STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1998

In the Matter of the Civil Commitment of:
Rahman Abdu Thomas,
a/k/a Raymond Leroy Thomas.

Filed April 16, 2012
Affirmed
Hudson, Judge

Clay County District Court
File No. 14-P9-05-002043

Rahman Abdu Thomas, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Noah Cashman, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Lawson, Clay County Attorney, Moorhead, Minnesota (for respondent state)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant challenges the district court's denial of his rule-60.02 motion to vacate his indeterminate commitment as a sexually dangerous person, arguing that his constitutional rights were violated by his receipt of inappropriate treatment, his stipulation to commitment was fraudulently obtained, and he was denied the effective assistance of counsel in deciding to stipulate to commitment. We affirm.

FACTS

In January 2006, a petition was filed in Clay County seeking to commit appellant Rahman Abdu Thomas as a sexual psychopathic personality under Minn. Stat. § 253B.02, subd. 18b (2004), or a sexually dangerous person (SDP) under Minn. Stat. § 253B.02, subd. 18c (2004). The petition alleged that appellant had a history of harmful sexual contact with minors, resulting in a 1987 Illinois conviction of aggravated criminal sexual assault and a 2002 Minnesota conviction of second-degree criminal sexual conduct; that he had numerous mental-health- and chemical-dependency-related hospitalizations dating from 1985; and that he had received sex-offender treatment while incarcerated at Minnesota Correctional Facilities at Lino Lakes and Moose Lake, but was terminated from treatment after a major violation for treatment refusal and denied readmission because he had insufficient time remaining on his prison sentence.

In support of the petition, two licensed psychologists reported that appellant suffered from antisocial personality disorder with several psychopathic features, was an untreated sex offender, and had chronic alcohol dependence. They opined that the combination of appellant's antisocial personality disorder and psychopathic traits identified him as a particularly high-risk offender. The district court appointed two additional licensed psychologists, Dr. Rosemary Linderman and Dr. James Gilbertson, who evaluated appellant. They opined that appellant had engaged in a course of harmful sexual conduct, based on his sexual-assault convictions and additional sexual offenses against juvenile female victims; and that he had diagnoses of polysubstance abuse, pedophilia, and a non-specified personality disorder. They offered opinions that, as a

result of his disorders, appellant had serious difficulty controlling his sexually harmful behavior; that he was dangerous and highly likely to engage in harmful sexual conduct in the future; and that his best chance for treatment was inpatient care in a structured, secure program with a chemical-dependency component.

At a district court hearing, after conferring with his court-appointed attorney, appellant signed a stipulation waiving his right to a hearing on the petition and to present and cross-examine witnesses. He agreed to commitment as an SDP and that he was fully advised of his rights and was adequately represented by his attorney. Appellant informed the court that he had sufficient time to discuss the case with his attorney, including possible defenses with respect to two of his alleged victims; that he understood that even without the allegations of those victims, the physicians would be opining that he met the criteria for commitment as an SDP; and that he was satisfied with his attorney's representation. He also stated on the record that he understood that by stipulating to commitment, he would not be discharged unless it appeared to the satisfaction of the commissioner, after a hearing and a recommendation by a special review board, that he would be able to adjust to open society and was no longer dangerous to the public. He acknowledged his understanding that he had a right of review of that decision by a three-judge panel. He stated that he understood that there was no guarantee of provisional or complete release and that he agreed to waive his right to a commitment hearing with the possibility of permanent commitment. The district court noted that appellant appeared to have an understanding of the rights he was giving up by entering into the stipulation and

indicated that it would receive evidence in support of the agreement, which would result in the order committing appellant as an SDP.

The district court issued stipulated findings of fact, conclusions of law, and an initial order committing appellant as an SDP. The district court found the opinions of Drs. Linderman and Gilbertson to be credible and concluded that clear and convincing evidence existed that appellant currently suffered from mental disorders that result in his inability to control his sexually harmful behavior; that it was highly likely that he would engage in further harmful sexual conduct; that he is dangerous to others; that he was in need of sex offender treatment; and that the Minnesota Sex Offender Program (MSOP) was the least restrictive program available consistent with his needs and the requirements of public safety.

In August 2006, before a scheduled 60-day review hearing, appellant wrote to his attorney and the district court pro se and indicated that he had objections to the proceeding and wished to withdraw his stipulation.[1] At the review hearing, however, appellant withdrew his request to withdraw the stipulation and informed the court that he had resolved his previous concerns with his attorney. The district court found that appellant knowingly, intelligently, and voluntarily withdrew his motion to withdraw the stipulation and other objections. The district court then considered the 60-day treatment

[1] The letter stated that the petition contained false allegations; that appellant had not received paperwork from the court or his attorney regarding the stipulation or his assessments; that his attorney had been inaccessible; and that he had not been well advised relating to a decision "to stipulate to SDP versus possible trial strategies and/or other options."

report, which indicated that appellant continued to meet the criteria for MSOP treatment, and ordered appellant's indeterminate commitment.

Appellant did not directly appeal his commitment, but approximately four years later, he filed a pro se motion requesting that the district court's order of commitment be set aside under Minn. R. Civ. P. 60.02. He argued that the county and MSOP had committed fraud on the court under rule 60.02(c); that he received ineffective assistance of counsel under rule 60.02(f) because his counsel improperly advised him to stipulate to treatment in MSOP when that program had not yet released a person from treatment; and that his commitment as an SDP violated his due-process rights because he could allegedly not complete treatment. He also filed a petition for a writ of habeas corpus. Because appellant had asserted that his counsel was ineffective, the district court appointed him new counsel.

The district court denied appellant's motion for relief under rule 60.02 and his ineffective-assistance claim. The district court concluded that appellant may not challenge the adequacy of his treatment in MSOP under rule 60.02, based on this court's decision in *In re Commitment of Lonergan*, 792 N.W.2d 473, 476–77 (Minn. App. 2011), *review granted* (Minn. Apr. 19, 2011). The district court noted that appellant was not precluded from alleging an ineffective-assistance claim under rule 60.02. *See Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). But the district court concluded that appellant's ineffective-assistance claim was untimely because it was brought four years after his commitment proceeding, which was not within a reasonable time. *See* Minn. R. Civ. P. 60.02 (stating

that motion under rule "shall be made within a reasonable time"). The district court additionally concluded that, even if the motion had been made within a reasonable time, appellant had failed to demonstrate a prima facie case either that counsel's representation fell below an objective standard of reasonableness or that a reasonable possibility existed that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984) (enunciating two-pronged test for ineffective-assistance claims).

The district court also rejected appellant's claim that Phase Three of the MSOP program, during which committed persons are monitored to determine whether they are able to maintain control over their behaviors, is unconstitutional because no individual has ever been released from that program. The district court concluded that appellant did not timely raise his claim that MSOP treatment as applied to him was unconstitutional, and that even if timely raised, his claim was not ripe because he was currently only in Phase One of the program. The district court also dismissed appellant's claim for a writ of habeas corpus. This appeal of the denial of the motion to vacate follows.

D E C I S I O N

I

Appellant argues that the district court abused its discretion by denying his request to vacate the commitment order under Minn. R. Civ. P. 60.02. He argues that his constitutional rights are being violated because he is receiving inappropriate treatment,

based on MSOP's failure to release any persons committed to that program.[2] This court reviews de novo the legal issue of whether appellant may challenge his treatment or seek discharge by moving to vacate the commitment order. *Lonergan*, 792 N.W.2d at 476.

This court has recently concluded that relief under Minn. R. Civ. P. 60.02 is not available to a person who has been committed as an SDP in order to seek discharge from commitment or assert a constitutional challenge to the adequacy of treatment. *Id.* at 476–78. We concluded that the committed person must seek relief from a special review board to address these issues, not by way of a 60.02 motion to the district court. *Id.* (citing Minn. Stat. §§ 253B.17, subd. 1; .18; .03, subd. 7 (2010)). Therefore, based on *Lonergan*, we conclude that the district court did not err by rejecting appellant's constitutional challenges to the adequacy of his treatment and the unlikelihood of his discharge.[3]

The county argues that, except for appellant's challenge to his treatment, his claims are nonappealable because he failed to file a direct appeal of his commitment. But this court may consider a commitment appeal in the interests of justice even if a nonappealable order is involved. *In re Jost*, 449 N.W.2d 719, 721 (Minn. 1990). Because appellant was deprived of his liberty by virtue of his commitment, and because

[2] We note that since the district court considered appellant's motion, a judicial appeal panel has authorized the provisional discharge of one person committed to MSOP. *Opheim v. Jesson*, No. AP119045 (Minn. Judicial Appeal Panel Feb. 10, 2012).

[3] The county initially challenges the district court's jurisdiction to hear appellant's claims once he was indeterminately committed. "As a general rule state courts have subject-matter jurisdiction over civil commitments." *Lonergan*, 792 N.W.2d at 477 n.1 (quoting *In re Commitment of Beaulieu*, 737 N.W.2d 231, 237 (Minn. App. 2007)).

he has alleged, among other claims, that his counsel provided ineffective assistance, we consider his additional arguments in the interests of justice. *See id*. (stating that compelling nature of commitment proceedings provides basis for reviewing court to consider committed person's arguments in interests of justice, rather than dismiss appeal on technical ground).

II

Appellant argues that the district court abused its discretion by failing to vacate the judgment of his commitment under Minn. R. Civ. P. 60.02(f), arguing that he should have been allowed to withdraw his stipulation to commitment in the MSOP program because no person has yet been released from that program, and his attorney fraudulently represented to him that he would be released in two to three years. A district court may vacate a judgment under Minn. R. Civ. P. 60.02(f) for "[a]ny other reason justifying relief from the operation of the judgment." Such a motion must be made within a reasonable time. Minn. R. Civ. P. 60.02.[4] This court reviews the district court's decision whether to vacate a judgment for an abuse of discretion. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988).

Previous Minnesota appellate decisions have concluded that motions to vacate a district court order filed approximately three years after the order were not filed within a

[4] Under Minn. R. Civ. P. 60.02(c), a district court may also order relief from a judgment on the basis of "[f]raud, . . . misrepresentation, or other misconduct of an adverse party." A motion to vacate on this ground must be made not more than one year after the order or judgment. Minn. R. Civ. P. 60.02. Although appellant sought relief under rule 60.02(f), because his claim was based on an alleged fraudulent representation by his attorney, the district court could also have rejected it as untimely under rule 60.02(c). *See id*.

reasonable time. *See Osterhus v. King Constr. Co.*, 259 Minn. 391, 396–97, 107 N.W.2d 526, 530–31 (1961) (concluding that motion to vacate filed three years after default judgment was not filed within reasonable time); *Majestic Inc. v. Berry*, 593 N.W.2d 251, 256 (Minn. App. 1999) (suggesting that three-and-one-half years would not be reasonable time for motion to vacate filed under rule 60.02(f)), *review denied* (Minn. Aug. 18, 1999). Appellant waited nearly four years to seek to vacate his commitment. We conclude that the district court did not abuse its discretion by rejecting his motion to vacate as untimely.

We also note that, even if we were to consider the merits of appellant's argument, the result would not change. A district court acts within its discretion by refusing to vacate a party's stipulation to civil commitment if that party "had a sound, rational basis for entering into the stipulation" and the stipulation was made "knowingly and voluntarily." *In re Commitment of Rannow*, 749 N.W.2d 393, 399 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008). Appellant signed an eight-page stipulation acknowledging his belief that a sufficient factual basis existed to support his commitment as an SDP. He stated on the record that he fully understood the nature of the proceedings and waived his rights to present and cross-examine witnesses. And he indicated that he understood the special-review board process and that he was not guaranteed provisional or complete release. Under these circumstances, we conclude that appellant has failed to sufficiently allege the existence of facts that, if proved, would permit vacation of his stipulation to commitment as an SDP, and we affirm the district court's rejection of appellant's claim seeking to withdraw his stipulation.

III

Appellant argues that he was deprived of the effective assistance of trial counsel because counsel misinformed him that, if he stipulated to commitment as an SDP, he would be released from MSOP in two to three years. A person who is the subject of a civil-commitment proceeding has a statutory right to representation by counsel. Minn. Stat. § 253B.07, subd. 2c (2010). This court may consider an ineffective-assistance claim raised by a person committed as an SDP in the context of a rule-60.02 motion. *Beaulieu*, 798 N.W.2d at 550; *see also In re Cordie*, 372 N.W.2d 24, 28–29 (Minn. App. 1985) (reviewing civil commitment for ineffective assistance of counsel under rule-60.02 motion), *review denied* (Minn. Sept. 26, 1985). Claims of ineffective assistance of counsel raise mixed questions of fact and law and are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

This court evaluates the adequacy of counsel in civil commitment cases under the same standard applied in criminal cases, examining whether counsel exercised "the diligence of a reasonably competent attorney under similar circumstances." *Cordie*, 372 N.W.2d at 28. To establish a claim of ineffective assistance of counsel, the moving party must demonstrate by a preponderance of the evidence that counsel's representation fell below an objective standard of reasonableness and that a reasonable possibility exists that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 668, 694, 104 S. Ct. 2064, 2068. This court "need not address both the performance and prejudice prongs if one is determinative." *Rhodes*, 657 N.W.2d at 842.

The district court concluded that appellant's ineffective-assistance claim would fail under the second prong of the *Strickland* test because appellant could not demonstrate that, but for his attorney's unprofessional errors, a different result would have been obtained. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In the context of a claim that a lawyer provided bad advice that led to a decision by the client to forego a trial, however, prejudice is not measured based on the hypothetical outcome of the trial, but on whether the client would have made the decision to forego trial regardless of the advice. *Anderson v. State*, 746 N.W.2d 901, 909 (Minn. App. 2008).

Nonetheless, the district court also noted that "even assuming *arguendo* that the Court had concluded that [appellant] had timely filed his Rule 60.02(f) motion for relief based on ineffective assistance of counsel, the Court would have been required to conclude that [appellant] had failed to allege a *prima facie* case that the counsel who represented him at his initial commitment hearing had provided ineffective assistance under the first prong of the *Strickland* standard." We agree. The record shows that at the initial commitment hearing, appellant informed the district court that he had no questions for his attorney that would affect his decision to proceed with the stipulation and that he understood there was no guarantee of permanent or provisional release. In addition, at the 60-day review hearing, appellant withdrew a previous letter request to withdraw his stipulation, stating that he had resolved concerns with his attorney about advice regarding the decision to stipulate to commitment. We conclude that, under these circumstances, the district court did not err by rejecting appellant's ineffective-assistance claim under the first prong of the *Strickland* analysis.

IV

Finally, appellant argues that determination of his civil commitment by clear and convincing evidence, rather than the higher burden of proof required in criminal proceedings, violates his due-process rights. But the United States Supreme Court has held that the constitutionally minimum burden of proof in civil-commitment proceedings is clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 432–33, 99 S. Ct. 1804, 1812–13 (1979). And we have previously held that a course of harmful sexual conduct supporting civil commitment as an SDP is a succession or sequence of actions over a period of years, which may include conduct that did not result in a conviction. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006); *see also In re Civil Commitment of Williams*, 735 N.W.2d 727, 731 (Minn. App. 2007) ("Incidents establishing a course of harmful sexual conduct need not be recent and are not limited to those that resulted in a criminal conviction."), *review denied* (Minn. Sept. 26, 2007).

Affirmed.