This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0574

In the Matter of the Civil Commitment of: Adnan Allen Fakaraldin Stone

Filed September 22, 2009
Reversed
Toussaint, Chief Judge

Waseca County District Court
File No. 81-P0-05-000302

Lori Swanson, Attorney General, Noah A. Cashman, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Paul M. Dressler, Waseca County Attorney, Waseca County Courthouse, 307 North State Street, Waseca, MN 56093 (for appellant State of Minnesota)

Mark R. Carver, Dow, Einhaus, Mattison & Carver, P.A., 202 North Cedar, P. O. Box 545, Owatonna, MN 55060 (for respondent Adnan Allen Fakaraldin Stone)

Considered and decided by Toussaint, Chief Judge; Ross, Judge; and Schellhas, Judge.

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

TOUSSAINT, Chief Judge

The district court granted respondent Adnan Allen Fakaraldin Stone's motion under Minn. R. Civ. P. 60.02(e) and vacated his indeterminate commitment as a sexually dangerous person (SDP) on the ground that one of respondent's prior convictions had

been vacated because of a procedural defect in the guilty plea. Because the vacation of respondent's conviction on procedural grounds does not entitle him to relief under rule 60.02 and vacation of his commitment, the district court abused its discretion in granting the motion and we reverse.[1]

D E C I S I O N

In 2005, appellant State of Minnesota petitioned for respondent's commitment as an SDP and a sexual psychopathic personality. The district court dismissed the petition after concluding that respondent had not engaged in a course of harmful sexual conduct within the meaning of Minn. Stat. § 253B.02, subd. 18c(a) (2004). This court reversed and concluded that respondent met the criteria for SDP commitment. *In re Commitment of Stone*, 711 N.W.2d 831, 841 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). A review hearing was held before a second district court judge, who issued an order for respondent's indeterminate commitment.

In 2007, respondent moved for postconviction relief to withdraw his 2004 guilty plea to third-degree criminal sexual conduct, arguing that the plea erroneously provided that he be sentenced without regard to Minn. Stat. §§ 609.108, 609.109 (2002), which imposed a mandatory five-year conditional-release period.[2] The first district court judge

[1] Our decision renders moot respondent's challenge, by notice of review, to the district court's denial of his motion for release pending a new trial on his commitment, and we do not address that issue.

[2] Minn. Stat. § 609.108 was repealed in 2005 and 2006. *See* 2005 Minn. Laws ch. 136, art. 2, § 23 (repealing subdivision 2); 2006 Minn. Laws ch. 260, art. 1, § 48 (repealing subdivisions 1, 3-7). Minn. Stat. § 609.108, subd. 6, addressing conditional release of sex offenders, was amended in 2005 to read "the court shall provide that after the [convicted]

granted the motion; the 2004 guilty plea was withdrawn, and respondent's conviction was vacated.

In 2008, after the charges leading to that conviction had been dismissed, respondent sought relief from the order of indeterminate commitment under Minn. R. Civ. P. 60.02(e), which permit relief from a judgment when "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."[3] Rule 60.02(e) enables a district court to "modify a judgment in light of changed circumstances." *Jacobson v. County of Goodhue*, 539 N.W.2d 623, 625 (Minn. App. 1995), *review denied* (Minn. Jan. 12, 1996). The first district court judge heard the motion.[4] The motion was granted on the ground that the vacation of respondent's 2004 conviction of third-degree criminal sexual conduct

---

offender has completed the sentence imposed, the commissioner of corrections shall place the offender on conditional release . . . for ten years. . . ." 2005 Minn. Laws ch. 136, art. 2, § 22.

[3] Respondent also sought relief under Minn. R. Civ. P. 60.02(f) (providing for relief for "[a]ny other reason justifying relief from the operation of the judgment"), but his motion was granted solely under Minn. R. Civ. P. 60.02(e), which is the only provision addressed by either party on appeal.

[4] Appellant argues that the second district court judge should have been appointed to hear respondent's rule 60.02 motion and that the first district court judge lacked authority to hear the motion. Before the hearing, appellant's attorney wrote to the court administrator raising this argument. The attorney received in reply a letter informing him the chief judge had determined that the first district court judge, who granted respondent's motion to withdraw his guilty plea, was the proper judge to hear his motion for relief under Minn. R. Civ. P. 60.02 and that, if appellant's attorney wished to pursue the matter, he could do so by motion at the hearing. Appellant's counsel never brought such a motion; consequently, there is no decision for this court to review. An appellate court does not generally consider issues raised for the first time on appeal. *Sletten v. Ramsey County*, 675 N.W.2d 291, 302 (Minn. 2004). Thus, the issue is not properly before us, and we do not address it.

was a "change in circumstances" that made his commitment inequitable. "The district court's application of Minn. R. Civ. P. 60.02 will not be reversed absent an abuse of discretion." *Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. App. 1996) (reversing vacation of final judgment because no basis for relief had been shown under Minn. R. Civ. P. 60.02), *review denied* (Minn. Dec. 23, 1996).

The district court abused its discretion in concluding that the vacation of respondent's 2004 conviction was a change in circumstances that justified the vacation of his commitment because indeterminate commitment is based not on an individual's convictions, but on his acts. *See* Minn. Stat. § 253B.02, subd. 18c (2008) (defining SDP not in terms of convictions but rather as person who has engaged in course of harmful sexual conduct, has manifested qualifying disorder or dysfunction, and, as result, is likely to engage in acts of harmful sexual conduct); *see also In re Monson*, 478 N.W.2d 785, 789 (Minn. App. 1991) (rejecting argument that commitment as psychopathic personality was not justified because appellant had been "convicted of sexual misconduct only once" and holding that commitment "statute does not address convictions; it addresses behavior, which in appellant's case clearly showed multiple acts of sexual abuse against young boys").

Here, respondent testified about his sexual activity with young girls, including the incident that led to the vacated conviction. In *Stone*, this court explicitly relied on that testimony:

> [T]he district court . . . rejected [the 2004 victim's] statements about her incapacitation or her physical injury at the time of the assault. *We therefore rely on [respondent's] version of the event, that [the victim] was conscious*

> *and wanted to engage in sexual relations.* This construction of events, however, does not rebut the presumption that [the] fifteen-year-old [victim] was likely to suffer long-term emotional harm. The expert witnesses testified that [the victim] was vulnerable, that she was humiliated by the encounter, that she suffers from posttraumatic stress, and that she will suffer long-tem emotional harm.

711 N.W.2d at 838 (emphasis added.) The vacation of the 2004 conviction does not annul respondent's testimony as to his acts, and those acts, not the conviction, supported the conclusion that he had engaged in a course of harmful sexual conduct warranting commitment.

Although this court in *Stone* deferred to the district court's other credibility determinations, its conclusion had ample support.

> Even if we accept [respondent's] assertion that he did not sexually penetrate the [four-year-old] child [in the 1998 incident], the evidence nonetheless established that she is likely to suffer serious emotional harm. [Her] young age, the repeated incidents, the escalating and different types of abuse, and her relationship with [respondent], her foster brother, were all factors that led the two court-appointed experts to conclude that she was likely to sustain serious emotional harm with long-term effects. . . .
>
> . . . .
>
> . . . . The district court concluded that only one of [respondent's other] acts qualified as harmful sexual conduct because the other incidents were not sexual in nature. The incident that the district court concluded was sexual in nature was [respondent's] violation of his probation by telephoning a young girl and telling her that he wanted to "jump her." . . . Although both experts testified that [respondent's] other interactions with young girls, including the incident in which he brandished a knife, were sexual in nature, the district court found that they were not. . . . [W]e defer to those assessments.

Id. at 838-39. This court also noted that:

> The expert-witness testimony and the results of the application of the reoffense factors provided clear and convincing evidence that [respondent]

> is highly likely to reoffend.[5] The district court's conclusion that [respondent] is likely to engage in harmful sexual conduct in the future is therefore supported by substantial evidence in the record.

Id. at 841. Thus, the vacation of respondent's 2004 conviction does not provide a basis for vacating his commitment because the commitment was not based on that conviction.

The district court abused its discretion in granting respondent's motion because the vacation of the 2004 guilty plea was not the basis for his indeterminate commitment and the facts that made respondent's indeterminate commitment equitable have not changed.

Reversed.

[5] In granting respondent's rule 60.02 motion, the district court stated that the experts on whom this court relied had themselves relied on the vacated 2004 conviction and quoted one expert as having stated that the actuarial tests "are only based on conviction and not the actual acts." But the district court misconstrued that testimony. The expert had been asked, "[D]o you know why [the actuarial tests] underestimate sexual recidivism?" and she answered, "Well, sometimes some of them are only based on convictions and not the actual acts." Thus, if the tests were in fact based on respondent's conviction, they underestimated, not overestimated, the likelihood of his recidivism. Contrary to the district court's implication, the experts' reliance on the vacated conviction is not a basis for concluding that, without the conviction, they would have considered respondent less likely to reoffend.