

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

1416

KA 10-01874

PRESENT: SCUDDER, P.J., CENTRA, GREEN, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM C. MARION, DEFENDANT-APPELLANT.

DAVID M. PALMIERE, ROCHESTER, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated September 25, 2009. 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.). The total risk factor score on the risk assessment instrument prepared by the Board of Examiners of Sex Offenders (Board) resulted in the presumptive classification of defendant as a level three risk but, as defendant correctly notes, the Board recommended a downward departure to level two. "County Court, however, was not bound by the Board's recommendation and, in the proper exercise of its discretion, the court determined defendant's risk level based upon the record before it" (*People v Woodard*, 63 AD3d 1655, 1656, *lv denied* 13 NY3d 706; *see People v Charache*, 32 AD3d 1345, *affd* 9 NY3d 829). "The record supports the court's determination that there was no 'mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines,' and thus that a departure from the presumptive risk level was not warranted" (*Charache*, 32 AD3d 1345).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court