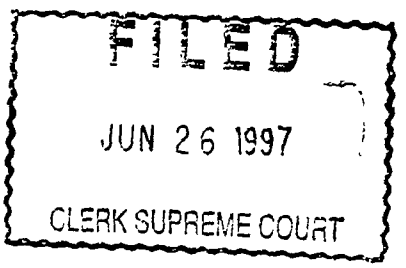
IN THE COURT OF APPEALS OF IOWA

No. 7-209 / 96-409 000613

STATE OF IOWA,
Appellee,

vs.

KEVIN EVERDING,
Appellant.



Appeal from the Iowa District Court for Black Hawk County, Walter R. Rothschild, District Associate Judge.

Defendant appeals the trial court's refusal to expunge all records of his arrest for operating while intoxicated. **AFFIRMED.**

John W. Ackerman of the Ackerman Law Office, Waterloo, for appellant.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, Kerry Anderson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kasey Wadding, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., Vogel, J., and Schlegel, S.J.*

***Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.**

VOGEL, J.

The issue before us is whether the court erred in failing to expunge all records of Kevin Everding's arrest for operating while intoxicated. He contends the refusal of the court to expunge these records violated his rights to due process, privacy, and equal protection under the law.

On November 24, 1993, Kevin Everding was arrested for operating while intoxicated (OWI), in violation of Iowa Code section 321J.2 (1993), following an accident. On January 14, 1994, the State filed a motion to dismiss the criminal charge, in the furtherance of justice, apparently for lack of speedy indictment. The criminal case was dismissed on January 21, 1994.

Everding claimed another person was driving his vehicle at the time of the accident, but his license revocation had been upheld after an administrative hearing. No appeal was taken of the administrative hearing, and a petition to reopen that record was denied. On February 28, 1995, Everding filed a petition in district court to reopen the record under Iowa Code section 321J.13(4), to challenge whether the law enforcement officer had reasonable grounds to believe that a violation of Iowa Code section 321J.2 had occurred. The district court denied his motion finding there was no statutory provision allowing for the reopening of a case once it had been dismissed. It also concluded Everding's remedy would have been to pursue judicial review of the agency action revoking his license.

On November 17, 1995, Everding filed a motion to expunge all official records relating to the arrest, indictment, trial, dismissal, and discharge from the OWI case. After a hearing, the court denied his motion, reasoning there were "no extreme or unusual circumstances demonstrated by [Everding] which would justify expungement of [his] arrest records." The court also noted, and defense counsel conceded, it had no authority to expunge the department of transportation records.

On appeal, Everding has raised several constitutional challenges for the court's failure to expunge the record. However, he failed to raise any constitutional arguments before the district court, and has thus failed to preserve error. Issues not raised in the trial court, including constitutional issues, may not ordinarily be first asserted on appeal. *See State v. Montgomery*, 243 N.W.2d 596, 597 (Iowa 1976); *Conner v. State*, 362 N.W.2d 449, 457 (Iowa 1985). Accordingly, we decline to consider Everding's newly raised constitutional arguments, and further affirm the district court's order.

AFFIRMED.

Schlegel, S.J., concurs; Sackett, P.J., specially concurs.

SACKETT, P.J. (concurring specially)

I concur that the majority has correctly applied the law in deciding this case. Unfortunately, this is a case where the process overrides justice.