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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1705**

In the Matter of the Civil Commitment of:
Matthew Alan Radke.

**Filed July 8, 2019
Affirmed
Halbrooks, Judge**

Freeborn County District Court
File No. 24-PR-12-625

Matthew Radke, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David J. Walker, Freeborn County Attorney, Erin M. O'Brien, Assistant County Attorney,
Albert Lea, Minnesota (for respondent Freeborn County Human Services)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and
Peterson, Judge.*

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the denial of his motion for a new trial, arguing that he is
entitled to a new trial based on ineffective assistance of counsel. We affirm.

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

FACTS

In April 2012, respondent Freeborn County petitioned for indeterminate commitment of appellant Matthew Alan Radke as a sexually dangerous person (SDP). The district court appointed counsel to represent Radke in the commitment proceedings and held a trial regarding the commitment petition on three days in September and October of 2012. In March 2013, the district court determined that Radke met the criteria for commitment as an SDP and ordered that he be indeterminately committed. Radke appealed the commitment order, and this court affirmed. *In re Civil Commitment of Radke*, No. A13-0795 (Minn. App. Sept. 15, 2014).

On February 2, 2018, Radke's court-appointed trial attorney was charged with first-degree controlled-substance sale and first-degree controlled-substance possession after police discovered drugs in his home while executing a search warrant. On May 16, 2018, Radke moved for a new trial under Minn. R. Civ. P. 59 and 60.02 on the ground that his counsel was ineffective during the civil-commitment trial. He argued that the attorney's criminal charges were newly discovered evidence that likely had an effect on his civil-commitment proceedings.

The district court held a motion hearing. Radke requested a court-appointed attorney, but the district court did not appoint one. Following the hearing, the district court denied Radke's motion. The district court determined that the motion was both untimely and failed on the merits. As to the merits, the district court determined that Radke did not submit any evidence to support his assertion that his trial attorney was under the influence of drugs at the time of the commitment hearing and that Radke had not established that his

counsel's claim fell below an objective standard of reasonableness or that the alleged errors affected the outcome of the proceeding. This appeal follows.

DECISION

I.

Radke argues that the district court erred in not appointing counsel to represent him in the proceedings on his new-trial motion. At the motion hearing, Radke requested that he be appointed counsel. The district court took the matter under advisement, but did not appoint him counsel. Radke now argues that “courts have recognized the constitutional necessity of providing court-appointed counsel to committed persons” under the Due Process Clause “even during various ancillary points in the proceedings” and that “[j]ust as the assistance of counsel is beneficial at trial, so too is the assistance of counsel beneficial in a motion claiming ineffective assistance of counsel.”

This court recently addressed this issue in *In re Civil Commitment of Johnson*, ___ N.W.2d ___, ___, 2019 WL 2495668, at *3 (Minn. App. June 17, 2019). Johnson was represented by the same attorney as Radke during his initial civil-commitment proceedings, and, like Radke, Johnson moved for a new trial under Minn. R. Civ. P. 59 and 60.02 after learning of the attorney's criminal charges. *Johnson*, 2019 WL 2495668, at *2. At the hearing on his new-trial motion, Johnson asked the district court to appoint an attorney to represent him in the proceedings. *Id.* The district court denied Johnson's request for court-appointed counsel and ultimately denied his new-trial motion because it was untimely and failed on the merits. *Id.* Johnson appealed, challenging both the denial of his request for court-appointed counsel and the denial of his new-trial motion. *Id.*

We determined that Johnson did not have a constitutional right to court-appointed counsel. *Id.* at *3. We noted that this court has previously held that the due-process clause does not confer a constitutional right to court-appointed counsel on a person who is the subject of a civil-commitment proceeding.¹ *Id.* (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)). Based on the reasoning in *Beaulieu*, we declined to recognize a constitutional right to counsel in a collateral proceeding attacking the validity of the civil-commitment order. *Id.* Accordingly, Radke was not entitled to counsel at the motion hearing, and the district court did not err by not appointing counsel to represent him.

II.

Radke argues that the district court erred by denying his motion for a new trial as untimely. Radke requested relief under rules 59 and 60.02, and the district court determined that the motion was untimely under both. We shall address each in turn.

Rule 59.03 provides:

A notice of motion for a new trial shall be served within 30 days after a general verdict or service of notice by a party of the filing of the decision or order; and the motion shall be heard within 60 days after such general verdict or notice of filing, unless the time for hearing be extended by the court within the 60-day period for good cause shown.

¹ The subject of a civil-commitment proceeding does have a statutory right to counsel at any proceeding under the Minnesota Commitment and Treatment Act, Minn. Stat. §§ 253B.01-.24 (2018). Minn. Stat. § 253B.07, subd. 2c. This right does not extend to a rule 60.02 motion because it is not a proceeding under the treatment act. *In re Civil Commitment of Moen*, 837 N.W.2d 40, 51 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013).

The district court's entry of judgment constitutes the "general verdict" in rule 59.03. *Kluge v. Benefit Ass'n of Ry. Emps.*, 149 N.W.2d 681, 688 (Minn. 1967). We review the district court's decision to dismiss a new-trial motion under rule 59 for an abuse of discretion. *Rubey v. Vannett*, 714 N.W.2d 417, 422-24 (Minn. 2006).

The district court filed its order of commitment on March 4, 2013, and judgment was entered that day. Radke's motion for a new trial was not brought until May 16, 2018, more than five years after entry of judgment. The motion is therefore untimely under rule 59.03. Radke argues that the 30-day time limit should not apply because "there is no way he could have filed the current motion within 30 days, because he did not know at the time of his civil commitment [that] his attorney . . . was using/selling drugs." But the 30-day time limit under rule 59.03 is absolute and may not be extended by the district court. Minn. R. Civ. P. 6.02.; *see also Johnson*, 2019 WL 2495668, at *3. Accordingly, the district court did not abuse its discretion in determining that Radke's motion was untimely under rule 59.03.

Rule 60.02 states that a party may seek relief from a "final judgment . . . , order, or proceeding" for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly discovered evidence . . . ;
- (c) Fraud . . . , misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) . . . 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. Motions brought under rule 60.02(a)-(c) must be brought within one year of the judgment, order, or proceeding being challenged. *Id.* Motions brought under rule 60.02(d)-(f) must be brought within a “reasonable time.” *Id.* We review a district court’s denial of a request for relief under rule 60.02 for an abuse of discretion. *Moen*, 837 N.W.2d at 44-45.

Radke brought his rule 60.02 motion based on paragraphs (b) and (f). Radke argues that he is entitled to relief under rule 60.02(b) because his court-appointed attorney’s criminal charges are newly discovered evidence that support his claim of ineffective assistance of counsel. He also argues that he is entitled to relief under rule 60.02(f) because motions brought under that paragraph must be brought within a “reasonable time,” and he brought the motion within a reasonable time of learning of the criminal charges.²

We recently addressed these arguments in *Johnson*. As previously stated, Johnson was represented by the same court-appointed counsel as Radke during his civil-commitment proceedings, and Johnson’s request for relief was similarly based on the attorney’s subsequent criminal charges. Like Radke, Johnson sought relief under rule 60.02(b), (f). *Johnson*, 2019 WL 2495668, at *4. We determined that the motion was untimely under both paragraphs because it was not brought within the one-year time limit

² The state argues that claims based on ineffective assistance of counsel are properly addressed under the “excusable neglect” provision of rule 60.02(a), rather than rule 60.02(b). The state further asserts that because such claims are addressed under rule 60.02(a), they cannot be brought under rule 60.02(f), because paragraph (f) only applies to exceptional circumstances not addressed by paragraphs (a) through (e). The state advanced the same argument in *Johnson*, and we determined that we need not decide the issues because Johnson’s motion was untimely under paragraph (f). *Johnson*, 2019 WL 2495668, at *4.

that applies to rule 60.02(a)-(c) and was not brought within a reasonable time as required by rule 60.02(f). *Id.*

In addressing Johnson's request for relief under paragraph (f), we first noted that relief is only available under paragraph (f) in "exceptional circumstances." *Id.* at *5 (quotation omitted). We then reasoned that the alleged ineffective assistance on which Johnson based his request for relief occurred during the initial commitment proceedings, and was therefore known to Johnson at that time. *Id.* Consequently, we determined that because Johnson could have raised the claim of ineffective assistance immediately after the original proceedings, his motion was not brought within a reasonable time. *Id.* Like Johnson, Radke argues that he received ineffective assistance of counsel during his original commitment proceedings in 2012. And like Johnson, Radke was aware of his counsel's performance at that time and therefore could have raised the claim immediately after the original proceedings, had he thought that there was ineffective assistance. Accordingly, his motion was not brought within a reasonable time. The district court therefore did not abuse its discretion in determining that Radke's motion was untimely under rule 60.02.

III.

Radke contends that the district court erred by denying his motion for a new trial on the merits. An individual who is indeterminately committed as an SDP may bring a claim of ineffective assistance of counsel under rule 60.02. *In re Civil Commitment of Lonergan*, 811 N.W.2d 635, 643 (Minn. 2012). We analyze an ineffective-assistance-of-counsel claim in a civil-commitment case under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984), applicable to criminal cases.

In re Dibley, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). To establish a claim for ineffective assistance of counsel, a party must demonstrate “that counsel’s representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010) (quotations omitted). Matters of trial strategy, including objections, are generally not subject to judicial review. *State v. Mosley*, 895 N.W.2d 585, 592 (Minn. 2017). We review claims of ineffective assistance of counsel *de novo*. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Radke argues that his trial counsel’s performance fell below an objective standard of reasonableness for six reasons. He argues that his counsel (1) failed to object to or challenge the commitment petition, (2) failed to object to or challenge the use of a particular examiner and the use of both examiners’ reports as evidence, (3) failed to object to the testimony of witnesses, (4) failed to object to inaccurate testimony and evidence, (5) did not support his arguments and misstated the law, and (6) failed to provide a less-restrictive alternative to civil commitment.

The errors assigned to counsel by Radke are identical to those alleged in *Johnson*. *Johnson*, 2019 WL 2495668, at *6. We determined that Johnson failed to establish that his counsel’s performance fell below an objective standard of reasonableness. *Id.* at *7. We noted that many of his assertions related to matters of trial strategy, which we generally do not review. *Id.* at *6. In addition, several of Johnson’s claims were refuted by the record, and Johnson failed to provide record support for other assertions. *Id.* We then stated:

Lastly, and most importantly, Johnson has not provided factual support for his claim of ineffective assistance of counsel. The crux of Johnson's claim is that his court-appointed attorney's "ineffective counsel was likely caused by his addiction to drugs and alcohol." Yet as the district court reasoned, Johnson has not provided any evidence that his attorney was using drugs or alcohol at the time of the 2011 commitment proceedings. Instead, Johnson points to his attorney's 2018 criminal charges and speculates that "if [his attorney] was high on narcotics during the civil commitment proceeding . . . , [his attorney] would not have been effective enough to raise issues in [his] best interest or rebut the state's allegations."

Id. (alterations in original). We determined that "Johnson's speculation that his lawyer was under the influence of drugs and alcohol during his commitment proceedings is insufficient to establish objectively unreasonable representation." *Id.*

Our analysis in *Johnson* applies equally to Radke's claim. Many of Radke's claims, such as the objections his counsel should have made, were matters of trial strategy. Radke failed to provide record support for many of his allegations, and others were refuted by the record. For example, Radke argues that his counsel was ineffective for failing to reply to the county's closing argument and proposed findings, but the record indicates he did so on two occasions. And contrary to Radke's assertion, his counsel did argue that there was a less-restrictive alternative to civil commitment—Radke living with his mother, being placed on intensive supervised release, and attending treatment at the Safety Center facility. But both the district court and this court determined that the proposed alternative was not adequate. Finally, and most importantly, Radke similarly failed to provide any factual support for his assertion that his counsel was under the influence of drugs or alcohol during the initial commitment proceedings. Like in *Johnson*, Radke's assertion is based on mere

speculation and is insufficient to establish that he received objectively unreasonable representation.³ *Id.* Accordingly, the district court did not err in determining that Radke’s motion for a new trial failed on the merits.

Affirmed.

³ Because Radke has failed to establish that he received objectively unreasonable representation, we need not address the prejudice requirement of the *Strickland* standard. See *Mosley*, 895 N.W.2d at 591 (stating that “[i]f a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement”).