

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

550

CA 19-01190

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF LAWRENCE PEREZ,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF
COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County
(Michael M. Mohun, A.J.), entered May 24, 2019 in a CPLR article 78
proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding
seeking to annul the determination that denied his inmate grievance,
in which he challenged respondent's determination that he must
participate in a sex offender counseling and treatment program
(SOCTP). Petitioner appeals from a judgment that dismissed the
petition. We affirm.

During the proceedings in Supreme Court, petitioner did not
challenge the inclusion of his presentence report (PSR) in the record
submitted to the court, and thus he failed to preserve for our review
his contention that the court erred in receiving and reviewing the PSR
in making its determination (*see generally Matter of Arrazola v State
Dept. of Motor Vehs., Appeals Bd.*, 129 AD3d 1444, 1445 [4th Dept
2015]; *Matter of Brown v Feehan*, 125 AD3d 1499, 1502 [4th Dept 2015];
Matter of Adams v Superintendent Bollinier, 118 AD3d 1351, 1351 [4th
Dept 2014]). Petitioner's contention that he was unaware that the PSR
had been submitted is belied by the answer, in which respondent stated
that his determination should be affirmed based on, among other
things, "a review of the petitioner's [PSR], which is a confidential
report and submitted to the Court for in camera review." In any
event, inasmuch as respondent was required to submit to the court the
entire administrative record upon which he made the determination at

issue (see *Matter of Collins v Behan*, 285 NY 187, 188 [1941]; *Matter of Tolliver v Fischer*, 125 AD3d 1023, 1023-1024 [3d Dept 2015], *lv denied* 25 NY3d 908 [2015]; *Matter of Gilbert v Endres*, 13 AD3d 1104, 1104 [4th Dept 2004]), respondent was required to provide the court with the PSR and any other evidence upon which the determination was based, regardless of its confidential nature (see e.g. *Matter of Watson v Annucci*, 173 AD3d 1606, 1606-1607 [4th Dept 2019]; *Matter of Cordova v Annucci*, 162 AD3d 1573, 1574 [4th Dept 2018]).

Petitioner further contends that the court erred in dismissing the petition because petitioner was acquitted of the murder in the first degree count in the indictment that charged him with committing the specific acts upon which respondent relied in determining that he must participate in SOCTP, and therefore respondent must conclude that petitioner did not commit those acts. We disagree. "It is hornbook law that an acquittal in a criminal proceeding is not binding on an administrative agency because of the differences in the burden of proof and rules of evidence" (*Matter of Webster v Van Lindt*, 117 AD2d 555, 558 [1st Dept 1986]; see *People ex rel. Dowdy v Smith*, 48 NY2d 477, 484 [1979]). Contrary to petitioner's further contention that respondent acted irrationally in imposing the SOCTP requirement, we conclude that, under the circumstances presented here, "it was rational both for respondent[] to refer petitioner to [SOCTP] and to deny his grievance in that regard" (*Matter of Harris v Granger*, 64 AD3d 837, 838 [3d Dept 2009], *lv denied* 13 NY3d 710 [2009]; see *Matter of Matos v Goord*, 27 AD3d 940, 941 [3d Dept 2006]).

Petitioner further contends that respondent originally concluded that he did not require SOCTP, and therefore the subsequent imposition of that requirement under the same circumstances is arbitrary and capricious. We conclude that, because "petitioner did not properly raise this issue in his grievance and . . . it was not administratively addressed, his failure to exhaust administrative remedies regarding this issue mandated dismissal of that portion of his petition" (*Matter of Clarke v Senkowski*, 255 AD2d 848, 849 [3d Dept 1998]; see *Matter of Henderson v Annucci*, 175 AD3d 976, 977 [4th Dept 2019]). Furthermore, petitioner failed to preserve that contention for our review because he failed to raise it in the petition (see *Matter of Rodriguez v Fischer*, 96 AD3d 1374, 1375 [4th Dept 2012]; see generally *Matter of Blue Lawn v County of Westchester*, 293 AD2d 532, 534 [2d Dept 2002], *lv denied* 98 NY2d 607 [2002]).