STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0516

In the Matter of the Civil Commitment of: Michael Ray Whipple

Filed August 5, 2013
Affirmed
Larkin, Judge

Crow Wing County District Court
File No. 18-PR-09-1005

Michael Whipple, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

LARKIN, Judge

Appellant challenges the district court's denial of his requests for an evidentiary hearing under Minnesota Rule of Civil Procedure 60 and court-appointed counsel. We affirm.

FACTS

The district court indeterminately committed appellant Michael Ray Whipple as a sexually dangerous person (SDP) in September 2009. In September 2010, Whipple filed a petition for relief from judgment under Minnesota Rules of Civil Procedure 60.02(c) and 60.02(f). The district court denied Whipple's request for relief, and this court affirmed the district court's decision.

In the present action, Whipple filed a "motion for [an] evidentiary hearing pursuant to rule 60.02(e)" asking "the committing court to look at the original commitment during an evidentiary hearing" because "during his commitment" at the Minnesota Sex Offender Program (MSOP) he has "not been offered adequate treatment to meet his needs." Whipple argued that the lack of treatment at MSOP violates his due-process rights. Whipple also raised double-jeopardy and equal-protection arguments. Whipple further argued that sexually dangerous persons "are . . . entitled to immediate release upon a showing that he/she is no longer dangerous." In addition to his request for an evidentiary hearing, Whipple moved the district court to appoint an attorney to represent him in the motion proceeding. The district court denied Whipple's requests, and this appeal follows.

D E C I S I O N

I.

On appeal, Whipple argues that the district court abused its discretion in denying his motion for an evidentiary hearing under Minn. R. Civ. P. 60.02(e) because "there are

changed circumstances [that] require an evidentiary hearing."[1]

Under Minn. R. Civ. P. 60.02(e), "the court may relieve a party or the party's legal representatives from a final judgment . . . order, or proceeding and may order a new trial or grant such other relief as may be just" if "[t]he judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." "Rule 60.02(e) represents the historic power of the court of equity to modify its decree in light of changed circumstances." *City of Barnum v. Sabri*, 657 N.W.2d 201, 205 (Minn. App. 2003). "To prevail under Minn. R. Civ. P. 60.02(e), a moving party must show that a present challenge to an underlying order would have merit." *Id*. at 206. "The burden of proof in a proceeding under Rule 60.02 is on the party seeking relief." *Id.* at 205.

"Whether to hold an evidentiary hearing on a motion generally is a discretionary decision of the district court, which we review for an abuse of discretion." *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007). "A district court abuses its discretion when its findings are not supported by the record or it misapplies the law." *Minneapolis Grand, LLC v. Galt Funding LLC*, 791 N.W.2d 549, 556 (Minn. App. 2010).

In support of his argument that circumstances have changed since his indeterminate commitment, Whipple cites a March 2011 legislative auditor's report to

[1] On appeal, Whipple addresses only his adequacy-of-treatment claim. He does not assign error to the district court's decisions regarding his other arguments.

argue that "[MSOP] does not provide adequate treatment to its patients/clients." Whipple further argues that because "the facility to which [he] was committed[] no longer provides adequate treatment contemplated by the statute . . . that constitutes a change of circumstances within the purview of Rule 60.02(e)." Whipple asserts that his "*individualized* claim that he personally has been denied treatment is one that goes to the heart of the justification for the commitment order." (Emphasis added.)

But Whipple did not make an individualized claim in district court. Instead, he argued that his "allegations about the MSOP's treatment program are sufficient to make [a] due process claim on the basis that the treatment program violates Minnesota law and is also so inadequate that it shocks the conscience." In denying Whipple's request for an evidentiary hearing, the district court relied on *In re Blodgett*, which explains that "[so] long as civil commitment is programmed to provide treatment and periodic review, due process is provided." 510 N.W.2d 910, 916 (Minn. 1994). The district court further reasoned that although Whipple "makes generalized statements regarding the inadequacy of treatment offered to all patients committed," he "fails to identify how he has personally been denied adequate treatment." The district court therefore concluded that Whipple "failed to meet his burden of proof pursuant to Minn. R. Civ. P. 60.02(e)" because "[h]e does not allege sufficient facts that would indicate he has been personally denied adequate treatment."

The district court's reasoning is sound. Whipple himself acknowledges that identification of the "specific remedy or relief sought, the factual basis for the relief, [and] the legal basis for the relief," as well as provision of "any supporting

documentation" are the necessary prerequisites for a hearing on an adequacy-of-treatment claim. Whipple's motion papers simply do not satisfy those requirements. He does not specify what relief he expects the district court to provide, and he does not provide any documentation to support a finding that he is not being provided with adequate treatment. *See* Minn. R. Gen. Pract. 115.04 (a)(3) (requiring the moving party to file and serve "[a]ny affidavits and exhibits to be submitted in conjunction with the motion"); Minn. R. Gen. Pract. 115.08 ("No testimony will be taken at motion hearings except under unusual circumstances.").

In the absence of any showing that Whipple has been denied adequate treatment, he has not demonstrated that the district court misapplied the law or otherwise abused its discretion in ruling on his adequacy-of-treatment claim. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (stating that on appeal "the burden of showing error rests upon the one who relies upon it"). In sum, the district court did not abuse its discretion in denying Whipple's motion for an evidentiary hearing under rule 60.02(e).

The state argues that "allowing an adequacy of treatment challenge to be raised under Rule 60.02 before the committing [district] court is contrary to the Civil Commitment and Treatment Act's removal of committing courts from ongoing involvement in indeterminate commitments." The state bases its argument on *In re Civil Commitment of Lonergan*, in which the supreme court stated that "under our case law, to the extent that the Commitment Act and Rule 60.02 present a distinct conflict, [civilly-committed individuals] must seek relief under the procedures set out in the Commitment Act, not Rule 60.02." 811 N.W.2d 635, 641 (Minn. 2012). The district court ruled that

Whipple's adequacy-of-treatment claim was properly raised in his rule 60.02 motion because it "does not distinctly conflict with the Commitment Act" and "does not frustrate the purpose of the Commitment Act." In essence, the state asks this court to affirm by overruling the district court's conclusion that Whipple's adequacy-of-treatment claim was properly raised in a rule 60 motion.

We decline to address the state's argument for two reasons. First, because the state did not file a notice of related appeal, its argument is not properly before this court. *See* Minn. R. Civ. App. P. 106 ("After an appeal has been filed, respondent may obtain review of a judgment or order entered in the same underlying action that may adversely affect respondent by filing a notice of related appeal . . . ."); *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996) ("If a party fails to file a notice of [related appeal] pursuant to Minn. R. Civ. App. P. 106, the issue is not preserved for appeal and a reviewing court cannot address it."), *review denied* (Minn. Aug. 6, 1996). Second, because we affirm the district court's decision on the merits, it is not necessary to determine whether adequacy-of-treatment claims are properly raised in a rule 60 motion. *See Educ. Minnesota-Osseo v. Indep. Sch. Dist. 279, Osseo Area Sch.*, 742 N.W.2d 199, 202 (Minn. App. 2007) (stating that because respondent "prevails on the merits, we do not address its subsidiary procedural arguments"), *review denied* (Minn. Feb. 19, 2008).

II.

Whipple argues that the district court erred in denying his request for court-appointed counsel. In support of his argument, Whipple references several district court cases in which counsel has been appointed to represent patients in proceedings under rule

60.02. In denying Whipple's request for court-appointed counsel, the district court reasoned that Whipple "is pursuing an action under Minn. R. Civ. P. 60.02(e), not under Minn. Stat. § 253B. This is not a proceeding pursuant to chapter 253B. Therefore, [Whipple] is not entitled to court-appointed counsel."

The commitment act provides that "[a] patient has the right to be represented by counsel at any proceeding under this chapter." Minn. Stat. § 253B.07, subd. 2c (2012). "The court shall appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel." *Id.* "The attorney shall be appointed at the time a petition for commitment is filed" and "continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court." *Id*. "[T]he right [to counsel in a civil-commitment proceeding] provided by section 253B.07, subdivision 2c, [is] a statutory right, not a constitutional right." *Beaulieu v. Minnesota Dep't of Human Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011), *aff'd*, 825 N.W.2d 716 (Minn. 2013).

Under the Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act, "the court shall appoint a qualified attorney to represent the respondent at public expense" immediately "upon the filing of a petition for commitment" and "at any subsequent proceeding under this chapter." Minn. Spec. R. Commit. & Treat. Act 9. "The attorney shall represent the respondent until the court dismisses the petition or the commitment and discharges the attorney." *Id*. "Counsel for the respondent is not required to file an appeal or commence any proceeding under

Minnesota Statutes, chapter 253B if, in the opinion of counsel, there is an insufficient basis for proceeding." *Id.*

We need not determine whether Whipple had a statutory right to counsel on his rule-60.02 motion because even if he did, any violation of the right is harmless. *See Droste v. Julien*, 477 F.3d 1030, 1036 (8th Cir. 2007) (stating that because the Sixth Amendment right to counsel was not implicated, "we believe an error in disqualifying counsel in the civil context is subject to a harmless error analysis"). The district court's denial of relief under rule 60.02 was based on the merits of the claim, which the district court correctly found to be inadequate. Because there is "an insufficient basis for proceeding," court-appointed counsel would not have been required to pursue Whipple's rule-60.02 motion. *See* Minn. Spec. R. Commit. & Treat. Act 9. Thus, on this record, we conclude that any violation of Whipple's statutory right to court-appointed counsel is harmless.

Affirmed.