evidence of active efforts and expert testimony as required by ICWA for out-of-home placement of an Indian child. Therefore, we reverse the portion of the judgment ordering Emma's continued out-of-home placement. We further remand the cause with directions to return Emma to Geneo's home, unless a hearing is held to remove her from the home in compliance with ICWA.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DANIEL S. ALBRECHT, APPELLANT.

790 N.W.2d 1

Filed May 18, 2010. Nos. A-09-542, A-09-543.

1. **Courts: Appeal and Error.** Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Courts: Evidence: Appeal and Error.** In its appellate review of a matter appealed from a county court to a district court, a higher appellate court can consider only such evidence as was presented to the district court in its intermediate review of the county court judgment.
3. **Judgments: Appeal and Error.** When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court.
4. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, it does have jurisdiction to determine whether a constitutional question has been properly raised.
5. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
6. **Constitutional Law: Statutes.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge; in order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer.
7. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.

8. **Statutes: Demurrer.** A motion to quash is a procedural prerequisite to challenge the constitutionality of a statute even though such statute does not bear on the charge but only on the sentence imposed upon conviction of the charge.
9. **Criminal Law: Drunk Driving: Probation and Parole.** For the purposes of determining whether a defendant was participating in criminal proceedings pursuant to Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008), once a defendant has pled guilty and such plea was accepted to one charge, the defendant was obviously participating in that criminal proceeding at the time he pled guilty to the second charge when both pleas were accepted at the same time, and thus the defendant is not eligible for probation under Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008).

Appeal from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

Thomas C. Riley, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Daniel S. Albrecht appeals his convictions and sentences for two driving under the influence (DUI) offenses. Because the convictions and sentences result from guilty pleas, we do not hear oral argument on this case. See Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008). Albrecht seeks to have us address the effect of a statute, Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008), that makes a defendant ineligible for probation if he or she is "participating in criminal proceedings" for a DUI offense and commits another such offense. For the reasons set forth herein, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 23, 2007, Albrecht was charged in a "complaint" filed in the county court for Douglas County with DUI pursuant to Omaha Mun. Code, ch. 36, art. III, § 36-115 (2005), and negligent driving for offenses occurring on July 27. On September 27, Albrecht was charged in a "complaint" filed

in the county court for Douglas County with DUI pursuant to § 36-115, driving during revocation pursuant to Neb. Rev. Stat. § 60-4,108 (Reissue 2004), and possession of marijuana pursuant to Neb. Rev. Stat. § 28-416 (Cum. Supp. 2006) for offenses that occurred on August 31 and September 18. The second DUI charge was amended to DUI pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 2004).

On October 2, 2007, Albrecht pled guilty to both DUI charges, and the remaining three charges were dismissed. The county court ordered a presentence investigation report. The county court held its sentencing hearing on December 13, at which time the court stated that Albrecht was not eligible for probation pursuant to § 60-6,197.09 because he committed the second DUI while the first DUI charge was pending. Albrecht was sentenced to pay a fine of $400, serve a term of 10 days in the corrections center, and have his driving privileges revoked for 6 months for each DUI conviction. The county court ordered that Albrecht serve these sentences concurrently.

Albrecht appealed both of his convictions and sentences to the district court for Douglas County. Albrecht filed a notice of errors on appeal, claiming that the county court imposed excessive sentences and, by a subsequent amendment to his claimed errors, that the statute involved in this case, § 60-6,197.09, was unconstitutionally vague and was an ex post facto law. The district court held a hearing on May 5, 2009. On May 6, the district court affirmed the convictions and sentences of the county court. Albrecht timely appealed both cases to this court, which we have consolidated for review and opinion.

ASSIGNMENTS OF ERROR

Albrecht assigns as error, restated and renumbered, that (1) the district court found that the challenge to § 60-6,197.09 should have been raised by a motion to quash, (2) the district court applied § 60-6,197.09 when neither the statute nor the elements necessary to establish the requirements of the statute were contained in the informations, and (3) the district court affirmed the judgment of the county court which denied Albrecht probation.

STANDARD OF REVIEW

[1,2] Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003). In our appellate review of a matter appealed from a county court to a district court, we can consider only such evidence as was presented to the district court in its intermediate review of the county court judgment. *Id.*

[3] When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court. *State v. Jensen*, 269 Neb. 213, 691 N.W.2d 139 (2005).

ANALYSIS

Constitutionality of § 60-6,197.09.

These two appeals attempt to raise the constitutionality of § 60-6,197.09, which provides as follows:

> Notwithstanding the provisions of section 60-498.02 or 60-6,197.03, a person who commits a violation punishable under subdivision (3)(b) or (c) of section 28-306 or a violation of section 60-6,196, 60-6,197, or 60-6,198 while participating in criminal proceedings for a violation of section 60-6,196, 60-6,197, or 60-6,198, or a city or village ordinance enacted in accordance with section 60-6,196 or 60-6,197, or a law of another state if, at the time of the violation under the law of such other state, the offense for which the person was charged would have been a violation of section 60-6,197, shall not be eligible to receive a sentence of probation, a suspended sentence, or an employment driving permit authorized under subsection (2) of section 60-498.02 for either violation committed in this state.

In these appeals, Albrecht challenges the apparent finding of the district court that the challenge to the constitutionality of § 60-6,197.09 should have been raised by a motion to quash in the county court. We say "apparent finding" because, while the district court orally alluded to such conclusion, it was not part of the district court's written order affirming the

convictions and sentences in either of Albrecht's cases. In any event, the State argues that Albrecht's constitutional claim was barred from consideration in the district court, and now in this court, because he did not properly raise the claim of unconstitutionality by a motion to quash in the county court. Albrecht would have us find that a motion to quash was not required because the attack was not on the charging ordinances or statutes, but, rather, on a statute which only impacts the sentencing options of the trial court. The State responds to this argument by pointing out that while the statute was discussed during the county court sentencing, no claim was made that § 60-6,197.09 was unconstitutional, but, rather, Albrecht argued that the statute did not apply to him because he was not on probation.

[4] Having set forth the basic claims of the parties and the procedural history, we must now turn to the issue of this court's jurisdiction over a claim that a statute is unconstitutional. This court cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before us, we do have jurisdiction to determine whether a constitutional question has been properly raised. *Harvey v. Harvey*, 6 Neb. App. 524, 575 N.W.2d 167 (1998); *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994).

[5] At the outset, we note the general proposition that in the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010). Albrecht did not challenge the constitutional validity of § 60-6,197.09 in the county court. Thus, when he appealed to the district court, acting as an intermediate appellate court, the claim of unconstitutionality would generally be procedurally barred.

[6,7] Moreover, Albrecht did not file a motion to quash in the county court concerning the statute. The bill of exceptions from the district court proceedings shows that Albrecht was explicitly challenging the facial validity of the statute, rather

than as applied to him. In *State v. Kanarick*, 257 Neb. 358, 362, 598 N.W.2d 430, 433 (1999), the court explained:

> A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). This court has repeatedly held that in order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer. See, e.g., *id.*; *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). See, also, Neb. Rev. Stat. §§ 29-1808, 29-1810, and 29-1812 (Reissue 1995). We have further stated: "All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue." *State v. Roucka*, 253 Neb. at 889, 573 N.W.2d at 421. Indeed, once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash. *Id.* In the instant case, [the defendant] did not file a motion to quash or a demurrer, he entered a plea of not guilty on December 3, 1997, and he did not subsequent thereto seek leave to withdraw his plea.

Albrecht entered a plea of guilty to both DUI charges then pending before the county court—without filing a motion to quash with respect to the constitutionality of § 60-6,197.09. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

However, we cannot avoid noting that the foregoing authority tends to be directed to challenges to the statute under which the defendant is charged. In contrast, rather than seeking to challenge the statute or ordinance under which he was charged, Albrecht seeks to challenge a separate statutory provision that only affects what type of sentence he might

receive in that it precludes a probationary sentence in certain circumstances.

[8] Thus, the question becomes whether a motion to quash is a procedural prerequisite to challenge the constitutionality of a statute, even though such statute does not bear on the charge but only on the sentence imposed upon conviction of the charge. We hold that this is a distinction without a difference, and that a motion to quash is a procedural necessity. In *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998), the defendant was charged with DUI, second offense, under Neb. Rev. Stat. § 60-6,196 (Reissue 1993), and he filed a motion to quash the information on the basis that § 60-6,196(8) (transferred to Neb. Rev. Stat. § 60-6,197.08 (Cum. Supp. 2006)) was unconstitutionally vague on its face. At the time that *Roucka, supra*, was decided, § 60-6,196(8) provided:

> Any person who has been convicted of driving while intoxicated for the first time or any person convicted of driving while intoxicated who has never been assessed for alcohol abuse shall, during a presentence evaluation, submit to and participate in an alcohol assessment. The alcohol assessment shall be paid for by the person convicted of driving while intoxicated. At the time of sentencing, the judge, having reviewed the assessment results, may then order the convicted person to follow through on the alcohol assessment results at the convicted person's expense in lieu of or in addition to any penalties deemed necessary.

The defendant in *Roucka* argued that the phrase "assessed for alcohol abuse" was not defined in the criminal code, had no generally accepted meaning, was meaningless, and gave the court no direction as to the expenses that may be incurred as a result of the "alcohol assessment." The Supreme Court set forth the procedural requirements for the defendant in *Roucka* to challenge the alcohol assessment required by § 60-6,196(8) as follows:

> A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. . . . See, also, *United States v. Solerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d

> 697 (1987) (holding that facial challenge to legislative act is most difficult challenge to mount successfully, because challenger must establish that no set of circumstances exists under which act would be valid). A motion to quash or a demurrer is the proper procedural method for challenging the facial validity of a statute. . . . All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. . . . Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and then files a motion to quash.

253 Neb. at 889-90, 573 N.W.2d at 421.

Clearly, the factual setting of *Roucka* is analogous to that before us in that the defendant in *Roucka* was challenging the consequence of a DUI conviction, yet the prerequisite of a motion to quash was clearly set forth by the Supreme Court. As a result, we conclude that the fact that Albrecht seeks to challenge the constitutionality of a statute that affects his sentence, rather than the underlying charge, does not absolve him of the need to file a motion to quash, which he did not do. Accordingly, he has not properly presented and preserved his challenge to the constitutionality of § 60-6,197.09, and the district court did not err in rejecting his attempted challenge to the statute. This holding is well within this court's limited jurisdiction over challenges to the constitutionality of statutes as outlined in *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994).

Did County Court Improperly Apply § 60-6,197.09?

Albrecht argues, citing *State v. Mlynarik*, 16 Neb. App. 324, 743 N.W.2d 778 (2008), that the county court improperly applied § 60-6,197.09 because the statutory elements making it applicable were not alleged in the charging documents. However, *Mlynarik* is factually distinguishable, because in that case, the trial court's sentencing of the defendant for a second offense misdemeanor was plain error, where the charge against the defendant did not specify that it was a second offense. Therefore, we found that the court could not sentence the

defendant to 3 years of probation, but was limited to a term of 2 years. In other words, because "second offense" is a different crime with different elements than "first offense," we required that the State specifically charge the defendant with such crime. Here, § 60-6,197.09 does not change the crime or the elements thereof, and thus *Mlynarik* is not controlling.

While Albrecht argues that he would have been sentenced to probation but for the county court's application of § 60-6,197.09, that is not entirely clear from the county court record. When the county court sentenced Albrecht after listening to his counsel's argument for probation, the court did state: "In any event, I don't think you qualify for probation because I don't think that statute allows it." We do note that the presentence investigation report stated that Albrecht had completed an inpatient treatment program in August 2005 and recommended probation. Given this record, we conclude that § 60-6,197.09 was used by the county court to deny Albrecht probation. However, given that the constitutional challenge to the statute was waived as discussed above, the question under our standard of review is simply whether there was error on the record in the county court's application of the statute.

The key provision of the statute (with our paraphrasing) is that a person who commits a DUI violation "while participating in criminal proceedings" for a DUI violation "shall not be eligible to receive a sentence of probation." Obviously, it is the language "while participating in criminal proceedings" for another DUI that is key. We know of only one other case discussing § 60-6,197.09—*State v. White*, 276 Neb. 573, 755 N.W.2d 604 (2008). In *White*, the defendant was arrested at 12:42 a.m. on July 27, 2006, tested .21 for blood alcohol content, and was taken home. Obviously, the defendant did not stay home, because later that morning, at 3:44 a.m., he was stopped a second time and this time his blood alcohol content was .196. The defendant was charged with two counts of second-offense DUI with a blood alcohol content of more than .15 and pled no contest to the charges. In each case, he was sentenced to 120 days in jail and his license was revoked for 2 years. The defendant's assignments of error to the Supreme Court were that the district court erred in affirming the order of the trial court

that he was not eligible for probation and erred in its implicit determination that § 60-6,197.09 was not an unconstitutional ex post facto law. The Supreme Court noted the defendant's argument that he was eligible for probation because he was not "participating in criminal proceedings" when he received his second citation, because he had not yet been arraigned on the first citation. The Supreme Court avoided any discussion of the meaning of the term "participating in criminal proceedings" for another DUI by saying:

> However, we do not reach the question of whether [the defendant] was "participating in criminal proceedings," because the trial court also concluded that he was not an appropriate candidate for probation. The only issue we must address, therefore, is whether the court abused its discretion in sentencing [the defendant].

State v. White, 276 Neb. at 575-76, 755 N.W.2d at 607. The *White* court then found that the sentence was not inappropriate and was not an abuse of discretion, and the court affirmed the judgment of the district court, which had affirmed the judgment of the county court.

[9] Here, the presentence investigation report allows the opposite conclusion—that Albrecht could be seen as an appropriate candidate for probation, given the recommendation in the report that he receive probation. Nonetheless, it would be absurd to say that Albrecht was not participating in another criminal proceeding for a DUI given that this case involves two successive arrests, arraignments of those charges, and then successive guilty pleas to the charges in both cases on the same day. Thus, we need not decide the question of exactly when "participation" in a criminal DUI proceeding starts, for example, at arrest, first court appearance, or conviction—because once he pled guilty and such plea was accepted to one charge, he was obviously participating in that criminal proceeding at the time he pled guilty to the second charge. In short, we need not delve into the nuances of what "participating in criminal proceedings" means when two DUI charges are at various stages of the criminal process, because in the case before us, the charges were actually filed, there had been arraignments on such, and then there were successive guilty pleas to each. Accordingly,

under these procedural facts, it is clear that Albrecht was "participating in criminal proceedings" after pleading guilty to one charge when he pled guilty to the second charge. The county court did not err in denying Albrecht probation on the basis of § 60-6,197.09.

Were Imposed Sentences Excessive?

Lastly, Albrecht simply argues that his sentences were excessive. His two sentences were identical: pay a fine of $400, serve 10 days of incarceration, and have his driving privileges revoked for 6 months. The county court ordered that Albrecht serve these sentences concurrently. Although the presentence investigation report concluded that Albrecht was "an appropriate candidate for traditional probation" of 12 months, many judges, including us, might easily disagree. Albrecht has a substantial history, particularly for a 20-year-old, of using virtually all available illegal mood- and mind-altering substances, including heroin. He has had unsuccessful involvement in the juvenile justice system and had previously had probation revoked. Finally, the testing administered during the presentence investigation shows that he was at "maximum" risk for "alcohol" use and abuse. Rather than excessive, the sentences he received, running concurrently, are better described as mild. This assignment of error is without merit.

CONCLUSION

The district court did not err in affirming the convictions and sentences of the county court.

AFFIRMED.