

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

1648

KA 08-02074

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN A. CUNNINGHAM, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered May 16, 2008. 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.*). Contrary to defendant's contention, the statements in the case summary constitute reliable hearsay upon which County Court properly relied pursuant to Correction Law § 168-n (3) (*see People v Thompson*, 66 AD3d 1455; *People v Ramos*, 41 AD3d 1250, *lv denied* 9 NY3d 809; *People v Wragg*, 41 AD3d 1273, *lv denied* 9 NY3d 809). Those statements constitute clear and convincing evidence that an upward departure from the presumptive risk level was warranted based upon "an aggravating . . . factor of a kind, or to a degree, . . . otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]).

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court