**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-0255**

In the Matter of the Civil Commitment of: Mark Jeffrey Dunker.

**Filed September 23, 2019**
**Affirmed**
**Schellhas, Judge**

Otter Tail County District Court
File No. 56-PR-16-3379

Mark Dunker, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Angela H. Kiese, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

**SCHELLHAS**, Judge

Appellant challenges the district court's denial of his motion to withdraw a civil-commitment stipulation under Minn. R. Civ. P. 60.02, arguing that (1) he received ineffective assistance of counsel and (2) the stipulation was invalid. We affirm.

## FACTS

Appellant Mark Dunker has an extensive history of sexually abusing young children, including his own daughter. In November 2016, respondent Otter Tail County (county) petitioned the district court to commit Dunker as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). The court appointed legal counsel for Dunker in the commitment proceedings, and it appointed Dr. Paul Reitman and Dr. Anne Pascucci as court examiners. Following their examinations, both Dr. Reitman and Dr. Pascucci opined in written reports that Dunker satisfied the criteria for commitment as an SDP.

On March 21, 2017, Dunker stipulated that he met the criteria for commitment as an SDP. At the time of the stipulation, the parties agreed to litigate the less-restrictive-alternative portion of the statute at a later date, and the county agreed not to seek Dunker's commitment as an SPP. Dunker also agreed on the record and under oath that he met the criteria to be committed as an SDP, and that he was "satisfied" with the representation of his attorney. Based upon the exhibits and Dunker's stipulation, the district court then concluded in a written order that "Dunker meets the criteria for commitment as a [SDP] under Minn. Stat. § 253D.02, subd. 16 (2016)." The court also scheduled a hearing related to Dunker's "possible proposed less restrictive alternative."

After a continuance of the hearing related to a less-restrictive alternative, Dunker filed a written waiver, in which he stated that "[a]fter speaking with my attorney, . . . we determined that circumstances have changed and it [is] no longer necessary to present my less restrictive alternative argument to the Court." Dunker therefore agreed to waive his

appearance at the hearing on a less-restrictive alternative, and the district court entered its stipulated findings of fact, conclusions of law, and order, indeterminately committing Dunker as an SDP to the Minnesota Sex Offender Program (MSOP).

On February 2, 2018, Dunker's court-appointed attorney was charged with first-degree controlled-substance sale and first-degree controlled-substance possession after police executed a search warrant at his home and discovered drugs. Dunker subsequently moved to withdraw his stipulation, claiming that his "stipulation was not made voluntarily, knowingly, or intelligently," and that he received ineffective assistance of counsel. The district court determined that Dunker's attorney's "conduct—based on the evidence submitted by [Dunker]—fails to support a claim of improper conduct" and concluded that Dunker "does not establish a record to support his claims the stipulation must be withdrawn under the applicable civil standard in this matter." The court therefore denied Dunker's motion to withdraw his stipulation.

This appeal follows.

## D E C I S I O N

A district court has discretionary power to grant relief from a final judgment. Minn. R. Civ. P. 60.02. Under rule 60.02, a party may seek relief from a "final judgment . . . , order, or proceeding" for the following reasons: "(a) Mistake, inadvertence, surprise, or excusable neglect; (b) Newly discovered evidence . . . ; (c) Fraud . . . , misrepresentation, or other misconduct of an adverse party; (d) The judgment is void; (e) . . . it is no longer equitable that the judgment should have prospective application; or (f) Any other reason justifying relief from the operation of the judgment." A district court's denial of such relief

is reviewed for an abuse of discretion. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988).

Dunker challenges the district court's denial of his motion to withdraw his stipulation as an SDP. He argues that he should be allowed to withdraw his stipulation because (1) he received ineffective assistance of counsel, and (2) the stipulation was invalid.

*A. Ineffective-assistance-of-counsel claim*

This court may consider ineffective-assistance-of-counsel claims of civilly committed persons raised by motion under rule 60.02. *In re Civil Commitment of Lonergan*, 811 N.W.2d 635, 642 (Minn. 2012). We analyze an ineffective-assistance-of-counsel claim in a civil-commitment proceeding under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104, S. Ct. 2052, 2064, 2068 (1984), which is applicable to criminal cases. *See In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987); *see also In re Alleged Mental Illness of Cordie*, 372 N.W.2d 24, 28–29 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985).

To establish ineffective assistance of counsel under the *Strickland* standard, a party must demonstrate that counsel's representation "fell below an objective standard of reasonableness," and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 687–88, 694, 104 S. Ct. 2064, 2068; *see also State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (applying *Strickland* standard to a claim of ineffective assistance of counsel). We review ineffective-assistance-of-counsel claims de novo. *Rhodes*, 657 N.W.2d at 842. There is a strong presumption that

counsel's representation was reasonable. *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009).

Dunker appears to argue that he was denied the effective assistance of counsel because his court-appointed attorney advised him that he would be a free person, completely discharged from MSOP, in three to four years, when, in fact, his "attorney knew that commitment to the MSOP was for the rest of his natural life." But nothing in the record supports Dunker's claim. To the contrary, Dunker testified under oath that nobody "made any promises" to make him agree to the stipulation. Moreover, Dunker's signed stipulation states that he had sufficient time to discuss his case with his attorney and that he understood that the "Petition seeks [his] *indeterminate* commitment as a 'sexually dangerous person.'" (Emphasis added.) Dunker's signed stipulation also states that he understood

> that by stipulating to this commitment, if ultimately committed to [MSOP], [he] shall not be discharged unless it appears to the satisfaction of the Special Review Board that [he is] capable of making an acceptable adjustment to open society, that [he is] no longer dangerous to the public, and that [he is] no longer in need of in-patient treatment and supervision.

And Dunker also testified under oath that he understood that if the district court "makes a determination that [he was] to be committed to the [MSOP] secure treatment facility that [he] would not be discharged until [he was] capable of making an acceptable adjustment to open society and [was] no longer dangerous to the public" and "no longer in need of treatment and supervision." The district court found that, to accept Dunker's claim that he understood that his commitment to MSOP was anything less than indeterminate, would

require the "Court to functionally reject his statements under oath" and his signed stipulation. Nothing in the record supports such a rejection.

Dunker also appears to contend that he was denied the effective assistance of counsel because his attorney "was a meth head and . . . was using and selling meth." This argument is unavailing. Dunker's court-appointed attorney was arrested in February 2018, several months after Dunker was committed, and Dunker fails to provide any evidence that his counsel was under the influence of drugs or alcohol during the commitment proceedings. Nor does Dunker provide any evidence that his decision to stipulate to the commitment was influenced by his court-appointed attorney's drug use. Instead, Dunker's claim that his attorney provided ineffective assistance due to drug use is based on mere speculation and therefore is insufficient to establish that he received objectively unreasonable representation. *See Gates v. State*, 398 N.W.2d 558, 563 (Minn. 1987) (stating that reversal under *Strickland* standard cannot be based on speculation); *see also In re Civil Commitment of Johnson*, 931 N.W.2d 649, 658 (Minn. App. 2019) (holding that, in a civil-commitment proceeding, speculation that attorney was under influence of controlled substances is not sufficient to establish objectively unreasonable representation), *pet. for review filed* (Minn. July 17, 2019).

Moreover, Dunker acknowledged under oath that, in addition to his court-appointed attorney, "a number of attorneys" from his court-appointed attorney's office "have worked with" him on his commitment case. And when Dunker was asked by his court-appointed attorney if Dunker felt that the attorney's "office ha[d] a sufficient understanding of [Dunker's] particular facts and . . . issues and have provided [him] with sufficient

information to be confident in [their] representation of him," Dunker replied, "Thoroughly, yes." In fact, the record is replete with Dunker's agreement that he was satisfied with his court-appointed attorney's performance. Dunker's signed stipulation states that he was "satisfied that [his] attorney [was] fully informed as to the facts of this case," and that he was "satisfied that [his] attorney ha[d] represented all of [his] interests and fully advised [him]." Dunker then echoed these sentiments by testifying under oath that he was "satisfied with his attorney's representation." And when asked by the prosecutor if he was "satisfied fully with [his] attorney's representation of [him]," Dunker replied, "Yes, I am." Again, to accept Dunker's claim that he received ineffective assistance of counsel would require the rejection of Dunker's sworn statements. Dunker provides no justification for such a rejection other than mere speculation. Dunker therefore is unable to establish the first prong of the *Strickland* standard.

Because Dunker is unable to establish the first prong under *Strickland*, we need not analyze the prejudice prong. *See Pearson v. State*, 891 N.W.2d 590, 600 (Minn. 2017) (stating that if one prong under *Strickland* is not satisfied, reviewing court need not analyze other prong). Accordingly, the district court did not err by concluding that Dunker was not denied the effective assistance of counsel.

*B. Validity of the stipulation*

Dunker challenges the validity of the stipulation. A stipulation cannot ordinarily be repudiated or withdrawn by one party without consent of the other except by leave of the court for cause shown. *Gran v. City of St. Paul*, 143 N.W.2d 246, 249 (Minn. 1966). "A stipulation may be vacated when it was made improvidently and in good conscience and

equity should not stand. When there is fraud or duress that prejudices the party making the stipulation, the stipulation was improvidently made." *In re Commitment of Rannow*, 749 N.W.2d 393, 396–97 (Minn. App. 2008) (citation omitted), *review denied* (Minn. Aug. 5, 2008). But a district court acts within its discretion by declining to vacate a stipulation when the party "had a sound, rational basis for entering into the stipulation" and the stipulation was made "knowingly and voluntarily." *Id*. at 399.

Dunker argues that his stipulation was not made knowingly or voluntarily because "there is no way in the world that [he] could have known . . . that his counsel was a drug user/seller and involved in criminal activity." He argues that because his stipulation was "improvidently made," the district court abused its discretion by denying his motion to withdraw his stipulation as an SDP. We disagree.

The district court made extensive findings related to Dunker's decision to stipulate and determined that Dunker "identified on the record under oath [that] he read through and understood the contents of the written stipulation." The court then concluded that "[c]ontrary to [Dunker's] assertions, the record before this Court does support enforcing the stipulation entered on March 21, 2017."

The record supports the district court's determination. Dunker's signed stipulation states that he understood that the county sought his "indeterminate commitment" as an SDP and that he "fully" understood the nature of the proceedings and the contents of the petition. Dunker's signed stipulation also states that he was not making any "claim that I am innocent of the crimes for which I have been convicted," and that he believed that the county "ha[d] enough evidence that, if presented to a judge, would most likely result in

[him] being found to meet the commitment criteria" as an SDP. Moreover, Dunker's signed stipulation states that he was fully advised of his rights and that he agreed to waive those rights. And finally, Dunker's signed stipulation acknowledged that he had "sufficient time to discuss [his] case with [his] attorney," and that he was "satisfied" with his attorney's representation.

Dunker's testimony at the March 21, 2017 hearing affirmed his signed stipulation. Dunker testified that he was satisfied with his attorney, that he understood his rights, and that he was agreeing to waive those rights. Dunker also testified that he understood that he was agreeing that he met "the criteria for commitment" as an SDP and that he "would not be discharged until" he is "capable of making an acceptable adjustment to open society and [is] no longer dangerous to the public" and "no longer in need of treatment and supervision." In fact, Dunker testified that he wanted the district court to know that he understood that the possibility existed that he could reoffend and that he did not want anybody to get "hurt again," particularly in light of the hurt and suffering he caused his daughter. And when asked by the district court if those were the "matters that [he] had in mind and contemplated as [he] entered the agreement," Dunker replied, "Yeah." Dunker's sworn testimony and his signed stipulation directly contradict his claim that his stipulation was not knowing, voluntary, and intelligent.[1] We therefore conclude that the

[1] Dunker also claims that he was not competent to enter into the stipulation according to Minn. R. Crim. P. 20.01. But this argument is not properly before us because it was raised for the first time in this appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court will generally not address issues that were not presented to and considered by the district court). And Dunker's argument is directly contradicted by his testimony and signed stipulation wherein he stated that he does "not have a mental

district court did not abuse its discretion by denying Dunker's request to withdraw his stipulation.

**Affirmed.**

disorder that interferes with [his] ability to make a fully informed decision with regard to entering into a stipulation in this case."