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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1024**

In the Matter of the Civil Commitment of:
Gary Peter Scott

**Filed November 28, 2011
Affirmed
Halbrooks, Judge**

Lake of the Woods County District Court
File No. 39-PR-08-7

Gary Peter Scott, Moose Lake, Minnesota (pro se appellant)

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

Philip Miller, Lake of the Woods County Attorney, Baudette, Minnesota (for respondent
State of Minnesota)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Pursuant to Minn. R. Civ. P. 60.02(f), appellant challenges the district court's denial of his motion to vacate its civil-commitment order on the grounds that his commitment violates his constitutional rights and that his attorney was ineffective. Because a rule 60.02 motion is not the proper mechanism for asserting a constitutional

challenge to the Minnesota Sex Offender Program (MSOP) and because appellant's claims regarding his attorney's ineffectiveness are unsupported by the record, we affirm.

FACTS

In November 2008, appellant Gary Peter Scott was civilly committed as a sexual psychopathic personality and a sexually dangerous person under Minn. Stat. §§ 253B.01-.24 (2008). Three months later, the district court ordered that his commitment be indeterminate. On Scott's subsequent direct appeal to this court, we affirmed the commitment on both bases. *See In re Commitment of Scott*, No. A09-366, 2009 WL 2499266 (Minn. App. Aug. 18, 2009).

In August 2010, Scott moved the district court to vacate its commitment order under Minn. R. Civ. P. 60.02, which permits the district court to "relieve a party" from any order for reasons including mistake, new evidence, fraud, or "any other reason justifying relief." Scott claimed that vacation of the commitment order is justified "for any other reason" because (1) he was improperly committed as a level-three sex offender and there is no mechanism through which he can gain release from the MSOP and (2) he had ineffective trial counsel. The district court denied Scott's motion. This appeal follows.

DECISION

I.

We first address Scott's ineffective-assistance-of-counsel claim, which can properly be brought in a rule 60.02 motion. *See In re Cordie*, 372 N.W.2d 24, 28 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985). We review a district court's decision

to grant or deny a rule 60.02 motion under an abuse-of-discretion standard. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988).

The civil-commitment statute provides a right to appointed counsel to “vigorous[ly] advocate” for individuals facing civil commitment. Minn. Stat. § 253B.07, subd. 2c (2010). We analyze the adequacy of appointed counsel by following the criminal standard for effective counsel. *Cordie*, 372 N.W.2d at 28. We therefore look to whether counsel exercised “the diligence of a reasonably competent attorney under similar circumstances” and whether, if not, the deficiency likely prejudiced the outcome. *Id.* at 28-29.

Scott alleges, without any factual support, that his court-appointed attorney failed to be his vigorous advocate during trial. Because his claim rests on his unsupported statement, it fails unless the ineffectiveness is “obvious on mere inspection.” *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971). The record here reveals that Scott’s attorney sought and obtained a second expert’s opinion, gave an opening statement, called two witnesses, cross-examined the petitioner’s witnesses, and submitted a posttrial memorandum and proposed order. After Scott’s commitment, his attorney appealed his case to this court. We conclude that the district court acted well within its discretion by denying Scott’s rule 60.02 motion with respect to his ineffective-assistance-of-counsel claim.

II.

We next address Scott’s remaining constitutional challenges to the MSOP. The district court properly denied Scott’s motion on the ground that a rule 60.02 motion is not

the proper mechanism to challenge his commitment or the adequacy of his treatment. *See In re Commitment of Lonergan*, 792 N.W.2d 473, 476-77 (Minn. App. 2011) (holding that the statutory framework governing indeterminate civil commitment of sexually dangerous persons, Minn. Stat. §§ 253B.01-.24, does not authorize rule 60.02 relief based on constitutional challenges to commitment or the adequacy of treatment), *review granted* (Minn. Apr. 19, 2011). Because this basis is dispositive, we do not address the district court's other grounds for denying the motion.

Affirmed.