

SUMMARIES OF DECISIONS, IOWA COURT OF APPEALS
February 7, 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Pursuant to Iowa Rule of Appellate Procedure 6.904(2)(6), an unpublished opinion of the Iowa Court of Appeals may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority.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. 15-1766

ANDERSON v. ANDERSON TOOLING

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

Appeal from the Iowa District Court for Jefferson County, Myron L. Gookin, Judge. Heard by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (17 pages)

Appellants Jeffrey Anderson, his wife Lori Anderson, and their business Fabrication and Construction Services, Inc. ("FabCon") appeal adverse parts of the jury's verdicts found in favor of Anderson Tooling, Inc. ("ATI") and its owners, Dean and Carol Anderson. Appellants challenge several aspects of the jury's verdicts and the court's denial of their motion for a new trial, among other things. **OPINION HOLDS:** We find that the district court should not have amended and modified its judgment to provide judgment in favor of ATI against Lori and FabCon, both jointly and severally, and should not have taxed court costs to Lori and FabCon, jointly and severally. We therefore reverse the district court in that respect and remand for entry of an order consistent with this opinion. We affirm the district court in all other respects.

No. 16-0249

RUTHERS v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Mahaska County, Myron L. Gookin, Judge. Heard by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Bower, J. (10 pages)

Thomas Ruthers Jr. appeals his conviction for assault causing bodily injury. **OPINION HOLDS:** We find neither trial nor appellate counsel were ineffective. We also find Ruthers cannot challenge whether the plea was proper at this stage in the proceedings. Finally, we find the postconviction court did not abuse its discretion by refusing to take additional evidence after the record was closed.

No. 16-1222

STATE v. RAMIREZ-RUIZ

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Andrea J. Dryer, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (13 pages)

Orlando Ramirez-Ruiz appeals his convictions for third-degree sexual abuse and enticing a minor. He challenges the sufficiency and weight of the evidence, the admission of hearsay evidence, and his trial counsel's failure to object to certain evidence. **OPINION HOLDS:** There was sufficient evidence, including forensic evidence and expert testimony, supporting the convictions for both crimes, and the weight of the evidence also supported the convictions for both crimes. The hearsay evidence was admissible because it was made to a medical professional in furtherance of medical treatment and did not identify Ramirez-Ruiz as the perpetrator. Ramirez-Ruiz's ineffective-assistance-of-counsel claim fails because it is unlikely the outcome would have changed had the evidence complained of been excluded.

No. 16-1361

IN RE ESTATE OF WILSON

AFFIRMED.

Appeal from the Iowa District Court for Crawford County, Patrick H. Tott, Judge. Heard by Vogel, P.J., and Potterfield and McDonald, JJ. Opinion by

McDonald, J. (8 pages)

David Wilson appeals a district court order granting summary judgment on his petition for a declaratory judgment. He contends a genuine issue of material fact existed and the court therefore erred in granting summary judgment. He alternatively argues the district court abused its discretion in declining to reserve ruling pending further discovery. **OPINION HOLDS:** We affirm the district court's denial of David's motion to reserve ruling pending further discovery and grant of summary judgment in favor of the appellees.

No. 16-1451

ALLGOOD v. BARNES

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrorn, Judge. Considered by Vogel, P.J., Tabor, J., and Goodhue, S.J. Opinion by Goodhue, S.J. (2 pages)

Jesse Barnes Sr. appeals a protective order requiring supervised visitation with his children. **OPINION HOLDS:** Having reviewed the record, we determine the case should be affirmed without opinion, pursuant to Iowa Rule of Appellate Procedure 6.1203(a) ("A judgment of the district court is correct") and (d) ("No error of law appears").

No. 16-1525

STATE v. NEWTON

**REVERSED IN PART
AND REMANDED.**

Appeal from the Iowa District Court for Ringgold County, Dustria A. Relph, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (14 pages)

Timothy Newton appeals his convictions for operating while intoxicated (OWI), second offense, and child endangerment. He claims his OWI conviction must be reversed because the jury was instructed on the "any amount of a controlled substance" alternative in Iowa Code section 321J.2(1)(c) (2014), and this alternative is unconstitutionally vague and violates his due process rights. He also claims his stipulation to his prior OWI offense was invalid because it was not knowingly and voluntarily entered. Finally, he claims his sentence must be vacated and this case remanded for a new sentencing hearing because the court considered unproven offenses when determining his sentence. **OPINION HOLDS:** We affirm Newton's OWI conviction as we conclude section 321J.2(1)(c) is not unconstitutionally vague and is rationally related to the purpose of the OWI statute. However, because Newton was not afforded a proper colloquy when stipulating to his prior conviction, we reverse his conviction and sentence for OWI, second offense, and remand this case for proceedings consistent with this opinion. Because of this reversal, we need not address the claims he makes regarding his sentencing hearing.

No. 16-1659

NEWMAN v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (2 pages)

Steward Newman appeals from the denial of his application for postconviction relief in which he contends his trial counsel was ineffective in not adequately advising Newman concerning the waiver of his right to a jury trial, allowing him to conditionally waive his right to a speedy trial, failing to seek dismissal of the case on speedy-trial grounds, not calling certain witnesses, and failing to suppress Newman's statement. **OPINION HOLDS:** We find the district court addressed all the issues, properly applied the law, and we adopt its findings and reasons as our own. We therefore affirm.

No. 16-1695

STATE v. RUNNER

**AFFIRMED IN PART
AND REMANDED.**

Appeal from the Iowa District Court for Poweshiek County, Annette J. Scieszinski, Judge. Considered by Vogel, P.J., Tabor, J., and Carr, S.J. Opinion by Carr, S.J. (10 pages)

A defendant challenges his convictions and sentences for assault with intent to inflict serious injury and criminal mischief in the second degree as a habitual offender. He argues the trial court failed to state sufficient reasons for his sentence, insufficient evidence was presented as to the valuation of the victim's vehicle, his trial counsel was ineffective for failing to object to a jury instruction about valuation and for failing to present evidence at trial on valuation, and the trial court erred in ordering restitution concerning the vehicle. **OPINION HOLDS:** We remand for resentencing to allow the trial court to state its reasons for sentencing on the record. Sufficient evidence supports this conviction, and we affirm on that point. We preserve the claims of ineffective assistance for possible postconviction relief due to an inadequate record. The trial court did not err in ordering restitution given the evidence presented to it.

No. 16-1978

DIXON v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (6 pages)

Lance Dixon, a postconviction relief applicant whose conviction became final four years before *Heemstra v. State*, 721 N.W.2d 549, 558 (Iowa 2006), was decided, appeals the summary disposition of his fourth postconviction relief application. He argues a recent United States Supreme Court opinion requires retroactive application of *Heemstra*. **OPINION HOLDS:** Because Dixon did not file his fourth postconviction application within the implied limitations period of three years from the *Heemstra* decision, his application was time-barred and the postconviction court could not reach the retroactivity claim. We therefore affirm.

No. 16-1981

STATE v. SHORTER

AFFIRMED.

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

Raymond Allen Shorter appeals his conviction for second-degree robbery following a jury trial. He challenges the sufficiency of the evidence supporting the jury's finding of guilt. **OPINION HOLDS:** Substantial evidence supports the jury's finding of guilt. We affirm Shorter's conviction for second-degree robbery.

No. 16-2011

STATE v. SHAFER

AFFIRMED.

Appeal from the Iowa District Court for Mahaska County, Lucy J. Gamon, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (3 pages)

Derrick Shafer appeals his conviction for sexual abuse in the second degree, claiming the trial court erred in failing to grant a motion to strike a juror for cause. **OPINION HOLDS:** Because Shafer did not identify an additional juror who the defense sought to remove from the jury through the exercise of an additional peremptory challenge and admits he can make no showing of actual prejudice, we affirm.

No. 16-2045

NACHAZEL FAMILY LIVING TRUST v. JKLM, INC.

AFFIRMED.

Appeal from the Iowa District Court for Jones County, Ian K. Thornhill, Judge. Heard by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (7 pages)

The Laddie Nachzael Family Living Trust appeals the district court order finding the corporate veil of JKLM, Inc. should not be pierced. **OPINION HOLDS:** We find JKLM was undercapitalized but the corporation's finances were not co-mingled with the finances of its shareholders, and the corporation followed corporate formalities. We find the Trust was unable to prove the corporate veil should be pierced.

No. 16-2083

NEW MIDWEST RENTALS v. IOWA DEPARTMENT OF COMMERCE

**DISTRICT COURT
DECISION VACATED IN
PART; AGENCY
DECISION AFFIRMED.**

Appeal from the Iowa District Court for Polk County, David N. May, Judge. Heard by Vogel, P.J., and Vaitheswaran and Potterfield, JJ. Opinion by Vogel, P.J. (17 pages)

New Midwest Rentals, LLC, d/b/a Des Moines Valero #204 (Valero) sought judicial review of the decision of the Iowa Department of Commerce Alcoholic Beverages Division (the ABD), which denied Valero's application to renew its retail beer permit. After the district court affirmed the ABD's action, Valero appeals, asserting (1) the district court erred in concluding the language of Iowa Code section 123.45 (2013) is unambiguous; (2) the ABD's interpretation of section 123.45 is irrational, illogical, and wholly unjustifiable; and (3) the ABD's denial of Valero's retail beer permit violates its equal protection and due process rights under both the Federal and Iowa Constitutions. **OPINION HOLDS:** We vacate that part of the district court's judicial review decision that held section 123.45 was unambiguous because that issue had already been resolved in an earlier judicial review decision. However, we affirm the ABD's remand decision in this case in its entirety. Its interpretation of section 123.45, so as to prohibit a manufacturer of any type of alcoholic beverage from holding an ownership interest in a business that holds any type of alcoholic beverage retail license or permit, is not irrational, illogical, or wholly unjustifiable. We likewise find no constitutional violation in the ABD's denial of Valero's retail beer permit.

No. 16-2150

STATE v. WYNN

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Jeffrey D. Farrell, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (12 pages)

Xavier Wynn appeals from his convictions following a jury trial for third-degree sexual abuse, in violation of Iowa Code sections 709.1(1) and .4(1) (2016), and criminal mischief, in violation of sections 716.1 and .5. Wynn contends defense counsel rendered ineffective assistance by failing to object to jury instructions. Wynn also asserts there is insufficient evidence to establish the lack of consent necessary to sustain his conviction for third-degree sexual abuse and to establish the value of damaged property to support his third-degree-criminal-mischief conviction. Wynn maintains defense counsel provided ineffective assistance in failing to move for judgment of acquittal on the particular insufficient-evidence grounds raised on appeal. **OPINION HOLDS:** We find Wynn has not shown defense counsel provided ineffective assistance and affirm.

No. 16-2220

STATE v. SMITH

AFFIRMED.

Appeal from the Iowa District Court for Keokuk County, Daniel P. Wilson, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Bower, J. (5 pages)

Nathan Smith appeals his conviction for domestic assault. **OPINION HOLDS:** We find the district court properly admitted the evidence and preserve one of Smith's claims of ineffective assistance for postconviction review.

No. 16-2224

STRATFORD HOLDING v. CITY OF DES MOINES

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge. Heard by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (12 pages)

A convenience store appeals the district court's affirmation of a board of adjustment's denial of a zoning variance permitting the sale of spirits and the court's refusal to consider the board's prior variance decisions to determine if the denial was arbitrary and capricious. The convenience store also raises an equal protection claim. **OPINION HOLDS:** Because the store failed to present an equal protection claim to the district court, that claim is not preserved for appeal. Because the store presented no authority indicating the district court should have considered prior board of adjustment decisions, we decline to remand.

No. 16-2229

IN RE MARRIAGE OF KRAGEL

**REVERSED ON
APPEAL; AFFIRMED
ON CROSS-APPEAL.**

Appeal from the Iowa District Court for Ida County, Duane E. Hoffmeyer, Judge. Heard by Danilson, C.J., and Vogel and Potterfield, JJ. Opinion by Danilson, C.J. (10 pages)

Randall Kragel appeals the district court's ruling denying his petition for the modification of a dissolution decree. He contends (1) the district court applied an incorrect modification standard and erred in failing to find a material change in circumstances to support modification and (2) the district court's ruling effectually modified the property-distribution provisions of the original decree. Leisha Kragel cross-appeals the same ruling which denied her request for attorney fees in the modification proceeding. Both parties request an award of appellate attorney fees. **OPINION HOLDS:** On appeal, we reverse the district court and modify Randall's spousal-support obligation. On cross-appeal, we affirm the denial of Leisha's request for trial attorney fees. We decline to award appellate attorney fees to either party.

No. 17-0100

MUMMAU v. ESTATE OF KRAUS

AFFIRMED.

Appeal from the Iowa District Court for Clayton County, David P. Odekirk, Judge. Considered by Vogel, P.J., Bower, J., and Scott, S.J. Opinion by Bower, J. (8 pages)

Vincent Mummau appeals the district court's decision granting summary judgment to defendants on his petition to set aside a sheriff's sale of farmland. **OPINION HOLDS:** We find no error in the district court's conclusion Mummau had an equitable interest in the farmland, which was subject to a judgment lien. Also, we find no error in the district court's conclusion Mummau's claims concerning the adequacy of the sale price were moot, as the one-year statutory redemption period had expired. We affirm the district court decision granting summary judgment.

No. 17-0119

IN RE D.M.

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Christine Dalton Ploof, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (5 pages)

The juvenile, D.M., appeals her adjudication as a delinquent, which was based on the court's findings she committed the delinquent acts of robbery in the

first degree and willful injury resulting in bodily injury. She maintains there was insufficient evidence to support the court's findings, arguing there was no evidence she "intended to steal the property of [the victim] or . . . had the intent to assault or harm [the victim] in any way." **OPINION HOLDS:** We affirm the juvenile court's adjudication of D.M. as a delinquent based on the findings she committed both delinquent acts of willful injury causing bodily injury and robbery in the first degree.

No. 17-0124

CARMICHAEL v. PHILPOTT

AFFIRMED.

Appeal from the Iowa District Court for Taylor County, John D. Lloyd, Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Potterfield, J. (9 pages)

Stacy Anderson (formerly known as Stacy Philpott) appeals from the district court's ruling on the petition to modify, which placed physical care of the parties' minor child with the father, Clinton Carmichael. On appeal, Stacy maintains the district court improperly considered testimony from the guardian ad litem (GAL) over her objection. She also maintains the court erred in its determination that a substantial change in circumstances warranting modification had taken place. **OPINION HOLDS:** Because Stacy failed to object to the testimony of the GAL, we have not considered this argument; the court did not abuse its discretion in admitting the GAL's report as a sanction for Stacy's willful disregard of discovery orders. Because there has been a substantial change in circumstances since the entry of the 2014 modification, we affirm.

No. 17-0153

JACKSON v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Robert J. Blink and William P. Kelly, Judges. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (4 pages)

Andrew Jackson appeals the dismissal of his third application for postconviction relief (PCR). He contends our supreme court's decision in *State v. Robinson*, 859 N.W.2d 464 (Iowa 2015), amounted to a substantive change in the law exempting him from the statute of limitations contained in Iowa Code section 822.3 (2015). **OPINION HOLDS:** We repeat our position that *Robinson* did not announce a new rule of law but merely clarified existing law. Jackson's application was untimely, and he is not exempted from the statute of limitations. We therefore affirm the dismissal of Jackson's PCR application.

No. 17-0184

STATE v. TAYLOR

AFFIRMED.

Appeal from the Iowa District Court for Pottawattamie County, Richard H. Davidson and James S. Heckerman, Judges. Considered by Vogel, P.J., Bower, J., and Mahan, S.J. Opinion by Mahan, S.J. (11 pages)

Jackie B. Taylor appeals following convictions for six counts of sexual abuse in the third degree involving two alleged victims, S.Z. and C.W., and three counts of lascivious conduct with a minor, S.Z. Taylor argues the court abused its discretion in consolidating the cases involving the different minors, trial counsel was ineffective in numerous respects, and the sentence imposed was illegal and an abuse of discretion. **OPINION HOLDS:** Because we find no abuse of discretion in the court allowing the cases to be tried together, the record is not adequate to address the ineffectiveness claims, and the sentencing challenges are not ripe for review at this time, we affirm the convictions.

No. 17-0190

STATE v. ALLIE

JUDGMENT REVERSED

Appeal from the Iowa District Court for Boone County, Paul G. Crawford, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald,

**IN PART AND
REMANDED.**

JJ. Opinion by McDonald, J. (15 pages)

Michael Allie challenges his conviction and sentence for possession of methamphetamine. He challenges the sufficiency of the evidence supporting his conviction, argues the district court abused its discretion in denying his motion for new trial, argues his trial counsel was ineffective, and contends the colloquy related to a habitual offender enhancement was inadequate. **OPINION HOLDS:** We find no merit in Allie's first two contentions and preserve his ineffective assistance claims for postconviction relief. We find the habitual offender colloquy was insufficient to establish Allie's stipulations were knowing and voluntary and reverse and remand for a hearing on the prior convictions.

No. 17-0209

**CONVICTION AND
SENTENCE VACATED
AND REMANDED.**

STATE v. BANES

Appeal from the Iowa District Court for Lee County, John G. Linn, Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by McDonald, J. (14 pages)

Marcus Banes challenges his conviction and sentence for burglary, theft, and ongoing criminal conduct. He argues there is insufficient evidence supporting his convictions and claims his counsel was ineffective for failing to object to hearsay testimony. **OPINION HOLDS:** There is sufficient evidence to support the burglary and theft convictions given the accomplice testimony, physical evidence, and corroborating witnesses. The ineffective assistance of counsel argument is equally unpersuasive. However, the evidence is insufficient as a matter of law to support a conviction for ongoing criminal conduct. We vacate Banes's conviction and sentence for ongoing criminal conduct and remand this matter for entry of dismissal with prejudice of the charge. We affirm Banes's other convictions.

No. 17-0267

**AFFIRMED ON BOTH
APPEALS.**

NESTLÉ USA v. CONELL

Appeal from the Iowa District Court for Polk County, Bradley McCall, Judge. Heard by Vaitheswaran, P.J., and Doyle and Bower, JJ. Opinion by Vaitheswaran, J. (10 pages)

An employer challenges the district court's reversal of the workers' compensation commissioner's denial of a passive prosthetic hand along with other aspects of the commissioner's decision. The employee cross-appeals and challenges the weeks used by the commissioner to calculate his weekly benefit rate. **OPINION HOLDS:** We affirm the district court's judicial review ruling, which reversed the commissioner's denial of the passive prosthetic hand but otherwise affirmed the commissioner's decision. Nestle must provide Conell with a passive prosthetic hand.

No. 17-0276

AFFIRMED.

LARIMER v. STATE

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (3 pages)

An applicant appeals the district court's summary dismissal of his application for postconviction relief. **OPINION HOLDS:** Because we decline to override the statutory limitations set forth in Iowa Code section 822.3, we affirm.

No. 17-0315

AFFIRMED.

STATE v. ALLEN

Appeal from the Iowa District Court for Marion County, Terry R. Rickers, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (5 pages)

Laura Ann Allen appeals her conviction for assault causing bodily injury. She argues the State failed to present substantial evidence to rebut her self-defense claim. **OPINION HOLDS:** Based on the evidence presented, including Allen's statements to police indicating she wished to inflict physical harm on the victim, the jury could reasonably reject Allen's self-defense claim.

No. 17-0318

GOODE v. STATE

AFFIRMED.

Appeal from the Iowa District Court for Des Moines County, John G. Linn, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (2 pages)

DeAndre Goode appeals the denial of his application for postconviction relief. He contends his postconviction counsel provided ineffective assistance by failing to fully develop the record to prove his claim that he had newly discovered evidence supporting his alibi defense. **OPINION HOLDS:** Goode does not raise an appropriate statutory ineffective assistance challenge. There is no constitutional right to the effective assistance of postconviction counsel. We affirm the denial of his application.

No. 17-0325

IN RE MARRIAGE OF CARTER

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Joel A. Dalrymple, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (4 pages)

Jason Carter appeals the child custody provisions of the decree dissolving his marriage to Danielle Carter. He objects to the order of joint legal custody and the placement of the parties' three children in Danielle's physical care. **OPINION HOLDS:** In both a pretrial stipulation and in a posttrial statement, Jason agreed to joint legal custody. Because this issue was not raised in the district court, we do not consider it now. Jason also argues the children should have been placed in his physical care. Having reviewed the record and the trial court's findings of fact and credibility assessments, we find no reason to disturb the ruling in any way.

No. 17-0330

STATE v. MABIOR

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt, District Associate Judge. Considered by Danilson, C.J., Bower, J., and Goodhue, S.J. Opinion by Goodhue, S.J. (4 pages)

Emmanuel Mabior appeals his conviction for aggravated theft. **OPINION HOLDS:** The district court denied Mabior's motion to dismiss on the basis of the State's violation of the applicable speedy-trial requirements. There was good cause for the delay, and the motion to dismiss was correctly denied. We affirm the decision of the district court.

No. 17-0351

STATE v. MCINTIRE

AFFIRMED.

Appeal from the Iowa District Court for Boone County, Steven J. Oeth, Judge. Considered by Vogel, P.J., Bower, J., and Blane, S.J. Opinion by Bower, J. (9 pages)

Jacob McIntire appeals his conviction for possession of a controlled substance (methamphetamine) with intent to deliver. **OPINION HOLDS:** We find the tenant of the apartment, where McIntire was a casual houseguest, voluntarily consented to a search of the apartment, where McIntire had possession of baggies of methamphetamine in plain view. We conclude the district court properly denied McIntire's motion to suppress. We affirm his conviction for possession of a controlled substance (methamphetamine) with intent to deliver.

No. 17-0353

STATE v. HARMON

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Christine Dalton and Cheryl Traum, District Associate Judges. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (5 pages)

Lawrence Harmon appeals from his conviction by written guilty plea to driving while barred as a habitual offender, in violation of Iowa Code sections 321.555 and .561 (2016). Harmon maintains there is not a factual basis for the plea because the record does not sufficiently establish the prior offenses giving rise to Harmon's habitual-offender status and because the State did not show Harmon was represented by counsel or validly waived counsel during the prior offenses. Harmon asserts defense counsel rendered ineffective assistance of counsel in failing to file a motion in arrest of judgment to challenge the deficiencies. **OPINION HOLDS:** We conclude the record contains a factual basis for the plea and, thus, defense counsel did not render ineffective assistance. Harmon's remaining claim is an improper collateral attack and has no merit.

No. 17-0438

IN RE MARRIAGE OF BARRETT

**AFFIRMED AS
MODIFIED.**

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Bower, J. (12 pages)

Dirk Sterling Barrett appeals various provisions of the district court's decree dissolving his marriage to Jaime Jo Barrett. **OPINION HOLDS:** We find the district court properly divided the parties' assets and debts. With the exception of the distribution of some premarital items and a minor change to visitation and child support, the district court ruling is affirmed as modified.

No. 17-0508

STATE v. HARRISON

AFFIRMED.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (4 pages)

Jennelle Harrison appeals her sentence following a guilty plea to operating while intoxicated. Harrison claims the district court abused its discretion in failing to consider mitigating factors. **OPINION HOLDS:** We find the district court did not abuse its discretion and affirm the sentence imposed.

No. 17-0533

STATE v. TRAN

AFFIRMED.

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

Thuan Dinh Tran was convicted following a jury trial for the sexual abuse in the second degree of a nine-year-old child. On appeal, Tran contends his trial counsel was constitutionally ineffective in failing to object to the testimony of an expert witness as indirectly vouching for the credibility of the child. **OPINION HOLDS:** Finding no breach of duty in counsel's failure to object, Tran's ineffectiveness claim fails. We therefore affirm the conviction.

No. 17-0559

SAVARY v. MURDACH

AFFIRMED.

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge. Considered by Vaitheswaran, P.J., Bower, J., and Blane, S.J. Opinion by Blane, S.J. (5 pages)

Elisabeth Murdach appeals the physical-care provision of the district court's decree, which provided joint physical care of the minor child, N.T., to Elisabeth and the child's father, Jeffrey Savary. Elisabeth maintains the court should have given her physical care of the minor child and asks for an award of appellate attorney fees. Jeffrey asks that we affirm the district court's shared-care provision and award him appellate attorney fees. **OPINION HOLDS:** Upon our de novo review, we conclude that joint physical care is in the best interest of this child, and we affirm. We decline to award either party appellate attorney fees.

No. 17-0616

STATE v. DISTRICT COURT

WRIT ANNULLED.

Certiorari to the Iowa District Court for Polk County, Odell G. McGhee II, District Associate Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. Special Concurrence by Vogel, P.J. (12 pages)

In this certiorari action, the State argues a district court does not have the authority to substitute community service for jailhouse room-and-board fees when the county sheriff did not request the fees be classified as restitution. **OPINION HOLDS:** Because the county attorney classified the fees as "court debt," the district court was authorized under Iowa Court Rule 26.4(2) to substitute community service since the defendant did not have the ability to pay the entire amount of his court debt. **SPECIAL CONCURRENCE ASSERTS:** I concur in the result, but write separately to note Iowa Court Rule 26.4, adopted in 2013, appears to conflict with the "guidance" provided by our supreme court's decision in *State v. Abrahamson*, 696 N.W.2d 589 (Iowa 2005), and Iowa Code section 356.7(3) (2015). While the sheriff was granted a judgment for the room-and-board fees, the district court later converted a portion of this judgment to community service under rule 26.4 without giving the sheriff notice or an opportunity to be heard. Rule 26.4 renders the judgment granted by section 356.7(3) voidable based on the district court's discretion.

No. 17-0650

STATE v. BENSON

AFFIRMED.

Appeal from the Iowa District Court for Woodbury County, Jeffrey L. Poulson, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (9 pages)

Owen Benson appeals from his convictions for assault causing bodily injury and child endangerment, challenging the sufficiency of the evidence his conduct was not legal corporal punishment and the jury instructions given. **OPINION HOLDS:** Finding substantial evidence to support the convictions and no error in the instructions given, we affirm.

No. 17-0722

STATE v. COSSOM

AFFIRMED.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt and Thomas A. Bitter, Judges. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (6 pages)

Tyshawn Cossom appeals his sentences for stalking in violation of a protective order, assault with intent to inflict serious injury, and violation of a no-contact order. Cossom argues the sentencing court considered incorrect criminal history found in the presentence investigation (PSI) report and abused its discretion by rejecting the State's recommendation for probation. **OPINION HOLDS:** The sentencing court was free to consider the unchallenged portions of the PSI report. The sentencing court did not abuse its discretion by considering the violent nature of the offense and Cossom's criminal history when imposing prison sentences within the statutory limits.

No. 17-0758

IN RE ESTATE OF VECELLIO

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Doyle, J. (8 pages)

Henry Beirnes appeals the order dismissing his personal injury claim against the Estate of Claudia Vecellio as untimely under Iowa Code section 633.410(1) (2014). **OPINION HOLDS:** Beirnes failed to preserve error on his argument regarding the section 633.410(3) exception for claims covered by insurance because he failed to obtain a ruling on the issue before filing his notice of appeal. We affirm the order dismissing Beirnes's claim on the limited issue of whether Beirnes was a reasonably ascertainable creditor; although Beirnes's identity was known, the mere possibility that he could bring a personal injury claim against Vecellio did not render his claim reasonably ascertainable on the facts before us.

No. 17-0827

JOHNSON-KRUEGER v. ALDRICH

AFFIRMED.

Appeal from the Iowa District Court for Woodbury County, Jeffrey L. Poulson, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (4 pages)

Kim Johnson-Krueger sued Angela J. Aldrich, M.D., her gynecologist, alleging she engaged in professional negligence by performing an unnecessary hysterectomy. **OPINION HOLDS:** Because Johnson-Krueger is unable to produce expert testimony that Dr. Aldrich breached the standard of care, we agree with the district court that she failed to generate a jury question on her professional negligence claims.

No. 17-0828

IN RE MARRIAGE OF O'BRIEN

**REVERSED AND
REMANDED.**

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (7 pages)

Todd O'Brien appeals from the district court's order denying his petition for modification of the decree dissolving his marriage to Anne O'Brien. Todd maintains there has been a substantial change in circumstances from the time the decree was entered justifying modification of the decree to place physical care of the parties' child, O.O., with Todd. **OPINION HOLDS:** Because we conclude Todd has established a substantial change in circumstances due to Anne's escalated alcohol abuse, we reverse the district court's denial of the petition for modification and remand for entry of a modified decree of dissolution.

No. 17-0854

STANDARD WATER CONTROL SYSTEMS, INC. v. JONES

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Lawrence P. McLellan, Judge. Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ. Opinion by Bower, J. Blane, S.J., takes no part. (7 pages)

Michael and Cori Jones appeal the district court's grant of trial and appellate attorney fees to Standard Water Control Systems, Inc. on remand. **OPINION HOLDS:** We find the district court did not abuse its discretion in awarding trial attorney fees or attorney fees for a previous appeal. We do not award any attorney fees for the present appeal. We affirm the decision of the district court.

No. 17-0963

IN RE MARRIAGE OF WALKER

Appeal from the Iowa District Court for Story County, Timothy J. Finn,

**AFFIRMED AS
MODIFIED AND
REMANDED.**

Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (6 pages)

A mother appeals the child custody provision of her dissolution decree. She argues the district court failed to provide necessary justification for denying her request for joint physical care of her two children. She argues the district court focused too heavily on the assumption of parenting duties since separation and did not consider the care she provided over the course of the children's lives. **OPINION HOLDS:** The district court failed to provide statutorily required reasons for denying the mother's request for joint physical care. After considering the entire history of parental involvement, including circumstances surrounding the separation; the level of respect between the parents; whether any conflict remains between the parents; and the similarities in their parenting strategies, we conclude awarding joint physical care is in the children's best interests. We remand to the district court to establish a shared-physical-care schedule and reassess the decree's child support provisions in light of the changed physical care award.

No. 17-0986

COLLETT v. VOGT

AFFIRMED.

Appeal from the Iowa District Court for Monona County, Jeffrey A. Neary, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Mullins, J. (8 pages)

Kari Vogt appeals a district court ruling on her petition to modify a decree concerning the paternity and custody of her and Mathew Collett's minor child. She contends the district court erred in concluding she did not establish the change in circumstances necessary for modification of the school-selection provision of the original decree. Both parties request an award of appellate attorney fees. **OPINION HOLDS:** We affirm the denial of Kari's petition for modification. We decline to award appellate attorney fees to Kari, and we award appellate attorney fees to Mathew in the amount of \$1000. Costs on appeal are assessed to Kari.

No. 17-1003

IN RE MARRIAGE OF STAHR

AFFIRMED.

Appeal from the Iowa District Court for Winneshiek County, Margaret L. Lingreen, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Danilson, C.J. (6 pages)

Annette Stahr, now known as Annette Balk, appeals from the denial of her petition to modify the physical-care provisions of her decree of dissolution of marriage to Eric Stahr. She argues the court's findings of fact are not supported by the evidence, there was a change of circumstances warranting modification, and she has shown she can provide the children superior care. **OPINION HOLDS:** After our de novo review, and giving weight to the testimony of the parties' two teenagers because of their age and both appear by their testimony to be mature, intelligent, and have provided a reasonable explanation for their opinion, we find no reason to disturb the trial court's analysis, determinations, and conclusions.

No. 17-1102

IN RE MARRIAGE OF ORTIZ

**AFFIRMED AND
REMANDED FOR
ENTRY OF NUNC PRO
TUNC ORDER.**

Appeal from the Iowa District Court for Harrison County, Jeffrey L. Larson, Judge. Heard by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (13 pages)

Alisha Ortiz appeals from the district court's order following a trial for dissolution of her marriage to Armando Scott Ortiz (Scott) and the court's corresponding custody determination regarding the parties' two children, K.O. and T.O. Alisha contends the court (1) failed to dissolve the parties' marriage, (2)

should have granted Alisha physical care of the children, (3) failed to correctly change Alisha's last name, and (4) abused its discretion in denying Alisha's request for attorney fees. Both parties request appellate attorney fees. **OPINION HOLDS:** We find no error or abuse of discretion in the district court's physical-care and attorney-fees determinations, and affirm. To address the court's errors regarding the failure to address the dissolution of the marriage and Alisha's name change, we remand to the district court for entry of a nunc pro tunc order amending the decree to expressly dissolve the marriage and change Alisha's last name to "Curnyn." We deny the parties' requests for appellate attorney fees.

No. 17-1564

IN RE A.S.

AFFIRMED.

Appeal from the Iowa District Court for Keokuk County, Crystal S. Cronk, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (5 pages)

A mother appeals the termination of her parental rights under Iowa Code chapter 600A (2017). **OPINION HOLDS:** Clear and convincing evidence establishes the mother abandoned the child; the mother failed to provide financial support or visit the child monthly during an eighteen-month period, and termination is in the child's best interest. The mother failed to preserve error on her due process claim, but, regardless, she was afforded due process.

No. 17-1722

IN RE B.B.

AFFIRMED.

Appeal from the Iowa District Court for Dallas County, Virginia Cobb, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (6 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 B.B.'s best interests, and no section 232.116(3) factor 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.

No. 17-1728

IN RE M.H.

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Christine Dalton Ploof, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (4 pages)

A mother appeals the termination of her parental rights to two children, born in 2014 and 2016. She contends termination was not in the children's best interests and, specifically, the district court should have granted her additional time to work towards reunification. **OPINION HOLDS:** We affirm the termination of the mother's parental rights to the two children.

No. 17-1781

IN RE D.H.-W.

AFFIRMED.

Appeal from the Iowa District Court for Buena Vista County, Mary L. McCollum Timko, Associate Juvenile Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (7 pages)

A mother appeals the termination of her parental rights. **OPINION HOLDS:** We find the termination was supported by clear and convincing evidence and termination is in the best interest of the child.

No. 17-1845

IN RE S.H.

AFFIRMED.

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 Danilson, C.J. (6 pages)

A mother appeals from the order terminating her parental rights to S.H., pursuant to Iowa Code section 232.116(1)(h) (2017). While the mother concedes the child is three years of age, has been adjudicated a child in need of assistance, and has been out of the mother's custody since July 2016, see Iowa Code § 232.116(1)(h)(1)–(3), she challenges the trial court's finding that the child cannot be returned to her at present. **OPINION HOLDS:** The mother has failed to show any sustained progress, S.H. has waited longer than the statutory six-month time frame for her mother to become a stable parent, and S.H. deserves and needs stability now. We affirm.

No. 17-1869

IN RE M.B.

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Barbara H. Liesveld, District Associate Judge. Considered by Vogel, P.J., and Tabor and Bower, JJ. Opinion by Tabor, J. (8 pages)

A mother appeals the termination of her parental rights to her three children. She challenges the statutory grounds supporting termination. She also argues the State did not make reasonable efforts toward reunification, termination is not in the children's best interests, and the parent-child bond should preclude termination. **OPINION HOLDS:** The statutory grounds supporting termination are supported because the children could not be returned to the mother's home without risk of harm, and the State made reasonable efforts toward reunification. Termination is in the children's best interests and the mother's bond with the children is not so strong as to preclude termination.

No. 17-1880

IN RE B.S.

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (4 pages)

A father appeals a juvenile court order terminating his parental rights. **OPINION HOLDS:** We affirm the termination of the father's parental rights.

No. 17-1893

IN RE M.D.

AFFIRMED ON BOTH APPEALS.

Appeal from the Iowa District Court for Scott County, Christine Dalton Ploof, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (6 pages)

The mother and father separately appeal the termination of their parental rights to their three children. On appeal, both parents maintain their parental rights should not have been terminated because (1) there is not clear and convincing evidence to support the statutory grounds for termination, (2) it is not in the best interests of the children, and (3) a permissive factor weighs against termination. Additionally, the father claims the oldest child should have been appointed an attorney separate from the guardian ad litem. **OPINION HOLDS:** While the parents made strides in some areas during the pendency of this case, the children would still have been at risk of suffering an adjudicatory harm if returned to their parents' care at the time of the termination hearing. Thus, there is clear and convincing evidence to support termination under section 232.116(1)(f) (2017). Because it is in the children's best interests and no permissive factor weighs against termination, we affirm on both appeals.

No. 17-1917

**AFFIRMED ON BOTH
APPEALS.**

IN RE E.H.

Appeal from the Iowa District Court for Boone County, James B. Malloy, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (5 pages)

A mother and father separately appeal the termination of their parental rights to E.H., born in 2013. The father argues termination is not in E.H.'s best interests and would be detrimental to E.H. due to the closeness of the parent-child relationship. The mother argues termination would be detrimental to E.H. due to the closeness of the parent-child relationship. **OPINION HOLDS:** Having carefully considered the record and each party's position, we reach the same conclusion as the juvenile court—termination of the mother's and the father's parental rights is in the best interests of the child. We affirm.

No. 17-1958

AFFIRMED.

IN RE D.D.

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty, Associate Juvenile Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (6 pages)

A mother appeals the termination of her parental rights in her two children. On appeal she challenges one of two identified grounds for termination. She argues termination is not in the children's best interests due to her strong bond with both children and requests an additional six months to work toward reunification. **OPINION HOLDS:** Because the mother does not challenge one of the stated grounds for termination, we affirm grounds for termination on that provision. We also conclude termination is in the children's best interests regardless of their bonds with their mother. Given the mother's extensive history of substance abuse and limited progress, we conclude the need for removal would likely remain in six months and an additional period to work toward reunification would be contrary to the children's best interests.

No. 17-2000

AFFIRMED.

IN RE K.R.

Appeal from the Iowa District Court for Clinton County, Phillip J. Tabor, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Tabor, J., takes no part. Opinion by Vogel, P.J. (4 pages)

The mother of three children appeals the district court's dismissal of a child-in-need-of-assistance proceeding. **OPINION HOLDS:** Because we agree with the district court that the efforts of the Iowa Department of Human Services to eliminate the adjudicatory harm had been exhausted, we conclude dismissal was proper.

No. 17-2027

AFFIRMED.

IN RE M.R. AND K.R.

Appeal from the Iowa District Court for Polk County, Rachael E. Seymour, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (6 pages)

A father appeals the termination of his parental rights arguing there was insufficient evidence to terminate his parental rights pursuant to Iowa Code section 232.116(1)(e) and (h) (2017), termination was not in the best interest of the children, and the parent-child relationship should be preserved where the children could be placed in a guardianship with the maternal grandparents. **OPINION HOLDS:** Upon our de novo review, we conclude termination was appropriate and affirm the juvenile court in all respects.