STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2076

Jacob Karl Rask, petitioner,
Appellant,

vs.

State of Minnesota, Department of Human Services, et al.,
Respondents.

Filed June 2, 2014
Affirmed
Larkin, Judge

Carlton County District Court
File No. 09-CV-13-1359

Jacob Rask, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Cleary, Chief Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's summary denial of his petition for a writ of habeas corpus. We affirm.

FACTS

In 2008, the district court civilly committed appellant Jacob Karl Rask to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). This court affirmed the commitment. *In re Civil Commitment of Rask*, 2009 WL 511943, No. A08-1551 (Minn. App. Feb. 26, 2009).

On July 3, 2013, Rask petitioned the district court for a writ of habeas corpus. Rask alleged that he is illegally confined based on (1) ineffective assistance of counsel; (2) violation of his constitutional rights to due process under the Fourteenth Amendment; and (3) violation of his protection against cruel and unusual punishment under the Eighth Amendment. He requested appointment of counsel to represent him in the habeas proceedings. The district court denied Rask's petition without holding an evidentiary hearing. This appeal follows.

D E C I S I O N

A writ of habeas corpus is a statutory civil remedy available "to obtain relief from [unlawful] imprisonment or restraint." Minn. Stat. § 589.01 (2012). "Committed persons may challenge the legality of their commitment through habeas corpus." *Joelson v. O'Keefe*, 594 N.W.2d 905, 908 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). "But the only issues the district court will consider are constitutional and jurisdictional challenges." *Id*.; *see also Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 547-48 (Minn. App. 2011) (*Beaulieu I*) (stating that "the supreme court regards habeas as a remedy only for a jurisdictional defect or a constitutional violation" and that "[t]he supreme court has refrained from expanding the scope of the writ of habeas corpus to

encompass statutory violations that give rise to unlawful restraint"), *aff'd*, 825 N.W.2d 716 (Minn. 2013) (*Beaulieu II*). "Further, appellants are not entitled to obtain review of an issue previously raised." *Joelson*, 594 N.W.2d at 908. "[H]abeas corpus may not be used as a substitute for a writ of error or appeal or as a cover for a collateral attack upon a judgment of a competent tribunal which had jurisdiction of the subject matter and of the person of the defendant." *State ex rel Thomas v. Rigg*, 255 Minn. 227, 234, 96 N.W.2d 252, 257 (1959).

"A petitioner is entitled to an evidentiary hearing only if a factual dispute is shown by the petition." *Seifert v. Erickson*, 420 N.W.2d 917, 920 (Minn. App. 1988), *review denied* (Minn. May 18, 1988). "The district court's findings in support of a denial of a petition for a writ of habeas corpus are entitled to great weight and will be upheld if reasonably supported by the evidence." *Aziz v. Fabian*, 791 N.W.2d 567, 569 (Minn. App. 2010). Questions of law pertaining to a habeas petition are reviewed de novo. *Id*.

Rask assigns several errors to the district court's denial of his habeas petition. We address each in turn. But we first note that Rask argues throughout his brief that the district court erred by denying his petition without an evidentiary hearing. Because Rask does not allege a factual dispute, he was not entitled to an evidentiary hearing in district court. *See Seifert*, 420 N.W.2d at 920.

I.

Rask argues that the district court "abused its discretion in denying [him] an evidentiary hearing on the issue that [his] [c]ounsel was ineffective, as [his] [c]ounsel failed to [p]etition to the Minnesota Supreme Court issues wrongfully [d]ecided by the

Minnesota Court of Appeals." This court has previously indicated that an ineffective-assistance-of-counsel claim is not properly raised in a habeas petition. *See Beaulieu I*, 798 N.W.2d at 551 (holding that an ineffective-assistance-of-counsel claim was not properly raised in a habeas corpus petition because it failed to allege a constitutional violation); *see also Beaulieu II*, 825 N.W.2d at 717 n.1 (refusing to decide "whether a person has a right to the effective assistance of counsel on appeal from an indeterminate civil commitment, and . . . if so, whether filing of a petition for a writ of habeas corpus is the proper procedure for asserting an ineffective-assistance-of-appellate-counsel claim" because the petitioner's substantive claims "fail[ed] on the merits or were waived"). Once again, a district court may only consider constitutional and jurisdictional challenges in a habeas corpus petition. *Joelson*, 594 N.W.2d at 908. And the right to counsel in the civil-commitment context is statutory, not constitutional. *Compare* U.S. Const. amend. VI (providing right to counsel in criminal cases), *with* Minn. Stat. § 253B.07, subd. 2c (2012) (providing right to counsel in civil-commitment proceedings).

Rask had an alternative method of challenging his attorney's performance. The supreme court has stated that "Minn. R. Civ. P. 60.02 provides a mechanism by which an indeterminately civilly committed individual can raise ineffective-assistance-of-counsel claims." *Beaulieu II*, 825 N.W.2d at 721 n.7. Rask argues that "[t]he problem . . . is that a motion under Rule 60.02 would not be timely." But Rask cannot obtain relief that is not clearly available under a habeas corpus petition simply because he failed to timely move the district court for relief under rule 60.02.

Moreover, Rask's ineffective-assistance-of-counsel claim fails on the merits. When analyzing an ineffective-assistance-of-counsel claim in a civil-commitment case, Minnesota courts apply the same standard that is used to analyze such claims in criminal cases, i.e. the *Strickland* test. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). To establish ineffective assistance of counsel under the *Strickland* test, a defendant must demonstrate that counsel's representation was "deficient" or "fell below an objective standard of reasonableness," and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). There is a strong presumption that counsel's representation was reasonable. *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009).

Appointed counsel in a civil commitment case "is not required to file an appeal . . . if, in the opinion of counsel, there is an insufficient basis for proceeding." Minn. Spec. R. Commit. & Treat. Act 9. And supreme court review of a civil-commitment order is entirely discretionary. Minn. R. Civ. App. P. 117, subd. 2. The district court made extensive findings of fact to support its conclusion that Rask met the criteria for commitment. On appeal to this court, Rask argued that his antisocial personality disorder was not a sufficient basis for his commitment. *Rask*, 2009 WL 511943, at *4. We rejected that claim, citing the court-appointed examiners and *In re Linehan*, 594 N.W.2d 867, 877-78 (Minn. 1999), in which the supreme court held that an antisocial personality disorder qualifies as a mental disorder for commitment purposes. Under these circumstances, it is unlikely that the supreme court would have granted a petition for

review. Rask therefore has not shown that his attorney's decision to forego a petition for further review by the supreme court "fell below an objective standard of reasonableness," and the district court did not err by denying Rask habeas relief on this issue.

Rask also argues that he "should be appointed effective counsel to represent him in these proceedings." Rask does not cite relevant legal authority to support his request for appointed counsel in this habeas corpus proceeding. An assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). For the reasons that follow, we discern no error.

Although "[a] patient has the right to be represented by counsel at any proceeding under [the Civil Commitment Act]," the right applies in civil-commitment cases only. Minn. Stat. § 253B.07, subd. 2c; *see also In re Civil Commitment of Moen*, 837 N.W.2d 40, 51 (Minn. App. 2013) (concluding that petitioner was not entitled to appointed counsel because "a rule 60.02 motion is not a 'proceeding' under the Commitment Act, as that term is used in section 253B.07, subdivision 2c"), *review denied* (Minn. Oct. 15, 2013). The statutes that govern habeas corpus proceedings do not provide for court-appointed counsel. *See* Minn. Stat. §§ 589.01-.35 (2012) (governing habeas corpus proceedings), 611.14 (2012) (listing the persons entitled to representation by public defender). And because habeas corpus is a civil matter, habeas corpus petitioners do not have a right to appointed counsel on appeal. *See Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998) (stating that pro se litigant has no constitutional right to counsel in civil case); *Breeding v. Swenson*, 240 Minn. 93, 96, 60 N.W.2d 4, 7 (1953) (holding that

habeas corpus "is a civil remedy, separate and apart from the criminal action"); *Fratzke v. Pung*, 378 N.W.2d 112, 114 (Minn. App. 1985) ("Neither the United States Supreme Court, the Minnesota Supreme Court, nor any Minnesota statutory authority grants habeas corpus petitioners a right to appointed counsel for appeals."), *review denied* (Minn. Jan. 31, 1986).

In sum, Rask's appellate arguments regarding attorney representation do not establish a basis for relief. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice resulting from the error); *White v. Minnesota Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (stating that error is never presumed on appeal), *review denied* (Minn. Oct. 31, 1997).

II.

Rask makes two constitutional arguments. First, he argues that his "continued confinement solely on the basis that he has an '[a]ntisocial [p]ersonality [d]isorder' violates his Constitutional right to Due Process under the 14th Amendment." Rask contends that it was improper for the district court to consider "this diagnosis as a basis for civil commitment." But Rask may not use habeas proceedings to obtain review of an issue previously raised, to substitute for an appeal, or to collaterally attack a judgment. *See Rigg*, 255 Minn. at 234, 96 N.W.2d at 257; *Joelson*, 594 N.W.2d at 908. This court has already considered this argument, stating that Rask "has been diagnosed with antisocial personality disorder, which qualifies as a mental disorder for purposes of SDP

commitment." *Rask*, 2009 WL 511943, at *4. In fact, Rask argues that "[t]his is specifically the issue that his court-appointed counsel failed to petition for review to the State Supreme Court." As to Rask's challenge to the validity of his diagnosis, it is an impermissible collateral attack. *See Rigg*, 255 Minn. at 234, 96 N.W.2d at 257; *Joelson*, 594 N.W.2d at 908.

Rask's argument also fails on the merits because antisocial personality disorder is not the only diagnosis supporting Rask's commitment. During the commitment proceeding, Dr. Alsdurf diagnosed Rask with Sexual Abuse of a Child, Mood Disorder, Attention Deficit Hyperactivity Disorder, Antisocial Personality Disorder with narcissistic features, and Borderline Intellectual Functioning. Dr. Reitman diagnosed Rask with Sexual Disorder Not Otherwise Specified, History of Conduct Disorder (childhood-onset type), History of Attention Deficit Hyperactivity Disorder, Cannabis Abuse, Antisocial Personality Disorder with narcissistic features, and Borderline Intellectual Functioning. The district court found the doctors' diagnoses credible. The district court also found that as a result of his disorders, Rask lacked the ability to adequately control his harmful sexual behaviors and that he was highly likely to commit further acts of harmful sexual conduct. In sum, Rask is not committed solely on the basis of an antisocial personality disorder. The district court's findings specifically tie Rask's mental disorders to his lack of control and dangerousness.

Moreover, Rask's reliance on *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780 (1992) is misplaced. The Minnesota Supreme Court considered *Foucha* in *In re Blodgett*, where it held that "Minnesota's Psychopathic Personality Statute does not violate

substantive due process nor does it violate the equal protection guaranties of the United States Constitution and the Minnesota Constitution." 510 N.W.2d 910, 911 (Minn. 1994). As to *Foucha*, the supreme court explained

> We do not read *Foucha* to prohibit Minnesota's commitment program for psychopathic personalities. In *Foucha* the confinement was for insanity and, when the insanity was shown to be in remission, the United States Supreme Court said Foucha had to be released. Here, if there is a remission of Blodgett's sexual disorder, if his deviant sexual assaultive conduct is brought under control, he, too, is entitled to be released. We conclude, therefore, that the psychopathic personality statute does not violate substantive due process.

Id. at 916. Similarly, Rask is entitled to release if he "is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." Minn. Stat. § 253D.31 (Supp. 2013).

Rask's second constitutional argument is based on the Eighth Amendment of the United States Constitution. Rask argues that, because he was a juvenile at the time of his offense, his commitment "amounts to a life sentence [and] violates the prohibition on Cruel and Unusual Punishment in . . . the 8th Amendment to the United States Constitution." Rask's reliance on *Miller v. Alabama*, 132 S. Ct. 2455 (2012), for support is misplaced. In *Miller*, the United States Supreme Court held that a mandatory life-without-parole criminal sentence imposed on a juvenile offender violates the cruel and unusual punishment clause under the Eighth Amendment. 132 S. Ct. at 2460. But civil commitment is not a criminal sentence; it is remedial, and not punitive. *See Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995) (stating that civil commitment does not

violate the prohibition against double jeopardy because it is remedial, and its purpose is treatment rather than punishment).

Moreover, unlike the circumstances resulting from a life-without-parole criminal sentence, there is a process by which Rask can obtain release from his civil commitment. Minnesota's civil-commitment statutes provide for release when "the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." Minn. Stat. § 253D.31. Rask does not assert that he satisfies these criteria or that he has been denied an opportunity to demonstrate that he satisfies these criteria.

In sum, Rask's constitutional arguments do not provide a basis for habeas relief.

Affirmed.