

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

1008

CA 10-01139

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND GORSKI, JJ.

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

V

MEMORANDUM AND ORDER

KEITH REEVE, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA
(JANINE E. FRANK OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 22, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent 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 determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Contrary to respondent's contention, we conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent suffers from a mental abnormality (*see Matter of State of New York v Farnsworth*, 75 AD3d 14, 17, appeal dismissed 15 NY3d 848; *see generally* § 10.03 [i]). Petitioner also established by clear and convincing evidence that respondent has such an inability to control his behavior that he "is likely to be a danger to others and to commit sex offenses if not confined" (§ 10.07 [f]). Thus, Supreme Court's determination that respondent should be committed to a secure treatment facility is not against the weight of the evidence (*see generally id.*).

"Respondent's contention regarding the order issued following the probable cause hearing is not properly before us because no appeal lies from such an order" (*Matter of State of New York v Stein*, 85 AD3d 1646, 1648; *see* Mental Hygiene Law § 10.13 [b]). Respondent's further contention regarding the standard of proof is not preserved for our review inasmuch as he failed to raise it before the trial court (*see Matter of State of New York v Gierszewski*, 81 AD3d 1473, lv denied 17 NY3d 702; *Matter of State of New York v Chrisman*, 75 AD3d 1057; *cf.*

Matter of State of New York v Rashid, 16 NY3d 1, 13). In any event, respondent's contention is not properly before us because it is raised for the first time in his reply brief (see *Matter of State of New York v Zimmer* [appeal No. 4], 63 AD3d 1563; see generally *Turner v Canale*, 15 AD3d 960, lv denied 5 NY3d 702).

We have considered respondent's remaining contentions and conclude that they are without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court