

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

1379

KA 09-00493

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HECTOR L. RIVERA, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered February 3, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act following a redetermination hearing.

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.) following a redetermination hearing conducted in accordance with the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456, cert denied 522 US 1122). Contrary to defendant's contention, Supreme Court did not abuse its discretion in refusing to grant defendant a downward departure from his presumptive risk level. Although defendant received the lowest possible point total to be classified as a level two risk and had not committed another sex offense in over 12 years, he failed to present evidence with respect to the nature of his rehabilitation or lifestyle during that time, and the record establishes that he was convicted of failing to register as a sex offender (§ 168-t). Defendant therefore "failed to present the requisite clear and convincing evidence of the existence of special circumstances warranting a downward departure" (*People v Marks*, 31 AD3d 1142, 1143, lv denied 7 NY3d 715; see *People v McGrigg*, 67 AD3d 1426, lv denied 14 NY3d 701; *People v Adams*, 52 AD3d 1237, lv denied 11 NY3d 705).

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court