STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2098

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

Filed May 23, 2011
Affirmed
Ross, Judge

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

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

Lori Swanson, Attorney General, Eric P. Schieferdecker, Assistant Attorney General, St. Paul, Minnesota; and

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

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

ROSS, Judge

Michael Whipple was indeterminately civilly committed as a sexually dangerous person after a 30-year history of sexual crimes against girls and women. Whipple stipulated that the evidence was sufficient to civilly commit him, but after coming to believe that in fifteen years no sexually dangerous person has ever been released from commitment, he moved the district court to vacate the commitment judgment under rule

60.02 of the Minnesota Rules of Civil Procedure. He lost the motion and argues now that he was deceived by his attorney, by the Minnesota Sex Offender Program, and by the state into thinking that if he stipulated to commitment he would soon be treated and then released. He also claims that his commitment violates his equal protection and due process rights and that his counsel was ineffective by failing to explain to him his realistic chances of release. Because Whipple's fraud and constitutional challenges cannot rest on rule 60.02 in light of *In re Commitment of Lonergan*, 792 N.W.2d 473 (Minn. App. 2011), *review granted* (Minn. Apr. 19, 2011), and his remaining ineffective-assistance-of-counsel claim is unsupported by the record, we affirm.

FACTS

The state civilly committed Michael Whipple as a sexually dangerous person after he waived his right to an initial commitment hearing and stipulated to the state's commitment petition. The petition contained a 30-year history detailing his sexual crimes against six girls and women ranging in age from 9 to 22, and two doctors' evaluations recommending his commitment. Whipple's history of sexual violence dates back to 1976 when, as a 17-year-old, he was adjudicated delinquent for rape in South Dakota. Four years later he raped a 16-year-old girl. For that, he was convicted of first-degree rape and sentenced to serve five years in a South Dakota penitentiary. Four years later he raped another woman in her car. He fled to Minneapolis to escape prosecution but was later arrested and extradited to South Dakota. A jury convicted him of first-degree rape and the court sentenced him to twelve years in prison. Fourteen years later he choked a 22-year-old woman and was convicted of simple assault. Seven years after that, he approached a

nine-year-old girl and offered her $20 to have sex with him. He pleaded guilty to sexual solicitation of a child and was sentenced to 23 months in a Minnesota prison. A few months after the solicitation incident, he was accused of having sexual intercourse with a 15-year-old mentally disabled girl. For that offense, he pleaded guilty to third-degree criminal sexual conduct and was sentenced to prison for 48 months.

Before Whipple's scheduled prison release date, the state petitioned for his civil commitment. Given that Whipple stipulated to the facts of the petition, he was initially committed as a sexually dangerous person for 60 days. After the initial commitment, the district court found no changes and ordered indeterminate commitment under Minnesota Statutes section 253B.18, subdivision 3 (2008).

Whipple moved the district court to vacate its indeterminate commitment order under Minnesota Rules of Civil Procedure 60.02(c) and (f), alleging fraudulent misrepresentations, ineffective assistance of counsel, and a violation of his right to equal protection and due process. The district court concluded that it lacked jurisdiction to consider Whipple's rule-60.02 challenge and denied the motion. It also separately addressed his ineffective-counsel claim and held that it was factually unsupported. This appeal follows.

D E C I S I O N

Whipple contends that exceptional circumstances warrant relief from his stipulated civil-commitment order. He claims essentially that he was misled by the state, by the Minnesota Sex Offender Program, and by his counsel into thinking that if he agreed to the commitment he would be treated and released within a few years, but that he has

since come to believe that no sexually dangerous person has ever been released from the program. He argues that the deception and violation of his constitutional rights warrant vacation of the judgment on rule 60.02 equity and exceptional-circumstance grounds.

Whether Whipple could properly move to vacate his commitment under rule 60.02 depends on the interpretation of the commitment statutes. This presents a legal issue, which we review de novo. *See Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004). That legal question was answered earlier this year so that Whipple's fraud, due-process, and equal-protection claims fail as a matter of law. They are properly disposed of by *In re Commitment of Lonergan*, 792 N.W.2d 473, 476–77 (Minn. App. 2011), *review granted* (Minn. Apr. 19, 2011). In *Lonergan*, we held that civilly committed persons' constitutional and adequacy challenges to their treatment cannot arise under rule 60.02 because Minnesota Statutes section 253B, the law governing civil commitments, does not authorize it. Rather, section 253B.18, subdivision 15, establishes the only framework for discharge. *Id*. That holding defeats most of Whipple's claims.

Regardless of whether *Lonergan* survives its present review by the supreme court, the district court alternatively analyzed Whipple's fraud and equal-protection claims on their merits, and it properly dismissed them. Whipple's fraud claim against his attorney and the state fails because his attorney is not an adverse party, and any fraud related to Whipple's individual treatment is not properly before the court. His equal-protection claim fails because he alleged no facts to support it.

Whipple's only surviving post-*Lonergan* claim is ineffective assistance of counsel. *See In re Cordie*, 372 N.W.2d 24, 28 (Minn. App. 1985) (reviewing a formerly

committed person's rule-60.02 motion to vacate civil commitment judgment on ineffective-counsel grounds), *review denied* (Minn. Sept. 26, 1985). We review challenges to the disposition of rule-60.02 motions for abuse of discretion. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988).

The commitment statute requires the appointment of qualified counsel to represent allegedly civilly committable patients. Minn. Stat. § 253B.07, subd. 2c (2010). Because civil commitment includes the patient's loss of liberty, we analyze the adequacy of appointed counsel under the same standard we use to evaluate adequacy of appointed counsel in criminal cases. *In re Cordie*, 372 N.W.2d at 28. We look to whether the appointed counsel exercised "the diligence of a reasonably competent attorney under similar circumstances." *Id.* And in most contexts if we decide that counsel failed to act reasonably, we set aside the judgment only if the deficiency likely prejudiced the outcome. *Id*. at 29 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). But in the context of a claim that a lawyer provided bad advice that led to a decision by the client to forego a trial, 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).

Whipple's ineffective-counsel claim rests on his unsupported allegation that his counsel told him that if he stipulated that he was a sexually dangerous person he would be treated and released in two years. The district court found that these assertions lacked

any proof and that Whipple's stipulation contradicts them. Whipple signed a stipulation stating that he understood that he will

> 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 in accordance with [the civil commitment statutes].

Although the stipulation does not necessarily contradict Whipple's claim that his attorney informed him that he could expect to be released after a two-year process, we agree with the district court that the record contains no support for Whipple's uncorroborated claim. We defer to the district court's credibility assessments. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). The district court alternatively observed that Whipple never claimed or provided evidence that there is a reasonable probability that he would not have been civilly committed but for his counsel's allegedly erroneous advice. We agree that overwhelming evidence, including sexual abuse involving multiple victims and spanning three decades, along with two doctors recommending commitment, makes it pretty likely that Whipple's indeterminate commitment was highly probable regardless of his stipulation. But the real question of prejudice in this circumstance is whether Whipple would have stipulated to commitment but for his attorney's advice. *Anderson*, 746 N.W.2d at 909. The district court did not address this. We nevertheless affirm because the district accurately found that Whipple's assertion that his lawyer told him he would be released in two years has no credible support.

Affirmed.