

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

1394

CA 08-01301

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KARL MUENCH, AN INMATE IN THE CUSTODY OF
NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered May 8, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility designated by the Commissioner of Mental Health based upon a jury finding that respondent is a detained sex offender with a mental abnormality that, inter alia, predisposes him to commit further sex offenses.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Oneida County, for a reconstruction hearing in accordance with the following Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 committing him to a secure treatment facility designated by the Commissioner of Mental Health based upon a jury finding that he is a detained sex offender with a mental abnormality that, inter alia, predisposes him to commit further sex offenses. We agree with respondent that his challenge to the alleged discharge of prospective jurors outside the presence of the trial judge implicates his fundamental right to a jury trial (*see generally People v Toliver*, 89 NY2d 843, 844-845), and that preservation therefore is not required because his challenge concerns a potential " 'mode of proceedings' " error (*People v Kelly*, 5 NY3d 116, 119). The record before us, however, is insufficient to enable us to review that challenge. Although the record contains references to jury questionnaires, it does not include the jury questionnaires at issue. The record also fails to establish whether any prospective jurors were in fact discharged pursuant to the allegedly improper procedure and, if so, who authorized the procedure and who actually discharged them. Consequently, we are unable to determine whether Supreme Court erred in " 'relinquish[ing] control over the proceedings' " by permitting

the allegedly improper procedure (*People v Bosa*, 60 AD3d 571, 573, *lv denied* 12 NY3d 923, quoting *Toliver*, 89 NY2d at 844), or whether the "procedure was an effective screening device and a proper exercise of discretion" by the court (*People v Boozer*, 298 AD2d 261, *lv denied* 99 NY2d 555; see *People v McGhee*, 4 AD3d 485, 486, *lv denied* 2 NY3d 803). We therefore hold the case, reserve decision and remit the matter to Supreme Court for a reconstruction hearing to determine the contents of the jury questionnaires, whether any prospective jurors were discharged pursuant to the allegedly improper procedure and, if so, who authorized the procedure and discharged them.