IN THE COURT OF APPEALS OF IOWA

No. 5-665 / 94-2122

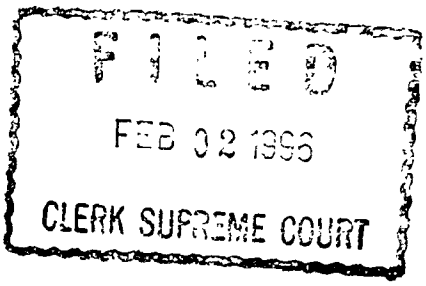
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ALLEN ALVIN BARKHAUSEN,

Defendant-Appellant.



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

Allen Barkhausen challenges his conviction, following a bench trial, of third-offense public intoxication. **AFFIRMED.**

Thomas P. Frerichs, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and John O'Connell, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

In the evening of June 6, 1994, officers were called to a Burger King restaurant to investigate an allegedly intoxicated male. The officers arrived to find Allen Alvin Barkhausen at the scene. The officers arrested Barkhausen for public intoxication. The matter proceeded to a bench trial. The court found Barkhausen guilty as charged.

Barkhausen appeals.

When the officers arrived at the Burger King restaurant, defendant was standing in the parking lot outside the passenger door of a vehicle. He smelled strongly of alcohol and had watery, bloodshot eyes; his speech was slurred; and he was "visibly very unsteady," requiring the vehicle to maintain his balance.

The officers testified, based on their training and experience, that their observations and conversation with defendant led them to believe he was intoxicated. There is testimony that although the determination of intoxication is based on the subjective view of the arresting officer, this determination is guided by the standard where the officer is trained to watch for certain key indicators of intoxication.

On appeal, Barkhausen contends Iowa Code section 123.46 (1993) is impermissibly vague and, as applied in this case, impermissibly overbroad.

Barkhausen raises his overbreadth objection for the first time on appeal. Error has not been properly preserved on this issue. Matters not raised in the trial court, including constitutional issues, cannot be asserted for the first time on appeal.

Donovan v. State, 445 N.W.2d 763, 767 (Iowa 1989). As the issue was not properly presented to the district court, we will not consider it on appeal.

Likewise, Barkhausen did not properly raise his vagueness claim. In order to preserve for review any alleged error in a ruling on the constitutionality of a statute, the party challenging the statute must do so at the earliest possible time. *State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992); *State v. Allen*, 304 N.W.2d 203, 206 (Iowa 1981); *State v. Ritchison*, 223 N.W.2d 207, 214 (Iowa 1974). Such challenges must ordinarily be made in a pretrial motion to dismiss. *Allen*, 304 N.W.2d at 206. This issue was also not properly preserved. We decline to consider the issue on appeal.

AFFIRMED.