

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

1358

KA 11-01407

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS J. POOLE, DEFENDANT-APPELLANT.

HEATON & VENUTI, LLP, GENEVA (MARK A. VENUTI OF COUNSEL), FOR
DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR
OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Craig J. Doran, J.), dated November 9, 2010. 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 ([SORA] Correction Law § 168 et seq.). We reject defendant's contention that County Court erred in assessing 30 points against him under risk factor 3, for the number of victims. It is well established that children depicted in pornographic images constitute "victims" for the purposes of SORA (see *People v Johnson*, 47 AD3d 140, 142-143, *aff'd* 11 NY3d 416; *People v Bretan*, 84 AD3d 906, 907; *People v Perahia*, 57 AD3d 865) and, here, defendant admitted that he possessed approximately 1,900 images and 300 videos depicting child pornography at the time of his arrest. The People therefore established by the requisite clear and convincing evidence that the crime in question involved three or more victims (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 10 [2006]; see generally § 168-n [3]; *People v Pettigrew*, 14 NY3d 406, 409; *People v Mingo*, 12 NY3d 563, 571). There is no merit to defendant's further contention that, inasmuch as he merely possessed child pornography, he should not have been assessed 20 points under risk factor 7, for a crime that "was directed at a stranger" (Risk Assessment Guidelines and Commentary, at 12; see *Johnson*, 11 NY3d at 419-421). Inasmuch as defendant admitted that he did not know any of the children depicted in the pornographic images, the court properly assessed points under that risk factor (see *Johnson*, 11 NY3d at 419-421; see generally *Mingo*, 12 NY3d at 572).

Finally, we conclude that "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v McDaniel*, 27 AD3d 1158, 1159, lv denied 7 NY3d 703; see *People v Fredendall*, 83 AD3d 1545), particularly in light of defendant's admission that many of the pornographic images at issue depicted violence (see generally *Bretan*, 84 AD3d at 907-908).