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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0163**

In the Matter of the Civil Commitment of:
Daniel A. Wilson.

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

Otter Tail County District Court
File No. 56-PR-16-1780

Daniel Aaron Wilson, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Noah A. Cashman, Assistant Attorney General, St. Paul,
Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

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

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

BJORKMAN, Judge

Appellant challenges the denial of his motion for a new civil-commitment trial, arguing that controlled-substance charges against his court-appointed attorney indicate that his attorney was impaired during his trial and rendered ineffective assistance. We affirm.

FACTS

In June 2016, respondent Otter Tail County Department of Human Services petitioned to have appellant Daniel Wilson civilly committed as a sexual psychopathic personality (SPP) under Minn. Stat. § 253D.02, subd. 15 (2014), and as a sexually dangerous person (SDP) under Minn. Stat. § 253D.02, subd. 16 (2014). The petition recounted Wilson's convictions of fourth-degree criminal sexual conduct against a nine-year-old girl and kidnapping of a four-year-old girl, and his extensive self-reported history of uncharged sexual contacts, primarily with children. The district court appointed an attorney to represent Wilson and conducted a two-day trial in October 2016, receiving testimony from Wilson, three psychologists, and a woman Wilson sexually assaulted. In April 2017, the court indeterminately committed Wilson as an SDP. Wilson did not appeal.

In February 2018, Wilson's attorney in the commitment proceeding was charged with first-degree possession and sale of controlled substances.

The following month, Wilson moved the district court for a new trial under Minn. R. Civ. P. 59.01 and Minn. R. Civ. P. 60.02, asserting that the charges against his former attorney were "newly discovered evidence" of ineffective assistance of counsel at his commitment trial because his attorney "was likely using drugs while representing [him]." The district court appointed an attorney for Wilson and, after a hearing, denied the motion. The district court reasoned that the rule 59.01 motion is untimely and the rule 60.02 motion fails because Wilson did not present even a fact question that his former attorney's performance at the time of the commitment trial in late 2016 (1) was affected by drug use or otherwise deficient or (2) prejudiced Wilson. Wilson appeals.

DECISION

I. The district court did not abuse its discretion by denying Wilson’s motion under Minn. R. Civ. P. 59.01.

We review a district court’s denial of a rule 59.01 motion for an abuse of discretion. *Rubey v. Vannett*, 714 N.W.2d 417, 424 (Minn. 2006).

A party seeking a new trial under Minn. R. Civ. P. 59.01 must serve the motion “within 30 days after a general verdict or service of notice by a party of the filing of the decision or order.” Minn. R. Civ. P. 59.03. Wilson did not serve his motion until late March 2018, nearly a year after the district court issued its commitment order and judgment was entered. Accordingly, the district court did not abuse its discretion by denying the motion.

II. The district court did not abuse its discretion by denying Wilson’s motion under Minn. R. Civ. P. 60.02.

We review a district court’s denial of a rule 60.02 motion for an abuse of discretion. *In re Civil Commitment of Moen*, 837 N.W.2d 40, 44-45 (Minn. App. 2013), review denied (Minn. Oct. 15, 2013).

A district court may grant relief from a final judgment and order a new trial based on “excusable neglect.” Minn. R. Civ. P. 60.02(a). A person indeterminately committed as an SDP may bring an ineffective-assistance-of-counsel claim under that excusable-neglect provision. *In re Civil Commitment of Lonergan*, 811 N.W.2d 635, 643 (Minn. 2012) (stating that ineffective-assistance-of-counsel claims “that do not specifically request transfer or discharge” may be brought under rule 60.02); *Chapman v. Special Sch.*

Dist. No. 1, 454 N.W.2d 921, 923 (Minn. 1990) (“Attorney misconduct has been characterized as ‘excusable neglect’ under clause (a) . . .”).¹

We analyze ineffective-assistance-of-counsel claims in civil-commitment cases under the two-factor standard articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *In re Civil Commitment of Johnson*, ___ N.W.2d ___, ___, 2019 WL 2495668, at *5 (Minn. App. June 17, 2019). “To prevail under *Strickland*, a defendant must show that counsel’s representation fell below an objective standard of reasonableness (the performance factor) and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different (the prejudice factor).” *Id.* (quotation omitted).

With respect to his former attorney’s performance, Wilson contends that the 2018 charge means his attorney was under the influence of drugs at the time of the 2016 commitment trial and therefore could not have provided competent representation. Wilson presents no more than speculation that his attorney was using drugs more than a year before he was charged with a drug offense. *See id.* at *6 (holding such speculation insufficient to establish unreasonable representation). And even if his former attorney was under the influence of drugs while representing Wilson, Wilson must demonstrate that the attorney’s actual performance was deficient. *See State v. Nissalke*, 801 N.W.2d 82, 111-12 (Minn. 2011) (rejecting ineffective-assistance-of-counsel claim when trial attorney was arrested

¹ Wilson also sought relief under clauses (b) and (f). He does not challenge the district court’s determination that the only substantive allegation in his motion is ineffective assistance of counsel, and therefore his motion is properly considered under clause (a).

for possession of cocaine during trial preparations but record did not reflect objectively unreasonable performance). He has not done so.

As examples of incompetent representation, Wilson points to failure to present certain arguments or evidence, “vigorously cross-examine” the county’s witnesses, or object to “inaccurate documents” that indicated “a false count of ‘victims.’” Strategic decisions—what evidence to present, which witnesses to call at trial, how to conduct cross-examination, when to object—are left to the discretion of trial counsel. *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006); *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001). Such decisions “are not reviewed for competency.” *Vick*, 632 N.W.2d at 689. But even if they were, the record supports the district court’s finding that counsel was competent.

As detailed in his cogent opening statement at trial, Wilson’s former attorney focused his trial strategy not on disputing Wilson’s admitted history of harmful sexual conduct but on the difficult issue of whether Wilson was likely to engage in such conduct in the future. See Minn. Stat. § 253D.02, subds. 15 (requiring proof that the person has “an utter lack of power to control the person’s sexual impulses” for SPP commitment), 16(3) (requiring proof that the person is “likely to engage in acts of harmful sexual conduct” for SDP commitment); see also *In re Civil Commitment of Ince*, 847 N.W.2d 13, 20-21 (Minn. 2014) (discussing the difficulty of defining and proving this predictive element). He pursued that strategy by extensively cross-examining each of the testifying psychologists. And he presented a thorough, reasoned closing argument that successfully highlighted a conflict in expert testimony that led the district court to find insufficient evidence for an SPP commitment. On this record, the district court did not abuse its

discretion by determining that Wilson failed to present even a fact question as to the adequacy of his former attorney's performance.

Moreover, Wilson has not demonstrated that any shortfalls in his attorney's performance negatively affected the outcome of the commitment trial. *See State v. Mouelle*, 922 N.W.2d 706, 717 (Minn. 2019) (stating that ineffective-assistance-of-counsel claim fails when defendant cannot demonstrate "that the alleged errors actually had an adverse effect on the outcome of the case" (quotation omitted)). Wilson plainly was not prejudiced with respect to the SPP petition, which the district court denied. And with respect to the SDP petition, the weight of the evidence before the district court—the unanimous opinion of three expert witnesses that Wilson meets the criteria for commitment and Wilson's own acknowledgement of an extensive history of sexual abuse and misconduct—was so great that it is inconceivable any errors in his attorney's performance influenced the district court's decision.

In sum, because Wilson failed to substantiate his ineffective-assistance-of-counsel claim with any indication of deficient performance or prejudice, the district court did not abuse its discretion by denying his motion for a new trial.

Affirmed.