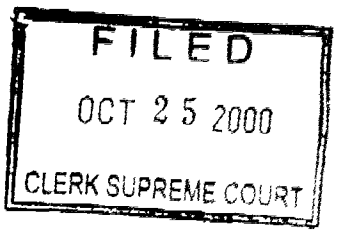
IN THE COURT OF APPEALS OF IOWA

No. 0-453 / 98-2146
Filed October 25, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT LEROY MANKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Robert Manke appeals following his Alford plea and subsequent sentencing for homicide by vehicle and failure to give aid and information. **AFFIRMED.**

Richard R. Hollis, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Odell McGhee and Teresa Vens, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

In February 1998 Manke was involved in an automobile accident leading to the death of Steven Tomlinson. Subsequently, Manke was charged with vehicular homicide by operating a motor vehicle while under the influence of alcohol and failure to remain at the scene of a crime and render aid and assistance. Manke entered into a plea agreement whereby he agreed to plead guilty in exchange for a reduced charge of vehicular homicide while driving a vehicle in a reckless manner and failure to remain at the scene of an accident and render aid and assistance. The district court sentenced Manke to consecutive terms of ten and two years respectively. Manke was also ordered to pay restitution to the victim's estate in the amount of $150,000 pursuant to Iowa Code section 910.3B (1997).

Manke appeals from the imposition of the restitution award claiming it violates his right under the Excessive Fines, Double Jeopardy, and Due Process Clauses of the United States and Iowa Constitutions. He also claims he was denied effective assistance of counsel because of his attorney's failure to request a competency hearing and to further explore the applicability of diminished responsibility and diminished capacity defenses.

II. Iowa Code section 910.3B.

Because Manke claims his constitutional rights were violated, we review the record de novo based upon the totality of the circumstances. *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996). Statutes are given a strong

presumption of constitutionality. *See* Iowa Code § 4.4(1) (statutes presumed to be intended to comply with federal and state constitutions); *State v. Osmundson*, 546 N.W.2d 907, 909 (Iowa 1996); *State v. Ryan*, 501 N.W.2d 516, 517 (Iowa 1993). This presumption places a heavy burden on one challenging the constitutionality of the statute. *Osmundson*, 546 N.W.2d at 909. The challenger must negate every reasonable basis for sustaining the statute. *Wettach v. Iowa Bd. of Dental Exam'rs*, 524 N.W.2d 168, 171 (Iowa 1994). We will give the statute any reasonable construction necessary to uphold it. *See Ryan*, 501 N.W.2d at 517.

The Code section at issue provides as follows:

> 1. In all criminal cases in which the offender is convicted of a felony in which the act or acts committed by the offender caused the death of another person, in addition to the amount determined to be payable and ordered to be paid to a victim for pecuniary damages, as defined under section 910.1, and determined under section 910.3, the court shall also order the offender to pay at least one hundred fifty thousand dollars in restitution to the victim's estate. The obligation to pay the additional amount shall not be dischargeable in any proceeding under the federal Bankruptcy Act. Payment of the additional amount shall have the same priority as payment of a victim's pecuniary damages under section 910.2, in the offender's plan for restitution.
>
> 2. An award under this section does not preclude or supersede the right of a victim's estate to bring a civil action against the offender for damages arising out of the same facts or event. However, no evidence relating to the entry of the judgment against the offender pursuant to this section or the amount of the award ordered pursuant to this section shall be permitted to be introduced in any civil action for damages arising out of the same facts or event.
>
> 3. An offender who is ordered to pay a victim's estate under this section is precluded from denying the elements of the felony offense which resulted in the order for payment in any subsequent civil action for damages arising out of the same facts or event.

Iowa Code § 910.3B (1997).

Manke contends this section is unconstitutional because it violates the Double Jeopardy, Excess Fines, and Due Process Clauses. His due process claim is multifaceted, including arguments that due process is violated by the lack of opportunity to challenge the statute's restitution minimum, by the disparate effect the statute minimum penalty will have on poor and wealthy persons, by the burden the statute places on the defendant during subsequent civil action, and by the restraint the statute places on the defendant's incentive to plea bargain.

Manke's claim regarding the disparate effect the statute has on poor versus wealthy persons was not properly preserved for review. This issue was not presented to or decided by the district court and, thus, cannot be raised and decided on appeal. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997). We may not consider an issue raised for the first time on appeal, even if it is of constitutional dimension. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994).

Our supreme court has recently resolved the remaining constitutional issues against Manke in the cases of *State v. Izzolena*, 609 N.W.2d 541 (Iowa 2000) (finding that Iowa Code section 910.3B does not on its face violate the Excess Fines, Double Jeopardy, or Due Process Clauses) and *State v. Klawonn*, 609 N.W.2d 515 (Iowa 2000) (finding that the penalty provided under section 910.3B is not excessive in its amount or effect, that this section does not deprive the defendant of his ability to enter an Alford plea, and that a validly entered and accepted guilty plea under this section precludes relitigation of the essential elements in a subsequent civil proceeding). Manke recognizes this precedent

but urges us to make contrary findings and to overturn these cases if necessary. It is the prerogative of the supreme court, as the court of last resort in our state, to determine the law. Accordingly, we are obliged to both follow this law and to decline Manke's invitation to overturn these cases. *See State v. Hughes*, 457 N.W.2d 25, 28 (Iowa App. 1990). As the supreme court pointed out in *State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957): "If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."

III. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In order to meet the first test, one must overcome the "strong presumption" his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test, it must be shown that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

We first reject Manke's argument that "counsel was quite possibly ineffective because he did not ask for a competency hearing." Manke attempts to support this claim by pointing to insignificant actions of the defendant during the plea proceeding. First, when asked if he was knowingly waiving defenses based on mental state, his first response was: "It's time to pay the Tomlinsons, yes." Second, when the court asked Manke if he agreed that there was sufficient evidence by which a jury would find him guilty, Manke answered yes, and then "pushed on the right side of his chest, near his shoulder, with his hand." Appellate counsel asserts that these actions raise a question of mental competency. We find that they do not.

The burden of proof is on appellant to establish his counsel was ineffective. *Birk v. Bennett*, 258 Iowa 1016, 1019, 141 N.W.2d 576, 578 (1966). Allegations of inadequate representation by counsel must be supported by more than speculative, generalized arguments. *See State v. Kendall,* 167 N.W.2d 909, 911 (Iowa 1969). We accordingly affirm on this issue.

Manke's second argument is that trial counsel was possibility ineffective for not exploring the defenses of diminished capacity and diminished responsibility, and if such defenses were found to be meritorious, for not urging his client to take his case to trial. We again find defendant failed to sustain his burden. If trial counsel had pursued and found these defenses to be worth taking to trial, Menke would not have been facing the reduced charges he plead to, but the original charges of vehicular homicide by operating a motor vehicle while under the influence of alcohol and failure to remain at the scene of a crime and

render aid and assistance. The defenses of diminished capacity and diminished responsibility are only defenses to the specific intent element of crimes. *See State v. McVey*, 376 N.W.2d 585, 587 (Iowa 1985); *Veverka v. Cash*, 318 N.W.2d 447, 449 (Iowa 1982). Neither of the above crimes have a specific intent element. Accordingly, trial counsel could not be ineffective for failing to pursue defenses that have no legal basis under the pending charges.

The district court decision is affirmed in its entirety.

AFFIRMED.