

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

854

KA 20-01460

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL RAY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ERIC SUN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W.
OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), entered September 9, 2020. 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 pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in granting the People's request for an upward departure to a level two risk. "[W]hen the People establish, by clear and convincing evidence (see Correction Law § 168-n [3]), the existence of aggravating factors that are, 'as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines,' a court 'must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure' from a sex offender's presumptive risk level" (*People v Havlen*, 167 AD3d 1579, 1579 [4th Dept 2018], quoting *People v Gillotti*, 23 NY3d 841, 861 [2014]). Here, we conclude that the determination to grant an upward departure was based on clear and convincing evidence of certain aggravating factors, namely the quantity and nature of the child pornography possessed by defendant (see *People v McCabe*, 142 AD3d 1379, 1380-1381 [4th Dept 2016]; *People v Rotunno*, 117 AD3d 1019, 1019 [2d Dept 2014], *lv denied* 24 NY3d 902 [2014]), and his use of the internet to engage with an undercover police officer posing as a 13-year-old girl, which included sending child pornography to the officer (see *Havlen*, 167 AD3d at 1579; *People v Agarwal*, 96 AD3d 1450, 1451

[4th Dept 2012]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court