

SUMMARIES OF DECISIONS, IOWA COURT OF APPEALS
January 10, 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Pursuant to Iowa Rule of Appellate Procedure 6.904(2)(6), an unpublished opinion of the Iowa Court of Appeals may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority.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. 16-0800

HOPKINS v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Cerro Gordo County, DeDra L. Schroeder, Judge, and Annette L. Boehlje, District Associate Judge. Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ. Opinion by Vaitheswaran, P.J. (6 pages)

Anthony Hopkins appeals the dismissal of his first postconviction-relief application. Hopkins contends his plea attorney was ineffective in (A) failing to ensure he understood the plea agreement and the effect of entering a guilty plea, (B) failing to pursue or investigate a potential claim of self-defense, (C) failing to object to an incorrect criminal history in a presentence investigation report and a comment in the criminal history report, and (D) failing to request recusal of the sentencing judge. He also contends his postconviction-relief attorney was ineffective in failing to address his self-defense claim by deposing the person he injured and calling that person as a witness at the postconviction trial. **OPINION HOLDS:** All of Hopkins' ineffective assistance claims fail. We affirm the denial of Hopkins' postconviction-relief application.

No. 16-1345

RYAN v. BELIN MCCORMICK, P.C.

DECISION VACATED.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille and Donna L. Paulsen, Judges. Heard by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Bower, J. (10 pages)

Belin McCormick, P.C., a law firm, appeals a declaratory judgment concerning the extent of its attorney-client relationship with Michael Ryan and Ryan Data Exchange, Ltd., doing business as Rydex, Ltd. **OPINION HOLDS:** We find the district court improperly determined Rydex and Seneca Distribution, L.C. were involved in a joint venture. We find there is no longer a justiciable controversy concerning the nature, scope, and extent of the attorney-client relationship between Belin and Rydex. We vacate the decision of the district court.

No. 16-1350

STATE v. NINO HERNANDEZ

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Paul D. Scott, Judge. Considered by Danilson, C.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (10 pages)

After hearing testimony that Juan Carlos Nino Hernandez rammed his red Chevy Silverado truck into a police Crown Victoria parked at a convenience store, a jury convicted him of criminal mischief in the first degree, in violation of Iowa Code sections 716.1 and 716.3 (2016). On appeal, Nino Hernandez challenges the sufficiency of the State's proof that the cost of replacing, repairing, or restoring the patrol car exceeded \$10,000. He also contends his conviction violated due process because the language in section 716.3 is ambiguous and the rule of lenity requires the statute be construed in his favor. **OPINION HOLDS:** Because Nino Hernandez did not assert a due process violation at the earliest opportunity or secure a district court ruling, that claim is not preserved for our review. Because the State presented substantial evidence to prove the cost of repairing the patrol car would have been more than \$29,000, we affirm his conviction for criminal

mischief in the first degree.

No. 16-1437

GREEN v. CITY OF FORT DODGE

AFFIRMED.

Appeal from the Iowa District Court for Webster County, Kurt J. Stoebe, Judge. Heard by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (18 pages)

Alevia Green appeals from the district court's denial of the motion for new trial and apportionment of court costs. Green maintains a new trial should be granted because post-verdict evidence establishes jury confusion as to damages. Green contends she is entitled to a new trial on the basis the verdict is inadequate as to damages and is not supported by sufficient evidence and does not render substantial justice as to damages and the allocation of fault. Green also asserts the trial court abused its discretion in apportioning costs equally between both parties. **OPINION HOLDS:** Upon careful review of the evidence, we find the trial court did not err or abuse its discretion in denying the motion for new trial. We also find the court acted within its discretion in assessing costs equally between the parties. We therefore affirm.

No. 16-1442

SMITH v. CITY OF PLEASANT HILL

**AFFIRMED AND
REMANDED.**

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge. Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Vaitheswaran, P.J. (6 pages)

The City of Pleasant Hill appeals a \$200,000 jury verdict in this eminent domain condemnation case. **OPINION HOLDS:** The City failed to preserve error on its challenge to the sufficiency of the evidence supporting the jury's damage award. We affirm and remand for consideration of Smith's request for appellate attorney fees.

No. 16-1447

JOHNSON v. MENTAL HEALTH INSTITUTE

AFFIRMED.

Appeal from the Iowa District Court for Buchanan County, Michael J. Shubbatt, Judge. Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Potterfield, J. Special Concurrence by McDonald, J. (21 pages)

Antoinette Johnson appeals the district court's dismissal on summary judgment for her claims of discrimination and retaliation against her employer, the Mental Health Institute (MHI). Johnson maintains the district court erred in its determination that she could not establish a prima facie case for discrimination because she could not prove she was performing her work satisfactorily at the time she was fired. Regarding her claim for retaliation, Johnson maintains the district court erred when it ruled she could not prove a causal connection between her complaints about being discriminated against and harassed and MHI's decision to fire her. **OPINION HOLDS:** Finding no error in the district court's grant of summary judgment in favor of MHI and the resulting dismissal of Johnson's claim, we affirm. **SPECIAL CONCURRENCE ASSERTS:** I concur in the rationale and judgment of the panel opinion but write separately to address two additional issues. First, I would affirm the district court because Johnson failed to establish any circumstances surrounding her termination that permit an inference of discrimination. Additionally, Johnson's conduct did not constitute the protected activity needed to establish her retaliation claim. I would affirm the judgment of the district court on this claim for these reasons as well as the reasons set forth in the panel opinion.

No. 16-1454

HYTEN v. HNI CORPORATION

Appeal from the Iowa District Court for Muscatine County, Nancy S.

AFFIRMED.

Tabor, Judge. Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Tabor, J., takes no part. Opinion by McDonald, J. (8 pages)

Christina Hyten appeals from an adverse jury verdict challenging several evidentiary rulings. She argues she should have been allowed to present evidence on the delay in receipt of workers' compensation benefits, the safety of her work assignment following her date of injury, and the company's waiver of a notice defense in the underlying workers' compensation proceeding. **OPINION HOLDS:** Under our highly deferential review, we conclude the district court did not abuse its discretion in excluding this evidence. The evidence had limited relevance, any probative value was substantially outweighed by Iowa Rule of Evidence 5.403 considerations, and Hyten failed to demonstrate her substantial rights were affected by the exclusion of any of the evidence.

No. 16-1575

BYRD v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Mary E. Chicchelly, Judge. Considered by Vaitheswaran, P.J., McDonald, J., and Goodhue, S.J. Opinion by Goodhue, S.J. Special Concurrence by McDonald, J. (8 pages)

Brandy Byrd appeals the denial of her application for postconviction relief. **OPINION HOLDS: I.** The restitution order is not excessive because it bears a reasonable relationship to the crime committed. **II.** The statute of limitations bars Byrd's attack on the jury instructions. **III.** Byrd's claim that an aider and abettor cannot receive punishment in excess of the principle is without merit. **SPECIAL CONCURRENCE ASSERTS:** I would conclude the specific claims asserted here are barred by Iowa Code sections 822.3 and 822.8 (2011).

No. 16-1577

WEINMAN v. CITY OF NORTH LIBERTY

APPEAL DISMISSED.

Appeal from the Iowa District Court for Johnson County, Sean W. McPartland, Judge. Heard by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (8 pages)

A landowner challenges the authority of the city of North Liberty to take a sanitary sewer easement over his property by eminent domain. **OPINION HOLDS:** Because the landowner accepted "just compensation" for the taking and the sewer line is completed, we dismiss his appeal as moot.

No. 16-1590

STATE v. JANES

AFFIRMED.

Appeal from the Iowa District Court for Boone County, Paul G. Crawford, District Associate Judge. Considered by Vaitheswaran, P.J., Potterfield, J., and Mahan, S.J. Opinion by Mahan, S.J. (11 pages)

Derrick Janes appeals from the judgment and sentence imposed upon his conviction for child endangerment, in violation of Iowa Code section 726.6(1)(a) (2016). He contends there is insufficient evidence that he acted with knowledge that he was creating a substantial risk to the child's health or safety. Janes also asserts the court abused its discretion in denying his motion for mistrial due to prosecutorial misconduct, his trial counsel was ineffective, and the court abused its discretion in considering improper factors in sentencing him. **OPINION HOLDS:** Finding no error or abuse of discretion, we affirm.

No. 16-1758

STATE v. FISHER

AFFIRMED.

Appeal from the Iowa District Court for Boone County, Timothy J. Finn, Judge. Heard by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Vogel, P.J. (9 pages)

Following a jury trial, Kohl Fisher appeals his convictions for conspiracy to manufacture, deliver, or possess with intent to deliver methamphetamine and possession with intent to deliver. He asserts on appeal the district court should have granted his motion to suppress evidence because the search of his vehicle was conducted at the request of his parole officer and violated his constitutional rights. **OPINION HOLDS:** Because we conclude the search was legally conducted under the automobile exception to the warrant requirement, we affirm the district court's denial of Fisher's motion to suppress and affirm his convictions and sentence.

No. 16-1902

IOWA ASS'N OF ORIENTAL MED. & ACUPUNCTURE v. IOWA BD. OF PHYSICAL AND OCCUPATIONAL THERAPY

AFFIRMED.

Appeal from the Iowa District Court for Polk County, David M. Porter, Judge. Heard by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Mullins, J. (9 pages)

The Iowa Association of Oriental Medicine and Acupuncture (Association) appeals a district court ruling on its petition for judicial review following a declaratory order by the Iowa Board of Physical and Occupational Therapy (Board). The Association contends the Board's determination is an irrational, illogical, or wholly unjustifiable interpretation of Iowa Code section 148A.1(1)(b) (2015). **OPINION HOLDS:** In granting deference to the Board, we conclude its determination was not an irrational, illogical, or wholly unjustifiable interpretation of the statute. We therefore affirm the district court's denial and dismissal of the Association's petition for judicial review of the Board's declaratory order.

No. 16-1925

STATE v. SAHIR

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge. Considered by Potterfield, P.J., McDonald, J., and Blane, S.J. Opinion by Blane, S.J. (8 pages)

A defendant appeals his convictions for sexual abuse in the third degree and assault with intent to commit sexual abuse. He argues the convictions were contrary to the weight of the evidence and his trial counsel was ineffective. **OPINION HOLDS:** The convictions were not contrary to the weight of the evidence. Trial counsel was not ineffective in failing to challenge the sufficiency of the evidence to convict the defendant because there was sufficient evidence to convict him. Trial counsel was not ineffective in failing to make certain evidentiary challenges. We preserve for possible postconviction relief an argument related to trial counsel's failure to present reputation or opinion evidence as to the victim.

No. 16-1943

BITZAN v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Monona County, Duane E. Hoffmeyer, Judge. Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ. Opinion by Vaitheswaran, P.J. (13 pages)

Mark Bitzan appeals the denial of his application for postconviction relief, raising a number of ineffective-assistance-of-counsel claims and a claim of prosecutorial misconduct. **OPINION HOLDS:** We find Bitzan's ineffective assistance claims are unpersuasive, and we further conclude Bitzan cannot establish cumulative error warranting a new trial. The postconviction court did not rule on any independent prosecutorial misconduct claims; accordingly, we have nothing to review. We affirm the denial of Bitzan's postconviction relief application.

No. 16-2047

STANLEY v. EMPLOYMENT APPEAL BOARD

Appeal from the Iowa District Court for Polk County, Lawrence P.

AFFIRMED.

McLellan, Judge. Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by McDonald, J. (8 pages)

An employee appeals from a district court's decision granting unemployment insurance benefits. **OPINION HOLDS:** Because the employee is eligible for unemployment insurance benefits based on his earnings record, he is unable to substitute more lucrative periods of employment from which to determine his unemployment benefits. We therefore affirm.

No. 16-2048

STATE v. KRAMER

AFFIRMED.

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge. Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Potterfield, J. Special Concurrence by McDonald, J. (26 pages)

Jeromie Kramer appeals from his convictions for sexual abuse in the third degree and lascivious acts with a child. He raises a number of arguments on appeal, specifically: 1) an actual conflict of interest with the victim's guardian ad litem resulted in an unfair trial, (2) the State did not present sufficient evidence of either "touching" or any "sex act," (3) the trial court's written findings included an incorrect statement that the victim had no inconsistencies in her story and no motive to fabricate allegations, (4) the trial court's decision not to afford weight to pages from the victim's journal was clear error; (5) the trial court erred by granting the guardian ad litem's motion for a protective order preventing him from taking the victim's deposition again after the trial information was amended to add felony charges, and (6) the trial court erred by admitting parts of the victim's deposition into evidence as prior consistent statements. **OPINION HOLDS:** Having considered each of Kramer's claims and finding no reversible error, we affirm his convictions. **SPECIAL CONCURRENCE ASSERTS:** Kramer has not presented a viable conflict-of-interest claim, and the district court did not abuse its discretion in denying his motion for new trial.

No. 16-2050

STATE v. DUNNE

AFFIRMED.

Appeal from the Iowa District Court for Lee (South) County, Mary Ann Brown, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (6 pages)

A defendant received a deferred judgment after pleading guilty to theft in the first degree. Then he violated the terms of his probation, resulting in the imposition of judgment and sentence. On appeal, he argues his attorney provided ineffective assistance by failing to file a motion in arrest of judgment to challenge both the factual basis for the guilty plea and the court's failure to inform him of the consequences should he fail to comply with the terms of the deferred judgment. **OPINION HOLDS:** Finding no breach of duty, we affirm.

No. 16-2073

IN RE A.M.

AFFIRMED.

Appeal from the Iowa District Court for Bremer County, Christopher C. Foy, Judge. Heard by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (15 pages)

A.M. appeals the district court's refusal to restore his firearm rights under Iowa Code section 724.31 (2016). **OPINION HOLDS:** After reviewing the available record, we reach the same conclusion as the district court—A.M. did not present sufficient evidence to show he would not be likely to act in a manner dangerous to public safety. Accordingly, we affirm.

No. 16-2074

STATE v. KOBOLD

AFFIRMED.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge. Considered by Danilson, C.J., Mullins, J., and Goodhue, S.J. Opinion by Goodhue, S.J. (2 pages)

Joshua Kobold appeals his conviction for sexual abuse in the second degree. **OPINION HOLDS:** The current record is not adequate for us to address Kobold's claims of ineffective assistance of counsel. We preserve his claims for a possible postconviction-relief action.

No. 16-2108

STATE v. MARCH

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge. Considered by Vaitheswaran, P.J., McDonald, J., and Goodhue, S.J. Opinion by Goodhue, S.J. (4 pages)

Keith March appeals the sentences imposed on his convictions for operating while under the influence and driving while barred. **OPINION HOLDS:** The sentencing court set out its reasons and did not abuse its discretion in sentencing March. Because placement determinations are the function and discretion of the Iowa Department of Corrections, the court did not err in failing to include March's placement in the Operating While Under the Influence Continuum Program in the written sentencing order.

No. 16-2117

IN RE C.B.

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Joseph W. Seidlin, District Associate Judge. Considered by Danilson, C.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (15 pages)

A juvenile appeals his adjudication as a delinquent for sexual abuse in the second degree. The juvenile argues enforcement of statutory rape statutes against him violated his right to due process, the statutes are void for vagueness as applied to him, and he was denied his right to a jury trial. **OPINION HOLDS:** The juvenile did not show a violation of his procedural due process rights. The statutes are not void for vagueness because they provided him with fair notice of what conduct the statute prohibited and were not arbitrarily enforced against him. He was not entitled to a jury trial for a juvenile delinquency adjudication.

No. 16-2142

BLOBAUM v. CITY OF STRAWBERRY POINT

AFFIRMED.

Appeal from the Iowa District Court for Clayton County, David P. Odekirk, Judge. Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Vaitheswaran, P.J. (6 pages)

Property owners appeal special assessments levied by the City of Strawberry Point. **OPINION HOLDS:** We conclude the property owners did not overcome the presumption that the City assessments were correct and consistent with the special benefit received from the improvement. We affirm the district court judgment in favor of the City.

No. 16-2174

STATE v. NULL

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge. Heard by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Doyle, J. (10 pages)

Denem Null appeals following a second resentencing for crimes he committed as a juvenile. **OPINION HOLDS: A.** The overall record here is sufficient to allow us to review the court's exercise of discretion in imposing consecutive sentences. Null's immediate eligibility parole comports with

constitutional requirements. The district court did not abuse its discretion in imposing consecutive sentences. **B.** Null failed to preserve error on his claim that Iowa Code section 902.4 (2009) is unconstitutional as applied to the facts and circumstances of his case.

No. 16-2178

STATE v. HENSLEY

AFFIRMED.

Appeal from the Iowa District Court for Polk County, William P. Kelly, Judge. Considered by Doyle, P.J., Mullins, J., and Scott, S.J. Opinion by Scott, S.J. (10 pages)

Brett Hensley appeals the district court's denial of his motion for credit for days he spent at the Bridges of Iowa program against his sentence of incarceration pursuant to Iowa Code sections 903A.5(1) or 907.3(3) (2016). The State asserts the district court correctly denied the credit. **OPINION HOLDS:** We conclude section 903A.5(1) is inapplicable to Hensley's stay at Bridges because it occurred after sentencing. We likewise conclude Hensley is not entitled to a credit under section 907.3(3) because Hensley has failed to prove the Bridges program is "an alternate jail facility" or a "community correctional residential treatment facility." We therefore affirm the district court's order denying Hensley credit for time served at Bridges.

No. 17-0006

STATE v. JONES

AFFIRMED.

Appeal from the Iowa District Court for Madison County, Richard B. Clogg, Judge. Considered by Tabor, P.J., Bower, J., and Scott, S.J. Opinion by Scott, S.J. (7 pages)

Following a bench trial, Brett Jones appeals his conviction for operating while intoxicated, second offense. He asserts on appeal the district court should have granted his motion to suppress the breath test results because implied consent, outlined in Iowa Code section 321J.6(1) (2016), was improperly invoked. **OPINION HOLDS:** Because we conclude Jones communicated his refusal of the preliminary breath test by his actions and silence, the deputy sheriff properly invoked implied consent, and the district court correctly denied Jones's motion to suppress.

No. 17-0007

LINN v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Muscatine County, Nancy S. Tabor, Judge. Considered by Potterfield, P.J., Mullins, J., and Carr, S.J. Tabor, J., takes no part. Opinion by Carr, S.J. (10 pages)

Cathryn Linn appeals the district court's order granting summary judgment on her application for postconviction relief (PCR) following her 2007 conviction for first-degree murder, claiming evidence of battered women's syndrome should have been introduced by trial counsel and admitted by the district court to bolster her justification defense. Linn also raises a claim of ineffective assistance of PCR counsel. **OPINION HOLDS:** Upon consideration of the issues raised on appeal, we affirm the district court's order granting summary judgment on Linn's PCR application.

No. 17-0032

DIETZ v. MCDONALD

AFFIRMED.

Appeal from the Iowa District Court for Chickasaw County, Margaret L. Lingreen, Judge. Heard by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (14 pages)

A mother appeals the modification of a decree of custody, visitation, and support. **OPINION HOLDS:** Because there has been frequent contempt litigation

between the parties, continual tension between the parents, a visitation schedule that was not working as expected, and a medical diagnosis of learning disabilities since the last modification, we find there has been a substantial change of circumstances. We also conclude the father has met his burden to establish he can provide superior care by more effectively providing for the child's long-term needs. We therefore affirm the modification of physical care.

No. 17-0151

SKADBURG v. GATELY

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Cerro Gordo County, Rustin T. Davenport, Judge. Considered by Danilson, C.J., and Tabor and McDonald, JJ. Opinion by Danilson, C.J. Dissent by McDonald, J. (17 pages)

Michelle Skadburg appeals from summary judgment granted to the defendants in this legal-malpractice action. **OPINION HOLDS:** We conclude there remains a genuine issue of material fact as to when Skadburg knew of the cause of action and, thus, when the statute of limitations on this action began to run. Summary judgment should not have been granted, and we reverse and remand. **DISSENT ASSERTS:** I respectfully dissent. Skadburg's claim is barred by the statute of limitations. The discovery rule does not allow Skadburg to circumvent this bar. Skadburg had actual and inquiry notice of her cause of action more than five years prior to filing as shown by her email exchanges with her then counsel. I would affirm the district court's grant of summary judgment.

No. 17-0188

IN RE MARRIAGE OF FIRESTONE

**AFFIRMED AS
MODIFIED ON BOTH
APPEALS.**

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge. Considered by Vaitheswaran, P.J., Potterfield, J., and Carr, S.J. Opinion by Carr, S.J. (8 pages)

Diego Firestone appeals from the decree dissolving his marriage to Diana Vasquez Firestone, challenging the property distribution ordered by the district court as inequitable. Diana cross-appeals, requesting reimbursement spousal support, attorney fees, and to revert to her former last name. We affirm as modified on both appeals. **OPINION HOLDS:** Upon our review of the issues raised on appeal, we affirm the dissolution decree entered by the district court and modify the decree to (1) order Diana to make an equalization payment to Diego in the amount of \$7500 rather than \$4000 and (2) provide for the restoration of Diana's name to Diana Vasquez. We decline to award appellate attorney fees. Costs on appeal are assessed equally to the parties.

No. 17-0278

STATE v. HELLBERG

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Decatur County, Sherman W. Phipps, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (7 pages)

Kristina Hellberg challenges her written guilty plea. She argues her plea was defective because it did not include an advisory regarding possible immigration consequences. **OPINION HOLDS:** Because the written plea did not inform Hellberg of possible immigration consequences and the record is silent on her citizenship status, the district court failed to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b). No showing of prejudice is required on direct appeal and reversal and remand to the district court is necessary.

No. 17-0279

STATE v. IHLENFELDT

**JUDGMENT OF
CONVICTION**

Appeal from the Iowa District Court for Bremer County, Christopher C. Foy, Judge. Considered by Potterfield, P.J., McDonald, J., and Carr, S.J. Opinion by Potterfield, P.J. (6 pages)

**AFFIRMED; SENTENCE
VACATED AND
REMANDED FOR
RESENTENCING.**

Nicholas Ihlenfeldt appeals the judgment and sentence imposed upon him for third-degree sexual abuse. He claims the district court erred in revoking his deferred judgment and failing to comply with Iowa Rule of Criminal Procedure 2.23 in imposing a sentence. **OPINION HOLDS:** We affirm the district court's revocation of deferred judgment but vacate Ihlenfeldt's sentence and remand for resentencing.

No. 17-0373

COLEMAN v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Stuart P. Werling, Judge. Considered by Danilson, C.J., Mullins, J., and Goodhue, S.J.* Opinion by Mullins, J. (4 pages)

Brandy Coleman appeals the district court's denial of her postconviction-relief (PCR) application. She contends the district court erred in denying her application because the indeterminate fifty-year prison sentence entered upon her conviction amounts to cruel and unusual punishment in violation of the United States and Iowa Constitutions. **OPINION HOLDS:** In light of our supreme court's controlling precedent on the issue, we affirm the district court's denial of Coleman's PCR application.

No. 17-0375

**WOODHURST v. DRIFTWOOD, INCORPORATED, a Corporation, d/b/a
DRIFTWOOD BAR AND GRILL**

AFFIRMED.

Appeal from the Iowa District Court for Jackson County, Nancy S. Tabor, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Tabor, J., takes no part. Opinion by Doyle, J. (8 pages)

Sheldon and Carla Woodhurst appeal the order granting summary judgment in favor of the Driftwood Bar and Grill (Driftwood) on their dramshop-liability claim, which stems from injuries sustained when David Zabransky—who had been served liquor at the Driftwood—shot Sheldon Woodhurst while intoxicated. **OPINION HOLDS:** Viewing the facts in the light most favorable to the Woodhursts, we agree the Woodhursts failed to generate a fact question as to whether the Driftwood knew or should have known that Zabransky was or would become intoxicated at the time it served him liquor. The “subsequent intoxicated condition inference” is not warranted on the facts before us.

No. 17-0389

SPENCER CONVENIENT HEALTHCARE, L.L.C. v. MCGREGOR

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

Appeal from the Iowa District Court for Dickinson County, David A. Lester, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Mullins, J. (14 pages)

Spencer Convenient Healthcare, L.L.C. (SCH) appeals a district court ruling denying its petition for an injunction and awarding Angela McGregor damages on her counterclaim for breach of contract. SCH contends the district court erred in (1) concluding it breached the employment contract in terminating McGregor's employment rather than finding McGregor breached the contract; (2) interpreting the student loan repayment provision of the employment contract; and (3) awarding damages that were not foreseeable. McGregor requests an award of appellate attorney fees. **OPINION HOLDS:** We affirm the district court's (1) determination that SCH breached a material provision of the employment contract by terminating McGregor's employment and, accordingly, that the non-compete clause is unenforceable against her and (2) interpretation and application of the student-loan-repayment provision of the employment contract. We conclude, although McGregor's decision to incur tax and early-withdrawal penalties flowed directly from SCH's breach, such penalties could not have been

reasonably anticipated by the parties when the contract was formed. As such, we vacate the portion of the damage award relating to the tax and early-withdrawal penalties and remand the case to the district court to enter judgment consistent with our decision. We deny McGregor's request for an award of appellate attorney fees.

No. 17-0434

MCCULLOUGH v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Humboldt County, Kurt J. Stoebe, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Mullins, J. (2 pages)

David McCullough requests that we apply the doctrine of equitable tolling to exempt him from the three-year statutory time bar contained in Iowa Code section 822.3 (2016). **OPINION HOLDS:** We repeat our position that the doctrine of equitable tolling does not apply to section 822.3 and affirm the ruling of the district court without further opinion pursuant to Iowa Court Rule 21.26(1)(a), (c), and (e).

No. 17-0558

DZANIC v. DEERFIELD RETIREMENT COMMUNITY

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Jeffrey D. Farrell, Judge. Considered by Vogel, P.J., Tabor, J., and Goodhue, S.J. Opinion by Vogel, P.J. (3 pages)

Sabaheta Dzanic claims Deerfield breached the parties' comprehensive settlement agreement because it did not produce her full personnel file. **OPINION HOLDS:** Because a "full and complete" copy of the personnel file had been given to Dzanic and Dzanic had the opportunity to review the file before she signed the settlement agreement, there is substantial evidence Deerfield did not breach the settlement agreement, and we affirm.

No. 17-0591

KOHL v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Clinton County, Marlita A. Greve, Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Potterfield, J. (4 pages)

Kenneth Kohl appeals the denial of his application for postconviction relief filed after his 2013 resentencing. Kohl argues double jeopardy prevents the district court from amending his sentence to reflect Iowa Code section 901A.2's special sentence for sex offenses because he had already served part of his prison term. **OPINION HOLDS:** We affirm the district court's denial of his application for postconviction relief.

No. 17-0596

STATE v. CHAIRSE

AFFIRMED.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Potterfield, J. (5 pages)

Cleotha Chairse appeals his sentence following a guilty plea to driving while barred. Chairse claims the district court abused its discretion in failing to consider mitigating factors and ordering his sentence to run consecutively to another two-year sentence of incarceration previously imposed instead of concurrently. **OPINION HOLDS:** We find the district court did not abuse its discretion and affirm the sentence imposed.

No. 17-0602

STATE v. HUSS

Appeal from the Iowa District Court for Lee (North) County, Michael J.

AFFIRMED.

Schilling, Judge. Considered by Tabor, P.J., Bower, J., and Blane, S.J. Opinion by Tabor, P.J. (4 pages)

John Huss challenges the sentences imposed after he pleaded guilty to two counts of assault while displaying a dangerous weapon. Huss argues the sentencing court abused its discretion by sentencing him to two consecutive indeterminate two-year terms of imprisonment rather than imposing suspended sentences. **OPINION HOLDS:** Because the sentences fall within the statutory limits and the sentencing court considered relevant factors, it did not abuse its discretion by denying Huss's request for suspended sentences.

No. 17-0605

STATE v. LIZARDE

AFFIRMED.

Appeal from the Iowa District Court for Marshall County, Kim M. Riley, District Associate Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Bower, J. (5 pages)

Juan Lizarde appeals his conviction for operating a motor vehicle without the owner's consent. **OPINION HOLDS:** Lizarde claimed he received ineffective assistance of counsel during his guilty plea proceeding. He does not, however, allege he would not have pleaded guilty and would have insisted on going to trial if not for counsel's alleged errors. We conclude Lizarde's claim of ineffective assistance should be preserved for possible postconviction proceedings. We affirm his conviction.

No. 17-0656

JENSEN v. CHAMPION WINDOW

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Paul D. Scott, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Vogel, P.J. (7 pages)

Randle Jensen was fired from his job with Champion Window of Omaha, L.L.C., in August 2013. In February 2016, he filed a lawsuit against Champion in Iowa alleging he was wrongfully discharged when he refused to sign a lead certification form for an Iowa construction project. Champion filed a motion to dismiss the claim, which the district court granted based on the court's conclusion that Nebraska law applied to the dispute. Jensen appeals claiming the court erred in applying Nebraska law and that Iowa law should be applicable to his claim. **OPINION HOLDS:** Because we conclude the district court correctly applied Nebraska law to this dispute, we affirm the district court's dismissal of Jensen's lawsuit.

No. 17-0659

STATE v. PIERCE

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve and Joel W. Barrows, Judges. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (10 pages)

Jordan Pierce received a deferred judgment after pleading guilty to first-degree theft and assault resulting in bodily injury. After Pierce violated the terms of his probation, the district court revoked his deferred judgment and imposed sentence. On appeal, Pierce argues the district court failed to give sufficient reasoning for revoking the deferred judgment and imposing a prison sentence, failed to consider mitigating circumstances, and denied his right to allocution. He also claims his counsel was ineffective for failing to object to the State's alleged breach of the plea agreement. **OPINION HOLDS:** The district court gave sufficient reasoning supporting revocation of the deferred judgment, considered Pierce's mitigating circumstances, and provided Pierce an opportunity to speak before sentencing. Because the State did not breach the plea

agreement, Pierce's counsel was not ineffective in failing to object.

No. 17-0742

ORRIS v. COLLEGE COMMUNITY SCHOOL DISTRICT

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Mitchell E. Turner, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Mullins, J. (10 pages)

April Orris appeals a district court ruling on her petition for judicial review of a determination of the workers' compensation commissioner. She contends the district court erred in finding substantial evidence supported the commissioner's rejection of an uncontroverted expert opinion regarding the causation of her worsened condition. **OPINION HOLDS:** We agree with the district court that the agency's causation finding is sufficiently supported by substantial evidence in the record and should not be disturbed on judicial review. We therefore affirm the district court's denial of Orris's petition for judicial review.

No. 17-0754

STATE v. ANDERSON

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Potterfield, J. (5 pages)

Abby Anderson appeals her sentence following a guilty plea to operating while intoxicated, first offense. Anderson claims the district court failed to exercise discretion in at first declining to delay mittimus because it has a policy of ordering immediate custody following sentencing when a defendant is sentenced to jail time. **OPINION HOLDS:** We find the district court properly exercised its discretion and affirm the sentence as imposed.

No. 17-0767

STATE v. GRAW

AFFIRMED.

Appeal from the Iowa District Court for Marshall County, James C. Ellefson, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Bower, J. (4 pages)

Richard Graw appeals his convictions and sentences for second-degree burglary, stalking while subject to a protective order, and tampering with a witness. **OPINION HOLDS:** We find the district court did not abuse its discretion by determining Graw should serve consecutive prison sentences. We affirm Graw's convictions and sentences.

No. 17-0910

GRAYSON v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Johnson County, Chad A. Kepros, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Doyle, J. (4 pages)

Edward Grayson appeals the dismissal of his application for postconviction relief. **OPINION HOLDS:** Because Grayson has failed to show his postconviction claim concerns newly discovered evidence, the district court properly dismissed Grayson's application as time barred. We have reviewed the remaining claims, including pro se claims, Grayson has raised on appeal and found that none merit granting Grayson relief. We have also reviewed Grayson's filings made after taking this appeal, and we find none have merit. We therefore deny the relief Grayson seeks in those filings.

No. 17-1602

IN RE J.D.

AFFIRMED.

Appeal from the Iowa District Court for Montgomery County, Amy L. Zacharias, District Associate Judge. Considered by Vogel, P.J., and Tabor and

Bower, JJ. Opinion by Bower, J. (5 pages)

A mother appeals the juvenile court order temporarily removing her children from her care. **OPINION HOLDS:** We find the children were properly removed pursuant to Iowa Code section 232.102(5)(a) (2017).

No. 17-1670

IN RE N.D.

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Susan Cox, District Associate Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Mullins, J. (8 pages)

A mother appeals a juvenile court order terminating her parental rights to her two children. She contends (1) the State failed to prove the statutory grounds for termination by clear and convincing evidence; (2) termination was not in the best interests of the children; and (3) a statutory exception should have precluded termination. **OPINION HOLDS:** In reviewing the issues properly before us, we affirm the termination of the mother's parental rights under Iowa Code section 232.116(1)(f) (2017).

No. 17-1682

IN RE I.W.

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Cheryl Traum, District Associate Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Bower, J. (4 pages)

A mother appeals the order terminating her parental rights. **OPINION HOLDS:** We find reasonable efforts were made by the State and termination is in the best interests of the child.

No. 17-1712

IN RE A.R.

AFFIRMED.

Appeal from the Iowa District Court for Pottawattamie County, Craig M. Dreismeier, District Associate Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Vaitheswaran, P.J. (4 pages)

A father appeals the termination of his parental rights to his twin children, born in 2016. He contends (1) the record lacks evidence to support the grounds for termination cited by the district court, (2) the department of human services failed to make reasonable reunification efforts, and (3) termination was not in the children's best interests. **OPINION HOLDS:** We affirm the termination of the father's parental rights.

No. 17-1720

IN RE S.F.

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Louise M. Jacobs, District Associate Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (7 pages)

The juvenile court decided six-year-old S.F. and three-year-old T.F. could not remain in the family home because their parents were failing to meet their nutritional, emotional, and medical needs and were not providing a safe and stable environment. Their father, Nicholas, appeals the removal on three grounds. First, he claims the juvenile court violated his right to due process by refusing to postpone the removal hearing so he could investigate claims made in a recently disclosed letter from S.F.'s pediatrician. Second, he claims removal was not the least restrictive disposition. Third, he asserts removal was not in the children's best interests. **OPINION HOLDS:** After reviewing the record, we conclude Nicholas did not preserve error on his constitutional claim. On the substance of the removal, we reach the same conclusion as the juvenile court—placing the

children outside the home is necessary to protect them from harm and serves their best interests.

No. 17-1731

IN RE L.S.

AFFIRMED.

Appeal from the Iowa District Court for Pottawattamie County, Craig M. Dreismeier, District Associate Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Vaitheswaran, P.J. (3 pages)

A father appeals the termination of his parental rights to his child, born in 2015. He (1) challenges the grounds for termination, (2) argues the State failed to make reasonable reunification efforts, and (3) contends termination was not in the child's best interests. **OPINION HOLDS:** We affirm the termination of the father's parental rights.

No. 17-1767

IN RE L.B.

AFFIRMED.

Appeal from the Iowa District Court for Crawford County, Mary L. Timko, Associate Juvenile Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (6 pages)

A mother appeals the termination of her parental rights to her child, L.B., pursuant to Iowa Code section 232.116(1)(h) (2017). The mother contests the juvenile court's finding the need for removal would still exist at the end of a six-month extension of time and the determination to terminate the mother's parental rights to L.B. The mother asserts the State failed to show reasonable efforts were made toward reunification. **OPINION HOLDS:** On our review of the record, we find there is clear and convincing evidence L.B. could not be safely returned to the mother's care and an additional six months will not alleviate the concerns to L.B.'s safety or the need for termination of the mother's parental rights. We therefore affirm.

No. 17-1796

IN RE A.J.

AFFIRMED.

Appeal from the Iowa District Court for Marion County, Steven W. Guiter, District Associate Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by McDonald, J. (7 pages)

A mother appeals the termination of her parental rights pursuant to Iowa Code section 232.116(1)(f). She contends the evidence supporting the ground for termination was insufficient and that termination was not in the best interest of her child. **OPINION HOLDS:** There was clear and convincing evidence to terminate the mother's parental rights pursuant to Iowa Code section 232.116(1)(f). We also find termination was in the best interest of the child and find no basis to exercise our discretion to preserve the parent-child relationship.