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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1392**

In the Matter of the Civil Commitment of John Myron Guy.

**Filed February 22, 2011
Affirmed
Stoneburner, Judge**

Becker County District Court
File No. 03P406000895

John Myron Guy, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Noah A. Cashman, Assistant Attorney General, St. Paul, Minnesota; and

Michael D. Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent state)

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant moved for relief under Minn. R. Civ. P. 60.02(f) from a 2007 judgment indeterminately committing him as a sexually dangerous person (SDP). The district court denied the motion as untimely and without merit, concluding that (1) some of appellant's challenges are not proper subjects of a rule 60.02 motion; (2) appellant failed to demonstrate that his attorney was ineffective or affected the outcome of the case; (3) the

district court lacks jurisdiction to determine risk levels; and (4) the discharge standard governing SDP and sexual psychopathic personality (SPP) civil commitments is constitutional. We affirm.

FACTS

Appellant John Myron Guy was initially committed to the Minnesota Sex Offender Program (MSOP) as a SDP in January 2007 after a two-day trial. A subsequent treatment report from MSOP supported Guy's continued commitment, and Guy, through counsel, waived a review hearing, specifically retaining the right to appeal his commitment. In April 2007, the district court issued a final commitment order, but Guy did not appeal.

In April 2010, Guy filed a pro se motion for relief from judgment under Minn. R. Civ. P. 60.02(f). Guy asserted that (1) his constitutional rights were denied when he was committed as a level 3 sex offender; (2) changes in management at MSOP deny him constitutional rights; (3) the failure of MSOP to release anyone violates his constitutional rights; and (4) he was denied his constitutional right to effective assistance of counsel because counsel "failed to be a vigorous advocate for [Guy]." The district court denied the motion, and Guy appealed.

D E C I S I O N

I. Standard of review.

Rule 60.02 specifically provides that a district court has discretionary power to grant relief from a final judgment; therefore we review a district court's denial of a motion for relief under rule 60.02 for abuse of discretion. *Charson v. Temple Israel*, 419

N.W.2d 488, 490 (Minn. 1988). The district court concluded, in relevant part, that (1) Guy failed to demonstrate the exceptional circumstances required for relief under rule 60.02 (f); (2) Guy failed to demonstrate that his attorney was deficient or that any claimed deficiency affected the outcome of the case; and (3) challenges to the legitimacy or quality of treatment at MSOP are not proper subjects of a rule 60.02 motion. The district court also concluded that the district court has no jurisdiction over civil-commitment discharge proceedings in SDP cases and that discharge standards for SDP/SPP commitments are constitutional.¹ We conclude that the district court did not abuse its discretion by denying relief under rule 60.02.

II. Constitutional challenges to SDP commitment and challenges to the adequacy of treatment are not permitted under rule 60.02.

This court recently held that the statutory framework governing indeterminate SDP commitment does not authorize a constitutional challenge to the commitment or a challenge to the adequacy of treatment by a rule 60.02 motion. *In re Commitment of Lonergan*, 792 N.W.2d 473 (Minn. App. Jan. 4, 2011), *pet. for review filed* (Minn. Jan. 31, 2011). On appeal, Guy repeatedly challenges treatment at MSOP and his continued commitment. Because under *Lonergan*, relief for these challenges is not available under rule 60.02, we do not address the issues raised by Guy. *Id.* at 476–77. The district court did not abuse its discretion by denying Guy’s challenges to treatment and continued commitment.

¹ While the district court describes the deficiency as “lack of jurisdiction,” the real defect is a lack of authority to hear the petition under rule 60.02. Minn. Stat. § 253B.17, subd. 1 (2010).

III. Guy's request for relief for ineffective assistance of counsel is untimely and without merit.

We have considered ineffective-assistance-of-counsel claims of civilly committed persons raised in timely motions for a new trial, timely motions to vacate under rule 60.02, or on direct appeal. *See, e.g., In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987) (asserting a claim of ineffective assistance of counsel in a timely motion to the district court for new trial, which Dibley also asserted on direct appeal from commitment), *review denied* (Minn. Mar. 25, 1987); *In re Cordie*, 372 N.W.2d 24, 28 n.29 (Minn. App. 1985) (reviewing formerly committed person's claims of inadequate counsel under rule 60.02 motion filed approximately five months after commitment).

Although the district court did not reject Guy's challenge to the effectiveness of counsel as untimely, we conclude that Guy's challenge was not brought "within a reasonable time" as required by rule 60.02. "What constitutes a reasonable time [under rule 60.02] varies from case to case and must be determined in each instance from the facts before the court[.]" *Newman v. Fjelstad*, 271 Minn. 514, 522, 137 N.W.2d 181, 186 (1965) (stating that in determining reasonable time period, court should consider circumstances such as "intervening rights, loss of proof by or prejudice to the adverse party, the commanding equities of the case, the general desirability that judgments be final and other relevant factors"); *see also Sommers v. Thomas*, 251 Minn. 461, 467, 88 N.W.2d 191, 195 (1958). Guy does not explain his three-year delay in challenging effectiveness of counsel, and we conclude that his motion for relief under rule 60.02 for ineffective assistance of counsel was untimely.

We also conclude that the district court did not abuse its discretion by concluding that Guy failed to establish that his counsel was ineffective or that he was prejudiced by counsel's performance.

The civil-commitment statute requires the district court to “appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel.” Minn. Stat. § 253B.07, subd. 2c (2010). To analyze an ineffective-assistance-of-counsel claim in a civil-commitment case, Minnesota courts apply by analogy the *Strickland* standard used to analyze such a claim in criminal cases. *Dibley*, 400 N.W.2d at 190. To establish ineffective assistance of counsel under the *Strickland* factors, a defendant must demonstrate that counsel's representation was “deficient” or “fell below an objective standard of reasonableness,” and that “but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984).

Although Guy asserts that he “has made a *prima facie* case of ineffective assistance of counsel throughout the Civil Commitment proceedings,” the only specific deficiency cited by Guy is counsel's failure to appeal Guy's commitment. A criminal defendant may establish that counsel was ineffective by demonstrating “that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.” *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038 (2000). Here, Guy does not claim that counsel failed to consult with him about an appeal or that Guy instructed counsel to file an appeal. Guy's written waiver of the review hearing prior to indeterminate commitment demonstrates that Guy

knew about and preserved his right to appeal. Additionally, the civil-commitment rules do not require an attorney to file an appeal or commence any proceeding under chapter 253B if the attorney believes that there is an insufficient basis for the action. Minn. Spec. R. Commit. & Treat. Act 9. Guy has not presented any evidence that there was a basis for appeal of his commitment. The district court did not abuse its discretion by concluding that Guy failed to demonstrate that his attorney was ineffective or that Guy was prejudiced by any alleged deficiencies.

IV. The district court did not err or abuse its discretion in denying Guy's request for a new attorney.

Minn. Stat. § 253B.07, subd. 2c, provides, in relevant part, that counsel for a person subject to commitment shall be appointed at the time the commitment petition is filed and that counsel shall continue to represent the person throughout any proceedings under chapter 253B, unless released by the district court. Therefore, Guy was represented when he chose to file his pro se motion for relief under rule 60.02. While Guy has expressed dissatisfaction with his appointed counsel, Guy has failed to demonstrate that counsel's representation is ineffective or that there is any other valid basis that would compel the district court to discharge counsel. As noted above, the commitment rules do not require an attorney to engage in proceedings if the attorney believes there is an insufficient basis for the action. Minn. Spec. R. Commit. & Treat. Act 9. And there is no provision in the commitment statutes or rules for appointment of separate or additional counsel to pursue an action desired by the committed person. The

district court did not err or abuse its discretion by denying Guy's request for counsel to pursue his rule 60.02 motion.

Affirmed.