seeking modification of his risk level pursuant to Correction Law § 168-o (3). Defendant failed to preserve that contention for our review (*see generally People v Windham*, 10 NY3d 801; *People v Charache*, 9 NY3d 829, 830; *People v Daniels*, 86 AD3d 921, 922, *lv denied* 17 NY3d 715) and, in any event, that contention is without merit. Correction Law § 168-o (3) does not require the filing of a petition to modify the classification of a sex offender convicted of a new qualifying sex offense (*see* § 168-a [2] [a]).

Defendant was assessed 115 points based upon the factors set forth in the risk assessment instrument (RAI), presumptively classifying him as a level three risk (*see generally* Correction Law § 168-1 [5], [6]). Contrary to the contention of defendant, his prior felony conviction for a sex offense, i.e., rape in the third degree (Penal Law § 130.25 [2]), " 'may be used as both an override factor and a basis upon which to add 30 points for risk factor 9 on the [RAI]' " (*People v Gilbert*, 78 AD3d 1584, 1585, *lv denied* 16 NY3d 704; *see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, at 13-14 [2006]). We further conclude that County Court's

alternative application of the presumptive override for a prior sex felony conviction to classify defendant a level three risk was warranted (see Risk Assessment Guidelines and Commentary, at 3-4; *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708).

Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level on the ground that both the present and prior sex offenses were nonviolent (see *Gilbert*, 78 AD3d at 1585-1586; *Ratcliff*, 53 AD3d 1110). In any event, "defendant's multiple convictions of sexual crimes constitute 'compelling evidence that [he] poses a serious risk to public safety' . . . , and thus a downward departure from the presumptive risk level is not warranted" (*Gilbert*, 78 AD3d at 1586).