2016 IL App (2d) 150540-U
No. 2-15-0540
Order filed June 2, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re COMMITMENT OF TOMMY O. HARDIN	)	Appeal from the Circuit Court of Du Page County.
	)	No. 07-MR-1685
(The People of the State of Illinois, Petitioner-Appellee v. Tommy O. Hardin., Respondent-Appellant.)	)	Honorable Bonnie M. Wheaton Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of respondent's section 2-1401 petition was affirmed where respondent was unable to allege a meritorious defense to the underlying judgment committing him to a secure treatment facility as a sexually violent person. Respondent's arguments were otherwise meritless.

¶ 2 In January 2011, respondent, Tommy O. Hardin, was adjudicated a sexually violent person (SVP) under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2010)). In April 2012, the trial court committed respondent to the custody of the Illinois Department of Human Services (DHS) for institutional treatment in a secure facility. Respondent was committed as an SVP under the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, DSM-IV-TR (2000)

(DSM-IV-TR), based on his diagnosis of "paraphilia not otherwise specified [PNOS], sexually attracted to nonconsenting and adolescent females."

¶ 3 In May 2013, the American Psychiatric Association, Diagnostic and Statistical Manual, 5th Edition, DSM-V (2013) (DSM-V) was released. The DSM-V did not include the diagnosis of PNOS. In July 2013, respondent filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) seeking to vacate the orders adjudicating him an SVP and committing him to DHS for treatment. After an evidentiary hearing, the trial court denied respondent's section 2-1401 petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The facts concerning the underlying sexual offenses for which respondent was convicted are set forth in detail in this court's previous opinions, as well as in our supreme court's prior opinion. Thus, we recite only those facts pertinent to the issues involved in the present appeal.

¶ 6 On three separate occasions, respondent was convicted of sex offenses against teenage girls between the ages of 12 and 15. Respondent used lies, manipulation, alcohol, force, or the threat of force to engage in nonconsensual sexual activity with the victims. After a bench trial for his last offense, respondent was convicted of five counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2000)) and was sentenced to 22 years' imprisonment. In 2007, before respondent was scheduled to begin mandatory supervised release (MSR), the State petitioned the court to have respondent declared an SVP. Following a probable cause hearing, the trial court dismissed the petition, the State appealed, and this court reversed and remanded for further proceedings. See *In re Detention of Hardin*, 391 Ill. App. 3d 211, 216-221 (2009). Our supreme court affirmed this court's judgment. See *In re Detention of Hardin*, 238 Ill. 2d 33, 54 (2010).

¶ 7 Following a bench trial on January 25, 2011, the court found respondent to be an SVP. At trial, the State presented the testimony of two certified experts in psychology. Dr. David Suire diagnosed respondent with "PNOS, sexually attracted to adolescent and nonconsenting persons." Dr. John Arroyo also diagnosed respondent with "PNOS, nonconsenting persons."[1] Both doctors diagnosed respondent with PNOS using the criteria set forth in the DSM-IV-TR. At the April 5, 2012, dispositional hearing, respondent's expert, Dr. Leslie Kane, also diagnosed respondent under the DSM-IV-TR with PNOS, attracted to nonconsenting persons. Dr. Kane, however, testified that there existed some controversy in the professional community over whether PNOS was a reliable diagnosis. Following the dispositional hearing, the court committed respondent to a secure treatment facility under the custody of DHS. Respondent appealed the judgment, and this court affirmed. See *In re Commitment of Hardin*, 2013 IL App (2d) 120977, ¶ 30.

¶ 8 In October 2012, Dr. Suire filed a psychological reexamination report pursuant to section 55 of the Act. 725 ILCS 207/55 (West 2012). In that report, Dr. Suire again opined that respondent met the DSM-IV-TR diagnostic criteria for PNOS, nonconsenting and adolescent females. Based on that diagnosis and a risk-of-reoffending analysis, Dr. Suire recommended that respondent remain committed for further secure care and treatment. On October 18, 2012, the State filed a "Motion for Periodic Re-Examination and Finding of No Probable Cause based on Review of October 2012 Re-Examination Report." The State requested that the trial court enter

[1] Both Dr. Suire and Dr. Arroyo also diagnosed respondent with personality disorder not otherwise specified, with antisocial features, but that diagnosis is not at issue for purposes of this appeal.

an order finding that no probable cause existed to believe that respondent was no longer an SVP. The requested finding would have precluded a further evidentiary hearing on that issue.

¶ 9 In April 2013, Dr. Suire submitted another psychological reexamination report in compliance with section 55 of the Act. In that report, Dr. Suire again diagnosed respondent under the DSM-IV-TR as suffering from the mental disorder of PNOS, nonconsenting and adolescent females. On April 26, 2013, the State filed a motion for periodic reexamination and finding of no probable cause based on Dr. Suire's April 2013 reexamination report.

¶ 10 In May 2013, while the State's motion was pending, the DSM-V was released. The DSM-V did not contain a specific sexual disorder identified as PNOS. Instead, the DSM-V contained two relevant categories entitled "Other Specified Paraphilic Disorders" and "Unspecified Paraphilic Disorders."

¶ 11 On July 16, 2013, respondent filed his section 2-1401 petition, alleging in essence that he no longer suffered from a mental disorder because the DSM-V did not include the diagnosis of PNOS. He thus claimed that he was committed under a "non-existent diagnosis." Respondent requested that the trial court vacate its original SVP finding and grant his immediate release. Alternatively, respondent requested that the court vacate the original SVP finding and "set the cause for a new trial with a *Frye* hearing to be conducted as to the validity of a diagnosis of paraphilia NOS."[2]

¶ 12 The State filed a motion to dismiss respondent's section 2-1401 petition. The State argued that respondent's diagnosis of PNOS was still recognized as a mental disorder in the

[2] Illinois has adopted the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), with regard to the admissibility of expert testimony. See *In re Commitment of Simons*, 213 Ill. 2d 523, 529 (2004).

DSM-V. The State contended that PNOS had been merely reclassified as "other specified paraphilic disorder" under the DSM-V. The State also argued that respondent's diagnosis was not subject to a *Frye* hearing, because *Frye* applies only to methodologies and not diagnoses. Nevertheless, the State noted that the diagnosis of PNOS had been widely recognized as a valid mental disorder in commitment proceedings under the Act. Finally, the State argued that respondent did not need to be diagnosed with a mental disorder explicitly listed in the DSM to be civilly committed under the Act.

¶ 13 The court held a hearing, which consisted solely of attorney arguments, on respondent's section 2-1401 petition. Following the hearing, the court ordered a "*Frye*-like" evidentiary hearing, at which both parties would present an expert witness. The court limited the scope of the evidentiary hearing as follows. Neither expert would reevaluate respondent for purposes of the evidentiary hearing nor would they diagnose him under the DSM-V. Instead, the experts' testimony would be confined to the similarities and differences between the diagnosis of PNOS under the DSM-IV-TR and the diagnoses of other specified or unspecified paraphilic disorders under the DSM-V.

¶ 14 At the evidentiary hearing on March 20, 2014, the respondent called Dr. Terence Campbell, a certified expert in forensic psychology. Dr. Campbell testified that no section in the DSM-V mirrored the section in the DSM-IV-TR that pertained to PNOS. Instead, Dr. Campbell testified, a practitioner could attempt to "shoehorn" the diagnosis of PNOS into the DSM-V under the sections entitled "Other Specified Paraphilic Disorders" and "Unspecified Paraphilic Disorders." Dr. Campbell also criticized the reliability of a diagnosis of PNOS, other specified paraphilic disorder, or unspecified paraphilic disorder.[3] Dr. Campbell ultimately opined that a

[3] Dr. Campbell also strongly criticized the "inter-rater reliability" of the DSM-V as a

diagnosis of PNOS under the DSM-IV-TR did not necessarily and automatically correlate to a diagnosis of other specified or unspecified paraphilic disorders under the DSM-V. Dr. Campbell testified that the DSM-V would have included explicit language indicating a direct correlation between the diagnoses if that was intended. Because he could not diagnose an individual under the DSM-V based solely on a prior diagnosis of PNOS, Dr. Campbell explained that he would need to review an individual's records, view psychological testing data, and conduct a face-to-face clinical interview before he could diagnose the individual.

¶ 15 On cross-examination, Dr. Campbell acknowledged that the DSM-V states that "the distinction between paraphilias and paraphilic disorders was implemented without making any changes to the basic structure of the diagnostic criteria as they had existed since DSM-III-R."

¶ 16 The State called Dr. Raymond Wood, a certified expert in clinical psychology. Dr. Wood testified that the term "paraphilia" was first used in the DSM-IV-TR as a way to group sexual disorders. Yet sexual disorders had always been recognized in the various editions of the DSM. Dr. Wood testified that there were two criteria for paraphilias under the DSM-IV-TR: (1) recurrent, intense sexually arousing fantasies, urges or behaviors, generally involving (among other things) nonconsenting persons that occur over a period of at least six months; and (2) behavior, sexual urges, or fantasies that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. A diagnosis of PNOS under the DSM-IV-TR meant that both criteria were met, but the diagnosis was not one of the eight specifically identified disorders of paraphilia, such as "exhibitionism, frotteurism, [or] pedophilia." Dr. Wood acknowledged that PNOS was not explicitly included in the DSM-V.

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whole. Inter-rater reliability refers to the extent that two or more mental health professionals assessing an individual independent of each other can agree on their diagnostic conclusions.

Instead, the sections entitled other specified and unspecified paraphilic disorders in the DSM-V "are translations of" PNOS into "exactly the same terms in DSM-V." Dr. Wood testified that a diagnosis of PNOS under the DSM-IV-TR is the equivalent diagnosis of either other specified or unspecified paraphilic disorder under the DSM-V.

¶ 17 On cross-examination, Dr. Wood acknowledged that under the DSM-V, the presence of a paraphilia is a necessary but not a sufficient condition to diagnose someone with a paraphilic disorder. To rise to the level of a paraphilic disorder under the DSM-V, a person with a paraphilia must have acted on it to the point of "some degree" of harm, distress, or disruption. Dr. Wood testified that the requirement of acting on a paraphilia to the point of harm, distress, or disruption was implied in the criteria for paraphilias in the DSM-IV-TR, although not explicitly listed as such. Dr. Wood also testified that a diagnosis of PNOS under the DSM-IV-TR "may not" necessarily and automatically equate to a diagnosis under the DSM-V. Instead, to make that determination, Dr. Wood testified that he would need to review the person's records, conduct an interview, and perform psychological testing.

¶ 18 At the end of the hearing, the court denied respondent's 2-1401 petition and ordered respondent's continued commitment. The court found that after hearing the testimony of the experts, the criteria for a diagnosis of PNOS under the DSM-IV-TR were sufficiently similar to the criteria for a diagnosis of paraphilic disorder under the DSM-V such that it would warrant the continued commitment of respondent until the next periodic reexamination. The court also found that the explicit criterion of harm, distress, or disruption that was included in the DSM-V criteria for paraphilic disorders was implied in the DSM-IV-TR criteria for paraphilias. The court noted that the need for a finding of harm, distress, or disruption "was certainly part of the

testimony that was taken into consideration in making the finding that respondent suffered from" PNOS.

¶ 19 Following the hearing, respondent filed a motion to reconsider the court's denial of his section 2-1401 petition. In that motion, respondent requested that he be allowed to amend and supplement the motion to reconsider upon receipt of the transcript from the evidentiary hearing.

¶ 20 On May 12, 2014, before respondent filed an amended motion to reconsider the denial of his section 2-1401 petition, Dr. Suire submitted another psychological reexamination report in compliance with section 55 of the Act. In that report, Dr. Suire diagnosed respondent with "PNOS, nonconsenting and adolescent females" under the DSM-IV-TR. Dr. Suire also diagnosed respondent under the DSM-V with "other specified paraphilic disorder, nonconsenting and adolescent females." In the report, Dr. Suire noted that the use of the DSM-V in place of the DSM-IV-TR did not have "significant implication for either the conceptualization of [respondent's] case and treatment needs, or the assessment of [respondent's] sexual recidivism risk. *** The changes in the diagnoses are mainly limited to small changes in wording and coding, rather than as to the underlying concepts."

¶ 21 Respondent filed his amended motion to reconsider the denial of his section 2-1401 petition on August 27, 2014. After a hearing, the court denied the amended motion on April 21, 2015. Respondent timely appealed.

¶ 22 II. ANALYSIS

¶ 23 Respondent argues that the trial court erred in denying his section 2-1401 petition. Respondent bifurcates his contention into two distinct arguments on appeal. First, respondent contends that he presented a meritorious defense, as evidenced by the testimony at the March 20,

2014, evidentiary hearing. Second, respondent argues that the court erred in denying his request for a *Frye* hearing, based upon the decision of *In re Detention of New*, 2014 IL 116306.[4]

¶ 24 The State argues that a subsequent change in the DSM cannot form the basis of relief from a judgment that initially committed respondent to the custody of DHS as an SVP. We agree.

¶ 25 We affirm the trial court's judgment in denying respondent's section 2-1401 petition, although we do not rely on its reasoning. See *In re Commitment of Tittelbach*, 2015 IL App (2d) 140392, ¶ 23 ("We review the trial court's judgment, not its reasoning, and thus we may affirm on any ground called for by the record.").

¶ 26 A party is entitled to relief under section 2-1401 when the petition sets forth specific factual allegations for each of three elements: (1) a meritorious defense or claim; (2) due diligence in presenting the defense or claim to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51. The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence. *Warren County Soil*, 2015 IL 117783, ¶ 51. When the petition presents a fact-dependent challenge to the final judgment or order, as here, we review a trial court's ultimate decision for an abuse of discretion. *Warren County Soil*, 2015 IL 117783, ¶ 51.

¶ 27 Respondent's section 2-1401 petition was based on the allegation that he was improperly committed to the custody of DHS as an SVP, because the DSM-V eliminated the diagnosis of PNOS, which served as the basis for his commitment under the Act. Hence, respondent

[4] Respondent similarly relies on the first district's decision of *In re Detention of New*, 2013 IL App (1st) 111556, which was upheld by our supreme court.

contended that he was committed under a non-existent diagnosis, "there is nothing to cure, and commitment is pointless."

¶ 28 *In re Commitment of Tittelbach* is directly on point. In *Tittelbach*, the respondent filed a section 2-1401 petition seeking relief from a judgment that recommitted him to the custody of DHS as an SVP. *Tittelbach*, 2015 IL App (2d) 140392, ¶ 1. The respondent argued that based upon the release of the DSM-V after he was initially found to be an SVP, he no longer suffered from a mental disorder and that there was no basis to confine him under the Act. *Tittelbach*, 2015 IL App (2d) 140392, ¶ 15. In affirming the trial court's denial of the respondent's section 2-1401 petition, this court explained that the petition was fatally flawed as a matter of law. *Tittelbach*, 2015 IL App (2d) 140392, ¶ 23. Respondent could not present a meritorious defense to the original judgment that found him to be an SVP. *Tittelbach*, 2015 IL App (2d) 140392, ¶ 25. Specifically, because the DSM-V did not exist at the time of the judgment, the trial court had properly relied on the expert's testimony that under the DSM-IV-TR, respondent suffered from a mental disorder that satisfied the Act. *Tittelbach*, 2015 IL App (2d) 140392, ¶ 25. Moreover, we explained that a party is unable to collaterally attack a judgment based on a "failure of clairvoyance on the part of expert witnesses." *Tittelbach*, 2015 IL App (2d) 140392, ¶ 26. The trial court had clear authority when it entered the judgment, and a change in the nonlegal standards on which experts based their opinions could not be equated with a change in the law. *Tittelbach*, 2015 IL App (2d) 140392, ¶ 26.

¶ 29 As in *Tittelbach*, respondent's section 2-1401 petition was fatally flawed as a matter of law, because a revision to the DSM in 2013 could not be a meritorious defense to the initial April 2012 judgment committing him to the custody of DHS for treatment as an SVP. He cannot collaterally attack the judgment based upon a "failure of clairvoyance" on the part of expert

witnesses to foresee that PNOS would not be included in the DSM-V. Simply stated, the trial court had clear authority to rely on Dr. Suire and Dr. Arroyo's testimony at trial that respondent suffered from the mental disorder of PNOS, nonconsenting and adolescent females, under the DSM as it existed at the time of the judgment. The change in the DSM after respondent was properly adjudicated an SVP might have provided a basis for him to seek a prospective discharge or to defend against subsequent motions for commitment, but it could not establish a meritorious defense to the judgment challenged here. See *Tittelbach*, 2015 IL App (2d) 140392, ¶ 26.

¶ 30 Respondent's attempts to distinguish *Tittelbach* are unavailing. He argues that the respondent in *Tittelbach* claimed that the DSM-V provided new applicable diagnoses not included in the DSM-IV-TR; whereas here, respondent's original diagnosis no longer exists. The fact that PNOS is not included in the DSM-V does not render *Tittelbach* inapplicable. As in *Tittelbach*, respondent's argument was premised on the allegation that his original diagnosis under the DSM-IV-TR was no longer valid in light of the DSM-V. See *Tittelbach*, 2015 IL App (2d) 140392, ¶ 25.

¶ 31 Additionally, respondent contends that *Tittelbach* is distinguishable because Dr. Suire diagnosed respondent with both PNOS under the DSM-IV-TR and other specified paraphilic disorder under the DSM-V in his May 12, 2014, reexamination report. Contrary to respondent's claim, the fact that Dr. Suire also diagnosed respondent with PNOS under the DSM-IV-TR in that report is immaterial. Dr. Suire explicitly stated in that report that the use of the DSM-V in place of the DSM-IV-TR did not have "significant implication for either the conceptualization of [respondent's] case and treatment needs, or the assessment of [respondent's] sexual recidivism risk."

¶ 32 Respondent further suggests that *Tittelbach* is distinguishable because he "cited" the decision of *In re Detention of New*, 2013 IL App (1st) 111556, in his section 2-1401 petition for the proposition that his given diagnosis was not universally recognized as a valid diagnosis. Respondent's argument misses the mark. Although *New* held that a novel mental diagnosis may be subject to a *Frye* hearing (*New*, 2013 IL App (1st) 111556, ¶ 59), nothing prevented respondent from challenging his given mental diagnosis on direct appeal, which he failed to do. Indeed, Dr. Kane testified at respondent's 2012 dispositional hearing that there was a faction of psychologists who viewed PNOS as an improper diagnosis. Dr. Kane also explicitly testified that a diagnosis of PNOS that contained addendums of sexual attraction to nonconsenting persons or adolescents had been rejected from the forthcoming DSM-V**.** See *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 1035 (1991) ("[S]ection 2-1401 was never intended to give a litigant a new opportunity to do that which should have been done in an earlier proceeding.").

¶ 33 We also reject respondent's suggestion that we should not apply *Tittelbach*'s rationale because a scenario may arise where a respondent is without recourse to challenge his or her commitment for 12 months. See 725 ILCS 207/60 (West 2012) (a respondent can petition a court for conditional release only if 12 months have elapsed since the initial commitment order, the most recent release petition was denied, or the most recent order for conditional release was revoked). As respondent admits in his brief, he had not been denied a request for release pursuant to section 60 of the Act. Thus, we decline to address an issue which is presented only through a hypothetical scenario and which is not presented by the facts of this particular case. See *In re Rose Lee Ann L.*, 307 Ill. App. 3d 907, 912 (1999).

¶ 34 Even if the new DSM-V was somehow applicable to the January 2011 judgment that adjudicated him an SVP and the April 2012 judgment committing him to the custody of DHS for treatment, as explained below respondent's arguments are otherwise meritless.

¶ 35 A. Respondent's Meritorious Defense Based on Evidentiary Hearing

¶ 36 On March 20, 2014, the court held an evidentiary hearing on respondent's section 2-1401 petition. Although classified as a "*Frye*-like" hearing, the court explained that the purpose of the hearing was to determine whether a PNOS diagnosis under the DSM-IV-TR was sufficiently similar to a diagnosis of paraphilic disorder under the DSM-V that it would warrant the continued commitment of respondent in the treatment facility until the next periodic reexamination. Based upon the parameters of the hearing, respondent contends that he established a meritorious defense that addressed the court's inquiry. Respondent thus argues that the judgment finding him to be an SVP should be vacated or a *Frye* hearing should be held to determine whether he actually "suffered from a mental disorder at the time of judgment."

¶ 37 We reject respondent's argument. At the hearing, Dr. Wood testified that the diagnoses of other specified and unspecified paraphilic disorders under the DSM-V were merely "translations" of PNOS. Dr. Wood explained that the DSM-V may have used different terms than the DSM-IV-TR, but the diagnoses of other specified and unspecified paraphilic disorders were equivalent diagnoses for PNOS. Although there are discrepancies in Dr. Campbell's testimony as to this point, these discrepancies go to the question of the credibility of the witnesses. See *People v. Jones*, 86 Ill. App. 3d 1013, 1017 (1980) ("It is the function of the trier of fact, in this case the trial judge, to weigh the testimony, judge the credibility of witnesses and determine factual matters in debatable sets of circumstances."). The court ultimately found that

after hearing the testimony of the two experts, a diagnosis of PNOS under the DSM-IV-TR was sufficiently similar to a diagnosis of paraphilic disorder under the DSM-V.

¶ 38 Contrary to respondent's claim, the fact that both experts testified that they could not automatically diagnose a respondent under the DSM-V based solely on a previous diagnosis of PNOS under the DSM-IV-TR does not undermine the court's finding. Those assertions were consistent with the experts' other testimony that mental health is not an exact science and two different practitioners can arrive at different diagnoses for the same respondent. Indeed, both experts clarified that they would need to review a respondent's criminal history, mental health history, and psychological testing data, as well as try to conduct a clinical interview before making *any* diagnosis under the DSM. They also stated that it would be unprofessional to make a diagnosis based solely upon a previous diagnosis by a different practitioner.

¶ 39 *In re Detention of Hayes*, 2015 IL App (1st) 142424, provides support for the trial court's decision. In *Hayes*, the court compared the diagnosis of PNOS in the DSM-IV-TR with the diagnosis of other specified paraphilic disorder under the DSM-V. *Hayes*, 2015 IL App (1st) 142424, ¶¶ 20-23. The court then held: "The change from paraphilia NOS to other specified paraphilic disorder does not suggest a change in professional knowledge, but rather a relabeling or clarification of the elements of essentially the same disorder." *Hayes*, 2015 IL App (1st) 142424, ¶ 23.

¶ 40 Moreover, we feel compelled to note that the court did not err in failing to order a *Frye* hearing as to the validity of PNOS as a mental disorder.[5] The court could have appropriately

[5] We note that we are only addressing the trial court's failure to grant a *Frye* hearing to determine the validity of a general diagnosis of PNOS, as specifically requested in respondent's petition. We are not referring to the court's refusal to grant a *Frye* hearing for the identifier of

taken judicial notice of unequivocal and undisputed judicial decisions that have accepted PNOS as a valid mental disorder under the Act. See *New*, 2014 IL 116306, ¶ 39 (court may determine general acceptance of a diagnosis by "taking judicial notice of unequivocal and undisputed prior judicial decisions ***[]"); see also *Hayes*, 2015 IL App (1st) 142424, ¶ 25 (listing cases in Illinois and other states that have relied upon the diagnosis of PNOS as a valid mental disorder to civilly commit respondents as SVPs); *In re Detention of Melcher*, 2013 IL App (1st) 123085, ¶ 60 ("The diagnosis of PNOS nonconsent *** has been the basis for numerous probable cause or sexually violent person findings in this state and other jurisdictions outside of this state.").

¶ 41 B. Respondent's Request for a *Frye* Hearing

¶ 42 Finally, relying on our supreme court's decision in *New*, 2014 IL 116306, respondent devotes a considerable portion of his appellate briefs to arguing that the trial court erred in failing to order a *Frye* hearing to determine the validity of the "adolescent females" portion of his diagnosis.

¶ 43 In *New*, the respondent was diagnosed with PNOS, sexually attracted to early pubescent males, otherwise known as hebephilia. *New*, 2014 IL 116306, ¶¶ 9, 12. On direct appeal, the respondent challenged the validity of his hebephilia diagnosis. *New*, 2014 IL 116306, ¶ 33. Our supreme court held that a diagnosis of hebephilia was subject to a *Frye* hearing, because it had an inadequate basis to determine whether hebephilia had gained general acceptance in the psychological and psychiatric communities. *New*, 2014 IL 116306, ¶ 53. The supreme court refused to take judicial notice of those cases in which courts previously accepted a diagnosis of

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"adolescent females" as it is used in respondent's diagnosis. As we will explain below, that particular argument is not properly before this court.

PNOS, because none of those cases involved the specific PNOS diagnosis at issue: sexually attracted to early adolescent males (hebephilia). *New*, 2014 IL 116306, ¶¶ 47, 49.

¶ 44 Here, respondent argues that his diagnosis of PNOS, nonconsenting and adolescent females is similarly subject to a *Frye* hearing, because the identifier of "adolescent females" used in his diagnosis is the same as hebephilia. Without addressing whether respondent's claim has any merit, we hold that respondent has forfeited this issue for review because he failed to present this argument to the trial court. See *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 229 (1986) ("These arguments, however, were not raised as a meritorious defense in Airoom's section 2-1401 petition, out of which this appeal arises. It is well established that matters not presented to or ruled upon by the trial court may not be raised for the first time on appeal.").

¶ 45 Although respondent did request a *Frye* hearing in his section 2-1401 petition, he requested the hearing for the purpose of determining "the validity of the diagnosis of paraphilia NOS." Respondent failed to challenge the "adolescent females" addendum to his PNOS diagnosis at any point in the section 2-1401 petition or during the hearings held on his petition. Respondent's arguments were based solely on the validity of the PNOS diagnosis, generally, due to the fact that it was not included in the DSM-V.

¶ 46 Instead, on January 26, 2015, respondent specifically filed a "Motion for *Frye* Hearing" that was unrelated to his section 2-1401 petition. In that motion and at the hearing on that motion, respondent argued those points that he now raises in his appellate briefs, *i.e.*, that the "adolescent females" language in his diagnosis was subject to a *Frye* hearing. The trial court denied respondent's motion on March 5, 2015, and respondent then attempted to appeal that order. We dismissed that appeal because it was not a final and appealable order.

¶ 47 Here, respondent is improperly attempting to include those arguments that were made in connection with his motion for a *Frye* hearing into the present appeal. Indeed, respondent's notice of appeal for the present case indicates that he is only appealing the April 21, 2015, order that denied his amended motion to reconsider the denial of his section 2-1401 petition.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 50 Affirmed.