IN THE COURT OF APPEALS OF IOWA

No. 1-532 / 10-2076
Filed November 9, 2011

BRIAN LEE OLDENKAMP,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF PUBLIC SAFETY,
Respondent-Appellee.

Appeal from the Iowa District Court for O'Brien County, Nancy L. Whittenburg, Judge.

Brian Oldenkamp appeals from the district court's ruling on his petition for judicial review affirming the decision of the Iowa Department of Public Safety that he was required to register as a sex offender. **REVERSED AND REMANDED WITH DIRECTIONS.**

Matthew G. Sease and Christopher R. Kemp of Kemp, Eason, Sease & Dyer, Des Moines, and Randall G. Sease of Sease Law Firm, Hartley, for appellant.

Thomas J. Miller, Attorney General, and John R. Lundquist, Assistant Attorney General, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Brian Oldenkamp appeals from the district court's ruling on his petition for judicial review affirming the decision of the Iowa Department of Public Safety (DPS) that he was required to register as a sex offender. Oldenkamp contends (1) Iowa Code chapter 692A (2009) requires a conviction for an offense involving some form of sexual conduct before registration as a sex offender is mandated and (2) the DPS's retroactive application of chapter 692A as amended was in violation of the constitutional protections against ex post facto laws. Upon our review, we conclude Oldenkamp's conviction for a qualifying sex offense was an issue that could not have been gleaned from Oldenkamp's guilty plea or the sentencing order.[1] The commissioner should have referred the matter for a contested case hearing to determine whether there were sufficient facts to constitute a qualifying offense requiring sex offender registry. We therefore reverse the district court judgment affirming the DPS's decision on this issue. We remand the case to the district court for remand to the DPS to allow further proceedings consistent with this opinion, if any, regarding the existence of Oldenkamp's conviction for a qualifying sex offense.

I. Background Facts and Proceedings.

On May 4, 2009, the State charged Brian Oldenkamp with false imprisonment and assault with intent to commit sexual abuse. On November 4, 2009, Oldenkamp pleaded guilty to the charge of false imprisonment as part of a plea agreement. The same day, the district court adjudged him guilty of false

[1] Without first establishing Oldenkamp was convicted for a qualifying offense, we need not address his remaining ex post facto clause argument.

imprisonment in violation of Iowa Code section 710.7[2] and dismissed the charge of assault with intent to commit sexual abuse. The court sentenced Oldenkamp to a term of twelve months, all of which was suspended. Oldenkamp was placed on probation and committed to the supervision of the Third Judicial District Department of Correctional Services. He was also fined and ordered to pay restitution to the crime victim assistance program. As was true with Oldenkamp's guilty plea, the judgment entry did not state Oldenkamp was required to register as a sex offender, nor did it state the requirement did not apply to Oldenkamp.

Soon after Oldenkamp's conviction, his probation officer insisted he register as a sex offender. Oldenkamp refused, believing his conviction did not carry a registry requirement. On March 3, 2010, the State and Oldenkamp filed a joint application for order for clarification. In the application, Oldenkamp asserted the crime to which he pleaded guilty, false imprisonment, was not a qualifying sexual offense and requiring registration as a sex offender was contrary to his agreement with the State. The State joined Oldenkamp in his request that the court issue an order ruling he was not required to register as a sex offender. The same day, Oldenkamp was arrested on the charge of failure to register as a sex offender. Law enforcement required Oldenkamp to register in order to secure his release from jail, and Oldenkamp complied.

On April 8, 2010, the district court concluded it was without jurisdiction to rule on the joint application for clarification as Oldenkamp was required to first raise the issue with the DPS. Oldenkamp filed an application for determination

[2] Section 710.7 does not draw distinctions amongst categories of victims, and simply makes it a crime to intentionally confine "another against the other's will."

with DPS the same day. His application asserted false imprisonment was not a qualifying sexual offense and therefore he was not required to register under Iowa Code chapter 692A. On July 1, 2010, DPS issued a decision of determination finding Oldenkamp was required to register, stating:

> Per Iowa Code Sections 692A.102, 692A.103 and 692A.106 as amended by Iowa Legislative Senate File 2305 (2010), false imprisonment of a minor in violation of Iowa Code section 710.7 is a tier 2 sex offense requiring registration as a sex offender for ten years commencing on the date of conviction, "except if committed by a parent."

On July 20, 2010, Oldenkamp filed a petition for judicial review asserting: (1) his offense was not a "sex offense" as required by the 2009 statute and therefore his registration was not required and (2) the agency's application of the 2010 amendments to chapter 692A violated the ex post facto clause of the Iowa and United States Constitutions. DPS resisted Oldenkamp's petition for judicial review, asserting the amendments to chapter 692A were applicable to Oldenkamp and did not violate the ex post facto clause. DPS further concluded, pursuant to these amendments, that it had properly determined Oldenkamp was convicted of a qualifying criminal offense requiring his registration as a sex offender under chapter 692A.

The district court received the matter by nonoral submission. On November 29, 2010, the district court overruled Oldenkamp's petition. The court concluded DPS's retroactive application of the 2010 amendments to chapter 692A did not violate the ex post facto clause and Oldenkamp's conviction for false imprisonment required him to register as a sex offender. The court did not decide whether the statutory language in chapter 692A required that a conviction

for an offense must involve sexual conduct or sexual contact to require registration. Oldenkamp did not file a motion to enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2).

Oldenkamp appeals the district court's ruling, asserting: (1) chapter 692A requires a conviction for an offense involving some form of sexual conduct before registration as a sex offender is mandated and (2) DPS's retroactive application of chapter 692A as amended was in violation of the constitutional protection against ex post facto laws.

II. Error Preservation.

The initial question before us pertains to Oldenkamp's claim he was not convicted of a qualifying offense. And this claim is twofold. As Oldenkamp sets forth, the guilty plea that he signed and submitted to the district court (1) "purposefully omitted any reference to the false imprisonment containing any sexual act" and (2) "makes no reference to a minor being falsely imprisoned."

In regard to the first part of this claim, DPS asserts Oldenkamp did not preserve error on his argument that chapter 692A requires the conviction be for an offense that has an element involving sexual conduct or contact to constitute a "sex offense" and require the convicted individual to register. We agree.

Although this issue was properly raised before and briefed to the district court, the district court did not address the issue in its ruling. Oldenkamp was required to file a motion to enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2) to preserve error on this issue. *See* Iowa R. Civ. P. 1.1603(3) (stating the provisions of rule 1.904(2) apply to proceedings for judicial review of an

agency action); *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised *and decided* by the district court before we will decide them on appeal." (emphasis added)).

Oldenkamp asserts that where the district court is acting in an appellate capacity, this court can address issues not decided by the district court, citing *McMahon v. Iowa Department of Transportation*, 522 N.W.2d 51, 56 (Iowa 1994), and *Barnes v. Iowa Department of Transportation*, 385 N.W.2d 260, 263 (Iowa 1986). However, these cases are distinguishable because they involved a *prevailing* party asking the appellate court to consider issues raised but not decided below. *See State v. Cromer*, 765 N.W.2d 1, 7 n.4 (Iowa 2009) ("A successful party in district court is not required to request the district court to rule on alternative grounds raised, but not relied upon by the district court in making its ruling, in order to assert those grounds in support of affirming the ruling of the district court when appealed by the opposing party."). Because Oldenkamp was not the successful party in district court and did not file a motion pursuant to rule 1.904(2), he has failed to preserve his argument for appeal. See *Meier*, 641 N.W.2d at 537 ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

However, in regard to the second part of Oldenkamp's claim, DPS acknowledges Oldenkamp has preserved error on the issue of whether he was convicted of a qualifying offense to require him to register as a sex offender

pursuant to chapter 692A.[3] We agree error has been preserved in respect to this issue. At all times throughout these proceedings, Oldenkamp has claimed he is not required to register on the sex offender registry list by his conviction for false imprisonment. Whether the "offense for which the offender has been convicted requires the offender to register" is one of two grounds upon which an offender may file an application for determination with DPS. Iowa Code § 692A.116(1). This ground was raised by Oldenkamp in his application for determination by stating he "plead guilty to the offense of false imprisonment which was not a sexual offense." However, DPS determined he was required to register by committing the offense of false imprisonment of a minor, a "Tier II sex offense." On appeal to the district court, Oldenkamp's brief stated in part:

> Nowhere in the judgment entry, or in the guilty plea process, did Brian Lee Oldenkamp admit to a sexual offense, nor was a sexual offense an element of the crime for which he had pled guilty, nor was there a factual basis established to support the offense as a sexual offense (emphasis added).

Oldenkamp's brief further recited:

> On April 14, 2010, Brian Lee Oldenkamp, pursuant to Iowa Code section 692A.116(1), petitioned for determination as to whether the offense of which he was convicted requires him to register as a sex offender under Chapter 692A of the Code of Iowa. This was a petition for agency review timely filed by Brian Lee Oldenkamp to the Iowa Department of Public Safety.

Assuming without deciding the retroactive application of the newly-amended provision of Iowa Code chapter 692A is not unconstitutional, we observe that section 692A.103(1) requires any person who has been convicted "of any sex offense classified as a tier I, tier II or tier III offense" to register upon

[3] During oral arguments, DPS retreated from this concession set out in their brief, at least as it related to a lack of factual allegation to support the determination.

the sex offender registry list. Iowa Code § 692A.103(1). "Sex offenses" are enumerated and classified in section 692A.102(1). One of the offenses identified as a tier II offense is "false imprisonment of a minor in violation of section 710.7, except if committed by a parent." Iowa Code § 692A.102(1)(b)(5). "Sex offense" is a term of art, specifically defined as:

> [A]n indictable offense for which a conviction has been entered that is enumerated in section 692A.102, and means any comparable offense for which a conviction has been entered under prior law, or any comparable offense for which a conviction has been entered in a federal, military, or foreign court, or another jurisdiction.

Iowa Code § 692A.101(27).

Moreover, the State's brief in resistance to the petition for judicial review acknowledged that one of the issues on judicial review was whether Oldenkamp's conviction was for a qualifying offense requiring him to register as a sex offender.

In the district court's ruling on petition for judicial review, the court's findings of fact state:

> Oldenkamp thought he did not plead guilty to a sex offense, which was required to make a person register with the sex offender registry under the 2009 Iowa Code. Oldenkamp asserts he pled guilty to the false imprisonment charge in order to avoid required registration as a sex offender.
>
> Upon being placed on probation with the Third Judicial District Department of Correctional Services, Oldenkamp's probation officer demanded that he register as a sex offender. On March 3, 2010, Oldenkamp filed an Application for an Order of Clarification stating that he was not required to register as a sex offender.

The district court's findings of fact also observe that, "On April 14, 2010, Oldenkamp filed a timely petition with the Iowa Department of Public Safety to

determine whether he was required to register as a sex offender under Iowa Code chapter 692A." After acknowledging this issue, the district court found, "Under the 2010 amendments, Oldenkamp would be required to register as a sex offender due to the false imprisonment conviction."

Clearly, this finding indicates the district court determined Oldenkamp was convicted of a qualifying offense. Thus, we conclude the district court was aware of the issue and summarily ruled upon it in its findings of fact. *See Meier*, 641 N.W.2d at 540 ("[T]he record must reveal the court was aware of the claim or issue and litigated."). Further, for purposes of our scope of review, we may presume the district court found facts essential to sustain its decision. *Id*. We acknowledge that Oldenkamp's recitation of the issues in his brief lacked precision, as observed by our dissenting colleague, but the issue of whether there was a sufficient basis to conclude Oldenkamp was convicted for a qualifying offense has been at the heart of his contentions throughout these proceedings and in his brief, not simply relegated to a footnote.

III. Scope and Standard of Review.

Iowa Code section 17A.19(10) governs judicial review of agency decision making. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010). We will apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. *Evercom Sys., Inc. v. Iowa Utilities Bd.*, ___ N.W.2d ___, ___ (Iowa 2011). "The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(*a*)

through (*n*)." *Renda*, 784 N.W.2d at 10; *see also* Iowa Code § 17A.19(10). Here, Oldenkamp seeks review on the basis that the agency committed an error at law or acted unreasonably, capriciously, or arbitrarily. *See* Iowa Code § 17A.19(10)(*n*). In determining whether the agency's action was arbitrary or capricious, we consider whether the commissioner's determination "was without regard to the law or facts." *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 831 (Iowa 2002). Our review of constitutional issues is de novo. *Drake Univ. v. Davis*, 769 N.W.2d 176, 181 (Iowa 2009).

IV. Qualifying Offense.

The record evidence reflects that Oldenkamp was not ordered to register as a sex offender by the sentencing court. Nor does the sentencing order convict him of an offense enumerated as a qualifying offense in Section 692A, but of the generic offense of false imprisonment. Rather, Oldenkamp's probation officer decided Oldenkamp needed to register. Section 692A.116 explains the process for an offender to challenge a claim that the offender must register:

> 1. An offender may request that the department determine whether the offense for which the offender has been convicted requires the offender to register under this chapter or whether the period of time during which the offender is required to register under this chapter has expired.
>
> 2. Application for determination shall be filed with the department and shall be made on forms provided by the department and accompanied by copies of sentencing or adjudicatory orders with respect to each offense for which the offender asks that a determination be made.
>
> 3. The department, after filing of the request and after all documentation or information requested by the department is received, shall have ninety days from the filing of the request, to determine whether the offender is required to register under this chapter.

Iowa Code § 692A.116. This process is further delineated in Iowa Administrative rule 661-83.3(5):

> *Application for determination.* Form DCI-148, Application for Determination, shall be completed by a person to initiate a request that the department review whether one or more offenses of which the person has been convicted require registration with the Iowa sex offender registry, whether the time period during which the person is required to register has expired, whether the person is exempt from the placement of information on the sex offender registry Web site, and the tier placement of the offender. A person who submits a completed copy of Form DCI-148 for review shall provide with it copies of any sentencing or adjudicatory orders related to each offense for which a determination of whether registration is required is being requested. The completed application (Form DCI-148) shall specify the exact grounds for the application and shall include a statement of any additional facts or law which the person intends to present to the department in support of the application. Failure to submit any of the required information shall constitute grounds for denial of the application. If the application sets forth an issue of fact which cannot be evaluated based upon the record of convictions, sentencing and adjudicatory orders, relevant statutory provisions, and other records provided, and is material to the determination, the commissioner may refer the matter to an administrative law judge or presiding officer for a contested case hearing.

Oldenkamp followed this process in submitting his "Application for Determination," dated April 8, 2010. In the application, Oldenkamp set forth reasons why he should not be required to register:

> *Applicant plead[ed] guilty to the offense of false imprisonment which was not a sexual offense.* Iowa Code 692A.102(27) provides that there be an element involving a sexual act, sexual contact, or sexual conduct AND which is enumerated in section 692A.102. Iowa Code 692A.1019(28) then goes on to define a "sex act" offense against a minor as meaning an offense for which a conviction has been entered for a SEX OFFENSE. *This applicant did not plead to an act,* nor was a sexual offense an element of the false imprisonment charge.

(Emphasis added.)

On July 1, 2010, DPS issued its decision of determination, requiring Oldenkamp to register. DPS stated it reached its determination "based upon the information contained on the Application and accompanying copies of sentencing and adjudicatory orders" in conformity with Iowa Code section 692A.116. The decision observed that Oldenkamp was required to register as a result of his conviction for "false imprisonment of a minor in violation of Iowa Code section 710.7" that "is a Tier 2 sex offense."

We observe that a "sex offense against a minor" is defined as "an offense for which a conviction has been entered for a sex offense classified as a tier I, tier II, or tier III offense under this chapter if such offense was committed against a minor, or otherwise involves a minor." *See* Iowa Code § 692A.101(28). However, here, Oldenkamp only admitted and was convicted of false imprisonment. Oldenkamp did not admit or acknowledge the fact the victim of his crime was a minor in his written guilty plea, nor did he admit to the truthfulness or accuracy of the minutes of testimony. *See Kruse v. Iowa Dist. Ct.*, 712 N.W.2d 695, 700 (Iowa 2006) (observing it is proper to resort to the minutes of testimony to determine whether facts support the conclusion that an offender committed a sex offense where the written guilty plea conceded the accuracy of the facts in the minutes of testimony).

Further, there is no sentencing order or any adjudicatory order providing DPS with a basis to conclude Oldenkamp's offense was against a minor. Our supreme court has stated, "In the context of sex offender registration, we have held that where a factual inquiry outside the face of the conviction is necessary to

determine sex offender status, resort to some tribunal must be available to resolve disputes over these issues." *Dykstra v. Iowa Dist. Ct.*, 783 N.W.2d 473, 481 (Iowa 2010); *see also Kruse*, 712 N.W.2d at 700-701.[4] Thus, because determination of Oldenkamp's conviction for a qualifying offense was an issue that could not have been gleaned from the sentencing order, the commissioner should have referred the matter "to an administrative judge or presiding officer for a contested case hearing." Iowa Admin. r. 661-833(5).

Although the minutes of testimony identify the victim as a minor, they do not constitute a sentencing or adjudicatory order as required by Iowa Code section 692A.116.[5] Moreover, minutes of testimony are "simply ex parte statements of certain witnesses, and hearsay," *State v. De Bont*, 273 N.W.2d 873, 874 (Iowa 1937), unless of course, they are stipulated to, or their truthfulness is acknowledged by the offender.

When faced with the issue of whether an offender was entitled to an evidentiary hearing to determine the offender's risk assessment as a sex offender, our supreme court has explained the offender's due process rights to an evidentiary hearing as follows:

> When a government agency focuses its machinery on the task of determining whether a person should be labeled publicly as having a certain undesirable characteristic or belonging to a certain undesirable group, and that agency must by law gather and synthesize evidence outside the public record in making that determination, the interest of the person to be labeled goes beyond mere reputation. The interest cannot be captured in a single word

[4] "Generally, a person has a constitutional due process right to an evidentiary hearing in accordance with contested case procedures if the underlying proceeding involves adjudicatory facts." *Greenwood Manor*, 641 N.W.2d at 836.

[5] For the same reasons, DPS cannot rely upon the sex offender registration form it required Oldenkamp to complete as a factual basis for a qualifying offense.

> or phrase. It is an interest in knowing when the government is moving against you and why it has singled you out for special attention. It is an interest in avoiding the secret machinations of a Star Chamber. Finally, and most importantly, it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and, perhaps, even physical harassment likely to follow from designation.

Brummer v. Iowa Dep't of Corr., 661 N.W.2d 167, 175 (Iowa 2003) (citing *Noble v. Bd. of Parole & Post-Prison Supervision*, 964 P.2d 990, 995-96 (Or. 1998)). Certainly, the same can be said in respect to the initial process that determined Oldenkamp's requirement to register as a sex offender.

Because there is no basis to conclude Oldenkamp was convicted for a qualifying offense as defined in section 692A.101(27), the agency's action was arbitrary and capricious as being without regard to the facts. *See Dykstra*, 783 N.W.2d at 483 (noting that because the agency "relied on unadmitted factual allegations that did not result in a sex offense conviction," action was remanded to the district court). Without first establishing Oldenkamp's conviction to a "sex offense," we need not address Oldenkamp's ex post facto clause argument.

V. Conclusion.

Upon our review, we conclude Oldenkamp's conviction for a qualifying sex offense was an issue that could not have been gleaned from Oldenkamp's guilty plea or the sentencing order. The commissioner should have referred the matter for a contested case hearing to determine whether a factual basis for such offense existed. We reverse the district court judgment affirming DPS's decision on this issue. We remand the case to the district court for remand to DPS to allow further proceedings, if any, consistent with this opinion regarding the

existence of a conviction for a qualifying sex offense. Without first establishing that Oldenkamp was convicted for a qualifying offense, we need not address Oldenkamp's remaining ex post facto clause argument.

REVERSED AND REMANDED WITH DIRECTIONS.

Potterfield, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent, not because I disagree with the majority's analysis, but because I would find the issue the majority reaches is not raised on appeal. In order to preserve an issue for our review, it must first be raised and decided by the district court. In order for this court to then consider an issue, the issue must be raised and argued on appeal. Iowa R. App. P. 6.903(2)(*c*), (*g*) (requiring a brief to include the issues presented for review and an argument section addressing each of those issues, and stating "[f]ailure to cite authority in support of an issue may be deemed waiver of that issue"). "It is a well-established rule of appellate procedure that '[t]he scope of appellate review is defined by the issues raised by the parties' briefs.' Issues not raised in the appellate briefs cannot be considered by the reviewing court." *Aluminum Co. of Am. v. Musal*, 622 N.W.2d 476, 479 (Iowa 2001). We must confine our review to the issues raised by the parties on appeal, and if we do not do so, then we assume a partisan role. *See Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) ("To reach the merits of this case would require us to assume a partisan role and undertake the appellant's research and advocacy. This role is one we refuse to assume.").

In his appellate brief, Oldenkamp has two argument sections: (1) chapter 692A requires a conviction for an offense involving some form of sexual conduct before registration as a sex offender is mandated and (2) DPS's retroactive application of chapter 692A as amended was in violation of the constitutional protection against ex post facto laws. As the majority finds, the first argument is not preserved for appeal and it does not reach the second. Nevertheless, the

majority considers an issue not argued on appeal, namely whether the proper procedure was followed to determine if the crime for which Oldenkamp was convicted required registration. The majority holds that because there was no hearing to determine if the crime for which he was convicted was a qualifying crime, "there is no basis to conclude Oldenkamp was convicted for a qualifying offense." Yet at no point in his argument does Oldenkamp assert that he should have been given a hearing and the only mention of the factual circumstances of his crime is in a footnote. *See State v. Mann*, 602 N.W.2d 785, 788 n.1 (Iowa 1999) (holding that random mention of an issue, without elaboration or supporting authority, is insufficient to raise issue for appellate court's consideration). Therefore, I would affirm the district court as the issue upon which the majority reverses and remands was not raised and argued on appeal.