STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0369

In re Civil Commitment of: Russell Lynn Norton

Filed July 22, 2013
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69-P6-04-600334

Russell L. Norton, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark Rubin, St. Louis County Attorney, Benjamin M. Stromberg, Assistant County Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Huspeni, Judge.*

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

CONNOLLY, Judge

Appellant challenges the district court's denial of his motions for an evidentiary hearing under Minn. R. Civ. P. 60.02(e) and for the appointment of counsel. Because the district court did not abuse its discretion in denying either motion, we affirm.

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

FACTS

Appellant Russell Lynn Norton has been civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) since March 2005. In March 2011, the Minnesota Office of the Legislative Auditor issued a report (OLA Report) following its evaluation of the civil-commitment process and the MSOP. In January 2013, appellant relied on the OLA report when he filed a motion for an evidentiary hearing under Minn. R. Civ. P. 60.02(e), arguing that "changed circumstances" made his commitment impermissible because the MSOP "no longer offer[ed] adequate treatment." Appellant alleged numerous deficiencies in the MSOP and argued that its "treatment protocol fail[ed] to move [him] toward rehabilitation and release." Further, appellant contended that the district court could entertain a rule 60.02(e) motion based on "inadequate treatment or denial of treatment" under *In re Commitment of Lonergan*, 811 N.W.2d 635 (Minn. 2012). Appellant filed a separate motion for the appointment of counsel pursuant to Minn. Stat. § 253B.07, subd. 2c (2012), arguing that his rule 60.02(e) motion constituted a proceeding under chapter 253B and thus entitled him to representation.

Respondent State of Minnesota argued that both motions should be dismissed or summarily denied. Respondent contended that appellant's rule 60.02(e) motion was not properly before the district court because treatment issues are "the province of the commissioner of human services" and wholly without merit because appellant failed to make an "individualized claim that he personally has been denied treatment." Respondent also argued that appellant is not entitled to counsel because his motion was

not a proceeding under chapter 253B and he failed to provide any other legal basis for the request.

In January 2013, the district court issued an order denying appellant's motion for an evidentiary hearing. The district court held that adequacy-of-treatment questions "are not properly before the committing court," that such issues "are currently before the correct body, the statutory review panel," and that, in any event, appellant's motion fails on the merits because he "has made no showing that he has requested treatment and been deprived of such treatment." This appeal follows.

D E C I S I O N

I.

Appellant first challenges the district court's denial of his motion for an evidentiary hearing on the adequacy of his treatment in the MSOP under Minn. R. Civ. P. 60.02(e), which states:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . , order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:
>
> . . . .
>
> (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; . . . .

A district court has "discretionary power to grant relief" under rule 60.02, and its refusal to grant relief will not be reversed unless the court abused its discretion. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988). A district court abuses its discretion

when its decision is "based on an erroneous view of the law" or is "against the facts in the record." *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011). In a rule 60.02 proceeding, the burden of proof is on the party seeking relief to show that a present challenge to an underlying order would have merit. *City of Barnum v. Sabri*, 657 N.W.2d 201, 205-06 (Minn. App. 2003).

Lonergan addressed the ability of a patient civilly committed as an SDP or sexual psychopathic personality (SPP) to bring a rule 60.02 motion for relief. 811 N.W.2d at 639-43. A patient seeking a discharge or transfer to another facility must follow certain statutory procedures, including a petition to a special review board (SRB) and review by a judicial appeal panel, rather than turn to the courts. *Id.* at 640-42 (citing Minn. Stat. § 253B.185, subds. 1(e), 9 (2010)). But a patient may raise a narrow category of "nontransfer, nondischarge claims" under rule 60.02 that do not "distinctly conflict" with the Minnesota Commitment and Treatment Act or "frustrate a patient's rehabilitation or the protection of the public." *Id.* at 642-43. Examples of these claims include "ineffective assistance of counsel," "lack of jurisdiction," and "procedural or jurisdictional defect[s] during the commitment process." *Id.*

Appellant argues that, "[b]ecause civil commitment as a sex offender has prospective effect, and because [he] is not receiving adequate treatment at the facility (MSOP) to which he was committed, there is a 'change in circumstances' requiring the [district] court to hold an evidentiary hearing."[1] He contends that he "is not [asking] and

[1] Appellant also argues that the "(1) MSOP breached its 'treatment contract,' (2) MSOP failed to meet its treatment obligations under the Minnesota Treatment and Commitment

has not asked for a transfer or discharge" and that, therefore, as a patient who is committed as an SDP, he "may bring a Rule 60.02(e) motion challenging the adequacy or denial of treatment before the committing court" under *Lonergan*.

But, as respondent points out, appellant "provides no allegation, much less any evidence, to support an individualized claim that he personally has suffered from the [MSOP's] alleged inadequacies." Appellant has not attempted to explain how any of the alleged deficiencies in the MSOP relate to him and his treatment, nor has he offered any suggestions as to how his individual treatment may be improved.

Instead, the record reflects that appellant has elected not to participate in treatment. In June 2012, appellant's petition for discharge came before the SRB. In its findings of fact and recommendations, the SRB noted that "[s]ince [arriving] at the current facility [appellant] has participated in treatment on an intermittent basis. At the present time he is not in treatment." Further, the SRB stated that appellant "currently resides on the Therapeutic Concepts Unit, which is designed for clients who choose not to participate in sex offender treatment," and that, although he petitioned the SRB for a hearing, "he refused to participate in the interview for the treatment report prepared in anticipation of [his] hearing." The MSOP's treatment report also notes that "[appellant]

Act, (3) MSOP committed 'fraud on the court,' (4) MSOP illegally confined appellant 'for profit,' (5) MSOP 'exacerbated the punitive nature of the program,' and (6) MSOP failed to confine appellant for purposes of treatment." Because appellant failed to raise these arguments in his motion to the district court, we decline to consider them now. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that generally an appellate court will not consider matters not argued to and considered by the district court).

currently is a non-participant in treatment at MSOP; he last participated in treatment in March of 2009."

Appellant concedes that he is voluntarily not participating in treatment but argues that it is "discriminatory and punishment" to deny a patient's rule 60.02(e) motion on such grounds because treatment in the MSOP is voluntary. We disagree. Because appellant is voluntarily refusing to participate in treatment, his challenge to the adequacy of his treatment in the MSOP is speculative and premature. *See In re Commitment of Pope*, 351 N.W.2d 682, 683-84 (Minn. App. 1984) (holding that "[a] patient may not assert a right to treatment until he is actually deprived of treatment" because any such allegation is "speculative and premature"). Appellant has no basis to challenge his treatment in the MSOP until he has either participated in such treatment or been denied the opportunity to participate in it. Therefore, the district court did not abuse its discretion in denying appellant's motion for an evidentiary hearing on the adequacy of his treatment in the MSOP, because he is not participating in treatment.

II.

Finally, appellant argues that the district court erred by denying his motion for appointment of counsel. A civilly-committed person has the right to be represented by counsel at any proceedings under Minn. Stat. §§ 253B.01-.24 (2012). Minn. Stat. § 253B.07, subd. 2c. The statute confers a right to counsel only at statutory commitment proceedings, and appellant's motion is an attempt to seek relief outside of the statutory commitment proceedings. Therefore, appellant is not entitled to appointment of counsel.

Affirmed.