**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-1270**

In re Civil Commitment of:
Robert Archie Kunshier

**Filed October 9, 2012**
**Affirmed**
**Ross, Judge**

Dakota County District Court
File No. 19-P5-88-001302

Robert A. Kunshier, Moose Lake, Minnesota (pro se appellant)

James C. Backstrom, Dakota County Attorney, John L. Kirwin, Special Assistant County Attorney, Karen L. Henke, Assistant County Attorney, Debra E. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

**ROSS**, Judge

This appeal from the district court's denial of appellant Robert Kunshier's motion under rule 60.02 of the Minnesota Rules of Civil Procedure challenging his commitment as a psychopathic personality was remanded by the supreme court, which reversed this court's affirmance of the district court's order. *In re Commitment of Kunshier*, No. A10-1270 2011 WL 500070 (Minn. App. Feb. 15, 2011), *rev'd and remanded sub nom.*, *In re*

*Civil Commitment of Lonergan*, 811 N.W.2d 635 (Minn. 2012). Based on our reconsideration of Kunshier's claims in light of the supreme court's opinion, we again affirm the district court's denial of relief.

## FACTS

The district court committed Kunshier as a psychopathic personality in 1993, but this court reversed and remanded the commitment, holding that the district court needed to consider the petition under the limiting standards set out in the Supreme Court's *Pearson* opinion, particularly the "utter lack of power to control" standard. *Matter of Kunshier*, 521 N.W.2d 880, 884 (Minn. App. 1994). The district court on remand applied those standards and again committed Kunshier. Kunshier appealed, and this court affirmed. *In re Kunshier*, No. C7-95-1490 1995 WL 687692 (Minn. App. Nov. 21, 1995).

In December 2009, Kunshier filed a pro se motion for relief from the commitment judgment under rule 60.02 of the Minnesota Rules of Civil Procedure. He claimed that the End of Confinement Review Committee had erroneously classified him as a level III sex offender, that the Minnesota Sex Offender Program (MSOP) was denying him any way to gain his release, that MSOP was forcing him to complete a new treatment program, that MSOP had failed to release anyone in its history, and that he had been denied the effective assistance of counsel in contesting his 1993–95 commitment proceedings.

Kunshier was represented by an attorney at a hearing on the rule 60.02 motion. Kunshier argued that, following Governor Pawlenty's 2003 executive "unallotment" order, he could not obtain release or discharge through MSOP and it was futile for him to

seek relief from the Judicial Appeal Panel. He claimed that he had complied with the rules of the MSOP treatment program but that after he made substantial progress MSOP merely changed its treatment program. He argued that he should be discharged, and he suggested a residential treatment facility in West St. Paul.

The district court issued an order in May 2010 denying Kunshier's motion. It ruled that rule 60.02 was not the proper means for Kunshier to obtain review of his claims and that Kunshier's motion was untimely. In granting the county's motion to dismiss the appeal, the court also noted that the facts weighed against granting relief under rule 60.02(f) of the Minnesota Rules of Civil Procedure and that "the facts and the law in this case support [Kunshier's] continued confinement." This court affirmed in an unpublished opinion, holding that Kunshier "cannot rely on rule 60.02 to challenge his commitment and must rely instead on the process ordered by statute." *In re Kunshier*, 2011 WL 500070 at *2. The opinion did not address the merits of Kunshier's claims. *See id.*

The supreme court reversed in part and remanded in an opinion addressing both Lonergan's and Kunshier's claims. As to Kunshier's claims in particular, the court stated that this court "erred . . . when it articulated a blanket prohibition on use of Rule 60.02 motions by patients indeterminately committed as SDPs or SPPs." *In re Lonergan*, 811 N.W.2d at 643. The court remanded for this court to determine "what, if any, nontransfer, nondischarge claims . . . Kunshier raise[s]." *Id.*

**D E C I S I O N**

The supreme court rejected any "blanket prohibition" on all rule 60.02 claims brought by a person committed as SDP or SPP. It held that, instead, an SDP or SPP

patient cannot use rule 60.02 to present a claim for transfer or discharge, or to present a claim that would either present a "distinct conflict" with chapter 253B, the Commitment Act, or "frustrate the purpose" of the Act. *See In re Lonergan*, 811 N.W.2d at 643. All claims raised by Kunshier that are specifically "transfer" or "discharge" claims therefore cannot be brought under rule 60.02. We must identify those claims and determine which of his other claims are permitted under rule 60.02, including those that do not present a "distinct conflict" with chapter 253B and that do not "frustrate the purpose" of that Act. Kunshier's makes five basic assertions: (1) the End-of-Confinement Review Committee (ECRC) erred by classifying him as a level III sex offender; (2) his rights have been violated because he has "no way to gain release" from MSOP; (3) MSOP has forced Kunshier to complete a new sex offender treatment program; (4) MSOP has failed to release anyone; and (5) he was denied the effective assistance of counsel during his 1993–95 commitment proceedings.

*ECRC Claim*

Kunshier asserts that the ECRC improperly assigned him as a level III offender in 2004. A challenge to an ECRC classification is far outside the scope of a challenge to sex-offender commitment or treatment. And Kunshier was committed as a psychopathic personality in 1993 (initially) and 1995 (on remand), long before his level III classification occurred. The level III classification is not part of the SPP commitment that Kunshier purports to attack under rule 60.02. He had a right to administrative review of the ECRC determination, and he had a right to appeal to this court (not the district court)

to challenge it. The ECRC classification claim is therefore outside the scope of either a proper challenge under rule 60.02 or a proper claim under the Commitment Act.

*Complaints about MSOP Treatment*

Kunshier's second, third, and fourth rule 60.02 claims are related to each other. Kunshier claimed that he has no means for release from civil commitment; that, after completing the treatment plan initially imposed on him, he has been forced to complete another treatment program; and that MSOP's failure to release any SDP or SPP patient demonstrates that the program violates his constitutional rights. The transcript of the hearing on Kunshier's motion establishes that he was seeking release or discharge from commitment based on these claims. His attorney argued that Kunshier "has achieved a completion of sexual offender treatment" and complied with the restrictions imposed on him when he was allowed out in the community on a pass. The attorney suggested placement at a West St. Paul residential facility, arguing that because of the 2003 Pawlenty executive order Kunshier's only hope for discharge is through the district court. *Id.* at 7.

The supreme court held that the Commitment Act's transfer and discharge remedies are the exclusive remedies for patients seeking transfer or discharge. *In re Lonergan*, 811 N.W.2d at 642 (stating that "any other procedure through which a patient indeterminately committed as an SDP or SPP seeks a transfer or discharge distinctly conflicts with the Commitment Act"). Kunshier's three rule 60.02 challenges to MSOP treatment practices are explicitly aimed to achieve the remedy of discharge (or release). Kunshier's attorney essentially argued that Kunshier had completed MSOP treatment,

and he explicitly sought release from MSOP and placement in a residential facility. And although Kunshier's motion included some generalized complaints about the MSOP program, a rule 60.02 motion seeks relief from the judgment, and Kunshier's claims are essentially all claims seeking discharge.

Kunshier's claim that there is "no way for him to gain release" under MSOP, along with his claim (more of an allegation) that MSOP has not released any SDP or SPP patients, might be viewed as generalized complaints about the MSOP program, not specific claims for discharge. But since Kunshier makes these claims in a rule 60.02 motion for relief from the judgment, they are in essence claims seeking discharge.

In the legally related appeal, *In re Lonergan*, A10-1269 (Minn. App. Oct. 9, 2012), a panel of this court has held that a patient may bring a claim under rule 60.02(e) alleging that, because he has not been provided proper treatment, his commitment is no longer permissible. But Lonergan brought his rule 60.02 motion only a year after his commitment, a time during which treatment would have been in the initial stages, not more than 15 years after commitment and after substantial treatment, as Kunshier did. Kunshier's claim that he has substantially completed treatment is also inconsistent with a claim that he has been provided with no treatment whatsoever.

Kunshier's claims are essentially claims for discharge, not an attempt to vindicate a right to treatment. Kunshier's complaint is not that he has been denied treatment, but rather that, despite his largely successful completion of the four-phase MSOP program, he has no prospect of release. And Kunshier's claim that he has "no way of being

released," based on the 2003 executive order, is a claim that release is barred to all SDP or SPP patients regardless of how much treatment they have received.

Kunshier's three challenges to MSOP treatment practices therefore are targeted to obtain the remedy of discharge (or release). As such, they fall within the supreme court's prohibition against making transfer or discharge claims in a rule 60.02 motion.

*Ineffective Assistance of Counsel*

Kunshier's rule 60.02 motion claimed that his attorney was ineffective during the commitment proceedings in three respects: (1) failing to use records of the 1988 commitment proceeding that was halted; (2) failing to provide notice of the attorney's disciplinary suspension; and (3) failing to file an "appeal." The supreme court states that there "exists a narrow class of claims that may be brought under Rule 60.02," and that "[e]xamples of these claims *might include*" ineffective assistance of counsel. *In re Lonergan*, 811 N.W.2d at 643 (emphasis added). Kunshier's ineffective-assistance claim may be within the scope of rule 60.02 relief, but the claim is both untimely and lacking in merit.[1]

Kunshier challenges the conduct of his attorney in the 1993–95 commitment proceedings. An ineffective-assistance claim is a claim of "excusable neglect" under rule 60.02(a), which is subject to a one-year time limitation. Kunshier's 2009 claim of

[1] The district court summarily rejected Kunshier's motion, but did so in part based on the merits of his claims. Although the supreme court remanded to this court the issue of the proper scope of rule 60.02 relief, because our review of this appeal would be incomplete without considering the merits of Kunshier's claims, we address them in the interests of justice. *See generally* Minn. R. Civ. App. P. 103.04 (providing that this court in deciding an appeal "may review any other matter as the interest of justice may require").

ineffective assistance was made far more than a year after the 1993–95 commitment proceeding and the final 1995 indeterminate commitment order. It is untimely.

Kunshier's ineffective-assistance claim also lacks merit. His attorney, John Grzybek, was suspended by the supreme court on July 25, 1996. *In re Grzybek*, 552 N.W.2d 215 (Minn. 1996). He was apparently an attorney in good standing at the time of Kunshier's commitment process and appeal because Grzybek's suspension came eight months after this court finally decided Kunshier's second appeal from his indeterminate commitment on November 21, 1995. It was Grzybek who represented Kunshier in his appeals and who presumably filed them on his behalf. *See In re Kunshier*, 521 N.W.2d at 881; *In re Kunshier*, 1995 WL 687692 at *1. Kunshier's claim that Grzybek did not file an appeal on his behalf is therefore incorrect. And nothing in the supreme court's two disciplinary opinions indicate that Grzybek committed any ethical violations in representing Kunshier. *See In re Grzybek*, 567 N.W.2d 259 (Minn. 1997); *In re Grzybek*, 552 N.W.2d 215 (Minn. 1996).

Kunshier might be claiming that Grzybek rendered ineffective assistance because he did not file a petition for review in the supreme court. The failure to file a PFR, however, is not unprofessional error if there are no grounds for review by the supreme court. *See generally* Minn. Spec. R. Commit & Treat. Act. 9 ("[c]ounsel for the [proposed patient] is not required to file an appeal . . . if, in the opinion of counsel, there is an insufficient basis for proceeding"). And even if Kunshier could show that Grzybek committed professional error by failing to file a PFR, his ineffective assistance claim would also require that he show that he suffered prejudice from that failure. *See generally*

*In re Cordie*, 372 N.W.2d 24, 28–29 (Minn. App. 1985) (applying *Strickland* standard to civil commitment case, at least by way of analogy), *review denied* (Minn. Sept. 26, 1985). This he cannot do. Kunshier obtained substantial relief in his 1994 appeal, in which this court remanded the case for reconsideration under the stricter constitutional standards. *In re Kunshier*, 521 N.W.2d at 885. Kunshier received the benefit of having the newly established *Linehan* factors applied to his case. *Id.* Kunshier has not suggested that the supreme court would have granted a PFR in his second appeal had one been filed. He therefore cannot show prejudice from his claim that counsel was ineffective in this respect, even if his ineffective-assistance claim had been timely.

Again, Grzybek was suspended only after this court decided Kunshier's appeal and after the time to file a PFR had expired. The rules of professional conduct do not include among the duties to former clients a duty to notify them of a later suspension. *See* Minn. R. Prof. Conduct 1.9. Kunshier does not cite any authority requiring Grzybek to have notified him of his suspension, which occurred after the representation had terminated.

Kunshier claims finally that Grzybek should have notified the court of a "contract" in the 1988 proceedings under which the petition was apparently dismissed because Kunshier agreed to further treatment. But the testimony from the 1988 proceedings was retained in the file in which the 1993 commitment was ordered. In the 1988 hearing, Kunshier testified that he had "volunteered" for sex offender treatment at Oak Park Heights. The district court continued the commitment hearing until 1993, or just before Kunshier's release from prison. In 1993, the district court noted that the 1988 court had

determined that commitment was "premature," implying that it was fully aware of the terms on which the 1988 commitment proceeding was continued. So even if the claim was timely, Kunshier could not show prejudice from Grzybek's alleged failure to inform the 1993 court of the terms on which the 1988 commitment was continued.

**Affirmed.**