

SUMMARIES OF DECISIONS, IOWA COURT OF APPEALS
April 4, 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Pursuant to Iowa Rule of Appellate Procedure 6.904(2)(6), an unpublished opinion of the Iowa Court of Appeals may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority.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. 16-0723

HEARD v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Greene County, Steven J. Oeth, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (6 pages)

Michael Heard Sr. appeals the dismissal of his application for postconviction relief. He raises several issues related to his sentencing and claims his trial counsel was constitutionally deficient for failing to investigate and explain a possible affirmative defense. Heard has since discharged his sentence. **OPINION HOLDS:** Heard's sentencing challenges are dismissed as moot. And because trial counsel credibly testified to his research, preparation, and explanation of the affirmative defense, Heard's ineffective assistance claim fails.

No. 16-2149

WELLS v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Thomas G. Reidel, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (4 pages)

DeWitt Wells appeals the district court decision denying his request for postconviction relief on his claim he received an illegal sentence. **OPINION HOLDS:** We find Wells has not shown he received an illegal sentence because his special sentence constituted cruel and unusual punishment or because Iowa Code section 903B.1 (2009) violated his right to substantive due process. We affirm the district court's decision denying Wells's application for postconviction relief.

No. 17-0142

STATE v. BENNETT

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Joel W. Barrows, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (11 pages)

Rees Bennett appeals one conviction of domestic abuse assault with intent to inflict serious injury and the sentences imposed upon that conviction and an additional conviction. As to the first of the convictions, he contends the evidence was insufficient to show that he was the person who committed the assault and his counsel rendered ineffective assistance in failing to file a motion for a new trial on weight-of-the-evidence grounds. As to both convictions, he argues the district court abused its discretion in sentencing. **OPINION HOLDS:** We conclude Bennett's conviction was supported by sufficient evidence, trial counsel was not ineffective, and the district court did not abuse its discretion in sentencing. We therefore affirm.

No. 17-0240

STATE v. THOMPSON

WRIT ANNULLED.

Appeal from the Iowa District Court for Des Moines County, Michael J. Schilling, Judge. Considered by Danilson, C.J., Vaitheswaran, J., and Mahan, S.J. Opinion by Danilson, C.J. (2 pages)

Deonte Thompson appeals from the district court's denial of his motion to reduce the sentence imposed upon his 2015 conviction for second-degree robbery. He contends counsel was ineffective because in arguing the motion to

reduce sentence counsel failed to raise due-process and equal-protection challenges to the non-retroactive application of the 2016 amendment to Iowa Code section 902.12(3). **OPINION HOLDS:** There is no appeal as a matter of right from the denial of a motion to reduce a sentence. We treat the notice of appeal as a writ of certiorari. Thompson's general allegations are insufficient to establish his claim of ineffective assistance of counsel. We annul the writ.

No. 17-0431

WILLIAMS v. STATE

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge. Heard by Potterfield, P.J., and Mullins and Bower, JJ. Opinion by Potterfield, P.J. (10 pages)

Troy Williams appeals the denial of his application for postconviction relief (PCR). Williams maintains his PCR counsel committed structural error and asks that we remand for a new trial of his PCR application. **OPINION HOLDS:** Because Williams was denied meaningful representation in his PCR action and because PCR counsel's failure to present any of Williams's claims allowed them all to be decided without a record and without adversarial testing, we find PCR counsel committed structural error. We remand to the district court for a new hearing on the merits of Williams's application for PCR, with new counsel.

No. 17-0436

JOHNSON v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Butler County, Christopher C. Foy, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (4 pages)

Jeremiah Johnson appeals the denial of his second application for postconviction relief (PCR). **OPINION HOLDS:** We agree with the PCR court that Johnson's claim about the kidnapping instruction was untimely, as it could have been raised within the three-year statute of limitations. Regarding his claim that PCR counsel was ineffective for failing to ensure the PCR court ruled on his pro se claim that the underlying trial information was inadequate, Johnson has not established that he was prejudiced by the court's failure to explicitly consider his claim. Although the PCR court should have considered Johnson's pro se claim, if it had, it would have determined it too was time-barred. We affirm.

No. 17-0470

STATE v. JACKSON

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (6 pages)

Antavieon Jackson appeals his convictions for willful injury causing serious injury and domestic abuse assault. Jackson argues there was insufficient evidence to support his convictions because the testimony of the complaining witness was so impossible, absurd, and self-contradictory it should be deemed a nullity by the court. Jackson argues the complaining witness's testimony is self-contradictory because she initially denied the abuse to medical professionals and law enforcement. **OPINION HOLDS:** The complaining witness's testimony is supported by competent evidence, and she provides a reason for her changed testimony. We defer to the credibility determinations made by the district court and affirm.

No. 17-0532

STATE v. VANG

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (9 pages)

Mason Vang appeals after pleading guilty to assault with intent to commit sexual abuse. **OPINION HOLDS: I.** The plea court substantially complied with the Iowa Rule of Criminal Procedure 2.8(2)(b)(4) colloquy requirements regarding his right to confrontation. **II.** Because the prosecutor did not breach the plea agreement, Vang's counsel had no duty to object to the purported breach, and Vang has failed to show his trial counsel was ineffective in that respect.

No. 17-0546

STATE v. BURT

AFFIRMED.

Appeal from the Iowa District Court for Wright County, Paul B. Ahlers, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (9 pages)

Defendant appeals his convictions for first-degree harassment, assault causing bodily injury, and trespass causing injury. **OPINION HOLDS:** We find the evidence is sufficient to uphold his convictions and trial counsel was not ineffective.

No. 17-0646

STATE v. BENDER

AFFIRMED.

Appeal from the Iowa District Court for Plymouth County, Steven J. Andreasen, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (4 pages)

Noel Bender appeals his conviction of domestic abuse assault, third or subsequent offense, as an habitual offender. Bender challenges the sufficiency of the evidence supporting the district court's finding of guilt. **OPINION HOLDS:** The district court's fact findings are supported by substantial evidence. We affirm Bender's judgment and sentence.

No. 17-0674

BUCK v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Johnson County, Ian K. Thornhill, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (7 pages)

Shatani Buck Jr. appeals from the denial of his application for postconviction relief. **OPINION HOLDS:** Buck has failed to show his trial counsel was ineffective and that he unknowingly and involuntarily entered his guilty plea. Accordingly, we affirm the order denying his application.

No. 17-0691

ANDERSON v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Monona County, Duane E. Hoffmeyer, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (3 pages)

Christopher Anderson appeals the dismissal of his application for postconviction relief alleging his special sentence imposing lifetime parole constitutes cruel and unusual punishment. Because Anderson is not yet serving his special sentence, he requests *State v. Tripp*, 776 N.W.2d 855 (Iowa 2010), be overturned so he may challenge the sentence now. **OPINION HOLDS:** *Tripp* is controlling and prevents the court from addressing Anderson's challenge before the special sentence becomes effective. And this court is not at liberty to overrule controlling supreme court precedent.

No. 17-0794

HELMERS v. CITY OF DES MOINES

REVERSED AND

Appeal from the Iowa District Court for Polk County, Lawrence P. McLellan, Judge. Heard by Danilson, C.J., and Vaitheswaran, Doyle, Tabor, and

REMANDED.

McDonald, JJ. Opinion by Tabor, J. Special Concurrences by Danilson, C.J. and Doyle, J. Dissents by Vaitheswaran and McDonald, JJ. (43 pages)

A dog owner appeals the denial of her writ of certiorari after the city of Des Moines seized the dog and determined that it had exhibited “vicious propensities” requiring the dog to be destroyed. On appeal, the owner challenges the sufficiency of the evidence supporting the city’s declaration and alleges the relevant city ordinance is unconstitutional as applied. **OPINION HOLDS:** Because the relevant city ordinance fails to provide pet owners with fair notice of prohibited animal conduct and provides inadequate guidelines to animal control officers enforcing the ordinance it is impermissibly vague and unconstitutional as applied. **SPECIAL CONCURRENCE ASSERTS:** I agree with the majority that the ordinance is unconstitutionally vague and also find there is insufficient evidence to support the dangerous-dog declaration. **SPECIAL CONCURRENCE ASSERTS:** I concur with Judge Tabor’s opinion. Although I have no dog in the fight, I feel compelled to ask: Why can’t this dispute be settled? **DISSENT ASSERTS:** Substantial evidence supports the administrative law judge’s affirmance of the declaration of the dog as a “dangerous animal.” The City’s failure to include animal-to-animal provocation or self-defense language in Des Moines, Iowa Code of Ordinances section 18-196(6) (2016) does not render the ordinance void for vagueness. **DISSENT ASSERTS:** Helmers failed to prove the administrative hearing officer acted illegally in affirming the city’s dangerous dog declaration. Helmers failed to prove the city’s animal ordinance is void-for-vagueness as applied.

No. 17-0815

STATE v. FREITAG

AFFIRMED.

Appeal from the Iowa District Court for Cerro Gordo County, Karen Kaufman Salic, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (10 pages)

Nicholas Freitag appeals his convictions following guilty pleas to possession of a firearm or offensive weapon by a felon and domestic abuse assault. He contends his defense counsel rendered ineffective assistance by (1) pressuring him to withdraw a motion in arrest of judgment, (2) failing to inform the trial court the plea colloquy was insufficient, specifically concerning the requirement to complete batterer’s education, and (3) not challenging the State’s alleged failure to abide by its obligations under the plea agreement. **OPINION HOLDS:** We affirm Freitag’s sentence and preserve one claim of ineffective assistance of counsel for possible postconviction-relief proceedings.

No. 17-0903

STATE v. UTECH

**CONVICTION
AFFIRMED, SENTENCE
VACATED, AND
REMANDED FOR
RESENTENCING.**

Appeal from the Iowa District Court for Woodbury County, John C. Nelson, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (9 pages)

The defendant appeals his conviction and sentence arguing plea counsel was ineffective for not informing him of the pretrial conference and not calculating surcharges on fines. The defendant also argues the court impermissibly forced him to enter a guilty plea, in exchange recalling a warrant for his arrest. Finally, the defendant argues his sentence was illegal because, although he was not placed on probation, he was sentenced to electronic monitoring and to take an anger management class. **OPINION HOLDS:** We preserve the defendant’s ineffective-assistance-of-counsel claim for postconviction-relief proceedings because the record is inadequate to address the issues. We find the sentence provision requiring electronic monitoring was valid but the order to attend anger management class was not because the defendant was never sentenced to

probation. We vacate the sentence and remand for resentencing.

No. 17-0924

STATE v. CLARK

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Joseph M. Moothart, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (5 pages)

A defendant appeals his conviction for assault causing bodily injury or mental illness. **OPINION HOLDS:** We find Clark did not preserve error on his claim of insufficient evidence. We also find trial counsel was effective.

No. 17-0980

STATE v. LOMEN

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (4 pages)

David Lomen appeals the amount of restitution ordered upon his conviction for theft in the fourth degree. **OPINION HOLDS:** The victim's cost for computer components incurred more than a decade before the defendant's possession of the stolen computer is not a reasonable measure of the damages caused by Lomen exercising control of a stolen computer. Restitution should be fixed in the amount of the reasonable cost to replace or repair the computer including the amount of other damages that are otherwise causally related to the criminal activity, if any. Because the court's order of restitution was grounded upon an improper measure of damages, we reverse the restitution order and remand for further proceedings consistent with this opinion.

No. 17-1040

IN RE MARRIAGE OF JACOBSON

**MODIFICATION
AFFIRMED.**

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

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (18 pages)

Sommer Wasser appeals from a ruling granting a petition to modify her dissolution decree and from a ruling granting contempt applications. She contends her ex-husband Jeffrey Jacobson failed to prove the grounds warranting modification of the decree and failed to prove the grounds for contempt. **OPINION HOLDS:** The district court correctly concluded there had been a substantial and material change in circumstances and that Jeffrey would be able to minister more effectively to the needs of the child and a change in physical care is in the child's best interest. We conclude the district court erred in finding contempt on three of the four challenged claims. We vacate those contempt citations and remand the matter for a redetermination of the attorney fee award in light of this decision.

No. 17-1044

STATE v. KEITH

AFFIRMED.

Appeal from the Iowa District Court for Bremer County, Christopher C. Foy, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (6 pages)

Thomas Keith appeals from his conviction for operating while intoxicated, third offense, a class "D" felony, in violation of Iowa Code section 321J.2 (2016). Keith maintains the district court erred in denying his motion to suppress on the basis there was no probable cause or reasonable suspicion for the traffic stop. **OPINION HOLDS:** On our review of the facts in this case, we find there was reasonable suspicion justifying the traffic stop and affirm the district court's denial of the motion to suppress.

No. 17-1224

IN RE MARRIAGE OF WHITE

APPEAL DISMISSED.

Appeal from the Iowa District Court for Linn County, Kevin McKeever, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (9 pages)

A husband appealed the economic provisions of a dissolution decree but died while the appeal was pending. Following the husband's death, this court issued an order staying the proceedings and directing his estate or legal representative to file an appearance and move for party substitution within thirty days. The husband's attorney moved to withdraw, stating he does not believe an estate will be opened or legal representative appointed. The wife requests that we decide the case without substitution or substitute the proper party *sua sponte*. **OPINION HOLDS:** We grant the husband's attorney's motion to withdraw and conclude this appeal should be dismissed because (1) the issues have been rendered moot by the husband's death and lack of a representative to pursue his interests, (2) no party has moved for substitution as is required by Iowa Code section 625A.17 (2017) and the Iowa Court Rules, (3) the parties failed to timely comply with this court's order requiring substitution, and (4) the wife has not cross-appealed and only asks us to affirm. Because we are dismissing the appeal, we decline to grant the wife an award of appellate attorney fees.

No. 17-1316

BROWN v. BROWN

APPEAL DISMISSED.

Appeal from the Iowa District Court for Pottawattamie County, Richard H. Davidson, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (4 pages)

Shannon Brown appeals a protective order barring contact with his wife. Brown argues there was insufficient evidence justifying the finding of domestic abuse. **OPINION HOLDS:** Because the protective order was previously dismissed, the issue is moot and the appeal should be dismissed.

No. 17-1533

STATE v. MCKIBBON

AFFIRMED.

Appeal from the Iowa District Court for Dallas County, Virginia Cobb, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (6 pages)

Matthew McKibbon appeals from his guilty plea to assault causing bodily injury. He asserts his trial counsel was ineffective in permitting him to (1) plead guilty when there was an insufficient factual basis for his guilty plea and (2) waive a verbatim record of the plea and sentencing proceedings, thus precluding any potential challenge of his guilty plea. **OPINION HOLDS:** Because the written plea agreement and minutes of evidence establish a factual basis, and McKibbon waived the right to a verbatim record, we affirm.

No. 18-0085

IN RE S.M.

AFFIRMED.

Appeal from the Iowa District Court for Johnson County, Deborah Farmer Minot, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (5 pages)

A father appeals the juvenile court order terminating his parental rights. **OPINION HOLDS:** We find there is clear and convincing evidence in the record to support termination of the father's parental rights and termination is in the child's best interests. We affirm the decision of the juvenile court.

No. 18-0090

IN RE J.C.

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty,

AFFIRMED.

Associate Juvenile Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (9 pages)

A mother appeals from the termination of her parental rights to her child, J.C., pursuant to Iowa Code section 232.116(1)(h) (2017). The mother asserts the juvenile court should have placed J.C. in a guardianship with the mother's former step-mother, A.C., instead of terminating the mother's parental rights. The mother maintains termination of her parental rights to J.C. is not in J.C.'s best interests and exceptions apply to preclude the need for termination. **OPINION HOLDS:** Because the mother was granted additional time to seek reunification with J.C. and was not able to resume care of the child, we conclude termination of the mother's parental rights is in J.C.'s best interests and affirm.

No. 18-0091

IN RE L.G.

AFFIRMED ON BOTH APPEALS.

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty, Associate Juvenile Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (6 pages)

A mother and father separately appeal the juvenile court decision terminating their parental rights. **OPINION HOLDS:** We find there was sufficient evidence to terminate parental rights, the juvenile court properly declined to apply exceptions to termination, and termination is in the best interests of the child.

No. 18-0162

IN RE K.F.

AFFIRMED ON BOTH APPEALS.

Appeal from the Iowa District Court for Polk County, Louise M. Jacobs, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (8 pages)

A mother appeals the termination of her parental rights in her three children. She challenges the statutory basis for termination and claims termination is not in the children's best interests due to their strong bond with her. The father of two of the children separately appeals arguing termination of his parental rights is not in the children's best interests and unnecessary because a guardianship with the paternal grandmother could be established. **OPINION HOLDS:** Given the mother's limited progress with her mental-health and substance-abuse issues, the children could not be returned to her care. And the children's best interests are supported through termination of the mother's parental rights. Likewise, the children's best interests are served by the termination of the father's parental rights. And the father did not establish that a family placement should preclude termination.

No. 18-0163

IN RE J.M.

AFFIRMED.

Appeal from the Iowa District Court for Marion County, Steven W. Guiter, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (8 pages)

A father appeals from an order terminating his parental rights in his four children. He contends the State failed to prove the statutory grounds authorizing the termination of his parental rights, the district court should have granted him six months' additional time to reunify with the children, and the strength of the parent-child bond warrants perseverance of the parent-child relationship. **OPINION HOLDS:** Finding these claims unavailing, we affirm the order of the juvenile court in all respects.

No. 18-0218

IN RE P.K.

Appeal from the Iowa District Court for Pottawattamie County, Craig M.

AFFIRMED.

Dreismeier, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (6 pages)

A mother appeals the termination of her parental rights to her children, asserting the State failed to prove the grounds for termination and the court should not have found termination is in the best interests of the children. **OPINION HOLDS:** Because of the uncertainty surrounding the mother's pending criminal charges, her lack of compliance with offered services, the resulting risk of adjudicatory harm to the children, the children's need for stability and permanency, and the lack of factors precluding termination, we affirm the termination of the mother's parental rights.

No. 18-0220

IN RE E.S.

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Joseph W. Seidlin, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (5 pages)

A mother appeals the termination of her parental rights to her child, born in 2017. She contends (1) the record lacks clear and convincing evidence to support the grounds for termination cited by the district court, (2) termination was not in the child's best interests, and (3) the "relative exception" should apply. **OPINION HOLDS:** (1) The State proved termination was warranted under section 232.116(1)(h) (2017). (2) Termination was in the child's best interests. (3) The mother failed to satisfy her burden to establish an exception to termination under section 232.116(3)(a). We affirm the termination of the mother's parental rights to her child.

No. 18-0232

IN RE K.A.

AFFIRMED.

Appeal from the Iowa District Court for Webster County, Angela L. Doyle, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (11 pages)

A father appeals the termination of his parental rights to his child. **OPINION HOLDS:** We find there are grounds for termination of the father's parental rights pursuant to section 232.116(1)(h) (2017), termination is in the child's best interests, and no section 232.116(3) exception precludes the need for termination. Because of the father's lack of progress in this case, an extension of time is unwarranted and contrary to the child's best interests. Therefore, we affirm the termination of the father's parental rights.