

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

901

**KA 11-01261**

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON L. HAYS, DEFENDANT-APPELLANT.

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WALLACE VAN C. AUSER, III, FULTON, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Oswego County Court (Walter W. Hafner, Jr., J.), entered May 16, 2011. The order determined, *inter alia*, 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, *inter alia*, that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in denying his request for a downward departure to a level one risk. We reject that contention. Although the court may, in the exercise of its discretion, "depart from the presumptive risk level even if the Board [of Examiners of Sex Offenders] does not recommend such a departure" (*People v Johnson*, 11 NY3d 416, 421), a downward departure is warranted only "where 'there exists . . . [a] mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines' " (*People v Hamelinck*, 23 AD3d 1060, 1060). Defendant must present "clear and convincing evidence of the existence of special circumstances to warrant a[] . . . downward departure" (*id.* [internal quotation marks omitted]; see *People v Vaughn*, 26 AD3d 776, 777). Contrary to defendant's contention, he has not established that his participation in a sex offender treatment program entitles him to a downward departure. Although "[a]n offender's response to [sex offender] treatment, *if exceptional*, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006] [emphasis added]), here defendant failed to demonstrate by clear and convincing evidence that he had an *exceptional response* to sex offender treatment.

Entered: October 5, 2012

Frances E. Cafarell  
Clerk of the Court