This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1840

In the Matter of the Civil Commitment of: Michael Benson.

Filed June 5, 2023
Affirmed
Larson, Judge

Commitment Appeal Panel
File No. AP21-9058

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

Keith Ellison, Attorney General, Gabriel R. Ulman, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Considered and decided by Gaïtas, Presiding Judge; Larson, Judge; and Rodenberg, Judge.[*]

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant Michael Benson appeals from a Commitment Appeal Panel's (the CAP)[1] decision granting respondent Minnesota Commissioner of Human Service's (the

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] The commitment statutes have evolved over time. We have previously called the CAP the "supreme court appeal panel," or "SCAP," or the "judicial appeal panel." *See In re Civ. Commitment of Edwards*, 933 N.W.2d 796, 797 n.1 (Minn. App. 2019) (noting evolution of the statute), *rev. denied* (Minn. Oct. 15, 2019).

commissioner) motion to dismiss his petition for a reduction in custody, denying appellant all requested relief, and ordering appellant's petition withdrawn. We affirm.

FACTS

Appellant is a patient in the Minnesota Sex Offender Program (MSOP). *Benson v. Johnston*, A21-1111, 2022 WL 1004845, at *1 (Minn. App. April 4, 2022), *rev. denied* (Minn. June 21, 2022). The commissioner civilly committed appellant indeterminately in 1993 on the basis that he has a psychopathic personality. *Id.*; *see also* the Minnesota Commitment and Treatment Act (MCTA), Minn. Stat. §§ 253B.01-.24 (2022).

The special review board (SRB) held a hearing on appellant's petition for a reduction in custody, and the SRB filed its recommendation to deny appellant's request. Appellant filed a petition for rehearing and reconsideration before the CAP. Appellant then filed a motion in district court through appointed counsel,[2] asking for an order allowing appellant to exercise his "statutory right to cross-examine all expert witnesses at the [CAP hearing]."

The district court ordered that:

> 1. [Appellant] will be allowed to assist with cross examination at the [CAP] hearing, if his counsel is also present. . . .
>
> 2. The parameters of [appellant's] questioning of the expert witnesses will be determined by the [CAP] on the day of the hearing, but [appellant] will be allowed to

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[2] On appeal, appellant claims counsel did not represent him before the CAP. The record amply establishes counsel's appointment and that counsel worked with appellant in anticipation of the CAP hearing.

> directly ask the expert(s) questions as long as the questioning remains respectful and appropriate.

The CAP heard appellant's petition for rehearing and reconsideration, at which both appellant and his appointed counsel appeared. In an order, the CAP described the hearing. The CAP informed appellant that, pursuant to the district court order, appellant could participate in cross-examination, but that appointed counsel would directly examine witnesses and offer exhibits. Appellant indicated an unwillingness to participate in the proceedings under these parameters and, after speaking privately with his appointed counsel, appellant chose not to offer any exhibits or witness testimony. The commissioner then moved to dismiss appellant's petition. Neither party offered exhibits or testimony.

The CAP granted the commissioner's motion to dismiss, denied appellant all requested relief, and ordered appellant's petition withdrawn. This appeal follows.

DECISION

Appellant challenges the CAP's decision on two grounds. First, appellant asserts the CAP violated his statutory right to represent himself when it only allowed him to participate in cross-examination. Second, appellant argues he received ineffective assistance of counsel. We address each issue in turn below.

I.

Appellant argues the CAP violated his statutory right to represent himself when it only allowed him to participate in cross examination.[3] We review statutory interpretation

[3] Appellant argues for the first time on appeal that he has a constitutional right to represent himself before the CAP. Generally, we do not review issues a party failed to raise below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). While this rule has exceptions, we see

issues de novo. *Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004). The MCTA provides persons subject to civil-commitment proceedings the following rights to representation:

> A patient has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed . . . . In all proceedings under this chapter, the attorney shall:
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> (1) consult with the person prior to any hearing;
>
> (2) be given adequate time and access to records to prepare for all hearings;
>
> (3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and
>
> (4) be a vigorous advocate on behalf of the person.

Minn. Stat. § 253B.07, subd. 2c. Appellant argues section 253B.07, subdivision 2c, confers a statutory right to self-representation, challenging our nonprecedential decision concluding that no such statutory right exists. We are not persuaded.

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no reason to depart here. And we have rejected a similar argument in at least one nonprecedential decision. *See, e.g.*, *In re Civ. Commitment of Emberland*, A11-1561, 2012 WL 612320, at *6-7 (Minn. App. Feb. 27, 2012); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c) ("Nonprecedential opinions . . . are not binding authority except as law of the case, res judicata or collateral estoppel, but nonprecedential opinions may be cited as persuasive authority.").

In *In re Irwin*, we interpreted the predecessor statute to section 253B.07, subdivision 2c,[4] to decide whether a civilly committed person had the right to represent himself. 529 N.W.2d 366, 371 (Minn. App. 1995), *rev. denied* (Minn. May 16, 1995). We determined the legislature intended the then-existing statute to mean a civilly committed person was not "permitted to waive the right to representation." *Id.* On this basis, we concluded "[n]either the statute nor the rules [gave] appellant the right to represent himself." *Id.*

More recently, in *Emberland*, we evaluated whether our decision in *Irwin* survived intervening changes to the statute and rules. 2012 WL 612320, at *5-6. We noted that section 253B.07, subdivision 2c, contains "substantially the same . . . language" as the prior statute and the same was true for modifications to the rules. *Id.* at *5. We, thus, decided "consistent with our conclusion in *Irwin*" that a civilly committed person does not "have a statutory right to represent himself at his commitment hearing." *Id.* at *6.

We discern no legal infirmity in our analysis in *Emberland* that *Irwin* correctly interpreted the legislature's intent regarding self-representation in civil-commitment proceedings. Because there have been no material changes to section 253B.07,

[4] In *Irwin*, we interpreted Minn. Stat. § 253B.03, subd. 9 (1994), and a comment to then Minnesota Rule of Civil Commitment 3.01. In 1997, the legislature repealed section 253B.03, subdivision 9, and replaced the statute with section 253B.07, subdivision 2c. *See* 1997 Minn. Laws ch. 217, art. 1, §§ 43, 118, at 2155, 2183. In 1999, the Minnesota Rules of Civil Commitment were repealed in their entirety and replaced with the Special Rules of Procedure Governing Proceedings under the Minnesota Commitment and Treatment Act. *See Promulgation of Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act*, No. C4-94-1646 (Minn. Nov. 10, 1999) (order).

subdivision 2c, since *Emberland*, we conclude that appellant does not have a statutory right to represent himself before the CAP.[5]

II.

Appellant argues that appointed counsel provided ineffective assistance at the CAP hearing because he admitted that cross-examination of experts in psychology was not his "forte." Appellant further asserts that he was prejudiced because the result would have been different if appointed counsel had these skills. We are not persuaded.

As a threshold issue, we do not provide relief for errors that an appellant causes. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) ("[A] party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."), *rev. denied* (Minn. Nov. 25, 2003). Here, after conferring with appointed counsel, appellant decided not to submit any exhibits or proceed with any witnesses at the CAP hearing. In doing so, appellant prevented his appointed counsel from providing the legal assistance he now challenges. Appointed counsel cannot act ineffectively when his client decides not to put on a case, and we will not provide appellant relief on this basis. *See id.*

Even so, we observe that appellant's ineffective-assistance-of-counsel claim fails on the merits. We review ineffective-assistance-of-counsel claims de novo. *In re Civ.*

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[5] Appellant makes several arguments about waiver and competency that assume a statutory right to self-representation. Because this right does not exist, appellant's waiver and competency arguments fail.

Commitment of Johnson, 931 N.W.2d 649, 657 (Minn. App. 2019), *rev. denied* (Minn. Sept. 17, 2019). In the civil-commitment context, we analyze ineffective-assistance-of-counsel claims using "the analytical framework ordinarily used in criminal cases when applying the Sixth Amendment right to counsel." *Beaulieu v. Minn. Dep't Hum. Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011), *aff'd*, 825 N.W.2d 716 (Minn. 2013). An appellant "must show that counsel's representation fell below an objective standard of reasonableness (the performance factor) and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different (the prejudice factor)." *Johnson*, 931 N.W.2d at 657 (quotation omitted). "A court may address the two prongs of the test in any order and may dispose of the claim on one prong without analyzing the other." *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Because appellant never allowed his appointed counsel to cross-examine an expert at the CAP hearing, appellant cannot show prejudice. We have noted on numerous occasions that we will not speculate on what might have occurred "without any evidentiary support." *E.g.*, *In re Dibley*, 400 N.W.2d 186, 190-91 (Minn. App. 1987), *rev. denied* (Minn. Mar. 25, 1987). Here, appellant asks us to speculate about the prejudicial effect of something that did not happen because appellant chose not to offer any exhibits or witnesses. Appellant has, therefore, failed to establish that appointed counsel's assistance prejudiced him. For this reason, appellant failed to establish that he received ineffective assistance of counsel.

Affirmed.