

SUMMARIES OF DECISIONS, IOWA COURT OF APPEALS
May 16, 2018

Pursuant to Iowa Rule of Appellate Procedure 6.904(2)(6), an unpublished opinion of the Iowa Court of Appeals may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority.

No. 16-1493

NEMICKAS, M.D. v. LINN COUNTY ANESTHESIOLOGISTS, P.C.

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Mary E. Chicchelly, Judge. Heard by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (22 pages)

Dr. Rimas Nemickas challenges the district court's adverse rulings on his claims against his former employer. Specifically, Dr. Nemickas argues the district court erred in dismissing his antitrust action after concluding he did not have antitrust standing. He also challenges the district court's rejection of several amended pleadings and the court's grant of summary judgment on various contract claims. **OPINION HOLDS:** Dr. Nemickas does not have the necessary antitrust standing required to bring an antitrust suit because he did not suffer an antitrust injury and his interests would not be representative of the others allegedly harmed. The district court did not abuse its discretion by rejecting the amended pleadings. And because there was no genuine issue of material fact presented regarding the contract claims, the court's grant of summary judgment was proper.

No. 16-1775

STATE v. WADSWORTH

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Polk County, Richard G. Blane and Paul D. Scott, Judges. Heard by Doyle, P.J., and Tabor and McDonald, JJ. Blane, S.J., takes no part. Opinion by Tabor, J. (20 pages)

Norman Wadsworth appeals from his conviction for second-degree murder, alleging the evidence was insufficient to support the conviction for second-degree murder and he was not competent to stand trial. **OPINION HOLDS:** On our review, we find substantial evidence supports the verdict of murder in the second degree. But, on our de novo review, we find Wadsworth did not have the ability at the time of the trial to assist his attorneys in his defense. Wadsworth's mental illness left him without sufficient present ability to consult with counsel with a reasonable degree of rational understanding. Accordingly, we reverse and remand for retrial.

No. 16-1786

STATE v. SCHROEDER

**AFFIRMED IN PART,
REVERSED AND
REMANDED IN PART.**

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge. Considered by Danilson, C.J., and Mullins and McDonald, JJ. Opinion by Danilson, C.J. (28 pages)

Timothy Schroeder appeals from his convictions for murder in the first degree, going armed with intent as a habitual offender, and being a felon in possession of a firearm as a habitual offender. Schroeder argues (1) trial counsel was ineffective for failing to challenge the corroboration of testimony by his wife, (2) the court erred in failing to redact statements from his recorded interview with law enforcement, and (3) his stipulation to the habitual-offender sentencing enhancements was procedurally faulty and, thus, not knowing and voluntary. **OPINION HOLDS:** Schroeder's ineffectiveness claim fails because he cannot prove the claimed breaches of duty resulted in prejudice. We find no abuse of discretion in the extent Schroeder's recorded interview was redacted. Finally, while the convictions for going armed with intent and for being a felon in possession of a firearm are supported by substantial evidence, because the court

ordered the sentences imposed upon those convictions are to be served consecutive to the life-without-parole (LWOP) sentence, and there is a possibility a LWOP sentence could be commuted or the conviction overturned notwithstanding our decision, we reverse Schroeder's stipulation to being a habitual offender and remand for further proceedings on the sentencing enhancement and resentencing on the convictions for going armed with intent and being a felon in possession of a firearm.

No. 16-2138

HUNTER LANDING, LLC v. CITY OF COUNCIL BLUFFS

**REVERSED AND
REMANDED FOR NEW
TRIAL.**

Appeal from the Iowa District Court for Pottawattamie County, Kathleen A. Kilnoski, Judge. Considered by Danilson, C.J., and Mullins and McDonald, JJ. Opinion by Danilson, C.J. Dissent by McDonald, J. (10 pages)

Hunter Landing, LLC, appeals from an adverse judgment in this inverse condemnation action. The central question in this appeal is whether Hunter Landing, LLC, is entitled to a new trial because of a faulty jury instruction on inverse condemnation. **OPINION HOLDS:** Because we conclude the instruction was a misstatement of the law, we reverse and remand for a new trial. **DISSENT ASSERTS:** The plaintiff failed to preserve error. I would affirm the judgment of the district court.

No. 17-0176

RICHARDSON v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Jeffrey D. Farrell, Judge. Considered by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Tabor, J. (5 pages)

Anthony Richardson appeals the denial of his application for postconviction relief (PCR). He contends trial counsel was ineffective in failing to secure phone records to corroborate an alibi defense, counsel was not prepared for trial, and Richardson felt that he had no other choice than to accept the plea. **OPINION HOLDS:** After reviewing the criminal and PCR record, we affirm the district court by memorandum opinion pursuant to Iowa Court Rule 21.26(1)(d) and (e).

No. 17-0234

STATE v. LONG

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Webster County, Thomas J. Bice, Judge. Considered by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Tabor, J. (6 pages)

Peter Long appeals the district court's dismissal of his petition for a restitution hearing as untimely. **OPINION HOLDS:** Iowa Code section 910.7 (2017) permits an offender to seek a restitution hearing if on probation, parole, or incarcerated. Because Long is incarcerated, section 910.7 allows him to request a restitution hearing at any time. On remand, the district court should consider the substance of Long's petition to determine if a hearing is warranted.

No. 17-0360

STATE v. SPENCER

**JUDGMENT AFFIRMED,
SENTENCE AFFIRMED
IN PART AND VACATED
IN PART, AND
REMANDED FOR
ENTRY OF
CORRECTED
SENTENCING ORDER.**

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson and David N. May, Judges. Considered by Danilson, C.J., and Mullins and McDonald, JJ. Opinion by Mullins, J. (10 pages)

Joseph Spencer appeals his convictions of possession of a controlled substance, third or subsequent offense, as a habitual offender and eluding and the sentences imposed. He contends the district court erred in denying his motion to suppress. He also claims the district court illegally sentenced him to a felony and imposed an illegal fine for the possession-as-a-habitual-offender charge.

OPINION HOLDS: We conclude the district did not err in denying Spencer's motion to suppress or err in sentencing him to a felony for the possession-as-a habitual-offender charge. However, the parties agree the court did improperly impose a fine. We affirm Spencer's conviction and sentence but vacate the fine. We remand for entry of a corrected sentencing order.

No. 17-0368

STATE v. ELLIOTT

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge. Considered by Danilson, C.J., and Mullins and McDonald, JJ. Opinion by McDonald, J. (3 pages)

Brandon Elliott challenges his conviction for assault causing bodily injury. Elliott contends he was pressured into making a guilty plea and that the plea lacked a factual basis. **OPINION HOLDS:** Finding no merit to either of Elliott's claims, we affirm the judgment of the district court in all respects.

No. 17-0496

STATE v. BARNHARDT

AFFIRMED.

Appeal from the Iowa District Court for Boone County, Steven J. Oeth, Judge. Considered by Vogel, P.J., Doyle, J., and Scott, S.J. Opinion by Doyle, J. (12 pages)

Ryan Barnhardt appeals from the judgment and sentence entered following his convictions on ten counts of sexual abuse. **OPINION HOLDS: I.** The district court did not abuse its discretion in permitting an expert witness to testify generally about misconceptions adults have of children and how children may react to traumatic events. Because the expert did not directly or indirectly comment on whether the complaining witnesses' behavior comported with how children who have been sexually abused generally behave, the testimony did not impermissibly vouch on their credibility. **II.** The district court properly instructed the jury that the law does not require that the testimony of the alleged victim be corroborated. **III.** The district court properly exercised its discretion in denying Barnhardt's challenge for cause because the challenged juror stated her ability to independently evaluate Barnhardt's guilt on each of the charges.

No. 17-0664

IN RE MARRIAGE OF WOLFS

**AFFIRMED IN PART,
REVERSED IN PART,
AND MODIFIED.**

Appeal from the Iowa District Court for Winneshiek County, Margaret L. Lingreen, Judge. Heard by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Tabor, J. (13 pages)

David Wolfs appeals the district court's denial of his request to reduce or eliminate his spousal support obligation to his former wife, Linda Wolfs. David argues Linda is now in a common law marriage triggering a terminating condition of their dissolution decree. Alternatively, David argues there has been a substantial change in circumstances warranting modification of the support obligation. **OPINION HOLDS:** Because Linda and her new paramour did not have the intent to marry and do not hold themselves out as a married couple, David cannot show the terminating condition of decree was triggered. But because Linda now receives significant financial support from her paramour, we find a material change in circumstances warranting a reduction in spousal support.

No. 17-0702

BROWN v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge. Considered by Vogel, P.J., Doyle, J., and Mahan, S.J. Opinion by Mahan, S.J. (4 pages)

Daveone Brown appeals from the denial of his application for

postconviction relief, contending trial counsel was ineffective in failing to request a jury instruction on theft. **OPINION HOLDS:** Because Brown has failed to prove prejudice, his ineffective-assistance-of-counsel claim fails.

No. 17-0743

BORKOVEC v. DISH NETWORK CORP.

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge. Heard by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. Special concurrence by Danilson, C.J. (9 pages)

Dish Network Corporation appeals the district court decision reversing a decision of the Iowa workers' compensation commissioner. **OPINION HOLDS:** We find the decision of the commissioner was based on substantial evidence and was not irrational, illogical, or wholly unreasonable. **SPECIAL CONCURRENCE ASSERTS:** If Borkovec makes a good faith effort to overcome his opioid addiction through a pain-management program, the healing period should end and his physical conditions should be at maximum medical improvement.

No. 17-0801

STATE v. FULTS

AFFIRMED.

Appeal from the Iowa District Court for Jasper County, Richard B. Clogg, Judge. Considered by Potterfield, P.J., Tabor, J., and Carr, S.J. Opinion by Tabor, J. (8 pages)

Jerry Fults appeals his convictions for third-degree sexual abuse. He argues the district court erred in considering a recorded interview of the alleged victim under the residual exception to the hearsay rule. **OPINION HOLDS:** Because the recorded interview duplicated other evidence admitted without objection, we do not need to determine if the recording was wrongly allowed under the residual exception to the hearsay rule.

No. 17-0808

AMES v. ELDER

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Lee (South) County, John M. Wright, Judge. Considered by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Potterfield, J. (5 pages)

Brandon Ames appeals the district court's imposition of discovery sanctions. **OPINION HOLDS:** Because the district court committed an error of law by failing to hold a hearing on discovery sanctions, and Ames was prejudiced as a result, we reverse and remand for a new trial.

No. 17-0893

IN RE ESTATE OF TERPSTRA

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Mahaska County, Myron L. Gookin, Judge. Considered by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Tabor, J. (5 pages)

Ronald Terpstra appeals the district court's dismissal of his declaratory-judgment action. He argues the court erred by dismissing the action on the basis of a statute of limitation provision other than the provision pleaded by the respondent. **OPINION HOLDS:** A respondent must specifically plead an intent to rely on the statute of limitations as a defense by identifying the correct statutory section and supporting facts. Failing to do so amounts to a waiver of the defense. Because the respondent failed to identify the correct statute, the district court erred and reversal is warranted.

No. 17-0895

KELLY v. STATE

Appeal from the Iowa District Court for Polk County, Paul D. Scott, Judge.

AFFIRMED. Considered by Vaitheswaran, P.J., Potterfield, J., and Scott, S.J. Opinion by Scott, S.J. (3 pages)

Ronald Kelly appeals the summary dismissal of his postconviction-relief application. **OPINION HOLDS:** We conclude Kelly failed to preserve error on the claim he raises on appeal and, in any event, his argument fails on the merits. We affirm the summary dismissal of Kelly's postconviction-relief application.

No. 17-0975

STATE v. GANAWAY

**AFFIRMED AND
REMANDED.**

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge. Considered by Danilson, C.J., Mullins, J., and Mahan, S.J. Opinion by Mahan, S.J. (8 pages)

Brandon Ganaway appeals, claiming the district court abused its discretion in sentencing him. **OPINION HOLDS:** We discern no abuse of discretion in the district court's sentencing decision, and we affirm the court's order. We remand the case to the district court so that it may issue a nunc pro tunc order to correct the clerical error in the written order with regard to the imposition of fines.

No. 17-1031

IN RE D.C.

AFFIRMED.

Appeal from the Iowa District Court for Jasper County, Steven J. Holwerda, District Associate Judge. Considered by Danilson, C.J., and Mullins and McDonald, JJ. Opinion by McDonald, J. (8 pages)

A juvenile challenges the revocation of a consent decree and delinquency adjudication. He contends the district court erred in denying a motion to continue, in admitting certain testimony, and in denying his motion for new trial and motion in arrest of judgment. **OPINION HOLDS:** We find these claims lack merit and affirm the judgment of the district court in all respects.

No. 17-1121

STATE v. WISE

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge. Considered by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Tabor, J. (7 pages)

Gary Wise appeals from his sentence following conviction for first-degree robbery. He asserts the seventeen-and-a-half years he must serve, pursuant to the statutory maximum and mandatory minimum sentencing provisions, is grossly disproportionate as applied to his situation and a violation of the prohibition of cruel and unusual punishment. **OPINION HOLDS:** Because we defer to the legislature's authority to set the length of sentences and the gravity of his offense was on par with the severity of the punishment, we reject the cruel-and-unusual-punishment challenge. Wise's age, which at eighteen years and eight months makes him an adult offender, was not a unique factor generating a high risk of gross disproportionality. We affirm.

No. 17-1127

SWANSON v. A.V. TRANSPORTATION, INC.

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Stuart P. Werling, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (7 pages)

David Swanson appeals the denial of his workers' compensation claim. He argues the commissioner's conclusion is not supported by substantial evidence. According to Swanson, the commissioner failed to properly credit certain evidence and relied on other, less credible evidence when reaching a

conclusion. **OPINION HOLDS:** Because the commissioner relied on video evidence showing the alleged workplace injury did not occur, the commissioner's conclusion is supported by substantial evidence.

No. 17-1258

STATE v. CARTER

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge. Considered by Danilson, C.J., and Mullins and McDonald, JJ. Opinion by Mullins, J. (4 pages)

Michael Carter appeals his convictions following guilty pleas to the charges of second-degree theft as a habitual offender and possession of marijuana, third offense. He contends the district court failed to comply with the *Harrington* requirements for a habitual-offender colloquy. **OPINION HOLDS:** Carter failed to preserve error and we decline to consider his challenge.

No. 17-1266

MONROE v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Johnson County, Paul D. Miller, Judge. Considered by Vaitheswaran, P.J., Potterfield J., and Scott, S.J. Opinion by Scott, S.J. (5 pages)

Lamont Monroe appeals the district court decision denying his request for postconviction relief from his conviction of second-degree burglary. **OPINION HOLDS:** Monroe has not shown an amendment to Iowa Code section 902.12(3) (2016) violated his equal protection rights. The issue of whether an indigent person should be required to pay a filing fee has not been properly presented in this appeal and we do not consider it. We affirm the decision of the district court.

No. 17-1352

STATE v. HOWARD

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (3 pages)

Mark Howard appeals his sentence for possession with intent to deliver crack cocaine, asserting the court abused its discretion in sentencing him to prison rather than probation. **OPINION HOLDS:** The court considered and discussed relevant factors and imposed a sentence within the statutory limits. We find no abuse of discretion and therefore affirm.

No. 17-1366

STATE v. HOWARD

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (5 pages)

Mark Howard appeals from the sentence imposed following his guilty plea to assault causing injury, arguing the district court abused its discretion by sentencing him in this case without considering the minimal essential factors. **OPINION HOLDS:** The record belies the claim. Finding no abuse of discretion, we affirm.

No. 17-1375

RYAN v. WRIGHT

**AFFIRMED AS
MODIFIED AND
REMANDED.**

Appeal from the Iowa District Court for Cass County, Gregory W. Steensland, Judge. Heard by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (18 pages)

Jessica Wright appeals the order modifying Sean Ryan's child visitation and support. **OPINION HOLDS: I.** Although the court incorrectly used

the term “physical care” with regard to Sean’s summer visitation, it is clear that the court did not modify the decree to provide shared physical care. However, because the visitation schedule adopted by the district court results in the children spending far too many hours commuting and is unworkable for the parties, we modify the visitation schedule in the manner we believe to be in the children’s best interests. **II.** We remand for calculation of Sean’s child-support obligation based on Sean earning an annual income of \$21,000. However, the credit for extraordinary visitation should not be applied on remand because the number of overnight visits provided in our modification of the decree fall short of the 128 days necessary to apply the credit. We find no error in requiring the parties to share one-half of the children’s unpaid medical expenses. **III.** We decline to award either party appellate attorney fees.

No. 17-1561

IN RE M.L.

AFFIRMED.

Appeal from the Iowa District Court for Johnson County, Paul D. Miller, Judge. Considered by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Tabor, J. (6 pages)

M.L. appeals the district court’s determination that he suffers from a serious mental impairment and his resulting civil commitment. M.L. claims the evidence in the record did not demonstrate he was likely to harm himself or others unless committed. **OPINION HOLDS:** M.L.’s recent threats and physical assaults of others in the prison demonstrate the endangerment element necessary for commitment.

No. 18-0380

IN RE K.C.

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Joseph W. Seidlin, District Associate Judge. Considered by Danilson, C.J., and Mullins and McDonald, JJ. Opinion by Mullins, J. (16 pages)

A mother appeals the termination of her parental rights to her child. **OPINION HOLDS:** We find the statutory grounds for termination under section 232.116(1)(h) of the mother’s parental rights were established by clear and convincing evidence, termination is in the child’s best interests, no section 232.116(3) exception precludes the need for termination, and an extension of time is unwarranted and contrary to the child’s best interests. We reject the mother’s claims regarding reasonable efforts and ineffective assistance of counsel. We affirm the termination of the mother’s parental rights.

No. 18-0485

IN RE Z.S.

AFFIRMED.

Appeal from the Iowa District Court for Webster County, Angela L. Doyle, District Associate Judge. Considered by Vaitheswaran, P.J., and Potterfield and Tabor, JJ. Opinion by Potterfield, J. (5 pages)

The father appeals the adjudication of his child, Z.S., as a child in need of assistance (CINA) and the continued placement of the child in the mother’s care and custody. The father asserts there is not clear and convincing evidence to adjudicate Z.S. CINA pursuant to Iowa Code section 232.2(6)(c)(2) and (6)(f) (2017). He also claims the continued placement of Z.S. in the mother’s care is not in the child’s best interests and argues the family should be returned to its previous equally-shared care schedule. **OPINION HOLDS:** Because there is clear and convincing evidence to support the adjudication of Z.S. pursuant to subsections 232.2(6)(c)(2) and (6)(f) and it is in Z.S.’s best interests to remain in the mother’s care, we affirm the juvenile court.