STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2123

In the Matter of the Civil Commitment of:
Dale Allen Lindsey.

Filed May 23, 2011
Affirmed
Johnson, Chief Judge

Hennepin County District Court
File No. 27-MH-PR-05-1149

Dale Allen Lindsey, Moose Lake, Minnesota (pro se appellant)

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Considered and decided by Johnson, Chief Judge; Shumaker, Judge; and Randall, Judge.*

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

JOHNSON, Chief Judge

In November 2006, Dale Allen Lindsey was civilly committed to the Minnesota Sex Offender Program as a sexually dangerous person. In May 2010, Lindsey filed a motion to vacate the commitment order pursuant to rule 60.02 of the Minnesota Rules of Civil Procedure, seeking relief on four grounds. The district court denied the motion.

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

We conclude that two of Lindsey's claims are barred by chapter 253B of the Minnesota Statutes, which requires him to assert those claims in a different forum. We also conclude that Lindsey's fourth claim—that the attorney who represented him at his commitment trial four years earlier provided him with ineffective assistance of counsel—is untimely because it was not asserted within one year of the commitment order. Lindsey's remaining claim has been abandoned. We further conclude, in the alternative, that the district court did not abuse its discretion by concluding that all of Lindsey's claims are untimely because they were not raised within a reasonable time of the commitment order. Therefore, we affirm.

FACTS

Lindsey's civil commitment is based on a series of incidents that occurred between 1990 and 2005 in which he engaged in violence and sexual misconduct toward various women. The details of those incidents are described thoroughly in this court's prior opinion but are not relevant to the issues raised by this appeal. *See In re Commitment of Lindsey*, No. A07-80, 2007 WL 1323597, at *1 (Minn. App. May 8, 2007), *review denied* (Minn. July 17, 2007).

In October 2005, Hennepin County petitioned to civilly commit Lindsey as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). The district court issued an order for his initial commitment as an SDP in June 2006. After a review hearing, the district court issued an order for his indeterminate commitment in November 2006. This court affirmed the indeterminate commitment in May 2007. *Commitment of Lindsey*, 2007 WL 1323597, at *6.

In May 2010, Lindsey filed a *pro se* motion in the district court to vacate the commitment order pursuant to rule 60.02 of the Minnesota Rules of Civil Procedure. Lindsey asserted four claims in his rule 60.02 motion: (1) that the end-of-confinement review committee (ECRC) erred by determining that he is a Level III sex offender; (2) that his commitment violates his constitutional rights because "he no longer meets the criteria" for commitment; (3) that his commitment violates his constitutional rights because, he asserts, no person has been released from the Minnesota Sex Offender Program (MSOP); and (4) that the attorney who represented him during commitment proceedings provided him with ineffective assistance of counsel. The district court denied the motion. The district court concluded that Lindsey's claims must be presented to a special-review board and, thus, may not be presented to the district court. The district court also concluded that Lindsey's rule 60.02 motion was untimely. Lindsey appeals.

D E C I S I O N

Lindsey argues that the district court erred by denying his motion to vacate the commitment order. The rule on which the motion is based provides that a district court

> may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;

> (c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The 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; or
>
> (f) Any other reason justifying relief from the operation of the judgment.

Minn. R. Civ. P. 60.02.

Both parties make numerous arguments on appeal with respect to Lindsey's claims. It is unnecessary for this court to address all arguments raised by the parties because Lindsey's appeal can be fully resolved for the three reasons discussed below.

A.

We first consider the district court's conclusion that Lindsey's rule 60.02 motion is barred by chapter 253B of the Minnesota Statutes, which permits him to challenge his commitment by petitioning a special-review board. We apply a *de novo* standard of review to the district court's determination of this issue because it is a matter of statutory interpretation. *In re Commitment of Lonergan*, 792 N.W.2d 473, 476 (Minn. App. 2011), *review granted* (Minn. Apr. 19, 2011); *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 358 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002).

The district court reasoned that Lindsey's rule 60.02 motion sought discharge, provisional discharge, or transfer to a non-secure DHS facility. The district court

concluded that Lindsey must seek relief by petitioning a special-review board, *see* Minn. Stat. § 253B.18, subd. 3 (2010), and, if necessary, by appealing the special-review board's decision to a judicial appeal panel, *see* Minn. Stat. § 253B.185, subd. 9(c). Lindsey's *pro se* brief does not directly address the district court's interpretation of chapter 253B. The county contends that the district court properly concluded that Lindsey's motion to vacate is barred by chapter 253B and that Lindsey's motion is barred by this court's subsequent opinion in *Lonergan*.

In *Lonergan*, this court considered whether a rule 60.02 motion to vacate is an appropriate procedural vehicle for an SDP patient to seek discharge from commitment or to challenge the adequacy of treatment. 792 N.W.2d at 476. Lonergan argued that MSOP programming is unconstitutional, that he was being denied appropriate treatment, and that he was entitled to discharge or to different programming. *Id.* at 476-77. We noted that the legislature has specifically excluded SDP patients from the category of persons who may petition a district court for release from commitment on the ground that "the patient is not in need of continued care and treatment." *Id.* (quoting Minn. Stat. § 253B.17, subd. 1 (2010)). We further noted that the legislature instead has provided a mechanism by which SDP patients may petition a special-review board for a "reduction in custody," *id.* at 477 (citing Minn. Stat. § 253B.18, subd. 5 (2010)), such as "transfer out of a secure treatment facility, a provisional discharge, or a discharge from commitment." Minn. Stat. § 253B.185, subd. 9(b)(2). Accordingly, we held, "The proper procedure for appellant to seek a reduction in custody is a petition to a special review board, which is specifically authorized by statute." *Lonergan*, 792 N.W.2d at 477

(citing Minn. Stat. § 253B.18, subd. 5). We further held that a rule 60.02 motion is not a proper procedural vehicle for a challenge to the adequacy of the treatment received by an SDP patient. *Id.* (citing *In re Commitment of Travis*, 767 N.W.2d 52, 58-59 (Minn. App. 2009); *In re Wicks*, 364 N.W.2d 844, 847 (Minn. App. 1985), *review denied* (Minn. May 31, 1985); *In re Pope*, 351 N.W.2d 682, 683 (Minn. App. 1984)). Thus, we held that Lonergan's rule 60.02 motion was barred. *Id.* at 478.

In light of this court's opinion in *Lonergan*, Lindsey's second and third claims plainly are barred. *Lonergan* does not speak to Lindsey's first claim, which challenges the risk-level assessment of the ECRC. *See* Minn. Stat. § 244.052, subd. 6 (2010) (providing for administrative review); Minn. Stat. §§ 14.63-.69 (2010) (authorizing judicial review of administrative decision); *see also In re Risk Level Determination of S.S.*, 726 N.W.2d 121, 124-27 (Minn. App. 2007) (reversing ECRC's risk-level assessment and remanding for redetermination), *review denied* (Minn. Mar. 28, 2007). But Lindsey does not mention the ECRC's risk-level assessment in his *pro se* brief, so we must assume that he has abandoned that claim on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

Ineffective assistance of counsel, which is Lindsey's fourth claim, was not at issue in *Lonergan*. 792 N.W.2d at 476-77. We do not interpret *Lonergan* to bar such a claim. The *Lonergan* bar is based on the opportunity to present certain claims to a special-review board, which is authorized by chapter 253B to determine whether an SDP patient still is "in need of continued care and treatment." *Id.* at 476 (quoting Minn. Stat. § 253B.17, subd. 1). The special-review board is not authorized to determine whether an

SDP patient received ineffective assistance of counsel during commitment proceedings. Thus, Lindsey's fourth claim is not barred by the statutory remedies in chapter 253B of the Minnesota Statutes. Rather, our caselaw establishes that an ineffective-assistance claim may be presented to the district court by a motion to vacate pursuant to rule 60.02. *See In re Cordie*, 372 N.W.2d 24, 28 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985).

B.

We next consider the district court's conclusion that Lindsey's fourth claim is untimely because it was not filed within one year of the commitment order. We apply a *de novo* standard of review to the district court's determination of this issue because it implicates the proper interpretation of a rule of civil procedure. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

The district court reasoned that an ineffective-assistance-of-counsel claim is governed by rule 60.02(a), not rule 60.02(f). Identifying the applicable paragraph of rule 60.02 is important because the rule contains two different time limitations. Generally, a motion to vacate "shall be made within a reasonable time." Minn. R. Civ. P. 60.02. But if a motion to vacate is brought pursuant to paragraphs (a), (b), or (c), the motion shall be made "not more than 1 year after the judgment, order, or proceeding was entered or taken." *Id.* Lindsey's *pro se* brief asserts that he moved to vacate pursuant to rule 60.02(f) but does not directly address the district court's conclusion that rule 60.02(a) must apply. The county contends that the district court correctly analyzed the ineffectiveness claim pursuant to rule 60.02(a).

The supreme court often has considered motions to vacate that seek relief due to the inadvertence of an attorney. In such cases, the supreme court consistently has reviewed such motions for "excusable neglect" pursuant to rule 60.02(a). *See, e.g.*, *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 488-91 (Minn. 1997) (analyzing legal assistant's failure to request trial *de novo* after nonbinding arbitration award); *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750-51 (1964) (analyzing attorney's failure to answer complaint); *Johnson v. Nelson*, 265 Minn. 71, 73-74, 120 N.W.2d 333, 335-36 (1963) (analyzing attorney's failure to answer complaint); *see also Seiberlich v. Burlington Northern R.R. Co.*, 447 N.W.2d 896, 898-99 (Minn. App. 1989) (analyzing attorney's failure to communicate result of arbitration to clients during 20-day period to request new trial), *review denied* (Minn. Jan. 12, 1990); *Kurak v. Control Data Corp.*, 410 N.W.2d 34, 35-37 (Minn. App. 1987) (analyzing attorney's failure to comply with scheduling order); *Stelflug v. Benson*, 385 N.W.2d 892, 893-94 (Minn. App. 1986) (analyzing attorney's failure to answer interrogatories). As a corollary to the principle that an attorney's inadvertence is within rule 60.02(a), the supreme court also has made clear that an attorney's inadvertence is *not* within rule 60.02(f). "Clause (f) has been designated as a residual clause, designed only to afford relief . . . under exceptional circumstances and then, *only if the basis for the motion is other than that specified under clauses (a) and (e)*." *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 924 (Minn. 1990) (emphasis added).

In this case, Lindsey alleged in his rule 60.02 motion that his attorney provided him with ineffective assistance of counsel because he "failed to be a vigorous

advocate," "to cross examine the state's witnesses," "to argue and fully present petitioner's case," "to consult with petitioner about second examiner," and "to call and subpoena witnesses on behalf of petitioner." In light of the above-described caselaw, Lindsey's ineffective-assistance claim necessarily is governed by paragraph (a) of rule 60.02, not paragraph (f). Consequently, Lindsey's ineffective-assistance claim is subject to the rule's one-year time limitation. *See* Minn. R. Civ. P. 60.02. Lindsey's commitment proceeding was commenced in October 2005, and the district court issued its order for indeterminate commitment in November 2006. But Lindsey did not file his motion to vacate until May 2010, three-and-one-half years after the commitment order was issued. Thus, Lindsey's motion to vacate the commitment order, to the extent it is based on the claim that his attorney provided him with ineffective assistance, is untimely because it was not filed within one year.

C.

We next consider the district court's conclusion that all of Lindsey's claims are untimely because they were not filed within a reasonable time of the commitment order. The district court apparently formed this conclusion as an alternative basis for denying the rule 60.02 motion. We too consider this conclusion to be an alternative ground for resolving Lindsey's second and third claims, if those claims are not barred by chapter 253B or *Lonergan*. We also consider the not-within-a-reasonable-time conclusion to be an alternative ground for resolving Lindsey's first and fourth claims. We apply an abuse-of-discretion standard of review to the district court's determination whether the rule

60.02 motion was filed within a reasonable time. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988).

The district court reasoned that Lindsey did not file his rule 60.02 motion within a reasonable time because he filed it three-and-one-half years after the commitment order and three years after this court affirmed Lindsey's commitment. Lindsey's *pro se* brief does not directly address the district court's reasoning on this point. The county contends that the district court correctly analyzed the issue because Lindsey's motion relies entirely on facts that were known to Lindsey at the time of commitment proceedings and because Lindsey has not explained why he could not have filed the motion sooner.

In his *pro se* brief, Lindsey does not explain why he did not file his motion sooner. He appears to contend that his motion is not subject to any time limitation because the district court's order is void for lack of subject-matter jurisdiction. But even a rule 60.02 motion that challenges a court's subject-matter jurisdiction must be brought within a reasonable time. *Bode v. Minnesota Dep't of Natural Resources*, 612 N.W.2d 862, 870 (Minn. 2000). The district court's determination of untimeliness is consistent with the applicable caselaw. *See id.* (holding that motion to vacate filed 18 years after initial appeal was not filed within reasonable time where appellants did not offer "satisfactory reasons" for delay); *Osterhus v. King Constr. Co.*, 259 Minn. 391, 396-97, 107 N.W.2d 526, 530-31 (1961) (holding 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).

Thus, the district court did not abuse its discretion by concluding that Lindsey did not file his motion to vacate within a reasonable time.

Affirmed.