STATE OF MINNESOTA
IN COURT OF APPEALS
A11-218

In the Matter of the Civil Commitment of: Wesley Elmer Wills.

Filed July 18, 2011
Affirmed
Kalitowski, Judge

Kandiyohi County District Court
File No. 34-PR-08-164

Lori Swanson, Attorney General, John D. Gross, Assistant Attorney General, St. Paul, Minnesota; and

Jennifer K. Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Wesley Elmer Wills, Moose Lake, Minnesota (pro se appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Larkin, Judge.

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

KALITOWSKI, Judge

Appellant Wesley E. Wills challenges the district court's denial of his motion for relief from judgment under Minn. R. Civ. P. 60.02(f), and his motions to remove the judge of the district court and to grant appellant standby counsel. We affirm.

D E C I S I O N

Appellant was indeterminately committed as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). This court affirmed appellant's

commitment, and the supreme court dismissed as untimely his petition for further review. *In re Commitment of Wills*, No. A09-2227, 2010 WL 2266623 (Minn. App. June 8, 2010), *review dismissed* (Minn. Sept. 29, 2010).

Appellant moved the district court for relief from judgment under Minn. R. Civ. P. 60.02(f). Appellant alleged ineffective assistance of counsel and various due-process violations, made various arguments about the inadmissibility of evidence at his initial commitment hearing, and challenged the constitutionality of indeterminate SDP and SPP commitment. The district court denied appellant's motion without a hearing.

Appellant challenges the district court's denial of his motion. We review a district court's decision whether to vacate a judgment for an abuse of discretion. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988). But whether a rule 60.02 motion is the proper vehicle for challenging a civil commitment is a legal issue, which we review de novo. *In re Commitment of Lonergan*, 792 N.W.2d 473, 476 (Minn. App. 2011), *review granted* (Minn. Apr. 19, 2011).

In *Lonergan*, this court held that a rule 60.02 motion is not the mechanism for a civilly committed person to challenge the constitutionality of his commitment or the adequacy of his treatment. *Id.* at 476-77. Instead, relief is to be sought through the process outlined in the Minnesota Commitment and Treatment Act. *Id.* at 477; *see* Minn. Stat. §§ 253B.18, subd. 15, 253B.185, subd. 18 (2010) (establishing guidelines for discharge from civil commitment). Thus, *Lonergan* defeats appellant's claims in his rule 60.02 motion that his indeterminate commitment is unconstitutional and that he is not receiving adequate treatment.

But *Lonergan* does not bar a civilly committed person from raising ineffective-assistance claims in a rule 60.02 motion. *See Beaulieu v. Minn. Dep't of Human Servs.*, ___ N.W.2d ___, ___, 2011 WL 1545451, at *7 (Minn. App. Apr. 26, 2011) (stating that a civilly committed person may raise an ineffective-assistance claim in a rule 60.02 motion), *pet. for review filed* (Minn. May 27, 2011); *In re Cordie*, 372 N.W.2d 24, 28 (Minn. App. 1985) (reviewing a formerly committed person's rule 60.02 motion to vacate a civil-commitment judgment on ineffective-assistance grounds), *review denied* (Minn. Sept. 26, 1985).

Appellant asserts that he received ineffective assistance of counsel during the commitment proceedings because his counsel "was not a vigorous advocate on his behalf."[1] But in deciding appellant's direct appeal of his commitment, this court held that there is no indication that appellant's counsel was ineffective. *Wills*, 2010 WL 2266623, at *8. Appellant's ineffective-assistance claim is therefore barred by the doctrine of law of the case. *See Lange v. Nelson-Ryan Flight Serv., Inc.*, 263 Minn. 152, 155, 116 N.W.2d 266, 269 (1962) (holding that it is "a well-established rule that issues considered and adjudicated on a first appeal become the law of the case and will not be reexamined or readjudicated on a second appeal of the same case").

We next address appellant's contention that the district court erred by denying his motion to remove the judge of the district court. Appellant contends that the judge

[1] In his rule 60.02 motion, appellant also asserted an ineffective-assistance claim against his appellate counsel. Appellant has abandoned this claim on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

should have recused himself from considering appellant's rule 60.02 motion, which is an attack on appellant's indeterminate commitment, because the judge presided at the commitment proceedings. A notice to remove a judge of the district court may not be filed against a judge "who has presided at a motion or any other proceeding of which the party had notice . . . . except upon an affirmative showing of prejudice on the part of the judge." Minn. R. Civ. P. 63.03. In his motion requesting removal, appellant alleged that the judge had a "conflict of interest [because] he presided over the underlying commitment." But this does not rise to the level of an affirmative showing of prejudice on the part of the judge. *See In re Welfare of D.L.*, 479 N.W.2d 408, 415 (Minn. App. 1991), *aff'd*, 486 N.W.2d 375 (Minn. 1992) (stating that disqualifying bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from her participation in the case"). The judge of the district court therefore did not abuse his discretion by declining to recuse himself. *See Durell v. Mayo Found.*, 429 N.W.2d 704, 705 (Minn. App. 1988) (stating that the decision "to honor a request for removal based on allegations of actual prejudice is a matter for the [district] court's discretion" (emphasis omitted)), *review denied* (Minn. Nov. 16, 1988).

Finally, we address appellant's contention that the district court erred by denying his motion to "grant [appellant] standby counsel." The Minnesota Commitment and Treatment 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 (2010). Because appellant's rule 60.02 motion is an attempt to seek discharge outside the statutory

discharge proceedings, *Lonergan*, 792 N.W.2d at 476-77, he is not entitled to appointment of counsel. We therefore conclude that the district court did not abuse its discretion by denying appellant's request for counsel to pursue his rule 60.02 motion.

Affirmed.