

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

578

KA 15-00274

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE L. SMITH, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered December 12, 2014. 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court abused its discretion in refusing to grant a downward departure from his presumptive risk level. We reject that contention. " 'A departure from the presumptive risk level is warranted where there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise taken into account by the guidelines' " (*People v Sells*, 115 AD3d 1345, 1346, *lv denied* 23 NY3d 905). Here, defendant failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of any mitigating factors by the requisite preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 860-861).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court