

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

1109

CA 19-00459

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

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

V

MEMORANDUM AND ORDER

SCOTT M., RESPONDENT-APPELLANT,
FOR CIVIL MANAGEMENT PURSUANT TO MENTAL
HYGIENE LAW ARTICLE 10.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Wyoming County (John L. Michalski, A.J.), entered October 17, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, granted the petition for confinement and adjudged that respondent is a dangerous sex offender requiring confinement to a secure treatment facility.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition for confinement is dismissed, and the matter is remitted to Supreme Court, Wyoming County, for further proceedings in accordance with the following memorandum: In this Mental Hygiene Law article 10 proceeding, respondent appeals from an order revoking his regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and confining him to a secure facility. As relevant here, a "[d]angerous sex offender requiring confinement" is a sex offender "suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he or she] is likely to be a danger to others and to commit sex offenses if not confined" (Mental Hygiene Law § 10.03 [e]). The statutory scheme "clearly envisages a distinction between sex offenders who have *difficulty* controlling their sexual conduct and those who are *unable* to control it. The former are to be supervised and treated as 'outpatients' and *only the latter may be confined*" (*Matter of State of New York v Michael M.*, 24 NY3d 649, 659 [2014] [emphasis added]). In other words, only where the offender is "presently 'unable' to control his [or her] sexual conduct" may he or she be confined under section 10.03 (e) (*Matter of State of New York v George N.*, 160 AD3d 28, 33 [4th Dept 2018] [emphasis added]).

Here, we agree with respondent that petitioner failed to meet its burden of proving, by clear and convincing evidence, that he is "presently 'unable' to control his sexual conduct" and is thus a dangerous sex offender requiring confinement (*id.*; see *Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340 [4th Dept 2020]). Contrary to petitioner's contention, the record does not establish that respondent touched an unknown adult female without her knowledge on an unknown date; rather, the record reflects only the possibility that such an act might have taken place. The balance of respondent's alleged SIST violations are technical missteps that do not evince an " 'inability' " to control sexual misconduct (*George N.*, 160 AD3d at 31). We note that the report of petitioner's expert failed to meaningfully address respondent's successful integration into the community while on SIST. At most, petitioner established that respondent "was struggling with his sexual urges, not that he was unable to control himself" (*Michael M.*, 24 NY3d at 659), and that is legally insufficient to justify confinement under Mental Hygiene Law § 10.03 (e) (see *Michael M.*, 24 NY3d at 659-660). We therefore reverse the order, dismiss the petition for confinement, and remit the matter for further proceedings (see *id.* at 660; *George N.*, 160 AD3d at 34).

Respondent's remaining contentions are academic in light of our determination.