STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1111

In the Matter of the Civil Commitment of: Byron K. Anderson

Filed November 13, 2012
Affirmed
Connolly, Judge

Douglas County District Court
File No. 21-P5-05-000375

Byron K. Anderson, Moose Lake, Minnesota (pro se appellant)

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

Chad Michael Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

CONNOLLY, Judge

Appellant challenges the denial of his Minn. R. Civ. P. 60.02 motion to vacate his commitment as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP), arguing that respondent county failed to establish venue, violated his plea agreement, and subjected him to malicious prosecution, and that his counsel provided

ineffective assistance. Although appellant's claims were properly made under Minn. R. Civ. P. 60.02 (d) and (f), none of the claims has merit. Consequently, we affirm.

FACTS

In the five-year period from 1987 to 1992, appellant Byron Anderson, then in his 20s, had sexual incidents with seven victims. In 1987, he sexually assaulted K.M.W. in respondent Douglas County. In 1988, he was reported peeking into H.B.'s windows and pleaded guilty to misdemeanor interference with privacy. In 1989, he sexually assaulted his wife's aunt while she was sleeping. In 1990, appellant attacked E.A.W. while she was jogging; the charge was dismissed as part of a plea agreement in a subsequent case. He also raped J.M.J. at her home, was charged with first-degree criminal sexual conduct, and pleaded guilty. Around 1991, he sexually grabbed his sister-in-law. In 1992, he sexually assaulted P.A.S., was charged with first-degree criminal sexual conduct, and again pleaded guilty.

In 2002, Stearns County filed a petition to commit appellant as SDP and SPP. Appellant provided false information to two medical examiners, who opposed his commitment based on that information. The petition was dismissed, and appellant was referred to a treatment program as a condition of supervised release. In 2003, he completed inpatient treatment and began outpatient treatment, which he did not complete.

In 2004, after H.B. reported that appellant had looked in her window, he was charged with misdemeanor surreptitious intrusion. A warrant was issued for appellant's arrest; his stay at the outpatient center was terminated; his conditional release was

revoked, and he was sent to prison. In 2005, while he was in prison, Hennepin County filed a petition for his commitment as SDP and SPP.

Appellant moved to transfer venue to one of four counties. The district court granted the motion and transferred venue to Stearns County. Hennepin County moved to transfer venue to Douglas County, appellant's county of financial responsibility; appellant agreed, and venue was transferred to Douglas County.

The district court appointed a medical examiner. Appellant declined to be interviewed by this examiner and waived his right to have a second examiner appointed. Instead, he chose to retain the two examiners who had examined him in connection with the 2002 Stearns County petition.

All three examiners agreed that appellant should be committed as SDP, and two of them also agreed that appellant should be committed as SPP. The district court issued an order for appellant's initial commitment as SDP and SPP.

Appellant challenged the commitment order, arguing that (1) insufficient evidence supported both commitments; (2) the district court was collaterally estopped from considering the Hennepin County petition; (3) the district court erred by admitting exhibits containing part of a polygraph report and police records; and (4) the commitment statutes violated appellant's right to due process and the prohibition against double jeopardy. This court affirmed the commitment order. *In Re Civil Commitment of Anderson*, No. A06-2008, 2007 WL 824019 *3-*5 (Minn. App. Mar. 20, 2007) (rejecting appellant's arguments and affirming his commitment as SDP and SPP), *review denied* (Minn. May 30, 2007) (*Anderson I*).

After a hearing, the district court issued an order for appellant's indeterminate commitment as SDP and SPP. Appellant challenged the order, arguing that the district court was collaterally estopped from considering the incident in which appellant looked in H.B.'s window and that it erred in finding that he attempted to sexually assault E.A.W. and sexually assaulted K.M.W. Again, this court affirmed appellant's commitment. *In re Civil Commitment of Anderson*, No. A07-2054 (Minn. App. Feb. 19, 2008) (order opinion declining to reexamine appellant's commitment as SDP and SPP because factual bases for challenging it were "identical to those in *Anderson I*"), *review denied* (Minn. May 1, 2008) (*Anderson II*).

Appellant then moved to vacate his commitment under Minn. R. Civ. P. 60.02 (d) and (f), arguing that Douglas County (1) failed to establish venue, (2) abused its discretion and denied him due process by committing him in violation of a condition in his 1993 plea agreement, (3) violated his right to be free from malicious prosecution, and (4) violated his sixth amendment rights by ineffective assistance of counsel and counsel's conflict of interest. The district court concluded that appellant's claims were properly raised under Minn. R. Civ. P. 60.02 (d) and (f) but lacked merit and denied them. Appellant challenges the denial of his claims.[1]

[1] Appellant also challenged his commitment in federal district court by filing a petition for a writ of habeas corpus. On the recommendation of a federal magistrate judge, the federal district court rejected appellant's arguments and denied the petition.

D E C I S I O N

1. Venue

"The district court's determination of a venue challenge raises a question of law that we review de novo." *State v. Daniels*, 765 N.W.2d 645, 648-49 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009).[2] Appellant moved the Hennepin County district court to transfer venue to any of four counties: Douglas and Anoka, which had "stronger residency inferences" than Hennepin; Pope, which had a stronger showing of criminal presence; and Stearns, which had both. Venue was transferred to Stearns County, where appellant was then incarcerated. On the motion of Hennepin County and with the consent of appellant, venue was transferred from Stearns County to Douglas County because "[a] petition should be filed in the county of financial responsibility as defined in Minn. Stat. § 253B.045, subd. 2." Minn. Spec. R. Commit. & Treat. Act 6. Hennepin County's motion to change venue from Stearns County to Douglas County asserted that "the parties agree that it is appropriate that this matter be venued in Douglas County rather than Stearns County." Appellant raised no objection to the transfer to Douglas County when this motion was brought, when venue was transferred, throughout the trial, or in either of his previous appeals. He has at least arguably waived the right to challenge venue now. *See State v. Blooflat*, 524 N.W.2d 482, 483 (Minn. App. 1994) (holding that an objection to venue not made before trial is waived).

[2] *But see State v. Walen*, 563 N.W.2d 742, 748 (Minn. 1997) (stating that this court reviews a district court's denial of a defendant's motion for change of venue under an abuse-of-discretion standard).

Moreover, a challenge to denial of a motion to change venue requires a showing that the venue "resulted in prejudice to the defendant." *State v. Chambers*, 589 N.W.2d 466, 473 (Minn. 1999). Appellant has shown no prejudice resulting from venue in Douglas County.

2. Plea Agreement

The district court stated that, "Other than [appellant's] affidavit, no evidence was presented on what the actual terms of the plea agreement were. Therefore, the Court cannot determine if the terms were violated." In the appendix to his brief, appellant includes a transcript of the August 5, 1993, guilty plea hearing in Stearns County. But the record on appeal consists only of "[t]he papers filed in the trial court [and] the exhibits." This court may not consider materials not in the record. Minn. R. Civ. App. P. 110.01; *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). Thus, appellant's claim that his plea agreement was breached lacks evidentiary support.

The district court noted that, even if a Stearns County prosecutor did agree not to pursue appellant's civil commitment as a term of a plea agreement, this would not bind Hennepin County, which petitioned for his commitment, or Douglas County, where the trial on the petition occurred.

Appellant's breach-of-plea-agreement argument fails.

3. Malicious Prosecution

Appellant argues that he was subjected to malicious prosecution because Hennepin County's filing of a second petition for his commitment was "presumptively vindictive." But Hennepin County filed its petition in 2005 after Stearns County, in 2002, had

determined on the basis of the examiners' recommendations that there was not good cause for a petition. The 2005 petition was based on information that became available only after the 2002 petition had been dismissed, partly because appellant was not honest during the trial on the 2002 petition. The district court found that, during the trial on the 2005 petition, "[appellant] testified that in 2002 he lied to [the examiners] and the court regarding his victims, his sexual misconduct, and his chemical dependency. [Appellant] testified that he lied specifically to avoid civil commitment." Appellant does not challenge this finding.

Petitioning for appellant's commitment in 2005 based on information that he had concealed to avoid commitment in 2002 was neither presumptively vindictive nor malicious prosecution.

4. Ineffective Assistance of Counsel

A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). "The [claimant] must affirmatively prove that his 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotations and citation omitted). The standard for evaluating the adequacy of counsel in civil commitment cases is the same as the standard applied in

criminal cases. *In re Cordie*, 372 N.W.2d 24, 28 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985).

Appellant argues that his counsel was ineffective in agreeing to venue in Douglas County because, if venue had been in Stearns County where an earlier petition for appellant's commitment had been denied, appellant would not have been committed. But appellant ignores the facts that the Stearns County denial of the 2002 commitment petition was based on appellant's untruthful information, which he himself later testified was untruthful, and that the medical examiners who opposed commitment in 2002 had changed their professional opinions by 2005, when they supported commitment. Moreover, as the district court found, "[appellant's] attorney did raise the issue of venue and filed two motions to dismiss the 2005 petition on the basis of collateral estoppel based on the dismissal of the 2002 petition in Stearns County." [3]

Appellant also accuses his counsel of conflict of interest because counsel had a lake home in Douglas County and was paid more per hour in Douglas County. Appellant presents no evidence to support either of these claims. Even if there were supporting facts, the district court found that "[appellant] has failed to show that his counsel's representation of him was affected by the fact that his lawyer has a lake home in Douglas County where he could stay or that his lawyer made more per hour in Douglas County." Absent any showing of conflicting interests, the claim fails.

[3] In any event, as respondent points out, an objection to venue is a matter of trial strategy and is not subject to review for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). In evaluating a claim of ineffective assistance, courts do not review matters of trial tactics or strategy. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999).

Appellant's claims are without merit.

Affirmed.