

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

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CA 12-00544

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ.

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

V

MEMORANDUM AND ORDER

DEREK GOODING, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO
(MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 2, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that respondent is a dangerous sex offender requiring confinement and committed him to a secure treatment facility.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent appeals from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement and committing him to a secure treatment facility (see Mental Hygiene Law § 10.01 *et seq.*). Contrary to respondent's contention, we conclude that petitioner established by clear and convincing evidence at the dispositional hearing that he is a dangerous sex offender requiring confinement (see §§ 10.03 [e]; 10.07 [f]). Moreover, Supreme Court, as the trier of fact, was " 'in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented' " (*Matter of State of New York v Blair*, 87 AD3d 1327, 1327; see *Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144), and we see no basis to disturb its decision to credit the testimony of petitioner's expert over that of respondent's expert (see *Blair*, 87 AD3d at 1327). We reject respondent's further contention that petitioner was required to "refute the possibility of a less restrictive placement" or that the court was required to specifically address the issue of a less restrictive alternative (see *Matter of State of New York v Enrique T.*, 93 AD3d 158, 166-167, *lv dismissed* 18 NY3d 976).

Finally, respondent's constitutional and statutory challenges to

the treatment he received while in a regimen of SIST (see Mental Hygiene Law § 10.11) at Mid-Erie Counseling and Treatment Services (Mid-Erie) are not properly before us inasmuch as they are unpreserved for our review (see *Blair*, 87 AD3d at 1328; see generally *Matter of Giovanni K. [Dawn K.]*, 68 AD3d 1766, 1767, lv denied 14 NY3d 707). In any event, on the record before us, there is no evidence that either petitioner or Mid-Erie failed to fulfill its treatment responsibilities or violated respondent's due process rights.