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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1691**

In the Matter of the Civil Commitment of: Justin Allen Newman.

**Filed July 22, 2019
Affirmed
Reyes, Judge**

Sherburne County District Court
File No. 71-PR-09-20

Justin Allen Newman, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Minnesota Attorney General, Matthew Frank Assistant Attorney General,
St. Paul, Minnesota; and

Kathleen Heaney, Sherburne County Attorney, Elk River, Minnesota (for respondent State
of Minnesota)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

On appeal from the district court's denial of his motion for a new trial under rules 59.03 and 60.02 of the Minnesota Rules of Civil Procedure, appellant, who is civilly committed, alleges ineffective assistance of trial attorney based on newly discovered evidence of recent controlled-substance charges against his attorney. We affirm.

FACTS

The district court ordered appellant Justin Allen Newman's indeterminate civil commitment on December 29, 2009, to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and sexually psychopathic personality (SPP) under what is now the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexually Psychopathic Personalities. In February 2018, the state charged the attorney who represented appellant during the commitment proceedings with first-degree controlled-substance sale and possession offenses. Appellant filed a motion for a new trial under rules 59.03 and 60.02(b) of the Minnesota Rules of Civil Procedure in July 2018. He argued that the allegation against his former attorney constituted newly discovered evidence that his attorney provided ineffective assistance of counsel while under the influence of controlled substances during his representation of appellant.

The district court denied his motion as untimely without a hearing. It further stated that, even if appellant had timely filed his motion, he did not allege any facts to support his ineffective-assistance-of-counsel claim. This appeal follows.

DECISION

I. The district court did not violate appellant's constitutional rights by failing to appoint an attorney for his new-trial motion.

Appellant argues that "courts have widely recognized a constitutional right to court-appointed counsel in civil-commitment proceedings," and that the district court should have appointed counsel to represent him during the proceedings on his new-trial motion. Appellant's argument lacks merit.

Appellant did not argue in his motion for a new trial that he should be appointed new counsel, and the district court did not address the issue.¹ We generally do not consider issues not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Moreover, this court has recently rejected the argument that a civilly committed person has a constitutional right to counsel in a new-trial motion. *In re Civil Commitment of Johnson*, __N.W.2d__, 2019 WL 2495668, *3 (Minn. App. June 17, 2019) (citing *Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 543 (Minn. App. 2011), *aff'd on other grounds*, 825 N.W.2d 716 (Minn. 2013) (holding that person subject to civil-commitment proceeding does not have constitutional right to counsel)). Therefore, appellant did not have a constitutional right to court-appointed counsel.²

II. The district court acted within its discretion when it denied appellant's new-trial motion as untimely under Minn. R. Civ. P. 59.03.

Appellant argues that he filed a timely new-trial motion under rule 59.03. We disagree.

We review a district court's denial of a motion for a new trial under rule 59.03 for an abuse of discretion. *Rubey v. Vannett*, 714 N.W.2d 417, 422-24 (Minn. 2006). Under

¹ The district court appears to have appointed counsel prior to appellant's filing of his motion, but for reasons not clear from the record, this attorney never represented him, and he appeared pro se throughout the new-trial proceedings.

² Moreover, while a person subject to civil-commitment proceedings has the statutory right to counsel during any proceeding under the Minnesota Commitment and Treatment Act, Minn. Stat. § 253B.07, subd. 2c (2018), a "rule 60.02 motion is not a 'proceeding' under the Commitment Act, as that term is used in section 253B.07, subdivision 2c." *In re Civil Commitment of Moen*, 837 N.W.2d 40, 51 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). A civilly committed person therefore does not have the statutory right to counsel for a rule 60.02 motion. *Id.*

rule 59.03, a notice of a motion for a new trial shall be served within 30 days after a general verdict or service of notice of the filing of the decision or order. Minn. R. Civ. P. 59.03. This time limit “is absolute,” and the district court cannot extend it. Minn. R. Civ. P. 6.02; *accord Ring v. McPeck*, 423 N.W.2d 711, 712 (Minn. App. 1988) (holding district court cannot address rule 59.03 motion on merits if untimely filed, even if untimeliness caused by excusable neglect). Moreover, “our longstanding principle is that a motion for a new trial cannot be filed after the time to appeal the resulting judgment has expired.” *Mingen v. Mingen*, 679 N.W.2d 724, 727 (Minn. 2004); *see* Minn. R. Civ. App. P. 104.01, subd. 1 (stating that “an appeal may be taken from a judgment within 60 days after its entry”).

The district court concluded that appellant filed an untimely motion because over eight years had passed since the date of his commitment order. Appellant contends that his motion is not untimely “because he did not know at the time of his civil commitment, that his attorney. . . was using/selling drugs.” But because rule 59.03 mandates strict compliance with its time limit, the district court did not abuse its discretion by denying appellant’s motion as untimely under rule 59.03.

III. The district court acted within its discretion when it denied appellant’s motion for a new trial as untimely under Minn. R. Civ. P. 60.02.

Appellant argues that he timely filed his rule 60.02 motion because he did not learn of his attorney’s controlled-substance charges until recently. We disagree.

We review a decision to deny rule 60.02 relief for an abuse of discretion. *Cole v. Wutzke*, 884 N.W.2d 634, 637 (Minn. 2016). Under rule 60.02, a district court may grant relief from a final judgment based on “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.” Minn. R. Civ. P. 60.02(b). Motions brought under rule 60.02(a), (b), and (c) must be brought within one year of the judgment, order, or proceeding being challenged. Minn. R. Civ. P. 60.02.

Appellant only seeks relief under clause (b) on appeal, which applies to claims based on newly discovered evidence. Appellant contends that his attorney did not effectively represent him during the civil-commitment trial based on newly discovered evidence that he was under the influence of drugs during his civil-commitment proceedings.³ But, as the district court determined, appellant’s motion did not comply with the one-year time bar of rule 60.02. He did not bring his rule 60.02 motion until more than eight years after his commitment. The district court did not abuse its discretion.

IV. Appellant’s ineffective-assistance-of-counsel claim lacks merit.

Appellant alleges that his attorney provided ineffective assistance while under the influence of controlled substances during his commitment proceedings, and that, had he been aware of his attorney’s condition, the proceedings would have had a different outcome. We are not persuaded.

A person who is indeterminately civilly committed may bring an ineffective-assistance-of-counsel claim under Minn. R. Civ. P. 60.02. *In re Civil Commitment of*

³ We note that whether appellant properly brought an ineffective-assistance-of-counsel claim under clause (b) is questionable because caselaw indicates that such claims belong in clause (a). See *Johnson*, 2019 WL 2495668, at *4 (citing *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 923 (Minn. 1990) (characterizing attorney misconduct as ‘excusable neglect’ properly brought under rule 60.02(a))). In any event, a claim under either clause (a) or (b) is subject to the one-year time bar.

Loneragan, 811 N.W.2d 635, 643 (Minn. 2012). In the civil-commitment context, we analyze ineffective-assistance-of-counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984).⁴ *In re Cordie*, 372 N.W.2d 24, 28-29 (Minn. App. 1985). We review ineffective-assistance-of-counsel claims de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Under the first prong, appellant must show that “counsel’s representation fell below an objective standard of reasonableness,” which we assess “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019) (citation omitted). Under the second prong, there must be “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (citation omitted). There is a strong presumption that counsel provided reasonable representation. *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009).

As to the first prong, appellant alleges that, if his attorney “was high on narcotics during the civil commitment proceedings, [his attorney] would not have been effective enough to raise issues in [his] best interest, or rebut the state’s allegations.” But there is nothing in the record indicating that his attorney used drugs in 2009, during his representation of appellant. Moreover, appellant does not allege that *any* specific conduct by his attorney, whether at trial or otherwise, was unreasonable. He merely speculates that his attorney was under the influence of controlled substances during his representation and

⁴ Appellant does not cite the *Strickland* standard. He instead relies on cases discussing whether a psychological disorder is a mitigating factor in attorney-discipline proceedings. These cases are irrelevant to our ineffective-assistance-of-counsel analysis, and we decline to address them.

that caused his performance to be unreasonable. A reversal under *Strickland* cannot be based on speculation. *Gates v. State*, 398 N.W.2d 558, 563 (Minn. 1987). Moreover, this court recently rejected the same argument in *Johnson*, 2019 WL 2495668, at *6-7. Johnson was represented by the same attorney as Newman, and like Newman, Johnson alleged that the attorney provided ineffective assistance of counsel. *Id.* at *2. This court held that, in civil-commitment proceeding, speculation that an attorney was under influence of controlled substances is not sufficient to establish objectively unreasonable representation. *Id.* at *6. Appellant's claim fails under the first prong of *Strickland*.

If appellant fails to meet one prong under *Strickland*, we need not analyze the other. *Pearson v. State*, 891 N.W.2d 590, 600 (Minn. 2017). Further, appellant merely states that the civil-commitment proceedings would have been different had he known of his attorney's felony charges. But again, he does not point with any specificity to any alleged errors by his attorney that affected the outcome of his case.

Affirmed.