IN THE COURT OF APPEALS OF IOWA

No. 7-282 / 06-1173
Filed June 27, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES MAYNNARD MUSSMANN,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, David H. Sivright, Jr., Judge.

James M. Mussmann appeals his conviction, following trial to the court, for failure to comply with sex offender registry residency requirements. **AFFIRMED.**

William M. Vilmont, Clinton, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael L. Wolf, County Attorney, and Elizabeth A. Srp, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

James M. Mussmann appeals his conviction, following trial to the court, for failure to comply with sex offender registry residency requirements. He contends the district court erred in finding he committed an offense involving sexual conduct directed toward a minor and in concluding a postdeprivation review was not a violation of his due process rights. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

On October 24, 2000, Mussmann was a janitor at a school in Andrew, Iowa. He was supervising two eleven-year-old girls when they asked him if they could draw on a board in one of the classrooms. Mussmann gave the girls permission to go into the classroom. He then came into the classroom, sat on a desk, and told the girls he would give them each two dollars if they would lift up their shirts. On February 2, 2001, Mussmann pled guilty to child endangerment in violation of Iowa Code sections 726(1)(a) and (3) (1999) as a result of his acts. In his guilty plea Mussmann stated that he discussed the minutes of testimony with his counsel and that "the minutes of testimony are essentially correct and true." He also admitted in his plea that he "did endanger a child." The minutes of testimony which Mussmann agreed were correct and true included the following:

> [K.C.] . . . will testify that on October 24, 2000 she and her friend [S.F.] were at the Andrew Community School . . . and that the janitor [Mussmann] . . . said [to them] "I'll give you two dollars a piece if you lift your shirts up." This witness will testify that she ran out of the room, and went outside to wait for [S.F.] . . . . [O]n the date of this incident, she was 11 years of age.
>
> [S.F.] . . . will testify that on October 24, 2000, she and her friend [K.C.] were at the Andrew Community School . . . and that the janitor [Mussmann] . . . said he would give us each $2.00 if we

> would take off our shirts. This witness will testify that [K.C.] went running out of the room; that she stayed behind and the janitor gave her some money . . . . [O]n the date of this incident she was 11 years of age.

The district court found Mussmann guilty as charged, granted him a deferred judgment, and placed him on supervised probation for two years. The court also ordered Mussmann to undergo a psychological evaluation to determine whether sex offender treatment was warranted.

In approximately June 2001, Mussmann's probation officer told him that he was required to register as a sex offender. On June 5, 2001, Mussmann was fingerprinted and photographed at the Jackson County Jail and registered as a sex offender with the Jackson County Sheriff's Office the next day. On June 8, 2001, Mussmann filed an application for determination with the Iowa Department of Public Safety (IDPS), pursuant to Iowa Code section 692A.8(1) (2001). This section provides:

> A person who is registered under this chapter may request that the department determine whether the offense for which the person has been convicted requires the person to register under this chapter or whether the period of time during which the person is obligated to register under this chapter has expired.

Once the IDPS received all of Mussmann's required paperwork, it sent him a "Decision of Determination" dated March 16, 2002, stating he was required to register as a sex offender because he was convicted of an "indictable offense involving sexual conduct directed toward a minor." *See* Iowa Code §§ 692A.1(5)(c) and 692A.2(1).

On June 16, 2004, Mussmann complied with a requirement of the sex offender registry by notifying the Clinton County Sheriff's Office of his new

address. On October 26, 2005, the Clinton County Sheriff's Office notified Mussmann by certified letter that he was violating the law by living within two thousand feet of an elementary or secondary school or licensed care center. Mussmann continued to live at the address. Thus, on February 14, 2006, he was charged, by trial information, with failing to comply with the sex offender registry residency requirements in violation of Iowa Code section 692A.2A(2) (2005).

Mussmann waived jury trial and agreed to be tried on the stipulated facts. The district court found him guilty as charged. He was sentenced to the custody of the Clinton County Sheriff for thirty days and ordered to pay a fine of $500. The court suspended the sentence. On appeal Mussmann contends the district court erred in finding he committed an offense involving sexual conduct directed toward a minor, and in finding the postdeprivation review was not a violation of due process.

II. SCOPE AND STANDARDS OF REVIEW.

Our scope of review of sufficiency-of-evidence challenges is for correction of errors at law. Iowa R. App. P. 6.4; *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). To the extent Mussmann raises a constitutional challenge our review is de novo in light of the totality of the circumstances. *State v. Bower,* 725 N.W.2d 435, 440-41 (Iowa 2006).

III. MERITS.

Mussmann first claims there was insufficient evidence to support the finding that he had to comply with the requirements of the sexual offender registry because he only pled guilty to child endangerment. For two reasons we find Mussmann entitled to no relief on this first claim of error.

The determination of whether a defendant is subject to chapter 692A and is required to register as a sex offender is the responsibility of the IDPS, not the courts. *See* Iowa Code § 692A.8; *State v. Bullock,* 638 N.W.2d 728, 735 (Iowa 2002). As set forth above, Mussmann properly challenged the applicability of the sex offender registry requirements to his conviction for child endangerment by filing an application for determination with the IDPS in June 2001. The IDPS determined Mussmann was required to register because the crime of which he was convicted involved sexual conduct directed toward a minor.

IDPS regulations provide that if there is an issue of fact that "cannot be evaluated based upon the record of convictions, sentencing and adjudicatory order, relevant statutory provisions, and other records provided", the issue may be made the subject of a contested case hearing before an administrative law judge. Iowa Admin. Code r. 661-83.3(4); *Kruse v. Iowa Dist. Court,* 712 N.W.2d 695, 701 n.3 (Iowa 2006). Mussmann neither suggested the existence of such an issue nor requested the matter be heard by an administrative law judge in a contested case hearing as allowed by the administrative rules. The decision by the IDPS became the final agency action. *See* Iowa Admin. Code r. 661-83.3(5).

Mussmann did not seek judicial review of the final agency action pursuant to Iowa Code chapter 17A.

Our courts "have held that the final adjudicatory decision of an administrative agency . . . is entitled to res judicata effect as if it were a judgment of a court." *Bennett v. MC No. 619, Inc.,* 586 N.W.2d 512, 517-18 (Iowa 1998); *see Robbins v. Heritage Acres,* 578 N.W.2d 262, 265 (Iowa Ct. App. 1998) (same). Accordingly, Mussmann's challenge at this juncture to the IDPS's March 2002 decision is a collateral attack on a final decision of an administrative agency. *State v. Clark,* 608 N.W.2d 5, 9 (Iowa 2000). We conclude Mussmann is precluded, by the doctrine of res judicata, from collaterally attacking the agency's final decision. *Toomer v. Iowa Dept. of Job Service,* 340 N.W.2d 594, 598 (Iowa 1983) (citing *United States v. Utah Construction & Mining Co*., 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642, 661 (1966) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."); *also citing* Restatement (Second) of Judgments § 83 (1982) ("[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions, as a judgment of a court."); 2 Am.Jur.2d, Administrative Law, section 493 ("[A] determination made by an administrative agency in its judicial or quasi-judicial capacity is not subject to collateral attack. . . .")); *see also State v. Bettenhausen*, 460 N.W.2d 394, 395 (N.D.1990) (holding defendant, who did not request a hearing on the

administrative suspension of his license, could not later challenge that suspension during a trial for driving while under suspension).

We conclude Mussmann is precluded from now, in this much later and separate proceeding, collaterally attacking the final decision by the administrative agency, the IDPS.

Further, and assuming Mussmann is entitled to now collaterally attack the IDPS decision, the evidence noted above more than sufficiently supports the district court's determination Mussmann's offense of child endangerment involved sexual conduct directed toward a minor.

Mussmann also argues the district court erred in finding the postdeprivation review was not a violation of due process. For two reasons we find Mussmann entitled to no relief on this second claim of error.

First, we conclude Mussmann in fact did not preserve error on this issue. In cases involving Iowa Code chapter 17A judicial review of final action of an administrative agency, an issue must generally be presented to the agency to satisfy error preservation requirements. *Strand v. Rasmussen,* 648 N.W.2d 95, 100 (Iowa 2002). Even constitutional issues must be raised at the agency level to be preserved for judicial review. *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). This is true despite the agency's lack of authority to decide such issues. *Id.* Because a party cannot raise an issue for the first time on judicial review of final agency action, the party surely cannot raise the issue for the first time by way of collateral attack in a separate, later

action, as Mussmann attempts to do in this case. Mussmann has made no claim or showing that he presented his due process claim to the IDPS.

Second, and assuming error has been preserved, the State argues, in part, that Mussmann has waived this issue on appeal because he failed to cite authority in support of this claim in his brief. We agree and deem this issue waived. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief . . . to cite authority in support of an issue may be deemed waiver of that issue.").

AFFIRMED.