STATE JUDICIAL NOMINATION COMMISSION AND OFFICE OF THE GOVERNOR JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. **State your full name.**

   Patrick Hubert Tott

2. **State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

   District Court Judge, Third Judicial District

3. **State your date of birth (to determine statutory eligibility).**

   May 18, 1967

4. **State your current city and county of residence.**

   Sioux City, Woodbury County

PROFESSIONAL AND EDUCATIONAL HISTORY

5. **List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

   Creighton University School of Law; Omaha, Nebraska
   August 1988 to May 1991
   JD (Summa Cum Laude) May 1991
   Class Rank 11/154

(Adopted June 17, 2019)

Creighton University; Omaha, Nebraska
August 1985 to May 1988
BSBA (Cum Laude) May 1989
GPA 3.69

6. Describe in reverse chronological order all of your work experience since graduating from college, including:

a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

a. 1. District Court Judge, Third Judicial District November 4, 2014 to present
620 Douglas Street Suite 210, Sioux City, Iowa 51101
Hon. Duane Hoffmeyer

2. Partner, Buckmeier & Daane, P.C.; July 2014 to November 2014
701 Pierce Street, Sioux City, Iowa
James Daane

3. Mental Health Judicial Referee, Sixth Judicial District – State of Nebraska
January 2006 to October 2014
No supervisor

4. Sioux City Community School District; Extracurricular Activities Appeal Hearing Officer; August 2005 to October 2014
627 4th Street, Sioux City, IA 51101
No supervisor

5. Woodbury County Judicial Magistrate; November 1999 to October 2014
407 7th Street, Sioux City, IA 51101
Hon. Duane Hoffmeyer

6. Attorney, Sole Practitioner; November 1999 to July 2014
705 Douglas Street Suite 509, Sioux City, Iowa 51101

7. Part-time Associate Juvenile Judge, Iowa Third Judicial District
December 1994 to October 2001
Hon. Brian Michaelson

8. Tribal Court Judge, Winnebago Tribe of Nebraska; Winnebago, Nebraska
   July 1994 to October 1996
   No supervisor; Thomas A. Fitch other Tribal Judge

9. Partner, Fitch & Tott; April 1994 to November 1999
   112 E 19th Street, South Sioux City, NE 68776
   Thomas A. Fitch, Partner

10. Associate Attorney, Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz
    July 1991 to March 1994
    1128 4th Street, Sioux City, IA 51101
    Daniel D. Dykstra, Partner

11. Law Clerk, Levy & Lazer, Omaha, Nebraska;
    March 1990 to August 1990
    Michael Lazer

b. No military experience.

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

State of Iowa
July 1991

United States District Court for the Northern District of Iowa
September 1992

State of Nebraska
September 1994

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

e. **The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.**

f. **The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.**

a. 1. July 1991 to March 1994. At the beginning of my legal career as an associate attorney with the Eidmoe Law Firm in Sioux City, I focused primarily on real estate, business and probate matters. This included drafting and reviewing contracts, wills, business formations, title examinations, will contests, collections, foreclosures, etc. My practice during this time was primarily office based with some courtroom experience involving contested matters regarding these areas of the law. From time to time I also assisted partners who focused on civil litigation with various aspects of their cases. During this time my practice would have been equally divided between these areas with my involvement in civil litigation being approximately 5 to 10%.

While with the Eidsmoe firm, my clients consisted primarily of private individuals, both large and small businesses, banks and credit unions.

2. April 1994 to November 2014. During this period of time my private practice was a traditional general practice of law. I focused primarily on criminal defense, family law, juvenile law, real estate, business formation and development, estate planning, guardianship and conservatorship matters and some civil litigation. During this time I would estimate that my time was devoted to these areas as follows: criminal defense 34%, family/domestic law 20%, Juvenile Law 25%, civil litigation 10%, probate/real estate 10%; administrative law 1%.

My typical clients during this time included private individuals, banks, credit unions, nonprofit agencies, privately retained and court appointed clients in criminal and juvenile court matters, small businesses, parties involved in real estate transactions, etc. I also served on two occasions as a Special Prosecutor for the State of Nebraska in Dakota County, Nebraska involving criminal matters. A significant client during this time was The Center for Siouxland which is a local non-profit agency helping low and underprivileged members of the community with a variety of services including transitional housing, guardianship and conservatorship services, financial counseling, food pantry, etc. I assisted The Center with hundreds of their clients in these areas at a low or significantly reduced fee.

3. From 1994 to 2014, I also held a variety of judicial positions in Iowa and Nebraska. For two years I worked as a Tribal Court Judge for the Winnebago Tribe of Nebraska. As a Tribal Court Judge, I presided over civil, criminal and juvenile matters. This position is very similar to that of a District Court Judge in Iowa as to the nature of the cases it handles. I also served as a Mental Health Referee in the Sixth Judicial District for the State of Nebraska, as a part-time Associate Juvenile Judge in Woodbury County, Iowa, and as a Magistrate in Woodbury County for 15 years while maintaining a vibrant private practice.

b. As stated above, for the first three years of my career my practice was primarily an office based practice dealing with real estate, business and probate matters. I would estimate that 90 to 95% of my practice during these three years was in areas other than appearing before courts.

Then from 1994 until my appointment to the District Court bench in 2014, I would estimate that 25% of my private practice (non-judicial capacity time) was in areas that did not involve court appearances. This time involved my real estate and probate practice, drafting real estate transactional documents, reviewing abstracts, drafting wills, trusts and other estate planning documents, probating estates, business formations and ongoing business related needs, etc. (During this time on average 15 to 20% of my time was spent in my various judicial capacities).

c. From 1994 to 2014, the approximate percentage of my private practice that involved litigation in court or other tribunals would be 75%. This would include criminal defense, representing parents and children in juvenile court, family/domestic law, contested probate and real estate matters and other areas of civil litigation (collections, personal injury, suits on contracts, etc.).

d. Approximate percentage of litigation: Administrative 1%, criminal 45%, civil/juvenile 54%.

e. In the last 10 years of my private practice I tried 1 case as sole counsel before a jury, and 25 cases as sole counsel directly to the court. I did not have co-counsel in any of my trials. During the last 5 years as a District Court Judge I have presided over dozens of jury trials, both criminal and civil, as well as many more trials to the court.

f. In the last 10 years of my private practice I was sole counsel in 2 appeals to the Iowa Court of Appeals, 8 appeals as sole counsel to the Nebraska Court of Appeals and 9 appeals to the Iowa Court of Appeals involving Iowa Juvenile Court appeals.

9. **Describe your pro bono work over at least the past 10 years, including:**
   a. **Approximate number of pro bono cases you've handled.**
   b. **Average number of hours of pro bono service per year.**
   c. **Types of pro bono cases.**

a. During the last 10 years of my private practice I handled approximately 40 pro bono cases.

b. I would estimate that the number of hours of pro bono service I provided per year was 50 hours.

c. The types of cases in which I typically provided pro bono services included guardianship/conservatorship matters, family law, and assistance to nonprofit organizations. Outside of my services to The Center for Siouxland for which I charged significantly reduced fees, I also assisted several individuals with the preparation of Annual Guardian and Conservatorship Reports. Many of these individuals had assumed responsibility for children through Juvenile Court and were of limited financial means. In addition to assisting The Center for Siouxland with its guardianship and conservatorship program, I routinely assisted with other issues that would develop from time to time involving their transitional housing program and other legal issues that would develop with their other programs. I also provided extensive assistance to St. Gabriel Communications which was a start-up Catholic Radio station beginning in 1999. I was involved and provided legal assistance from the initial organizational meetings through the next several years, until a license to broadcast was obtained and the radio station went on the air. After that I continued to provide legal assistance with the normal business operations for running and maintaining a radio station include employment and compliance issues. I also from time to time provided pro bono representation for family law clients and criminal clients.

10. **If you have ever held judicial office or served in a quasi-judicial position:**

    a. **Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.**

       1. District Court Judge, Third Judicial District State of Iowa
          November 2014 to present
          Appointed by Governor Terry Branstad September 2014
          Court of General Jurisdiction.

2. Woodbury County Magistrate, State of Iowa
   November 1999 to October 2014
   Appointed and reappointed by the Woodbury County Judicial Nominating Commission to successive 4 year terms beginning in November 1999
   Jurisdiction: Small claims, initial appearances for all criminal matters and simple misdemeanor trials, mental health and off-hours on-call duty.

3. Mental Health Judicial Referee, Sixth Judicial District State of Nebraska
   January 2006 to October 2014
   Appointed by District Court Judges for Sixth Judicial District State of Nebraska
   I was the chairman for the Mental Health Board for the Sixth Judicial District in the State of Nebraska. A three member board presided over mental health and substance abuse committal hearings in the Sixth Judicial District.

4. Sioux City Community School District Extracurricular Activities Appeal Hearing Officer
   August 2005 to October 2014
   Hired by Superintendent of the Sioux City Community School District Dr. Larry Williams and retained by his successor Dr. Paul Gausmann.
   In this position I conducted appeal hearings requested by students who had been suspended from participation in extracurricular activities due to alleged violations of the Student Code of Conduct. I conducted hearings, on short notice, to determine if a violation of the Code of Conduct had occurred and if so, whether the sanction imposed was appropriate under the Code of Conduct.

5. Part-time Juvenile Court Judge, Third Judicial District State of Iowa
   December 1994 to October 2001
   Appointed by the District Court Judges in District 3B
   In this position I served as an Associate Juvenile Court Judge approximately 2 days per week. I handled all types of cases in Juvenile Court including Child in Need of Assistance and Delinquency proceedings, Terminations of Parental Rights proceedings, juvenile committal proceedings. All matters were tried to the Court with no juries.

6. Tribal Court Judge for the Winnebago Tribe of Nebraska
   April 1994 to October 1996
   Hired by the Winnebago Tribe Tribal Council
   This court is a court of general jurisdiction for the Winnebago Tribe of Nebraska. The court presides over civil, criminal and juvenile matters. Parties that appeared included members of the Winnebago Tribe as well as non-Native American individuals and entities that had involvement with members or the Tribe.

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

1. State v. Bender, Plymouth County Case No. SRCR016095
   Court of Appeals Decision: State v. Bender, 888 N.W.2d 902 (Table) (Iowa App. 2016)

2. In Re the Detention of Ogden, Plymouth County Case No. CVCV036026
   Court of Appeals Decision: In Re Detention of Ogden, 906 N.W.2d 204 (Table) (Iowa App. 2017)

3. In Re Interest of M.D., K.T., G.A., E.A. and S.A., Ida County Case Nos. JVJV001242-001246
   Affirmed by the Court of Appeals: In Re Interest of M.D., K.T., G.A., E.A. & S.A., 924 N.W.2d 533 (Table) (Iowa App. 2018)

   Reversed by the Supreme Court: In Re Interest of M.D., 921 N.W.2d 229 (Iowa 2019)

4. State v. Schiebout, Sioux County Case No. FECR016068
   Court of Appeals Decision: State v. Schiebout, 2019 WL 4309062 (Iowa App. September 11, 2019) Affirmed in part, sentence remanded.

5. State v. Delgado-Jimenez, Woodbury County Case No. FECR102958
   Court of Appeals Decision: State v. Delgago-Jimenez, 2020 WL 115768 (Iowa App. January 9, 2020)
   Discretionary Review granted by Supreme Court May 17, 2019 (decision pending)

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

1. State v. Delgado-Jimenez, see above. This matter is currently under discretionary review by the Iowa Supreme Court. It involves issues regarding the automobile exception to the warrant requirement to search a person's motor vehicle without a warrant. My opinion found that exigent circumstances to justify the warrantless search of the automobile did not exist under the facts of this case. The Court of Appeals disagreed with my analysis that concluded that the automobile exception did apply to the facts of this particular case. The Supreme Court has accepted discretionary review of the matter and their decision is pending.

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

None

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days.

None

ii. 180 days.

None

iii. 240 days.

None

iv. One year.

None

12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:

a. Title of the case and venue,
b. A brief summary of the substance of each matter,
c. A succinct statement of what you believe to be the significance of it,
d. The name of the party you represented, if applicable,
e. The nature of your participation in the case,
f. Dates of your involvement,
g. The outcome of the case,
h. Name(s) and address(es) [city, state] of co-counsel (if any),
i. Name(s) of counsel for opposing parties in the case, and
j. Name of the judge before whom you tried the case, if applicable.

1. I would state that the most significant legal matter that I have been personally involved in would be each and every case I have had the privilege of presiding over in my various judicial positions over the last 26+ years. While these cases may have varied in their relative degrees of seriousness and complexness, each case was the most important one as far as the parties involved were concerned. I have tried very hard during my judicial career

to treat each case that has come before me with the attention I would want it to have if I was one of the parties involved. Judges are the face of the judiciary and are what the public primarily base their opinion of the judicial branch on. While it is critical for the Judge to get their decision right, it is equally important that the parties involved have been treated fairly and with respect, and while they might not agree with the ultimate outcome, that they feel that they have been treated fairly

2. State of Nebraska v. Jennifer Hancock, Dakota County, Nebraska. In 2004, I represented the Defendant, Jennifer Hancock in a criminal matter as her sole counsel. In this case, Ms. Hancock was charged with 3 felonies including two counts of Motor Vehicle Homicide and one count of Felony Drug Possession. The State of Nebraska was represented by Donald Kleine who was First Assistant Attorney General for the State of Nebraska at the time. Mr. Kleine is now the County Attorney for Douglas County (Omaha), Nebraska. (1701 Farnam Street, Omaha, NE 68183; 402-444-7040).

Because of the nature of the proceedings, the local District Court Judge and the Dakota County Attorney's Office had both recused themselves from the proceeding. The charges came after a highly publicized recall effort was undertaken against Robert Finney who had been the Dakota County Attorney at that time. Mr. Finney had refused to file the felony level motor vehicle homicide charges against Ms. Hancock based on his opinion that the facts he could prove did not warrant a felony level charge. The mother of one of the victims then conducted what turned out to be a successful recall campaign against Mr. Finney and he was removed as the Dakota County Attorney. After the successful recall, the Attorney General for the State of Nebraska, in a highly publicized fashion, filed the felony level motor vehicle homicide charges against Ms. Hancock after the newly appointed Dakota County Attorney had recused themselves from the matter.

As a result of the recall campaign against Mr. Finney, this case received extensive media attention, initially dealing with the recall effort and then the subsequent election of a new county attorney and the ongoing criminal prosecution. After the charges were filed, the presiding judge for Dakota County, Maurice Redmond, recused himself from the proceeding and a retired senior judge from Omaha, Nebraska, Robert Burkhard was assigned to preside over the case. Based on the publicity from the recall effort, the public sympathy resulting from the death of the two young men and the prejudice against Ms. Hancock that was created from the publicity involved, I as well, came under significant pressure from members of the community as to how I could represent this criminal defendant. Pressure that the sitting District Court Judge and new County Attorney refused to face. Taking my obligations to the bar and the Court seriously, I ignored such pressures and represented Ms. Hancock vigorously. After a series of lengthy pre-trial motions, including motions to suppress evidence and a motion for transfer of venue, each of which were successful, a plea agreement was ultimately reached between Ms. Hancock and the State of Nebraska just a couple of days before trial was set to commence in Omaha.

I believe this matter was significant due to the external pressures and challenges that it presented to me personally. Due to the high profile nature of the proceeding it would have been easy to try to dodge the original appointment or to seek co-counsel to deflect some of

the negative publicity I received for representing Ms. Hancock. However, I felt that it was cases like this as to why I became an attorney. The oath we take as attorneys and judges to defend the constitution and to defend the most vulnerable among us is very serious. I believe that this was a test of my character and I believe that I passed that test by representing my client to the best of my abilities despite the negative consequences I faced at that time for doing so.

3. While in my career as a District Court Judge I have presided over murder trials and civil litigation in which millions of dollars in damages have been sought, in my opinion, the next most significant legal matters I have personally handled would be each of the many termination of parental rights actions I either presided over as a Juvenile Court Judge or as a parent's attorney or guardian ad litem for the child(ren). I cannot think of a more significant thing that the Courts in Iowa do other than to permanently sever the relationship between a parent and their child(ren). I have treated each of these cases with extreme attention to detail and consideration because of this. As a judge in these cases, some of the decisions are unfortunately quite easy because of the egregious conduct of the parents, while others are very difficult. I would not be human if I did not state that I did wonder on a few occasions if I had done the right thing after terminating a parent's rights to their child(ren). As a judge, however, my duty is to weigh the evidence in light of the law and reach what I believe the law and facts require. Having said that, one of the termination of parental rights cases that I presided over as a Juvenile Judge sticks out in my mind. In that case, the State was seeking to terminate the parental rights of a single father of 3 young girls. The father did have a fairly extensive history of drug use that had led to the filing of the original Child in Need of Assistance proceedings and the subsequent termination of parental rights proceedings. (Due to the sensitive nature of the subject matter and the parties' confidentiality I am not disclosing the name of the parties or the case number involved). However, at the time of the filing of the petition to terminate his parental rights, the father did appear to be turning things around. The State argued, as they often do, that the past is the best predictor of the future. While the State's position is correct many times, there was something about this father that told me had changed. After considering all of the evidence and applying the applicable law, I ruled that the father should be given an additional 6 months (which is one permanency option available to the court) to prove himself before his rights would be terminated. I cannot state how pleased I am that the State was wrong in this case. The father did in fact turn it around and not only were his parental rights not terminated, but his children were returned to his care and the case had a successful closure.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

Over the course of the last 5 and a half years as a District Court Judge, I have found that my experience and background in many traditional non-litigation areas of the law has been a significant asset. My knowledge of the law in the non-litigation areas of real estate, probate, estate planning, business formation and operation, bankruptcy, banking, etc. has given me the background to understand and address many legal issues that commonly arise

in a litigation setting. In many trials and pre-trial motions, attorneys will argue obscure legal principles from the areas of law that the litigation arose out of. Without a fundamental understanding of those underlying issues, the ability to handle and address those issue as they arise in litigation is complicated substantially.

This is even more important as it relates to serving as a Supreme Court Justice. To be an effective Supreme Court Justice, a person must possess a vast spectrum of knowledge and experience to draw from. The Supreme Court addresses issues dealing with all aspects of the law and as such must be familiar with all aspects of the law. A Justice of the Supreme Court does not have luxury of being able to specialize in one or a few areas of the law. A Justice must not only be well versed in all areas but must also have a comprehension of how a decision in one case might have implications to other areas outside of the immediate circumstances before it. Having the extensive background and experience in non-litigation related matters that I had over 23 years of private practice only enhances the nearly 27 years of Judicial experience I have had handling all types of civil, criminal, juvenile and mental health/substance abuse matters. I believe the diversity of my background and legal experience as well as my personal background and experiences make me uniquely qualified to serve as a Justice of the Supreme Court.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

None

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.
b. Your title.
c. Your duties.
d. Dates of involvement.

N/A

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

Iowa Guardianship and Conservatorship Reform Task Force (Iowa Supreme Court)	2015 to 2017
Iowa Bar Association	1991 to present
Woodbury County Bar Association	1991 to present
- Fee Arbitration Committee	2006 to 2014
- Court Committee	2005
Nebraska Bar Association	1994 to present
Dakota County (Nebraska) Bar Association	1994 to 2014
- President	2006
- Vice President	2005
- Treasurer	2004
American Bar Association	1991 to 1994; 2015
Iowa Magistrates Association	1999 to 2014
Iowa Judges Association	2014 to present
- Board of Governors Rep (3B)	2019 to present

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

Center for Siouxland	
- Member Board of Directors	2007 to 2013
St. Gabriel Communications (Catholic Radio)	
- Original Founding Board	1999
- Advisory Board of Directors	1999 to 2014
March of Dimes	
- Ambassador Family	2011

The Soup Kitchen (Sioux City, Iowa)
- Board Member and Vice President 1995 to 2000

Court Appointed Special Advocate (CASA)
- Training Instructor for Volunteers 1999 to 2001

Siouxland Junior Achievement
- Classroom Instructor 1996 to 1998

St. Michael Catholic Church 1973 to present
- Capital Campaign Chairman 1994
- Parish Council Member 2004 to 2010
- Building & Oversight Committee 2004 and 2008
- Vice President Parish Council 2007 and 2008
- President Parish Council 2009 and 2010

Volunteer Coach for Youth Soccer, Baseball and Basketball 2012 to present

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

1. Johnson Propane, Heating and Cooling, Inc. v. The Iowa Department of Transportation, Woodbury County Case No. CVCV163078 Filed April 27, 2016

Supreme Court Decision affirming my ruling: Johnson Propane, Heating & Cooling, Inc., v. The Iowa Department of Transportation, 891 N.W.2d 220 (Iowa 2017)

I selected this opinion because it dealt with complex issues involving eminent domain and the procedures necessary to challenge actions taken by the State taking property rights from citizens. The analysis involved multiple steps and the interrelation of multiple administrative provisions and Iowa statutory law. I believe this opinion reflects my ability to analyze complex issues and enter a ruling on such issues in a concise and understandable fashion. On review, the Iowa Supreme Court affirmed my decision.

2. United Real Estate Solutions, Inc. and United Commercial Real Estate LLC, d/b/a NAI United v. Richard Salem and Richard Salem Real Estate, Woodbury County Case No. EQCV176008, filed July 24, 2018.

Opinion not appealed.

I selected this opinion again because of the complex nature of the issues involved and the multiple layers of analysis involved. This case involved a request for issuance of a temporary injunction and required consideration of the terms of multiple contracts between the parties, multiple changes in the corporate structures of the Plaintiff and how those contracts and changes in structure interrelated with each other and the impact on the respective rights and obligations of the parties. Again, I believe this case and my opinion, demonstrates my ability to recognize complex legal issues and how the law in one area (corporate formation and structure) can impact other contractual responsibilities between the parties. I believe the opinion shows my ability to describe those issues, how they affect each other and explain my rationale in a concise and clear manner.

3. State of Iowa v. Darius Wright, Woodbury County Case No. FECR096917 Filed July 5, 2017.

Court of Appeals Decision affirming my ruling: State of Iowa v. Darius Wright, 928 N.W.2d 151 (Table) (Iowa App. 2019)

I selected this opinion as it a good reflection of the manner in which I go about analyzing the facts and the law involved in a case, and how I reach my decisions by applying the facts of the case to the applicable law. In this case, I initially set forth my detailed findings of fact followed by the applicable law to be applied to those facts. This is followed by my analysis applying the law to the facts of the case and how I reached my ultimate ruling. I believe this opinion reflects a clear and concise approach to how I reach my decision in a case and then logically present it in writing.

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

N/A

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

None

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

None

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

"A Reasonable Approach to Reasonable Suspicion and Informant's Tips: State v. Bridge", 24 Creighton Law Review 621 (1991).

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

1. Siouxland Estate Planning Council Judge's Panel
   -November 5, 2019 Sioux City
   -Panel presentation to estate planning attorneys and estate planning professionals regarding issues typically facing judges regarding probate and estate planning issues.

2. Annual March to Honor Lost Children
   - November 27, 2019; November 21, 2018; November 22, 2017; November 23, 2016; November 25, 2015; November 26, 2014
   -Annual March by the Siouxland Native American Community to draw attention to the plight of Native American Children in the child welfare (DHS) system. Short address made to the attendees of this event at the Woodbury County Courthouse acknowledging the issues facing this community and the collaborative efforts between the Native Community, the Courts and the Department of Human Services.

3. As Judges See It: Top Mistakes Attorneys Make in Civil Litigation
   - November 2017 Sioux City presented by National Business Institute
   - Panel presentation to member of the local bar regarding issues Judge's observe in civil ligation and advice and recommendations to attorneys regarding best practices.

4. Search and Seizure Case Law Update
   - June 2017 Des Moines, Iowa; Iowa Judicial Branch– Magistrate Conf.
   - Case law update to Iowa Magistrates regarding recent developments in search and seizure law in Iowa.

5. Implementation of EDMS in Iowa
   - July 2014 Des Moines, Iowa; Iowa Judicial Branch-Magistrate Conf.

6. Guardianship and Conservatorship Issues
   - July 2008 Sioux City, Iowa; Iowa Association of Legal Assistants
   - Presentation regarding issues and best practices regarding guardianships and conservatorships in Iowa.

7. Juvenile Law Issues
   - July 2006 Sioux City, Iowa; Iowa Association of Legal Assistants
   - Presentation regarding issues and best practices in Juvenile Court in Iowa.

8. Issues in Juvenile Court
   - 2003 Sioux City, Iowa; Woodbury County Bar Association
   - Presentation to local members of the bar regarding issues in Juvenile Court and best practices.

9. Small Wonders Conference – Issues in Juvenile Law
   - Fall 2001 Sioux City, Iowa; Western Hills Education Agency
   - Panel presentation to attorneys and social workers regarding issues in Juvenile Court and placement of children.

10. CASA Training Instructor
    - Sioux City, Iowa 1991 to 2001 Presented training regarding cultural diversity

11. Junior Achievement Classroom Instructor
    - 1996 to 1998
    - Provided classroom instruction to middle school students regarding various aspects of business and marketing.

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Facebook, Account Name Patrick Tott
LinkedIn, Account Name Patrick Tott

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

1. American Jurisprudence Award – Legal Research and Writing
   Creighton University School of Law; January 1989

2. Law Review
   Creighton University School of Law; September 1990

3. Graduate of Leadership Sioux City
   Leadership Sioux City; June 1993

4. Graduate of Sioux City Police Department "Citizens Academy"
   Sioux City Police Department; June 1998

5. Nominated to be a District Associate Judge in Woodbury County
   Woodbury County Nominating Commission; 2000 and 2013

6. Nominated to be a District Court Judge – Sixth Judicial District of Nebraska
   Nebraska Judicial Nominating Commission; 2005 and 2011

7. Certified Guardian ad Litem for State of Nebraska
   Nebraska Supreme Court: 2007 to 2014

8. Salutatorian of High School Class
   Bishop Heelan Catholic High School May 1985
   GPA 3.97 (Rank 3/196)

9. Special Recognition from the Court Appointed Special Advocate Program (CASA) for service to the Juvenile Court in general and to the CASA program in particular
   CASA : October 2001

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

Hon. John D. Ackerman 712 279-6494
- Partner with Eidsmoe Law firm while I was an associate there, fellow District Court Judge in District 3B and personal friend

James Daane, Esq. 712 252-2424
- Form partner with in firm of Buckmeier & Daane in Sioux City. Legal colleague in Sioux City legal community for many years.

Cristi Bauerly 712 540-0444
- Court Reporter assigned to me since I became a District Court Judge in 2014

Hon. Stephanie Forker-Parry 712 279-6467
- District Associate Judge Woodbury County, Iowa; legal colleague for many years in Sioux City legal community for many years.

Hon. Douglas Luebe 402 755-5607
- County Court Judge for Sixth Judicial District, State of Nebraska
- I appeared in Judge Luebe's court many times during my legal career. He is very familiar with my legal abilities as an attorney as well my personal qualities.

27. Explain why you are seeking this judicial position.

I have had the honor and privilege of serving my community for the last 26+ years as a judicial officer in a variety of positions. Initially I served as a Tribal Court Judge for the Winnebago Tribe of Nebraska, then as a part-time Juvenile Court Judge in Woodbury County, as a Magistrate in Woodbury County and now for the past five plus years as a District Court Judge for the Third Judicial District. I am the father of seven wonderful children ranging in age from 7 to 33 and two small grandchildren. Of my 2 adult children, one works as a nurse for a helicopter medical transport service and as an ER nurse and the other served for nearly 8 years in the United States Air Force before being honorably discharged due to becoming medically disabled while in the service. My wife Lisa is a stay at home mother and together we are raising our five youngest children. In addition, she has found time to operate a business from home, serve on the PTO our children's school, and volunteer with the March of Dimes and other charitable causes. It is important to my family and I that we contribute to the betterment of our community in the ways that we are best suited. In addition to my other civic activities, I feel that I have been an effective Judge over the last 26 years. I greatly enjoy being a District Court Judge but feel I am ready to take the next step in my judicial career. I believe that I have, and have displayed, the knowledge, skills, demeanor and temperament necessary to be an effective Justice of the Supreme Court. I believe that I have made a difference in the lives of members of our community, as a private citizen, an attorney in private practice, as well as in the various judicial positions I have held throughout my career. I believe that I am ready for the responsibilities of being a Justice of the Iowa Supreme Court and would like the opportunity to serve my State in that position. Since the untimely passing of Justice Darryl Hecht, the western part of Iowa in general and the northwestern part of Iowa in particular, has not been represented on the Court. Being a life-long resident of Siouxland, I believe I can bring the perspectives of northwest Iowa to the Court.

I can honestly state that I have looked forward to each and every day that I have had the opportunity to serve as a judicial officer and I know that I will enjoy and appreciate every day that I will serve as a Justice of the Supreme Court if I am given the opportunity to do so.

28. Explain how your appointment would enhance the court.

I believe that the unique blend of experiences that I have had have made me a very valuable asset to the Court system and would as well as a Justice of Iowa Supreme Court. I have had a significant amount of experience in a wide range of areas of law, both as an attorney in the private practice of law for 27 years as well as being a Judicial Officer for the last 26 years. During my years as an attorney, I tried to make my practice as diverse as possible to prepare me for the various areas of law I would be responsible for whether it be as a District Court Judge or as a Justice of the Iowa Supreme Court. To be effective as a Justice of the Supreme Court, a candidate needs to be well versed in all areas of the law. I have a significant amount of experience in many areas, such as criminal law, family law, mental health, juvenile, probate, civil litigation, commercial law, and real

estate. Not only do I have the background knowledge of these and other areas of the law, but I also have a 26 year track record of dealing with those issues as a Judge as well. I know the frustrations and difficulties that sometimes come with the responsibilities of being a judge. I have worked through those issues and believe I am uniquely prepared for this position based upon my years of blended experience both as a private attorney as well as a Judge.

I also believe that my personal experiences outside of the law would contribute to the functioning of the court by bringing differing perspectives to the court. I come from a background that has included both white collar and blue collar jobs. My maternal grandfather was a medical doctor while my paternal grandfather was a cattle buyer for the stockyards in Sioux City. My father owned and operated a service station in Sioux City for 40 years before his retirement in the early 1990's. While I have been employed exclusively in the legal profession for my adult life, as a teenager and student I worked at my father's service station as well as jobs in production (Wells Blue Bunny). I also have extended family in agriculture and as such I have been exposed to issues facing both rural and urban Iowa. In addition, my triplets who are amazing children, as are all of my children, were born premature and are on the autism spectrum. As a result they have benefited from waiver services through the Department of Human Services which has given me exposure to the benefits of the types of services that are available while at the same time exposing me to the frustrations and challenges associated with obtaining such services as well.

I believe I present a unique blend of professional qualifications with my combined years of experience in private practice and as a judicial officer with a diverse personal background. I believe I will be able to draw upon these experiences to make myself a valuable contributor to the Supreme Court for years to come.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

It has been an honor and a privilege to have the opportunity to serve my community over the last 26 years first as a part-time Juvenile Court Judge, then as a Judicial Magistrate for Woodbury County for 15 years and now as a District Court Judge since 2014.
One of the most important aspects of a free society is having an impartial and fair judiciary to resolve disputes. Some of the greatest satisfaction I have had over the course of my 24 years of experience serving as a judicial officer, have been the occasions when individuals, both attorneys and lay people, have approached me outside of the courtroom to thank me for giving them a fair opportunity to be heard. It has been my experience that people who participate in the court system have a much greater sense of satisfaction with the system, whether they win or lose, if they feel they have been treated fairly. I strive each and every day to treat all people in this fashion. With the array of experience I have had the opportunity to have at this point in my career, I am able to approach the situations that I face with an open mind and be able to make tough decisions in light of the framework of the law. I am a strong believer in our constitutional form of government and believe that it is by far the best in the world.

Attachments regarding Question 10(b)

Attached are the following items:

1. State v. Bender, Plymouth County Case No. SRCR016095
   Court of Appeals Decision: State v. Bender, 888 N.W.2d 902 (Table) (Iowa App. 2016)

2. In Re the Detention of Ogden, Plymouth County Case No. CVCV036026
   Court of Appeals Decision: In Re Detention of Ogden, 906 N.W.2d 204 (Table) (Iowa App. 2017)

3. In Re Interest of M.D., K.T., G.A., E.A. and S.A., Ida County Case Nos. JVJV001242-001246
   Affirmed by the Court of Appeals: In Re Interest of M.D., K.T., G.A., E.A. & S.A., 924 N.W.2d 533 (Table) (Iowa App. 2018)

   Reversed by the Supreme Court: In Re Interest of M.D., 921 N.W.2d 229 (Iowa 2019)

4. State v. Schiebout, Sioux County Case No. FECR016068
   Court of Appeals Decision: State v. Schiebout, 2019 WL 4309062 (Iowa App. September 11, 2019) Affirmed in part, sentence remanded.

5. State v. Delgado-Jimenez, Woodbury County Case No. FECR102958
   Court of Appeals Decision: State v. Delgago-Jimenez, 2020 WL 115768 (Iowa App. January 9, 2020)
   Discretionary Review granted by Supreme Court May 17, 2019 (decision pending)

IN THE IOWA DISTRICT COURT FOR PLYMOUTH COUNTY

STATE OF IOWA, **Plaintiff,** **vs.** **NOEL JERMAINE BENDER,** **Defendant.**	**SRCR016095** **JUDGMENT AND SENTENCE** **(Felony- Not Sex Abuse or OWI Third)**

APPEARANCES:
Attorney Darin J. Raymond for the State
Attorney John Loos for the Defendant, and Defendant in person

On the 19th day of August, 2015, Defendant
☐ pled guilty
☒ was found guilty following trial of the offense(s) shown in paragraph one (1) below.

PSI Pursuant to Iowa Code § 901.2-.4
☐ **A presentence investigation report** is on file and has been distributed to counsel of record.
☒ **Defendant waives use of a presentence investigation** and waived any additional time for sentencing and any additional time to file a Motion in Arrest of Judgment and requested sentencing proceed on August 31, 2015. The Court hereby orders that the Judicial District Department of Correctional Services prepare a presentence investigation report, file it with the Clerk of Court, and distribute copies as provided by law.

Based on the record made, and pursuant to Iowa Code § 901.6,
IT IS NOW ORDERED AND ADJUDGED as follows:

1. **Judgment**. Defendant is guilty and is convicted of the following crimes:

Count	Offense Date	Iowa Code Sections	Offense
1	April 28, 2015	§§708.2A(1), 708.2A(4), 902.8, 902.9	Domestic Abuse Assault 3rd Offense As a Habitual Offender
		§	
		§	

2. **Incarceration and Fine.** Pursuant to Iowa Code §§ shown in paragraph 1 above and the Iowa Code §§(s) shown below at *, the defendant is sentenced to an indeterminate term of incarceration not to exceed that shown below plus fine and surcharge as follows:

Count	Incarceration	Fine	Surcharge
1	15 years	N/A	N/A

*Check all applicable Code §§ (The descriptive parentheticals are only to aid in preparing the document and are not substantive parts of this order.)

☒ 911.1 (surcharge)	☐ 902.9(5) (5 yrs. + $750-7500)	☐ 124.411 (2nd off. up to 3x)
☐ 902.1 (life)	☐ 124.401(1)(a) (50 yrs+$0-1mil.)	☐ 124.413 (1/3) min.
☐ 902.9(1) (99 yrs.)	☐ 124.401(1)(b) (25 yrs+$5k-100k)	☐ 124.401A (1000 ft. + 5 yrs.)
☐ 707.3 (50 yrs.)	☐ 124.401(1)(c) (10yrs.+$1k-50k)	☐ 124.401B (1000 ft. + 100 hrs.)
☐ 902.9(2) (25 yrs.)	☐ 124.401(e) (firearm 2x)	☐ 124.401C (minors + 5 yrs.)
☒ 902.9(1)(c) (15 yrs.)	☐ 124.401(f) (off.weap 3x)	☐ 124.401D (minors, 2nd, life)
☐ 902.9(4) (10 yrs. + $1k-10k)	☐	

Pursuant to Iowa Code § 901.7, the defendant is committed to the custody of the Director, Iowa Department of Corrections. The Sheriff of this county is ordered to transport the defendant (accompanied by a person of the same sex) to the Iowa Medical and Classification Center at Oakdale, Iowa.

3. **Consecutive/Concurrent.** Pursuant to Iowa Code §§ 901.5(9)(c) and 901.8, the above sentence(s) of incarceration will run

☒ **consecutive,** or ☐ **concurrent**

☐ with the sentence imposed in Woodbury County Case No. SRCR91048

☒ with the sentence imposed in parole/probation revocation in Plymouth County Case Number FECR013988.

☒ All sentences shall be served consecutively to each other.

☐ This paragraph is not applicable.

4. **Mandatory Minimum.** A mandatory minimum sentence of incarceration

☐ is not applicable.

☒ is imposed in Count 1, pursuant to Iowa Code §§ (s):

☐ 124.413 (1/3)	☒ **902.8 (3 yrs. habit.)**
☐ 901.10(1) (1st conviction)	☐ 902.8A (10 yrs., 124.401D 1st)
☐ 901.10(2) (meth reduction)	☐ 902.11 (1/2 if prior ff)
☐ 902.10(3) (124.401D reduction)	☐ 902.12 (70% certain fel.)
☐ 902.7(5 yrs. ff + weap.)	☒ **708.2A(7)(b) (1 Year for Felony Domestic Abuse)**

5. **Credit for Time Served.** Pursuant to Iowa Code §§ 903A.5 and 901.6, the defendant shall be given credit for all time served in connection with this case.

6. **Sentence of Incarceration.** The above term of incarceration is not suspended and Mittimus shall issue forthwith.

7. **Sentence of Fine and Surcharge** are not applicable.

8. **LEIS Surcharge.** Pursuant to 911.3, the Law Enforcement Initiative Surcharge for a violation of Iowa Code(s)124;155A;453B;713;714;715A;716; 719.7;719.8;725.1;725.2;or 725.3.

☒ is not applicable.

☐ is applicable and defendant shall pay $125.00. If multiple offenses, surcharge shall apply for each offense.

9. **DARE Surcharge.** Pursuant to 911.2, the Drug Abuse Resistance Education surcharge for a violation of Iowa Code(s) 321J or 124, division IV,

☒ is not applicable or not applicable because judgment suspended. See §911.2(2).

☐ is applicable. Pursuant to Iowa Code § 911.2, defendant is ordered to pay $10.00.

10. **Victims.**

☒ **Pecuniary damages** pursuant to Iowa Code 915.100

☒ to the victim(s) as defined at Iowa Code 915.10(3).

☒ If no pecuniary statement of damages is available, or only a partial statement is available at sentencing, the County Attorney pursuant to Iowa Code 910.3 shall provide a statement no later than thirty (30) days after sentencing and provide a permanent, supplemental order, setting the full amount of restitution.

☒ **No Contact Order**. Pursuant to Iowa Code § 664A.2 and 664A.5, a No Contact order

☐ is not applicable or not needed or not requested. Any No Contact Order entered in this case, if any, is terminated.

☒ is applicable. Defendant shall have no contact with Gayle Banks for five (5) years, from the date of this judgment. The Court will issue a separate order to further implement this paragraph, if requested.

11. **Restitution.** Pursuant to Iowa Code § 910.3, the defendant shall pay and judgment is imposed against the defendant as follows: (check all that apply)

☐ **Fines, penalties and surcharges** to the Clerk of Court as set forth above.

☒ **Crime victim assistance program** (See Iowa Code 13.31) reimbursement pursuant to Iowa Code 910 and 915 in the amount of $ _____.

☒ To public agencies pursuant to Iowa Code § 321J.2(13)(b).

☒ **Court costs** in an amount that will be later certified by the Clerk of Court.

☒ **Correctional fees** pursuant to Iowa Code § 356.7 to be certified by the Sheriff.

☒ **Court-appointed attorney's fees** per Iowa Code § 815.9, if the defendant is receiving court appointed legal assistance, the court finds upon inquiry, review of the case file any other information provided by the parties, the defendant has the reasonable ability to pay restitution of fees, including expense of a public defender

☒ in the amount approved by the State Public Defender

☐ or $_____ whichever is less.

☐ Reasonable Ability to Pay Adjustment Option: Pursuant to Iowa Code 910.2(1) the court finds upon inquiry, review of the case file and any other information provided by the parties, that the defendant has the reasonable ability to pay restitution for the above items of $ _____ .

☐ Community Service Option: Pursuant to Iowa Code 910.2(2) the court finds the defendant is not reasonably able to pay the above _____ and accordingly shall perform _____ hours of public service at a governmental agency or for a private nonprofit agency which provides service to youth, elderly or poor of the community. The judicial district department of correctional services or designated individual shall provide for the assignment to perform the required service. The hours ordered are an "approximately equivalent value to those costs."

12. **Notice Regarding Financial Obligations:**

All fines and costs, unless otherwise ordered, shall be paid on the day imposed. Payment of any fines, surcharges, court costs, restitution, or court appointed attorney's fees may be paid on-line by going to www.iowacourts.gov or at the Clerk of Court's office or at some County Attorney's office.

☐ **Installment Payment Option:** Defendant shall pay not less than $50 per month with the first payment due within 30 days (Iowa Code 909.3) of the date of this order and each month thereafter until all that is owed is paid in full. The entire financial liability must be paid within two years of this Order (Supreme Court Supervisory Order dated July 3,2010). A Judge may not order an installment plan for any debt that is already delinquent, cannot forgive any installment payments, cannot modify, block, rescind any installment plan made by CCU, County Attorney, DOT, County Treasurer or other entities collecting delinquent court debt. CCU and some County Attorneys can arrange ONE installment plan for all court debt owed- the Judge CANNNOT do so. (7/3/2010 S.Ct. Order)

If a payment is more than 30 days past due, the Clerk of Court will turn the matter over to the Central Collection Unit (CCU)(515-281-6944) to begin collection efforts and a 10% penalty will be added to any unpaid balance. After one (1) year, if any portion of the financial obligation is unpaid, it may be sent to a private third-party collection agency with an additional 25% added to the unpaid delinquent amount.

The State of Iowa may intercept any state income tax refund due to the defendant, any vendor amounts due the defendant by the State of Iowa, or monetary amounts held by the clerk of court and payable to the defendant.

Unless Defendant fully complies with all the requirements ordered in this judgment, including payment of the restitution, fine, surcharges, and court costs within the required time, the Defendant may be ordered to appear in person before this Court and show cause why the Defendant should not be held in contempt of court. If the Defendant is held in contempt of court, a jail term may be imposed.

13. **Driver's License Revocation.** Pursuant to §901.5(1)

☒ Is not applicable.

☐ The Iowa Department of Transportation ("IDOT") shall revoke defendant's driver's license or motor vehicle operating privilege for a period of 180 days, or shall delay the issuance of a driver's license for 180 days after defendant is first eligible if defendant has not been issued a driver's license. If defendant's operating privileges are suspended or revoked at the time of sentencing, then the 180-day revocation period shall not begin until all other suspensions or revocations have terminated. In the event defendant qualifies, the IDOT shall grant a temporary, restricted driver's license to defendant for the purposes of traveling to and from work, substance abuse counseling or treatment; and for any other travel requirements imposed as conditions of defendant's probation.

14. **Reduction of Term.** Pursuant to Iowa Code § 901.5(9)(a), (b), the court publicly announced that defendant's term of incarceration may be reduced from the maximum sentence because of statutory earned time, work credits and program credits; and defendant may be eligible for parole before the sentence is discharged.

15. **DNA Profiling**. Pursuant to Iowa Code §§ 81.2 and 901.5(8A)(a), the Defendant shall submit a physical specimen for DNA profiling.

16. **Appeal Bond.** Defendant was informed of the right to appeal. Pursuant to Iowa Code § 811.1(2), Defendant is not eligible for bond on appeal. If an appeal bond is posted, the court, upon the request of either party or on the court's own motion, will set a hearing to determine if any special conditions of release should be imposed pending an appellate decision.

17. **Bonds Exonerated**. All outstanding bonds are exonerated.

18. Pursuant to Iowa Code §§907.3, 907.5, 901.3 and 901.5, the reasons supporting this sentence include those set forth on the record and:

- ☒ The maximum opportunity for the rehabilitation of the defendant.
- ☒ Protection of the community from further offenses by the defendant and others.
- ☒ Defendant's age.
- ☒ Defendant's prior record (or lack thereof) as to convictions and deferments.
- ☒ Defendant's employment circumstances.
- ☒ Defendant's family circumstances.
- ☒ Nature of the offense committed.
- ☐ Contents of the presentence investigation.
- ☐ Plea Agreement.
- ☒ The financial condition of the defendant.
- ☐ A weapon or force was used.
- ☐ Comments from the victim(s) of the crime.
- ☒ If consecutive sentences, the court explained on the record why imposed.
- ☐ Other factors:

19. **Other.**
☒ All warrants, if any, are recalled.
☐

JUDGMENT IS ENTERED ACCORDINGLY this 31st day of August, 2015.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
SRCR016095	STATE OF IOWA VS BENDER, NOEL JERMAINE

So Ordered

Patrick H. Tott

Patrick H. Tott, District Court Judge,
Third Judicial District of Iowa

888 N.W.2d 902 (Table)
Only the Westlaw citation is currently available.
NOTICE: FINAL PUBLICATION
DECISION PENDING
Court of Appeals of Iowa.

STATE Of Iowa, Plaintiff–Appellee,
v.
Noel BENDER, Defendant–Appellant.

No. 15–1595.
|
Oct. 26, 2016.

Appeal from the Iowa District Court for Plymouth County, Patrick H. **Tott**. Judge.
Noel Bender appeals his judgment and sentence for domestic abuse assault. REVERSED AND REMANDED.

Attorneys and Law Firms

Priscilla E. Forsyth, Sioux City, for appellant.

Thomas J. Miller, Attorney General, and Tyler J. Buller, Assistant Attorney General, for appellee.

Considered by VOGEL, P.J., and VAITHESWARAN and McDONALD, JJ.

Opinion

VAITHESWARAN, Judge.

***1** Noel Bender appeals his judgment and sentence for domestic abuse assault. He contends his attorney was ineffective in failing to object to an "intimate relationship" alternative in the marshalling instruction.

I. Background Facts and Proceedings
Bender met a woman and moved in with her approximately two months later. Bender indisputably assaulted the woman.

The State charged Bender with domestic abuse assault, third or subsequent offense while being a habitual felon. *See* Iowa Code §§ 708.2A(1), 708.2A(4), 902.8, 902.9 (2015). The district court instructed the jury that the State would have to prove the assault "occurred between persons who were in an 'intimate relationship' ... or occurred between persons who were household members who resided together at the time of the assault." The jury returned a general verdict of guilty. Bender appealed.

II. Jury Instruction–Intimate Relationship
Iowa Code chapter 708 sets forth enhanced penalties for assaults that are "domestic abuse as defined in section 236.2, subsection 2, paragraph 'a', 'b', 'c', or 'd'." *Id.* § 708.2A(1). The statute does not authorize enhanced penalties for assaults that are domestic abuse as defined in section 236.2(2)(e). Subsection (e) refers to assaults "between persons who are in an intimate relationship or have been in an intimate relationship" and states "[a] person may be involved in an intimate relationship with more than one person at a time." *Id.* § 236.2(2)(e)(1), (2).

Bender only disputes the "domestic abuse" element of domestic abuse assault. In his view, the district court "erroneously instructed the jury that the definition of domestic abuse includes intimate relationships as defined in Iowa Code [s]ection 236.2(2)(e)(1) and (2)." Because his attorney failed to object to the instruction on this basis, he raises the issue under an ineffective-assistance-of-counsel rubric.

To succeed, Bender must show (1) the breach of an essential duty and (2) prejudice. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). We find the record adequate to address this claim. *See State v. Clay,* 824 N.W.2d 488, 494 (Iowa 2012).

The State essentially concedes Bender's attorney breached an essential duty in failing to object to the jury instruction that erroneously allowed the State to prove domestic abuse based on an intimate relationship. *See State v. Perkins,* 875 N.W.2d 190, 193–94 (Iowa Ct.App.2015) (concluding defendant's guilty plea to domestic abuse lacked a factual basis where defendant "admitted that he had been in an intimate relationship" with the victim, but "specifically denied living with [her]"); *see also State v. Ondayog,* 722 N.W.2d 778, 785 (Iowa 2006) ("[F]ailure to recognize an erroneous instruction and preserve error breaches an essential duty."). The State focuses on the prejudice prong of Bender's ineffective-assistance-of-counsel claim, arguing Bender "cannot carry his burden to prove the reasonable probability of a different outcome." *See State v. Maxwell,* 743 N.W.2d 185, 197 (Iowa 2008) ("When the submission of a superfluous jury instruction does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred, in the context

of an ineffective-assistance-of-counsel claim, no prejudice results."). We are not persuaded by the State's argument.

***2** As discussed, the district court instructed the jury on two alternative means of establishing a "domestic" relationship: (1) the persons were in an "intimate relationship" or (2) the persons were "household members." The State presented evidence supporting both alternatives and highlighted both in its opening statement and closing argument. Bender conceded he had sex with the woman and, while characterizing the sex as "casual," focused most of his testimony on the "household member" alternative. He pointed to several facts cutting against a finding of household membership, including the absence of his name on the lease or utility bills and the minimal number of personal items in the woman's home. In light of this record, jurors very well could have found guilt under the less contentious but erroneously-included "intimate relationship" alternative rather than the heavily-disputed "household member" alternative. Jurors were instructed they need not agree on a theory as long as they were unanimous on the verdict. We cannot tell from the general verdict form which alternative they chose. On our de novo review, we conclude Bender proved a reasonable probability of a different outcome had counsel objected to the inclusion of the "intimate relationship" alternative.

A recent opinion with a similar issue does not alter our conclusion. *See State v. Thorndike,* 860 N.W.2d 316 (Iowa 2015). In *Thorndike,* the court was asked to decide whether counsel was ineffective in failing to object to a jury instruction containing a superfluous alternative. *Id.* at 322–23. The court concluded the defendant failed to establish prejudice because (1) "the alternative ... did not contradict another instruction given ... or misstate the law," (2) the record was "devoid of any evidence that would have allowed the jury to find" guilt on the superfluous ground, and (3) the State made no argument that the superfluous alternative was applicable. *Id.*

Thorndike is distinguishable. Unlike the jury instruction in that case, the jury instruction here admittedly misstated the law. See Maxwell, 743 N.W.2d at 197 ("Under the facts contained in this record, we do not believe the aiding and abetting instruction misstated [the defendant's] culpability in a material way."). And, as noted, the State presented evidence in support of the erroneously-included "intimate relationship" alternative. Indeed, the State used those precise terms in eliciting testimony from the woman who was assaulted. Finally, the State invoked the erroneously-included alternative in arguing for a finding of guilt. *See State v. Simms,* No. 15–0274, 2016 WL 4543496, at *4 (Iowa Ct.App. Aug. 31, 2016) (distinguishing Thorndike on the ground the record was "laden" with references to four alternative means of committing the crime and "the prosecutor stated, 'There is evidence of all four and the State believes that you could find all four' ").

***3** Because Bender proved his ineffective-assistance-of-counsel claim, we reverse and remand for a new trial.

REVERSED AND REMANDED.

All Citations

888 N.W.2d 902 (Table), 2016 WL 6396227

End of Document

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E-FILED 2015 DEC 10 1:25 PM PLYMOUTH - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT FOR PLYMOUTH COUNTY

IN RE: THE DETENTION OF MICHAEL OGDEN, Respondent.	NO. CVCV036026 RULING RE: MOTION TO DISMISS & STATUS CONFERENCE

Now on this 4th day of December 2015, this matter came before the Court for a telephonic hearing regarding the Respondent's Motion to Dismiss filed September 21, 2015, and the State's Resistance thereto filed October 21, 2015. The Respondent appeared by counsel Jill Immerman. The State appeared by Assistant Attorney General Keisha Cretsinger. From review of the filings and the contents of the Court file, the Court finds as follows:

1. The State filed its Petition pursuant to Chapter 229A alleging that the Respondent is a sexually violent predator on November 24, 2014. At the time of the filing of the Petition, the Respondent was incarcerated at the Fort Dodge Correctional Facility for violation of his special sentence under Chapter 903B.

2. Respondent was initially convicted of Assault with Intent to Commit Sex Abuse in the Iowa District Court for Plymouth County on December 7, 2010.

3. The Respondent was sentenced to 365 days in jail with all but 30 days suspended and was placed on probation with a 10 year special sentence under Section 903B.

4. The Respondent's probation was revoked on April 18, 2011, and his original sentence was imposed.

5. In January 2012, the Respondent was paroled having discharged his original sentence and was placed in a residential facility to begin serving his 10 year special sentence.

6. On November 9, 2012, the Respondent was ordered to serve a two year prison sentence for a violation of his special sentence with an expected discharge date of December 5, 2014. The violation regarded inappropriate sexual contact with a female co-worker.

PROPOSITIONS OF LAW

Under Iowa Code Section 229A.4, in order for the State to file a petition for civil commitment as a sexually violent predator, the respondent must either be presently confined for a sexually violent offense, or they must have committed a "recent over act" after discharging their sentence. In re Detention of Gonzales, 658 N.W.2d 102 (Iowa 2003).

Under Chapter 903B.2, the 10 year special sentence imposed is in addition to any other punishment provided by law for a conviction of a class D felony under chapter 709, section 726.2 or section 728.12. State v. Harkins, 786 N.W.2d 498 (Iowa Ct. App. 2009). Assault with intent to commit sexual abuse is a violation of Section 709.11.

Under Section 229A.2(11)(a) a "sexually violent offense" includes a violation of any provision of chapter 709.

ANALYSIS AND CONCLUSIONS

On November 24, 2014, at the time the State filed its petition herein, the Respondent was incarcerated at the Fort Dodge Correctional Facility for violation of his special sentence under Chapter 903B regarding his conviction for Assault with Intent to

Commit Sex Abuse on December 7, 2010. As stated in Harkins the special sentence under Chapter 903B is a part of the sentence for this conviction. As the Respondent was still serving this special sentence when the petition was filed herein, he was "presently confined" for a sexually violent offense. **Accordingly the Respondent's Motion to Dismiss is denied.**

IT IS THEREFORE ORDERED that the Respondent's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that this matter be scheduled for a further status hearing on March 4, 2016, at 9:00 a.m. the parties may appear telephonically at that time by contacting the Court at (866) 685-1580 and entering conference code 7065868569. After placing this phone call if you feel you have been on hold for an extended period of time, please hang up and redial.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV036026	IN RE THE DETENTION OF MICHAEL ROSS OGDEN

So Ordered

Patrick H. Tott

Patrick H. Tott, District Court Judge,
Third Judicial District of Iowa

906 N.W.2d 204 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

IN RE the DETENTION OF Michael OGDEN
Michael Ogden, Respondent-Appellant.

No. 16-0726
|
Filed July 6, 2017

Appeal from the Iowa District Court for Plymouth County, Patrick H. **Tott**, Judge.
Michael Ogden appeals his civil commitment as a sexually violent predator. **REVERSED AND REMANDED.**

Attorneys and Law Firms

Jason A. Dunn, Assistant Public Defender, for appellant.

Thomas J. Miller, Attorney General, and Jean C. Pettinger, Assistant Attorney General, for appellee State.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

Opinion

TABOR, Judge.

***1** Today we examine the intersection between the sexually violent predator commitment procedures in Iowa Code chapter 229A and the more recently enacted "special sentencing" for sexual offenders under chapter 903B. Michael Ogden appeals the district court's order committing him as a sexually violent predator. He contends the district court should have granted his motion to dismiss because he was not "presently confined" within the meaning of Iowa Code section 229A.4(1) (2014) when the State filed its civil commitment petition. We agree, and because the State neither amended its petition to allege Ogden committed a recent overt act under section 229A.4(2) nor sought a factual determination under that alternative predicate, we reverse the district court's commitment order and remand for dismissal. [1]

I. Background Facts and Prior Proceedings

While living in a residential treatment facility, then nineteen-year-old Ogden digitally penetrated a female resident against her will and was charged with assault with intent to commit sex abuse—a sexually violent offense as defined in Iowa Code section 229A.2(10) (2009). Ogden pleaded guilty in December 2010. The district court sentenced him to 365 days in jail with all but thirty days suspended, placed him on probation, and imposed a ten-year special sentence under Iowa Code section 903B.2. Ogden's probation was later revoked, and the court imposed the suspended jail sentence. [2]

In January 2012, Ogden was released from jail and placed at a residential facility to begin serving his special sentence under section 903B.2. Less than one year later, Ogden reported to his parole officer that he had "nibbled on" a female coworker's ear and "grabbed her butt" while they were gathered with a group of other people in a break area at his place of employment. Starting in January 2013, Ogden was incarcerated for two years for violating the terms of his special sentence. [3]

On November 24, 2014, shortly before Ogden's discharge of the two-year term, the State filed a petition seeking to commit Ogden as a sexually violent predator. Ogden filed a motion to dismiss, asserting he was not "presently confined" within the meaning of section 229A.4 (2014), because at the time he violated his special sentence, "[h]e had completed his sentence for the sexually violent offenses and was only revoked for acts that are not sexually violent offenses." The district court denied Ogden's motion to dismiss, reasoning the special sentence was part of Ogden's conviction for a sexually violent offense and, because Ogden was still serving the special sentence when the petition was filed, he was "presently confined" within the meaning of the statute.

***2** The case proceeded to trial on April 12–14, 2016, and the jury returned a verdict finding Ogden to be a sexually violent predator. Ogden now appeals.

II. Scope and Standard of Review

We review the district court's ruling on Ogden's motion to dismiss for correction of legal error. *See In re Det. of Stenzel*, 827 N.W.2d 690, 697 (Iowa 2013); *In re Det. of Shaffer*, 769 N.W.2d 169, 172 (Iowa 2009).

III. Analysis

The State may seek to civilly commit an individual who appears to be a sexually violent predator by following either of two routes. *See* Iowa Code § 229A.4 (providing certain criteria to commence proceedings to commit "a person presently confined" and separate criteria to commence

proceedings to commit "a person who has committed a recent overt act"); *Shaffer*, 769 N.W.2d at 173. Our supreme court has described these statutory alternatives as "an either-or proposition." *Stenzel*, 827 N.W.2d at 699. The State relied upon the "presently confined" ground in its petition to commit Ogden. But in resisting his motion to dismiss, the State advanced the alternative theory Ogden had committed a recent overt act. In this appeal, we are asked to decide if the State successfully navigated either course to commit Ogden as a sexually violent predator.

Presently Confined. "When it appears that a person who is confined may meet the definition of a sexually violent predator," the State may initiate proceedings "no later than ninety days prior to ... [t]he anticipated discharge of a person who has been convicted of a sexually violent offense from total confinement." Iowa Code § 229A.3(1)(a). To be considered "presently confined" within the meaning of Iowa Code section 229A.4(1), a person must be confined for a sexually violent offense. *See In re Det. of Gonzales*, 658 N.W.2d 102, 104–05 (Iowa 2003).

Ogden contends because he completed his sentence for assault with intent to commit sex abuse and was released from jail, the State could not rely upon the "presently confined" ground for commitment. In support of his position, Ogden relies on two cases: *Gonzales*, 658 N.W.2d at 102–03, and *In re Detention of Ward*, No. 02-1571, 2003 WL 23005197, at *4 (Iowa Ct. App. Dec. 24, 2003). In *Gonzales*, the State filed a petition under section 229A.4(1), seeking to commit Gonzales as a sexually violent predator while he was "presently confined" for operating a motor vehicle without the owner's consent. 658 N.W.2d at 102–03. Gonzales had previously been convicted of sexually violent offenses but had been released from confinement on those offenses two years before the operating-without-consent conviction. *Id.* at 102.

The Iowa Supreme Court concluded allowing the State to commit an individual confined for a nonsexual offense in the absence of a recent overt act would raise "serious constitutional issues." *Id.* at 105. The court explained it would not be "just or reasonable" to commit a person without proving a recent overt act simply because that person was incarcerated. *Id.* (cautioning a contrary interpretation would "allow the State to reach back in time, seize on a sexually violent offense for which a defendant was discharged, and couple this with a present confinement for a totally different —or even perhaps trivial—offense and use chapter 229A to confine the person"). Accordingly, the *Gonzales* court construed the statute to avoid these concerns, holding to satisfy the prerequisite of present confinement, the individual must be "confined for a sexually violent offense at the time the petition was filed." *Id.* at 104–06.

***3** In *Ward*, this court considered the scope of the confinement requirement, rejecting an argument that "confined" applied only to "those respondents who have been continuously incarcerated, from the moment of their sentencing for a sexually violent offense to the moment a petition for commitment was filed." 2003 WL 23005197, at *4. The court held Ward was "presently confined" within the meaning of the statute because the State filed its petition during his incarceration following a probation violation. *Id.* (seeing no basis to distinguish a person continually confined from the date of sentencing for a sexually violent offense, and someone like Ward, "who had been continually incarcerated for a sexually violent offense for over two years at the time the commitment petition was filed"). Ogden highlights the following dicta from the *Ward* opinion:

> This is not a case where a respondent has completed his term of confinement for the sexually violent offense, but was nevertheless incarcerated at the time the petition was filed for a non-sexually-violent offense or parole violation. We would agree that, in such instances, the State should be required to prove a recent overt act. *See Gonzales*, 658 N.W.2d at 102–03 (requiring recent over [t] act where respondent was discharged from confinement for sexually violent offense, but was incarcerated for motor-vehicle-related violation); *In re Albrecht*, ... 51 P.3d 73, 78 (Wash. 2002) (requiring proof of recent overt act, where at time the petition was filed respondent had completed two-year prison term for sexually violent offense but was serving jail sentence for violating the community placement portion of his sentence).

Id.

Two years after *Gonzales* and *Ward* were filed, the legislature enacted Iowa Code sections 903B.1 and .2, which subject individuals who are convicted of sex crimes to an additional parole-like "special sentence," commencing "upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense." *See* Iowa Code §§ 903B.1–.2. Depending on the severity of the underlying offense, convicted individuals are committed into the custody of the director of the Iowa Department of Corrections for either ten years or the rest of their lives, with eligibility for parole. *See id.* §§ 903B.1 (imposing a lifetime special sentence on any person convicted of a class "C" felony or greater offense under chapter 709 or a class "C" felony under section 728.12), .2 (imposing a ten-year special sentence on any person convicted of a misdemeanor or a class "D" felony under chapter 709, section 726.2, or section 728.12). Upon a violation of the terms and conditions of the special sentence, the court may revoke the individual's release: "The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation." *Id.* §§ 903B.1, .2; *see also id.* § 908.5(2).

After enacting the "special sentencing" under sections 903B.1 and .2, the legislature did not amend the sexually-violent-predator notice and petition provisions in sections 229A.3 and .4. Accordingly, it is unclear how the legislature intended to treat "confinement" for a special-sentence violation in the context of a chapter 229A civil commitment. *See Gonzales*, 658 N.W.2d at 104 (finding "plain meaning" of confinement was "not plain at all").

Our court has previously looked at how these two chapters fit together but from the other direction. *See In re Det. of West*, No. 11-1545, 2013 WL 988815, at *3 (Iowa Ct. App. Mar. 13, 2013). In *West*, the State filed a petition under section 229A.4(1) while the respondent was still serving his prison sentence for the underlying sexually violent offense and before his special sentence commenced under section 903B.2. *Id.* at *1. West argued the petition was premature and the legislature intended individuals to be subject to commitment under chapter 229A only after they discharged their underlying sentence, including the "special sentence" under section 903B.2. *Id.* at *2. Our court disagreed, holding the phrase "total confinement" in section 229A.3(1)(a) meant "complete or full imprisonment."[4] *Id.* at *3. We reasoned: "Reading the two statutes together, section 903B.2 does not alter the section 229A.3(1)(a) requirement that the potential [sexually violent predator] must be close to discharging the total confinement portion of his sentence imposed for his conviction of a sexually violent offense." *Id.* In *West* we concluded, because of the dangerous nature of sexually violent predators, "it makes sense that such a petition should be filed *before* a potential [sexually violent predator] is released into society, even if the anticipated release is subject to parole, probation, or any other kind of supervision." *Id.*

***4** So if, under the reasoning in *West*, the State may file its petition while the respondent is still confined on the underlying offense and *before* the "special sentence" commences, does the State also have a second option—as it did in Ogden's case—to file its petition *after* the respondent has been released from "total confinement" into the community, the special sentence has commenced, and then release is revoked? Ogden would answer "no"—he contends, because the State waited until his original sentence of confinement was discharged, it may not bring a sexually-violent-predator petition without proving he committed a recent overt act. He argues the revocation of his release under section 903B.2 is distinct from the original confinement for a sexually violent offense because under the "special sentence" he was allowed to live and work in the community, and if he continued to pose a danger as a sexual predator, it could be detected through his conduct.

Ogden's argument echoes the position of the Washington Supreme Court when considering a similar question under its sexually-violent-predator act.[5] *See Albrecht*, 51 P.3d at 75–78. In *Albrecht*, after a sex offender was released from prison, placed on community supervision, and then confined for a violation of his community supervision, the State filed a commitment petition under Washington's sexually-violent-predator act—without alleging a recent overt act. *Id.* at 76. The Washington Supreme Court rejected the State's argument that "when an offender is released into the community and is later totally incarcerated, no proof of a recent overt act is required." *Id.* at 78 (noting "Albrecht could have easily been jailed for consuming alcohol, going to a park, or moving without permission, each of which would have been a violation of the terms of his community placement but none of which would amount to a recent overt act as defined by the sexually violent predator statute"). The *Albrecht* opinion held:

> [T]o relieve the State of the burden of proving a recent overt act because an offender [was incarcerated] for a violation of the conditions of

> community placement would subvert due process. An individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous.

Id.

The State urges a different view of section 229A.4, contending Ogden was "presently confined" because he had not yet "been discharged after completion of the sentence imposed for the offense." *See* Iowa Code § 229A.4(2)(a). The State points out Ogden "had not successfully completed the special sentence component of his sentence, and thus his confinement was the direct result of [the original] offense." In support of its position, the State cites *State v. Harkins*, 786 N.W.2d 498, 505 (Iowa Ct. App. 2009), in which our court rejected defendant's due-process claim that his lifetime supervision under section 903B.1 was punishing him for "crimes not committed" and characterized the special sentence as "part of" the sentence being served for the underlying sexual-abuse offense.

***5** We do not find *Harkins* to be persuasive in the context of chapter 229A. *Harkins* addressed a constitutional challenge to the multi-layered sex-offender sentencing under section 903B.1, but it did not illuminate how the divisible parts of a sex offender's sentence should be treated under sections 229A.3 and .4. To the extent that judicial interpretations of the special sentences influence our decision today, we note that in both *Harkins*, 786 N.W.2d at 505, and *State v. Tripp*, 776 N.W.2d 855, 858–59 (Iowa 2010), the appellate courts recognized a dividing line between the sentence for the underlying criminal offense and the "special sentence" to commence after the completion of the underlying sentence by finding constitutional challenges directed only at the "special sentence" were not ripe for adjudication before the offenders started to serve their parole-like terms. *See id.* §§ 903B.1, .2 (stating "special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense").

When deciding what it means to be "presently confined" for a sexually violent offense under section 229A.4(1), we do not assess "words and phrases in isolation, but instead by incorporating considerations of the structure and purpose of the statute in its entirety." *See Den Hartog v. City of Waterloo*, 847 N.W.2d 459, 462 (Iowa 2014). When we consider "the context in which words are used," we are able to decipher their "ordinary meanings" to best achieve the statute's purpose. *Id.* (finding "contextual cues" from "related statutory provisions and our caselaw"). The purpose of chapter 229A is to provide "a small but extremely dangerous group of sexually violent predators" with "long-term care and treatment" through procedures that "reflect legitimate public safety concerns." Iowa Code § 229A.1. The later-enacted "special sentencing" in chapter 903B casts a broader net by imposing an additional period of supervision on all individuals convicted of sexual-abuse offenses under Iowa statutes. *See Kolzow v. State*, 813 N.W.2d 731, 737 (Iowa 2012) (explaining "legislature's objective in enacting the special sentence provisions ... was to further protect the citizens of Iowa from sex crimes"). In this larger context, we examine the procedure for filing a petition alleging an individual falls into that uber-dangerous category of sex offenders when he has been released from confinement for his underlying sexual offense. Our analysis consists of two prongs: (1) reading the phrase "presently confined" in section 229A.4(1) in conjunction with the phrase "total confinement" in section 229A.3 and (2) accounting for the recent-overt-act requirement from *Gonzales*.

First, we read the terms "confined" and "confinement" consistently across sections 229A.3 and 229A.4. *See State ex rel. Miller v. Midwest Pork, L.C.*, 625 N.W.2d 694, 698 (Iowa 2001) (giving consistent definition to related words "construct" and "construction"). We are convinced the phrase "total confinement" in section 229A.3 applies to confinement for "the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense" and not to potential imprisonment faced by an individual who is on supervised release under section 903B.1 or .2 if that release is eventually revoked. Section 229A.3 describes "total confinement" as including readmission to prison after "revocation of parole" but not as including "revocation of release" under section 903B.1 or 2. The State's contrary interpretation could lead to absurd results. For instance, an individual could be on supervised release in the community for up to a decade (or more if the individual remained on lifetime supervision under section 903B.1) without committing a sexually violent act. But if the individual were revoked for conduct which violated a term or condition of that release (but did not constitute a recent overt act as defined in section 229A.2(8)), the State could nevertheless file a petition under section 229A.4(1) without showing a

recent overt act. In that case, the original sexually violent offense—committed years earlier—would form the only basis for determining if the individual was "likely to engage in predatory acts of violence" under section 229A.2(5). Using the extended supervision of all sex offenders afforded by chapter 903B to expand the State's opportunities to commence civil commitment proceedings against what is supposed to be "a small but extremely dangerous group of sexually violent predators" would construe the phrases "total confinement" and "presently confined" too broadly.

***6** Second, allowing the State to file a civil commitment petition based on an attenuated connection to the respondent's original sexually violent offense "would raise serious constitutional issues." *See Gonzales*, 658 N.W.2d at 105 (citing Iowa Code § 4.4(1) (stating presumption that, in enacting a statute, "[c]ompliance with the Constitutions of the state and of the United States is intended")). Under *Gonzales*, the recent-overt-act requirement must be satisfied whether the State is proceeding under section 229A.4(1) or (2). *Id.* If the individual is confined for a sexually violent offense at the time the State files the petition, "[t]he recent act would simply be deemed to be the act for which the person is presently confined." *Id.* Since *Gonzales*, our courts have elaborated on the rationale for allowing the State to rely upon present confinement, emphasizing the respondent's limited ability to commit an overt act while confined. *See, e.g.*, *In re Det. of Willis*, 691 N.W.2d 726, 729 (Iowa 2005) ("The absence of sexually predatory acts in a setting of secure confinement does not paint the same picture as the absence of such acts in a normal life situation."); *Stenzel*, 827 N.W.2d at 700 ("Regardless of the portion of the sentence that the inmate may be technically serving, he or she is still in 'secure confinement,' thus limiting the opportunity to commit 'sexually predatory acts.' "); *Johnson*, 2012 WL 1860242, at *5 (citing *In re Det. of Lewis*, 177 P.3d 708, 713–14 (Wash. 2008), for the proposition proof of a recent overt act is required only when a sexually violent offender has been released from confinement and spent time in the community). These cases persuade us that the phrase "presently confined for a sexually violent offense" should be construed narrowly so as not to diminish the State's burden of proving dangerousness. *See Gonzales*, 658 N.W.2d at 105 ("To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another." (quoting *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974))).

Ogden completed his sentence of incarceration for his 2010 conviction and was released back into the community in 2012. Had the State wanted to commit Ogden based on his 2010 conviction, it could have done so by filing the commitment petition before he discharged the sentence for the underlying offense. *See West*, 2013 WL 988815, at *3. But the State did not do so. If the State did not consider the respondent too dangerous to release into society—subject to the "special sentence" under section 903B.2—then we conclude a petition filed after his release from "total confinement" must be premised on the commission of a recent overt act. Because Ogden was released back into the community following his discharge, the rationale for allowing the State to rely upon present confinement dissipated—"proof of a recent overt act [was] no longer an impossible burden for the State to meet." *Albrecht*, 51 P.3d at 78.

In sum, to be true to *Gonzales*, we conclude being "presently confined" for a sexually violent offense requires proof of present confinement for the underlying sexual offense and not a subsequent revocation for violating the terms and conditions of release under section 903B.2. [6]

Recent Overt Act. Because we find Ogden was not "presently confined" within the meaning of section 229A.4, we turn to the State's argument that we may affirm based on the commission of a recent overt act. A "recent overt act" is "any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm." Iowa Code § 229A.2(7). A finding of a "recent overt act" involves "an objective assessment based on all the surrounding circumstances." *In re Det. of Swanson*, 668 N.W.2d 570, 576 (Iowa 2003). The State alleges Ogden's physical contact with his female coworker in 2012 qualifies as a recent overt act.

The State did not allege a recent overt act in its petition, nor did it seek to amend the petition to add this alternative ground. And while there may be evidence in the record that could support a finding of a recent overt act, the issue was never submitted to or decided by a fact finder. [7] We decline to make this fact-finding for the first time on appeal.

***7** Accordingly, we reverse the commitment order and remand for dismissal of the petition. *See, e.g.*, *Gonzales*, 658 N.W.2d at 106 (reversing and remanding for dismissal after finding respondent "was not confined for a sexually violent offense at the time the petition was filed, and the

State failed to prove, or even allege, a recent overt act that meets the definition of the statute"); *In re Det. of Taute*, No. 01-1686, 2003 WL 289014, at *1 (Iowa Ct. App. Feb. 12, 2003) (same); *see also Matlock*, 2003 WL 288999, at *2 & n.2 (reversing and remanding for dismissal after State raised alternative recent-overt-acts argument in resistance to respondent's motion to dismiss but did not allege a recent overt act in its petition, "did not attempt to have the jury instructed on this 'recent overt act' predicate ... [, and] the issue was never submitted and decided by the fact-finder").

REVERSED AND REMANDED.

All Citations

906 N.W.2d 204 (Table), 2017 WL 2876243

Footnotes

1 Ogden also challenges the sufficiency of the State's evidence and argues the district court should have granted his motion for mistrial after the prosecutor referred to Ogden's motion in limine during the direct examination of one of the State's experts. Because we find the State did not meet either predicate requirement for filing the commitment petition, it is not necessary to consider Ogden's other arguments.

2 Neither the State nor Ogden offered testimony or other evidence about the reason for the probation revocation.

3 The record does not disclose the precise nature of Ogden's special-sentence violation. On appeal, Ogden asserts he violated the conditions of his special sentence by "not having a job." It is unclear whether the incident with Ogden's coworker resulted in his job loss or to what extent the court considered the incident in finding a violation of his special sentence.

4 Iowa Code chapter 229A does not define "total confinement." The same phrase is used in a comparable sexually-violent-predator statute in Washington. Wash. Rev. Code § 71.09.025(1)(a)(i) (2017) (allowing State to initiate commitment proceedings three months before "[t]he anticipated release from total confinement of a person who has been convicted of a sexually violent offense"); *see also id.* § 71.09.030 (providing the State may file a commitment petition when: (1) "[a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement," or (2) "a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act."). Washington's legislature defines "total confinement" as "confinement inside the physical boundaries of a facility or institution operated ... by the state or any other unit of government for twenty-four hours a day." *See In re Det. of Anderson*, 139 P.3d 396, 403 (Wash. Ct. App. 2006) (citation omitted).

5 Our courts have consistently found Washington case law regarding sexually-violent-predator commitments to be persuasive. *See, e.g.*, *Stenzel*, 827 N.W.2d at 701 (citing Washington case for proposition respondent is "presently confined" if respondent has been continuously incarcerated on a term that includes a sentence for a sexually violent offense at the time State files petition); *In re Det. of Williams*, 628 N.W.2d 447, 458 (Iowa 2001) (citing Washington case for proposition "likely" means "more likely than not" without the risk of falling below the constitutionally required minimum of clear and convincing evidence); *In re Det. of Ewoldt*, 634 N.W.2d 622, 624 (Iowa 2001) (citing Washington case for proposition pedophilia constituted a "mental abnormality"); *In re Det. of Johnson*, No. 10-1462, 2012 WL 1860242, at *5 (Iowa Ct. App. May 23, 2012) (citing Washington case for proposition "proof of a recent overt act is necessary only where a sexually violent offender has been released from total confinement and spent time in the community"); *Ward*, 2003 WL 23005197, at *4 (suggesting the State would be required to prove a recent overt act if respondent was incarcerated due to a parole violation and citing *Albrecht*, 51 P.3d at 78, with approval); *Springett v. Iowa Dist. Ct.*, No. 01-1432, 2002 WL 31882912, at *1 (Iowa Ct. App. Dec. 30, 2002) (citing Washington case with approval and noting Washington's "civil commitment statute [is] very similar to Iowa Code chapter 229A").

6 In accordance with this construction, when the State relies upon a recent overt act under section 229A.4(2), a person is considered "discharged after the completion of the sentence imposed for the offense" once the sentence *for the underlying sexually violent offense* has been discharged.

7 At oral argument, the parties disagreed whether Ogden had a right to have a jury decide the recent-overt-act issue. *See* Iowa Code § 229A.7(5)(a) (noting the right to have a jury determine the question "whether, beyond a reasonable doubt, the respondent is a sexually violent predator"); *id.* § 229A.2(4) (defining an element of the sexually-violent-predator definition—"likely to engage in predatory acts of sexual violence"—and noting "[i]f a person is not confined at the time that a petition is filed, a person is 'likely to engage in predatory acts of sexual violence' only if the person commits a recent overt act"); *see also Swanson*, 668 N.W.2d at 574 & n.3 (declining to comment on the propriety of the district

court's decision to bifurcate trial, with the court deciding whether a respondent's conduct constituted a recent overt act and the jury deciding the other issues); *In re Det. of Matlock*, No. 01-1094, 2003 WL 288999, at *2 (Iowa Ct. App. Feb. 12, 2003) (assuming the recent-overt-act predicate was a jury question). Because neither the judge nor the jury made this determination below, we find it unnecessary to decide this issue.

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IN THE IOWA DISTRICT COURT FOR IDA COUNTY
JUVENILE DIVISION

IN THE INTEREST OF:	)	**CASE NO. JVJV001145-001148**
EMBER ARBEGAST DOB 9-8-14	)	**JVJV001201/**
GEMMA JADE ARBEGAST DOB 11-15-11	)	**JVJV001242-001246**
KYLI TRAYLOR DOB 5-25-07	)	
MAKENZI DEVITT DOB 7-29-02	)	**CHILDREN IN NEED OF ASSISTANCE/**
SCARLET ARBEGAST DOB 10-3-16	)	**TERMINATION OF PARENTAL RIGHTS**
MINOR CHILDREN.	)	**ORDER**

On the 1st day of May 2018, this matter came before the Court for a Children in Need of Assistance review hearing in Case No. JVJV001145-001148 & JVJV001201, and a Termination of Parental Rights hearing in Case No. JVJV001242-JVJV001246. The State appeared by Assistant Ida County Attorney Kristal Phillips. Lesley Rynell appeared as the guardian ad litem/attorney for the children. Kristi Arbegast appeared telephonically and by her attorney Robert Deck. Nathan Arbegast appeared personally (Nathan's attorney was excused from being present). Lyle Traylor appeared personally and by his attorney George Blazek. Scott Devitt appeared personally and by his attorney Martha Sibbel. Ashley Trost appeared as the representative of the Iowa Department of Human Services. The proceedings were reported by certified court reporter Cristi Bauerly.

In regards to the CHINA review hearing, the State offered State's Exhibits 156 through 168, inclusive, in Case No. JVJV001145 and JVJV001146; State's Exhibits 154 through 163, inclusive, in Case No. JVJV001147; State's Exhibits 152 through 162, inclusive, in Case No. JVJV001148; and State's Exhibits 78 through 89, inclusive, in Case No. JVJV001201, which exhibits were accepted as offered. The mother offered evidence through her own testimony as well as Mother's Exhibits 139 through

141, inclusive, which exhibits were accepted as offered. No additional evidence was offered as part of the review portion of the hearing.

In regards to the termination of parental rights hearing, the State requested that the Court take judicial notice of and give evidentiary consideration to the orders and exhibits listed in the State's exhibit list filed April 30, 2018, which included those orders listed as Exhibits 1 through 10 on the State's exhibit list. In addition, the State offered State's Exhibits 10 through 18 in Case No. JVJV001145 - JVJV001148. The State presented additional evidence through the testimony of Ashley Trost.

Evidence was presented by Lyle Traylor through his own testimony. The mother, Kristi Arbegast, presented evidence through her own testimony and Mother's Exhibit 001. The guardian ad litem presented evidence through Child's Exhibit ATCH004. No additional evidence was offered by any of the parties.

The Court having considered the evidence, having further considered the statements of the parties, and having been fully advised in the premises **FINDS**:

1. That the prior findings of fact made by the Court in Case Nos. JVJV001145 – JVJV001148 and JVJV001201 are incorporated herein by reference.

2. That the children, with the exception of Scarlet, were adjudicated to be children in need of assistance by order filed February 9, 2016, pursuant to Iowa Code Section 232.2(6)(b)&(c)(2). Scarlet was adjudicated to be a child in need of assistance by order filed June 1, 2017, pursuant to Iowa Code Section 232.2(6)(c).

3. All of the children have been removed from Kristi's care since March 29, 2017, when they were removed by law enforcement due to a domestic disturbance between Kristi and Nathan Arbegast and concerns that Kristi was again using illegal

controlled substances. The children have remained removed from Kristi's care and there have been no trial placements for any of the children with her since that time. Upon removal from Kristi, Scarlet was placed in family foster care and the other four children were temporarily placed with their grandparents, Harold and Mae Greenwald.

4. At the removal hearing held April 5, 2017, the Court placed Ember and Gemma with their father, Nathan Arbegast; Kyli was placed with her father, Lyle Traylor; Mackenzi was placed with her father, Scott Devitt; and Scarlet was placed with the Iowa Department of Human Services for placement in foster care/relative care. Placement of Scarlet was transferred to Nathan after her adjudicatory hearing on May 15, 2017. All of the children have remained in these placements since that time.

5. Since the last court hearing in March when Kristi's whereabouts were unknown, Kristi has been arrested in Tripp County, South Dakota, and is facing several felony charges there as well as in two additional South Dakota counties. These include the following: **A)** Possession of a Controlled Substance with Intent to Deliver (Class 3 Felony), Possession of a Controlled Substance (Class 5 Felony) and 2 counts of Possession of Drug Paraphernalia (Class 2 Misdemeanor) in Union County, South Dakota; **B)** Possession with the Intent to Deliver a Controlled Substance – Methamphetamine (Class 4 Felony), Possession of a Controlled Substance – Methamphetamine (Class 5 Felony) and Possession of a Controlled Substance – Clonazepam/Klonopin (Class 6 Felony) in Yankton County, South Dakota; and **C)** Distribution of a Controlled Substance – Methamphetamine (Class 4 Felony), Possession of a Controlled Substance - Methamphetamine (Class 5 Felony), Unauthorized Ingestion of a Controlled Substance – Methamphetamine (Class 5

Felony), Ingesting – Marijuana (Class 1 Misdemeanor), Possession of 2 oz. or less of Marijuana (Class 1 Misdemeanor) and Possession of Drug Paraphernalia (Class 2 Misdemeanor) in Tripp County, South Dakota. Kristi is also facing a Failure to Appear charge in Union County, South Dakota, for failing to appear for a hearing on February 5, 2018, dealing with the above-referenced Union County charges.

6. Kristi has continued to maintain relationships with people she has been involved with drugs with in the past and one who is currently a co-defendant with her. At the time of her most recent arrest she was found with Sidney Buckholtz and a gun was found. In addition, since 2015 she has relapsed with Brian Young, Josh Johnson, Chris Wilson, Sidney Buckholtz and mostly recently with Marcus Lee. Kristi began a relationship with Mr. Lee in December 2017 and used drugs with him. Kristi admits that she married Mr. Lee on April 13, 2018, which was just 10 days after she obtained her most recent substance abuse evaluation that recommended intensive inpatient treatment.

7. Kristi has not had any authorized contact with the children since the beginning of January. Kristi stopped visiting on her own prior to being arrested again. She did not have any phone contact with the children throughout that time either. She did contact Makenzi by text since she has been in jail.

8. Makenzi remains placed with her father, Scott Devitt. Makenzi attempted suicide on April 2, 2018, by taking an overdose of prescription drugs. As a result, Makenzi was placed at the Mental Health Institute in Cherokee, Iowa. Prior to that she was stabilized at St. Luke's Hospital in Sioux City for five days. After completion of treatment, Makenzi will return to her father's home in Sac City where she continues to

attend the alternative school. Makenzi's suicide attempt came shortly after she had received text messages from her mother. Makenzi has made it clear that she does not want any further contact from her mother and that she feels that her mother's involvement in her and siblings' lives is detrimental to them. Makenzi stated that she feels the text messages she received from Kristi contributed to her suicide attempt. Makenzi indicates that her greatest concern is to be able to continue to have contact with her siblings. Makenzi stated that she believes her siblings are being well taken care of by their respective fathers. The children's fathers have worked well together to maximize the children's contact with each other.

9. Kyli remains in Minnesota where she lives with her father. She has had several behavioral concerns in school and at home and as a result her therapy services were increased. Kyli has struggled with her emotions regarding Kristi. She is also working with a skills practitioner. Kyli is working on identifying emotions, coping skills and strategies and perspective taking.

10. Gemma, Ember and Scarlet continue to live with Nathan in Ida Grove. Gemma and Ember are in therapy at Plains Area Mental Health. Gemma has had several behavioral concerns since she has not had consistent visitation with her mother. Gemma's behaviors began to increase when Kristi stopped visiting in January 2018. Gemma and Ember have continued therapy services at Plains Area Mental Health. The children are all developmentally on track and up to date on immunizations. Nathan has reached out to appropriate workers for feedback and assistance with Gemma's behaviors. Gemma's therapist has assessed her for BHIS and a referral was made to Family Solutions.

11. Kristi has been involved with the Department of Human Services and Juvenile Court on prior occasions. These cases dealt primarily with Kristi's drug use, methamphetamine, and resulted in the termination of her parental rights in 2006 to two of her other children.

12. When the present case began, the primary issue was domestic violence between Nathan and Kristi. After some resistance, Nathan completed the Iowa Domestic Violence Program and couples therapy with Kristi. It was also recommended that Kristi cooperate with a psychological evaluation and medicine management. Kristi refused to cooperate with the psychological evaluation. Early into these proceedings, substance abuse concerns arose again involving Kristi. Kristi adamantly denied use and passed drug screens given. It is clear at this point that Kristi has been using methamphetamine and marijuana, among other things, for a considerable period of time and that she has been taking steps to cheat on the drug tests given. This drug use by Kristi, as well as her renewed association with Christopher Wilson and Michael Swanson, known drug users/distributors, led to the removal of the children from her care in March 2017 as referenced above. Kristi now admits to significant and ongoing use including using in 2015 through March 2017 while the children were in her care.

13. After the children were removed from her care, Kristi did obtain a substance abuse evaluation through New Opportunities. She attended a couple of group counseling sessions before quitting treatment. Kristi later stated that she did not believe in traditional 12-step treatment and was going to enter treatment at St. Gregory instead. Kristi attend treatment there for approximately one month before leaving

without completing the program. Kristi has not followed through with any other treatment since that time. Prior to her most recent arrest in Tripp County, South Dakota, none of the providers or the Department of Human Services had had any contact from Kristi nor did they know her whereabouts for approximately two months.

14. The Department of Human Services has not made any efforts to arrange visitations between Kristi and the children since her arrest in light of the pending termination hearing and the detrimental effect the sporadic contact by Kristi with the children has had on the children.

15. While the Department of Human Services can point to no physical harm suffered by the children due to Kristi's actions, they indicate that the children have suffered and continue to suffer significant emotional harm as a result. In addition, in light of Kristi's criminal activities and the persons with whom she has been associating with, there is a significant risk of physical harm to the children should they be in her care.

16. In addition to Kristi's significant ongoing substance abuse issues, she also has significant mental health issues she has failed to address as well. At the present time Kristi needs to not only resolve her multiple felony criminal charges, but she also needs to arrange for and begin dual diagnosis treatment for her mental health and substance abuse problems. Kristi did obtain a new substance abuse evaluation through Main Gate Counseling Services on April 3, 2018. As part of that assessment, the evaluation found as follows: "At this time, client appears to be in the stage of change related to chemical use most related to 'pre-contemplation'; client may think there's an issue, but they don't, and even if they do, they don't want to do anything

about it." (Mother's Ex 001, page 6). Under the circumstances as they exist at this time there is no reasonable chance of reunification of the children with Kristi within six months.

17. Throughout the course of this case, Kristi was offered a wide range of services through the Department of Human Services. These services include, but are not limited to, substance abuse treatment, mental health counseling, medication management, domestic abuse counseling/couple's counseling, family support workers (FSRP), counseling for the children, etc. While Kristi accepted services dealing with the domestic abuse issues, she has refused outright or failed to comply with those services dealing with her substance abuse and mental health issues all the while being dishonest with the providers until now. There are not any additional services that can be offered to Kristi at this time that have not been previously provided or offered to her.

18. Kristi states that she has been sober now for 60 days and is ready to cooperate with inpatient substance abuse treatment. She also acknowledges that she needs mental health treatment. Despite this she continues to blame others or outside events for her failure to enter treatment sooner. While Kristi now admits that the children have been emotionally scarred by the events that have taken place over the last five years, she still asserts that the chaos the children suffer is due to her not being allowed to be around the children. This obviously ignores the fact that the reason she has not been allowed around the children is her own decisions and actions. Kristi is requesting another chance with her children.

CONCLUSIONS OF LAW

In arriving at the Order entered, the Court has given consideration to Iowa Statutes and Iowa Case Law.

On the question of termination of parental rights, the best interest of the children are of paramount concern. Iowa R. App. P. 14(f)(15); *In Interest of T.A.L.*, 505 N.W.2d 480, 482 (Iowa 1993).

Under Iowa law, the Court may order termination of parental rights if there is clear and convincing evidence to support any of the grounds for termination as set forth in Iowa Code Section 232.116. For evidence to be "clear and convincing," it is necessary that there be no serious or substantial doubt about the correctness or conclusions drawn from it. *Raim v. Stancel*, 339 N.W. 2d 621, 624 (Iowa App. 1983).

Termination of parental rights under Chapter 232 follows a three-step analysis. *In re P.L.*, 778 N.W.2d at 39. First, the Court must determine if a ground for termination under Section 232.116(1) has been established. *Id.* If a ground for termination is established, the Court must secondly apply the best-interest framework set out in Section 232.116(2) to decide if the grounds for termination should result in a termination of parental rights. *Id.* Third, if the statutory best-interest framework supports termination of parental rights, the court must consider if any statutory exceptions set out in Section 232.116(3) should serve to preclude termination of parental rights. *Id.*

In Interest of D.W., 791 N.W.2d 703, 706-07 (Iowa 2010).

<u>Step One:</u> Statutory Ground for Termination

The State filed a Petition for Termination of Parental Rights in this case based upon Iowa Code Sections 232.116(1)(b), 232.116(1)(d), 232.116(1)(e), 232.116(1)(g), and 232.116(i).

Section 232.116(1)(b) provides that the Court may terminate parental rights if the Court finds that there is clear and convincing evidence that the child has been abandoned or deserted. Two elements are involved in determination of whether abandonment of child occurred, supporting termination of parental rights: first, giving up of parental rights and responsibilities refers to conduct, and second, intent element refers to accompanying state of mind. *In Interest of A.B.,* 554 N.W.2d 291 (Iowa App. 1996).

In the present case it can certainly be claimed that Kristi's conduct would suggest abandonment of the children on her part. She has repeatedly engaged in illegal conduct that can result in a significant period of incarceration. She has not actively participated in services geared towards her reunification with the children and has chosen her addiction over her children. That being said, she has tried to maintain contact with Makenzi through text messages as well as trying whatever means were available to her to contact the other children. She also has testified that she wants another chance to reunify with the children. On this record, the Court cannot find that Kristi has displayed the required state of mind necessary to find that she has abandoned or deserted the children to warrant termination of her parental rights under Iowa Code Section 232.116(1)(b).

Section 232.116(1)(d) provides that the Court may terminate parental rights if the Court finds that the Court has previously adjudicated the child to be a child in need

of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding and that subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

With the exception of Scarlet, each of the children have been adjudicated to be children in need of assistance pursuant to Section 232.2(6)(b) which states that the child has been physically abused or neglected as the result of the acts of omissions of one or both parents. While Scarlet was not adjudicated on this same ground, the Court has previously adjudicated her siblings who are members of the same family after this finding. Accordingly, the first prong of Section 232.116(1)(d) has been met for all five children.

The circumstances that led to the adjudication of the children other than Scarlet was the domestic violence between Nathan and Kristi. Those circumstances have been resolved as the result of the provision of services by the Department of Human Services. The proceedings for those children, as well as the proceedings regarding Scarlet, remain open due to Kristi's ongoing drug use and criminal activity. Accordingly, the Court cannot find that the circumstances which led to the adjudication of the children other than Scarlet continues to exist at this time. As a result the Court must deny the State's request to terminate Kristi's rights as it pertains to the children, other than Scarlet, under Section 232.116(1)(d).

Regarding Scarlet, the circumstances that led to her adjudication dealt with Kristi's ongoing drug use and criminal activity. Throughout the course of Scarlet's case, as well as the case for the other children, the Department of Human Services has offered Kristi services on multiple occasions to address her substance abuse issues. Despite the offer of these services, Kristi's substance abuse issues continue to exist. Accordingly, the State has met its burden of proof by clear and convincing evidence under Section 232.116(1)(d) as it pertains to Kristi's rights to Scarlet.

Section 232.116(1)(e) provides that the Court may terminate parental rights if the Court finds that the child has been adjudicated a child in need of assistance pursuant to Section 232.96, that the child has been removed from the physical custody of the child's parent for a period of at least six consecutive months, and that there is clear and convincing evidence that the parent has not maintained significant and meaningful contact with the child during the previous six consecutive months and has made no reasonable efforts to resume care of the child despite being given the opportunity to do so. Significant and meaningful contact is defined to include, but not be limited to, the affirmative assumption by the parent of the duties encompassed by the role of being a parent, with the affirmative duty in addition to financial obligations, requiring continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parent establish and maintain a place of importance in the child's life.

Regarding this subsection, it is clear that each of the children have been adjudicated to be children in need of assistance and all have been removed from

Kristi's physical care for more than six consecutive months. It is equally clear that Kristi has failed to maintain significant and meaningful contact with the children during the past six months and has made no reasonable effort to resume the care of the children despite having been given the opportunity to do so. During the last six months, Kristi has not provided any financial support for the children, she has not made any genuine effort to complete her responsibilities as set out in the case permanency plan, she has not taken advantage of the opportunity to visit with the children as provided by the Department of Human Services and she has not maintained a place of importance in the children's lives. On the contrary, Kristi has continued to engage in criminal activity causing her to be on the run and hiding from law enforcement, ultimately resulting in her being arrested and placed in jail. Accordingly, the State has met its burden of proof by clear and convincing evidence under Section 232.116(1)(e) as it pertains to Kristi's rights to all five of the children.

Section 232.116(1)(f) provides that the Court may terminate parental rights if the Court finds that the child is four years of age or older, that the child has been adjudicated a child in need of assistance pursuant to Section 232.96, that the child has been removed from the physical custody of the child's parent for at least 12 of the last 18 months or for the last 12 consecutive months and any trial period at home has been less than 30 days, and that there is clear and convincing evidence that at the present time, the child cannot be returned to the custody of the child's parent as provided by Section 232.102.

The State has asserted this ground for termination of parental rights as to Gemma, Kyli and Makenzi. Each of these children are over the age of 4, each have

been adjudicated to be a child in need of assistance and each have been removed from their mother's physical custody for more than the last 12 consecutive months with no trial periods with Kristi during that time. The Court notes that each of the children were placed with their respective biological father during that time.[1] Regarding the final element of Section 232.116(1)(f), the State meets its burden to prove this element if it presents clear and convincing evidence the children have suffered or are imminently likely to suffer an adjudicatory harm upon their return to the parent's custody sought to be terminated. *In re A.M.S.,* 419 N.W.2d 723, 725, (Iowa 1988). At the present time it is clear that the children cannot be returned to Kristi's custody. Kristi remains incarcerated facing multiple felony charges. Even if Kristi was not in custody, she has not received treatment for her substance abuse and mental health issues. She has also just married a man who also has ongoing substance abuse issues. The children would clearly be in imminent danger of physical abuse and/or neglect if they were to be returned to Kristi's care at this time. Accordingly, the State has met its burden of proof by clear and convincing evidence under Section 232.116(1)(e) as it pertains to Kristi's rights to Gemma, Kyli and Makenzi.

Section 232.116(1)(g) provides that the Court may terminate parental rights if the Court finds that the child has been adjudicated a child in need of assistance pursuant to Section 232.96, that the Court has terminated parental rights pursuant to Section 232.117 with respect to another child who is a member of the same family or a court of competent jurisdiction in another state has entered an order involuntarily terminating parental rights with respect to another child who is a member of the same

[1] Court notes that the Iowa Court of Appeals has found that Section 232.116(1)(f) does apply when one of the child's parent retains physical care of the child. *In re B.M.,* 834 N.W.2d 873, 878 (Iowa App. 2013).

family, that there is clear and convincing evidence that the parent continues to lack the ability or willingness to respond to services which would correct the situation, and that there is clear and convincing evidence that an additional period of rehabilitation would not correct the situation.

The evidence presented shows that each of the children have been adjudicated to be children in need of assistance and that Kristi has previously had her parental rights terminated in 2006 to two other children who were the siblings of Kyli and half-siblings of the other four children. The evidence also clearly establishes that Kristi continues to lack the ability and/or willingness to respond to services that would correct her substance abuse and mental health issues and that an additional period of rehabilitation would correct the situation. While Kristi talks as though she is ready to address her substance abuse and mental health issues at this time, her actions speak differently. Most telling in this regard is the fact that Kristi choose to marry Marcus Lee approximately three weeks before the termination trial, Mr. Lee being someone Kristi admits to using with during their relationship. Accordingly, the State has met its burden of proof by clear and convincing evidence under Section 232.116(1)(g) as it pertains to Kristi's rights to all five of her children.

Section 232.116(1)(i) provides that the Court may terminate parental rights if the Court finds that the child meets the definition of child in need of assistance based on a finding of physical or sexual abuse or neglect as a result of the acts or omissions of one or both parents, that there is clear and convincing evidence that the abuse or neglect posed a significant risk to the life of the child or constituted imminent danger to the child, and there is clear and convincing evidence that the offer or receipt of

services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time.

Based on Kristi's chronic and ongoing substance abuse and criminal activity, it is clear that the children would meet the definition of a child in need of assistance based on a finding of neglect as a result of Kristi's actions. Kristi has been engaging in drug use and criminal activity dating back to before the children were removed from her care. The evidence shows that she exposed at least some of the children to the various men she was using with prior to the children being removed from her care. While the children did not suffer any direct physical harm as a result of that exposure, they were certainly in imminent danger of harm from Kristi's own use as well as the exposure to others who were also using and engaging in other criminal activity. As stated before, it is also clear that the offer or receipt of services would not correct the conditions which led to the neglect within a reasonable period of time. Kristi remains incarcerated on multiple felony charges that may result in a lengthy period of incarceration. Even if Kristi is able to successfully resolve her criminal charges without the imposition of a significant period of incarceration, she still faces a lengthy period of treatment for her substance abuse and mental health issues. Again, even though Kristi talks as though she is ready to address those issues head on, her action of marrying Mr. Lee clearly suggests otherwise. Accordingly, the State has met its burden of proof by clear and convincing evidence under Section 232.116(1)(i) as it pertains to Kristi's rights to all five of her children.

Step Two: Best Interests Framework

Having found that there are multiple statutory grounds that would support a termination of Kristi's parental rights, the Court must next make a best interests analysis. Section 232.116(2) requires that the Court in considering whether to terminate the parental rights of a parent under Section 232.116, shall give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental and emotional conditions and needs of the child. "Insight for the determination of the child's long-range best interests can be gleaned from 'evidence of the parent's past performance for that performance may be indicative of the quality of the future care that parent is capable of providing." *In re Dameron,* 306 N.W.2d 743, 745 (Iowa 1981). *In Interest of C.B.*, 611 N.W.2d 489, 495 (Iowa 2000).

At the present time each of the children have been placed with their respective parents. While each child continues to struggle with issues involving separation from each other as well as separation from Kristi, they are being properly cared for by their respective fathers and are receiving the necessary services to address their issues. Each of the children is safe in the care of their father, the fathers have all shown a willingness to cooperate with the Department of Human Services and in getting their respective children to the services they need. The fathers have all been willing to work with each other so that the children can maintain contact with each other. While each of the fathers have issues of their own, they have also worked on addressing their issues and have been able to maintain stability in their own lives.

Kristi, on the other hand, has continued in her cycle of substance abuse and mental health issues, has continued to lie to providers and continues to make bad

decisions which not only puts her in danger of a long period of incarceration but would also put the children at risk of serious harm should she continue her behaviors around the children. While it is true that Kristi has not personally physically abused the children, her actions have repeatedly put them in imminent danger of physical abuse and have caused great emotional damage to all of the children. That emotional damage continues to this date as is shown by Makenzi's recent suicide attempt after having been contacted by Kristi from jail.

It is clear from the evidence presented that the best interests of the children going forward is for them to be placed with their respective fathers free of the disruptive and damaging influence of Kristi who has gone in and out of their lives wrecking havoc on their emotional well-being.

Step Three: Statutory Exceptions to Termination

The final step in the three-step analysis is to consider whether any of the statutory exceptions set out in Section 232.116(3) should serve to preclude a termination of parental rights.

Section 232.116(3) provides the Court need not terminate the relationship between the parent and child if any of the following circumstances exist:

a. A relative has legal custody of the child.

b. The child is over ten years of age and objects to the termination.

c. There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

d. It is necessary to place the child in a hospital, facility, or institution for care and treatment and the continuation of the parent-child relationship is not preventing a permanent family placement for the child.

> e. The absence of a parent is due to the parent's admission or commitment to any institution, hospital, or health facility or due to active service in the state or federal armed forces.

We must reasonably limit the time for parents to be in a position to assume care of their children because patience with parents can soon translate into intolerable hardship for the children. *In re A.Y.H.,* 508 N.W.2d 92, 96 (Iowa App.1993). A child should not be forced to endlessly suffer the parentless limbo of foster care. *In re J.P.*, 499 N.W.2d 334, 339 (Iowa App.1993). The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems. *In re D.A.*, 506 N.W.2d 478, 479 (Iowa App.1993). Children simply cannot wait for responsible parenting. *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990). *In Interest of E.K.*, 568 N.W.2d 829, 831 (Iowa App. 1997). "At some point, the rights and needs of the child rise above the rights and needs of the parents. The legislature, through Section 232.116, directs us to that point." *In Interest of J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997).

Iowa parental termination statutes are preventative as well as remedial. *In re E.B.L.*, 501 N.W.2d 547, 549 (Iowa 1993). '[T]he General Assembly has carefully crafted a legislative framework for state intercession into the parent-child relationship while protecting wherever possible the integrity of the family unit.' *In re I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988). The statutes are designed to prevent probable harm to a child. *In re E.B.L.*, at 549. The paramount consideration in parental termination proceedings is the best interests of the child. Iowa R. App. P. 14(f)(15). *In Interest of C.K.*, 558 N.W.2d 170, 172 (Iowa 1997).

Under Section 232.116(3) there are two applicable grounds which the Court must consider in this case regarding whether or not Kristi's parental rights should be terminated. The first is Section 232.116(3)(a) as each of the children's respective fathers has their legal custody, and Section 232.116(3)(c) whether there is clear and convincing evidence that the termination would be detrimental to the child due to the closeness of the parent-child relationship.

The evidence clearly shows that the relationships between Kristi and the children's fathers are strained. With the exception of Nathan, Kristi has been opposed to the placement of the children with their fathers. The record would reflect that she has long-standing history of animosity towards the children's fathers and even attacked Lyle's chances of being able to remain sober during the termination hearing. Kristi's relationship with Nathan is also up and down as was shown during the course of these proceedings. The Court notes that the current CHINA proceedings were initiated due to significant domestic violence between Kristi and Nathan. The history of these cases shows that Kristi and Nathan can get along with each other at times and turn on each other quickly. In addition, the evidence shows that Kristi's coming in and out of the children's lives and her personal life choices have had a significant negative impact on the children's lives as can be seen in Makenzi's recent suicide attempt and the other children showing emotional harm from their mother not being consistently in their lives.

While it is true that some of the children have expressed a desire to have contact with Kristi and that they miss their mother, the evidence is clear that Kristi's choices have caused more harm to the children than whatever good might come to them from having contact with her. This is especially true in the case of Makenzi who,

despite being the oldest child, has specifically made it known that she wants her mother's rights terminated and that she thinks termination is necessary to protect her younger siblings as well.

Having considered the grounds under Section 232.116(3), the Court concludes that none of the statutory exceptions set out in this subsection should serve to preclude the termination of Kristi's parental rights. The children were removed from Kristi's care and custody over one year ago due to criminal activity and drug use. Over the course of this case these issues have not only continued but have escalated. Kristi has continued to use methamphetamine and marijuana, and it appears that she is involved in selling illegal substances as well. Kristi's participation in services has not been consistent. She has participated in inpatient and outpatient substance abuse treatment, mental health therapy and FSRP services but has not internalized anything from these services. Prior to the beginning of the current proceedings, Makenzi and Kyli had previously achieved permanency outside of Kristi's care, however she was able to get them back in her custody only to have them removed again from her care. In order to keep these children safe and to allow them to achieve permanency, it is appropriate to terminate Kristi's parental rights, and the Court finds that none of the exclusions under Section 232.116(3) should prevent termination of her parental rights and the best interests of her children require the termination of her parental rights.

IT IS THEREFORE ORDERED as follows:

1. That pursuant to Sections 232.116(1)(d),(e),(g)&(i), the parental rights of Kristi Arbegast with respect to Scarlet Arbegast are hereby terminated;

2. That pursuant to Sections 232.116(1)(e),(g)&(i), the parental rights of Kristi Arbegast with respect to Ember Arbegast are hereby terminated;

3. That pursuant to Sections 232.116(1)(e),(f),(g)&(i), the parental rights of Kristi Arbegast with respect to Gemma Arbegast are hereby terminated;

4. That pursuant to Sections 232.116(1)(e),(f),(g)&(i) the parental rights of Kristi Arbegast with respect to Kyli Traylor are hereby terminated;

5. That pursuant to Sections 232.116(1)(e),(f),(g)&(i), the parental rights of Kristi Arbegast with respect to Makenzi Devitt are hereby terminated;

6. That that the care, custody and control of Ember, Gemma and Scarlet remain with their father, Nathan Arbegast, subject to the protective supervision of the Iowa Department of Human Services. That the care, custody and control of Kyli be with her father, Lyle Traylor, subject to the protective supervision of the Iowa Department of Human Services. That the care, custody and control of Makenzi be with her father, Scott Devitt, subject to the protective supervision of the Iowa Department of Human Services;

7. That a post-termination review hearing in this matter is hereby scheduled for July 23, 2018, at 9:30 a.m.

ANY APPEAL BY AN AGGRIEVED PARTY MUST BE TAKEN PURSUANT TO IOWA R. APP. P. 6.101(1) BY FILING A NOTICE OF APPEAL WITHIN 15 DAYS OF THE ENTRY OF THIS ORDER AND BY FILING A PETITION ON APPEAL WITHIN 15 DAYS THEREAFTER.

Copies to:
Ida County Attorney's Office
Lesley Rynell, GAL/Attorney for the Child
Ashley Trost, Iowa Department of Human Services
Robert Deck, Attorney for Mother

Lisa Mazurek, Attorney for Nathan Arbegast
Martha Sibbel, Attorney for Scott Devitt
George Blazek, Attorney for Lyle Traylor

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
JVJV001242	TPR AS TO SCARLET ARBEGAST

So Ordered

Patrick H. Tott

Patrick H. Tott, District Court Judge,
Third Judicial District of Iowa

KeyCite Red Flag - Severe Negative Treatment
Decision Vacated by In Interest of M.D., Iowa, November 30, 2018

924 N.W.2d 533 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

IN the INTEREST OF M.D., K.T, G.A., E.A., & S.A., Minor Children, K.A., Mother, Appellant.

No. 18-0947
|
Filed August 1, 2018

Appeal from the Iowa District Court for Ida County, Patrick H. Tott, Judge.

A mother appeals the termination of her parental rights to her children. **AFFIRMED.**

Attorneys and Law Firms

Robert B. Deck of Deck Law PLC, Sioux City, for appellant mother.

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Considered by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

Opinion

DOYLE, Judge.

***1** A mother appeals the termination of her parental rights to her children. She does not dispute the State proved the grounds for termination. Instead, she argues the juvenile court abused its discretion by refusing to continue the termination hearing and violated her procedural due process rights by restricting her telephonic participation in the hearing to her own testimony.

We review termination proceedings de novo. *See In re A.M.*, 843 N.W.2d 100, 110 (Iowa 2014). We review the denial of a motion for a continuance under an abuse-of-discretion standard. *See In re C.W.*, 554 N.W.2d 279, 281 (Iowa Ct. App. 1996). We reverse only if the denial of the motion to continue was unreasonable under the circumstances and injustice will result to the party requesting the continuance. *See id.*

The mother moved to continue the termination hearing because she was incarcerated and unable to attend the hearing in person. The court denied the motion, finding "a delay in the determination of permanency for the children would not be in the children's best interests." Because "[a] sense of urgency exists in termination cases due to the importance of stability in a child's life," *id.*, the juvenile court did not abuse its discretion in denying the mother's motion to continue the termination hearing.

As an alternative to continuing the termination hearing, the mother requested to take part in the hearing telephonically. The court granted the mother's request "for purposes of providing her own testimony and cross examination" and allowed her "to testify after the other parties have presented their case's in chief so that her counsel can advise her of the nature of the evidence presented at the trial prior to her testimony." The mother's attorney was present at the termination hearing. The mother was not on the phone to hear the evidence presented by the State and the father at the hearing. After the State rested and after the father testified, a recess was taken. The mother was called and she testified telephonically. At the end of her testimony, she was allowed to speak briefly with her attorney. The call was ended and the parties proceeded with closing arguments.

On appeal, the mother claims that by being prohibited from being on the telephone during the entire termination hearing she was denied her the right to confront witnesses, to assist her attorney with the cross-examination of witnesses, and to know the evidence presented against her. The procedure followed in this case was "good enough" under our precedent. *See In re K.M.*, No. 16-0795, 2016 WL 4379375, at *4 n.3 (Iowa Ct. App. Aug. 17, 2016) (collecting cases and citing *In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991) (holding the juvenile court afforded a parent due process if given notice of the proceedings, represented by counsel who is present at the proceedings, and afforded the opportunity to present testimony—by deposition)), *further review denied* (Sept. 8, 2016). In *In re K.M.* we said:

> Just because the process employed here was good enough does not make it right. We note that the due process requirements outlined in our prior cases are a floor, not a ceiling. Although the court was not required to permit the mother to remain on the telephone during the proceedings, we see ample reasons why an incarcerated parent should

be permitted to do so. If a witness is providing untruthful or biased testimony about an interaction with the parent, it is the parent who is in the best position to recognize it. Hearing the evidence as it comes in—either in person or telephonically—provides a parent with the opportunity to confer with counsel and potentially offer points of rebuttal to that evidence.

***2** We see no reason for the denial of the mother's participation in the termination hearing—nor was any articulated by the court. Certainly, the court must be allowed to run its own courtroom as it sees fit, and if the mother was disruptive during the proceedings, the court could have denied her continued participation. But where ... no reason was shown to preclude her participation in the entire hearing, the better practice would have been to allow it. Just because a parent's participation is not constitutionally required does not mean it should be denied without reason.

Id. We have said, "The better practice, however, would be to allow parental participation when requested and feasible." *In re N.W.*, No.12-1233, 2012 WL 3860661, at *1 n.1 (Iowa Ct. App. Sept. 6, 2012). The State acknowledges this would be the better practice. But, because the procedure utilized here was good enough to meet minimum due process requirements, we affirm.

AFFIRMED.

All Citations

924 N.W.2d 533 (Table), 2018 WL 3650371

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921 N.W.2d 229
Supreme Court of Iowa.

IN the INTEREST OF M.D., K.T., G.A., and S.A., Minor Children.
K.A., Mother, Appellant.

No. 18-0947
|
Filed November 30, 2018
|
Rehearing Denied January 17, 2019
|
As Amended March 5, 2019

Synopsis

Background: A petition was filed seeking to terminate incarcerated mother's parental rights to her five children. The District Court, Ida County, Patrick H. Tott, J., terminated parental rights. Mother appealed. The Court of Appeals, 2018 WL 3650371, affirmed. Mother sought review.

[Holding:] The Supreme Court, Cady, C.J., held that mother's due process rights were violated when she was only allowed to participate in termination of parental rights hearing by telephone to give testimony.

Court of Appeals vacated; District Court reversed and remanded.

Christensen, J., filed an opinion concurring in part and dissenting in part.

West Headnotes (13)

[1] **Infants**
Trial or review de novo

Supreme Court review of termination of parental rights proceedings is de novo.

11 Cases that cite this headnote

[2] **Infants**
Dependency, Permanency, and Rights Termination

Although the Supreme Court is not bound by the juvenile court's findings of fact in a termination of parental rights case, it does give them weight, especially in assessing the credibility of witnesses.

4 Cases that cite this headnote

[3] **Infants**
Trial or review de novo

Constitutional claims in a termination of parental rights case, such as the deprivation of due process, are reviewed de novo. U.S. Const. Amend. 14.

[4] **Appeal and Error**
Continuance and stay

Supreme Court review of a district court's denial of a motion for continuance is for an abuse of discretion.

4 Cases that cite this headnote

[5] **Courts**
Abuse of discretion in general

A court abuses its discretion when the decision is grounded on reasons that are clearly untenable or unreasonable, such as when it is based on an erroneous application of the law.

2 Cases that cite this headnote

[6] **Infants**
Needs, interest, and welfare of child

The Supreme Court's fundamental concern in review of termination of parental rights proceedings is the child's best interests.

12 Cases that cite this headnote

[7] **Constitutional Law**
Rights, Interests, Benefits, or Privileges Involved in General

The protections provided under the constitutional guarantee of due process include procedural safeguards for people who face state action that threatens a protected liberty or property interest. U.S. Const. Amend. 14.

[8] **Constitutional Law**

Procedural due process in general

Once the law finds a protected interest to exist, the question turns to what process or procedure the law must provide the person. U.S. Const. Amend. 14.

[9] **Constitutional Law**

Factors considered; flexibility and balancing

Generally, three competing interests have shaped the contours of the due process protection; first, the private interest affected by the proceeding; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[10] **Infants**

Continuance

The trial court's denial of mother's request for a continuance of termination of parental rights hearing due to mother's incarceration was not an abuse of discretion; mother made no claim that she would be unable to participate meaningfully in the termination hearing by telephone, with the physical presence of counsel at the hearing, and the delay of the hearing until incarcerated mother's physical presence could be achieved would be contrary to the best interests of the children. Iowa Code Ann. § 232.112.

5 Cases that cite this headnote

[11] **Infants**

Presence of parties and counsel

Generally, an incarcerated parent who is unable physically to attend a termination of parental rights hearing must be given the opportunity to participate in the hearing by alternative means.

2 Cases that cite this headnote

[12] **Constitutional Law**

Removal or termination of parental rights

Infants

Presence of parties and counsel

Prisons

Presence or appearance

In a termination of parental rights proceeding in which a parent is incarcerated, due process requires juvenile judges to give incarcerated parents the opportunity to participate by telephone in the entire hearing, but if the attorney representing the incarcerated parent is unable to obtain the cooperation of prison officials to make the incarcerated parent available for the entire hearing, the juvenile court must communicate with the prison officials to explain the importance of participation by the parent and the benefits of avoiding the alternative procedure, and finally, if the efforts of the juvenile court are unsuccessful in giving the parent an opportunity to participate in the entire hearing, the juvenile judge must follow the alternative procedure that gives the incarcerated parent the opportunity to review the record of the evidence presented by the state at the hearing before testifying. U.S. Const. Amend. 14.

3 Cases that cite this headnote

[13] **Constitutional Law**

Removal or termination of parental rights

Infants

Presence of parties and counsel

Prisons

Presence or appearance

Incarcerated mother's due process rights were violated when she was only allowed to participate in termination of parental rights

hearing by telephone to give testimony. U.S. Const. Amend. 14.

1 Cases that cite this headnote

***230** On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Ida County, Patrick H. **Tott**, Judge.

An incarcerated parent appeals an order by juvenile court terminating her parental rights. **DECISION OF THE COURT OF APPEALS VACATED; JUVENILE COURT DECISION REVERSED AND REMANDED.**

Attorneys and Law Firms

Robert B. Deck of Deck Law PLC, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Kathryn K. Lang, Assistant Attorney General, Meghann Cosgrove-Whitmer, County Attorney, and Kristal L. Phillips, Assistant County Attorney, for appellee.

Lesley D. Rynell, Public Defender, Sioux City, guardian ad litem for minor children.

Opinion

CADY, Chief Justice.

In this appeal, we must decide the extent to which an incarcerated parent is entitled to participate from prison by telephone in a hearing to terminate parental rights. The juvenile court permitted the parent to participate in the hearing by telephone but only to give testimony and entered an order terminating parental rights following the hearing. On appeal, the court of appeals affirmed the decision ***231** of the juvenile court. On further review, we vacate the decision of the court of appeals, reverse the decision of the juvenile court, and remand the case for an expedited hearing consistent with the procedure set forth in this opinion. We conclude an incarcerated parent is entitled to participate from a prison or jail facility in the entire hearing for termination of parental rights.

I. Background Facts and Proceedings.

The juvenile court in Ida County terminated the parental rights of a mother to her five children on May 22, 2018, following a hearing. The children had been removed from the mother's care prior to the hearing primarily due to her chronic drug and alcohol abuse. She had used methamphetamines off and on for years and was convicted and sentenced to prison in 2010 for manufacturing methamphetamine. The mother consumed and manufactured methamphetamine in the presence of the children, and her drug addiction adversely impacted her ability to parent and attend to the needs and development of her children.[1] The children were in the care of their respective fathers at the time of the termination hearing.

The mother was incarcerated in a jail facility in Winner, South Dakota, at the time of the termination hearing. She had been arrested in South Dakota on multiple felony charges involving possession of controlled substances with intent to deliver, possession of methamphetamines, and other crimes alleged to have occurred in three different counties in South Dakota. Prior to the termination hearing, the mother moved for a continuance due to her imprisonment or, alternatively, requested to participate in the hearing by telephone.

The juvenile court denied the motion for a continuance. It concluded the resulting delay would not be in the best interests of the children. Instead, it granted the mother's alternative request to appear at the hearing by telephone, but only to present her testimony and to be cross-examined. The juvenile court, however, directed that she present her testimony at the close of the State's case-in-chief to allow her counsel to inform her prior to testifying of the nature of the evidence presented by the State in support of the termination.

Counsel throughout the hearing represented the mother. After the State concluded the presentation of its evidence, the mother conferred with her counsel and then presented her testimony. At the conclusion of the telephone call, the attorneys presented their closing arguments. The juvenile court subsequently entered a written order terminating the mother's parental rights.

On appeal, the mother claimed the process provided by the juvenile court for her to participate in the termination hearing deprived her of her rights to confront witnesses, assist in cross-examination of witnesses, and hear the evidence offered by the State. She identified numerous findings of fact made by the juvenile court in the juvenile order that were based on evidence submitted by the State that she claimed was incorrect and was unable to refute due to the limitations on her ability to participate in the hearing.

The State acknowledged the better practice may have been to allow the mother to ***232** participate by telephone in the entire hearing, but argued the procedure followed by the court satisfied the minimum requirements of due process. The court of appeals found the procedure was "good enough" under its precedence, although it too acknowledged the "better practice" would have been to do more to give the mother a greater opportunity to participate in the hearing. [2]

The mother requested, and we granted, further review. She asks that we establish the procedure for juvenile courts in this state to follow in conducting hearings to terminate parental rights of parents who are incarcerated. She requests a new hearing under a procedure that gives her an opportunity to participate in the entire hearing.

II. Scope of Review.

[1] [2] [3] Our review of termination of parental rights proceedings is de novo. *In re A.S.*, 906 N.W.2d 467, 472 (Iowa 2018). Although we are not bound by the juvenile court's findings of fact, "we do give them weight, especially in assessing the credibility of witnesses." *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). Constitutional claims, such as the deprivation of due process, are also reviewed de novo. *P.M. v. T.B.*, 907 N.W.2d 522, 530 (Iowa 2018).

[4] [5] Moreover, our review of a district court's denial of a motion for continuance is for an abuse of discretion. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). A court abuses its discretion when "the decision is grounded on reasons that are clearly untenable or unreasonable," such as "when it is based on an erroneous application of the law." *In re A.M.*, 856 N.W.2d 365, 370 (Iowa 2014) (quoting *Office of Citizens' Aide/Ombudsman v. Edwards*, 825 N.W.2d 8, 14 (Iowa 2012)).

[6] Most importantly, "our fundamental concern" in review of termination of parental rights proceedings "is the child's best interests." *In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014).

III. Analysis.

[7] [8] [9] The cornerstone of the analysis of the issue presented in this case is due process of law. *See* U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 9. The protections provided people under the constitutional guarantee of due process are fundamental to society. These protections include procedural safeguards for people who face state action that threatens a protected liberty or property interest. *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 690 (Iowa 2002). Once the law finds a protected interest to exist, the question turns to what process or procedure the law must provide the person. *In re C.M.*, 652 N.W.2d 204, 212 (Iowa 2002). Generally, three competing interests have shaped the contours of this protection.

> First, the private interest ... affected by the [proceeding]; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [third,] the Government's interest, including the function involved and the ***233** fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *see In re C.M.*, 652 N.W.2d at 212. These factors identify the interests and concerns involved and draw upon evidence and analysis to give a specific meaning to due process.

We have said that parental termination hearings involve state action that threatens to deprive parents of their liberty interests in the care, custody, and control of their children. *In re C.M.*, 652 N.W.2d at 211. Thus, the broad issue we address in this appeal turns on how much process is due to incarcerated parents who face a hearing to terminate their parental rights.

Procedural due process plays a significant role in the overall operation of our justice system. The way a justice system treats people who enter it must be as just and fair as the court decisions made by its judges. This understanding shines greater light on the critical importance of procedural fairness of a court system and the need for courts to ensure fairness in the process of justice itself.

The mother in this case asked for due process in the form of a continuance of the termination hearing or, alternatively, an opportunity to participate in the hearing by telephone. This claim illustrates the challenge in achieving procedural due process. The outcome involves a careful balancing of the

personal interest of litigants, the ability of the court system to accommodate and provide safeguards for litigants, and the broad interests of the government to both provide safeguards and protect the interests of all. The requested procedure also applies to a final hearing on the merits of the action. Unlike a hearing on an application for postconviction relief, the parent has not yet had his or her day in court. The hearing involves a final adjudication of the rights at stake.

[10] **A. Continuance of the Hearing.** A continuance of a termination hearing until an incarcerated parent is able to attend may be helpful to the parent, but the delay that accompanies such continuances may be detrimental to the best interests of children. *See In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990) (indicating children must not be forced to wait for responsible parenting). The focus of child welfare in this country, and Iowa, is now on permanency, and continuances of court hearings to accommodate parents might offend this goal. *See In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000) (explaining the Adoption and Safe Family Act of 1997 refocused the goals of child welfare cases by its increased emphasis on children's health and safety and mandate that children be placed in a permanent home as early as possible). The juvenile court in this case understood this potential harm and sought to strike the balance demanded by the Due Process Clause by allowing for a telephone appearance at the hearing.

The State suggests a continuance is not even a procedural option for a juvenile court in termination hearings when the parent is not incarcerated in the same county as the court. It claims a court may only order a person confined in a penitentiary or jail to appear in a civil case to give testimony in a court in the county where the person is imprisoned. *See* Iowa Code § 622.82 (2017). The State also points out this statutory limitation is the foundation of the rule that has been followed in Iowa, previously articulated by the court of appeals, and applied by the juvenile judge in this case that incarcerated persons only need to receive advance notice of a hearing, be represented by counsel at a hearing, and be given an opportunity to present testimony orally by telephone. *See* ***234** *Webb v. State*, 555 N.W.2d 824, 826 (Iowa 1996) (applying the rule to postconviction-relief proceedings and citing *In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991), holding the same is true involving the termination of parental rights).

We find it unnecessary to address the State's statutory argument. Section 622.82 generally applies to persons incarcerated in this state. The mother in this case was not confined in Iowa. Furthermore, Iowa Code section 232.112 specifically requires parents be given "an opportunity to be heard" in a termination hearing. Nevertheless, the motion for continuance made by the mother in this case did not ask the juvenile court to order her appearance in court at a future hearing while incarcerated. Additionally, the mother did not ask us to recognize a due process right for incarcerated parents to be physically present at a termination hearing. *See In re Termination of Parental Rights of Heller*, 669 A.2d 25, 32 (Del. 1995) (recognizing no due process right for an incarcerated parent to be present at a hearing to terminate parental rights); *In re J.P.B.*, 509 S.W.3d 84, 97 (Mo. 2017) (recognizing no constitutional right of incarcerated parents to attend a termination hearing); *St. Claire v. St. Claire*, 675 N.W.2d 175, 177–78 (N.D. 2004) (concluding an incarcerated parent has only a limited right to appear in person at a hearing to terminate parental rights). Accordingly, we review the juvenile court's denial of the motion for continuance in this case under an abuse-of-discretion standard and find ample reasons that show the juvenile court properly exercised its discretion to deny the continuance. *See In re Involuntary Termination of Parent–Child Relationship of K.W.*, 12 N.E.3d 241, 244–47 (Ind. 2014) (identifying and applying eleven factors, typically used in consideration of a motion to transport an incarcerated parent, to review the exercise of discretion in denying a motion to continue a termination hearing). The mother made no claim that she would be unable to participate meaningfully in the termination hearing by telephone, with the physical presence of counsel at the hearing. On the other hand, the delay associated with a continuance of a hearing until the physical appearance of an incarcerated parent can be achieved could very well be contrary to the best interests of children and our nation's policy. Considering all relevant factors, the balance of the competing interests support the mother's alternative request to participate by telephone, not a continuance. The fighting issue turns on whether the limitations imposed by the juvenile court on the mother's participation in the hearing by telephone comply with due process.

[11] **B. Participation in Hearing by Telephone.** Generally, an incarcerated parent who is unable physically to attend a termination hearing must be given the opportunity to participate in the hearing by alternative means. *In re Baby K.*, 143 N.H. 201, 722 A.2d 470, 472 (1998) (concluding due process does not require an incarcerated parent's physical presence at the termination hearing "provided the parent is otherwise afforded procedural due process at the hearing"); *In re Adoption of J.N.F.*, 887 A.2d 775, 781 (Pa. Super. Ct. 2005)

(holding a trial court must give an incarcerated parent the ability to meaningfully participate in a termination proceeding if the parent desires to contest the termination petition). Some courts have concluded that due process is satisfied when an incarcerated parent is afforded the opportunity to participate in the entire termination hearing by telephone from the prison. *Orville v. Div. of Family Servs.*, 759 A.2d 595, 599 (Del. 2000) (holding the family court should have afforded the incarcerated mother an opportunity to participate by phone for the entire hearing and citing ***235** its prior decision in *Heller*, 669 A.2d at 32, as concluding the same proposition); *In re Baby K.*, 722 A.2d at 473 (finding the incarcerated father's inability to hear the proceedings via telephone "increased the risk of an erroneous determination"). These courts stress that meaningful participation in a parental termination case requires actual knowledge of the testimony and documentary evidence offered in support of the petition for termination. *See Orville*, 759 A.2d at 599. Parents often have exclusive and particular knowledge of the evidence offered by the state to support the termination petition and need to hear it to understand the evidence needed to make an effective response. *Id.* at 600. It is a concept fundamental to a system of justice. These observations make the parent's interests in appearing by telephone for the entire hearing compelling. *See Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S.Ct. 1388, 1394–95, 71 L.Ed.2d 599 (1982) (recognizing procedural protections for parents facing termination of rights to their children are more critical than for parents resisting state intervention into ongoing family matters). Moreover, the full-participation standard has given rise to a further requirement for juvenile courts to implement substitute procedures and accommodations when circumstances surface to impugn the ability of a parent to hear and participate in the entire hearing. *See Orville*, 759 A.2d at 600. The substitute procedures center on a brief continuance of the hearing to provide the parent a transcript or digital reproduction of those portions of the hearing that the parent did not hear over the telephone prior to testifying by telephone. *See id.* (offering a variety of safeguards that can be utilized to protect an incarcerated parent's due process rights). They seek to give a parent the substantial equivalence of full participation. *See In re Termination of Parental Rights to Idella W.*, 288 Wis.2d 504, 708 N.W.2d 698, 702–03 (Ct. App. 2005) (recognizing alternative proceedings must be "functionally equivalent to personal presence" (emphasis omitted)).

Other jurisdictions, on the other hand, are more deferential to the limitations inherent in the authority of courts to order prisoners in other states to be available to participate in an entire hearing. They permit limited participation by telephone without additional safeguards if justified by other circumstances based on a balancing of the *Mathews* factors. *See In re D.C.S.H.C.*, 733 N.W.2d 902, 910 (N.D. 2007) (recognizing the importance of parent's participation in entire proceeding, but declining to remand in part due to the court's inability to compel the out-of-state correctional facility to allow incarcerated parent to participate in entire hearing); *see also In re Involuntary Termination of Parent–Child Relationship of C.G.*, 954 N.E.2d 910, 921–23 (Ind. 2011) (reviewing the approaches followed by courts in other jurisdictions).

We acknowledge the process due in each case is flexible depending on the particular circumstances. *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994). We also acknowledge the procedure followed by the juvenile court in this case provided some due process for the incarcerated mother. Yet, the competing interests involved simply do not justify the limitations imposed on full participation.

[12] **[13]** In termination hearings, the flexibility of due process should only work to identify a substitute procedural safeguard for incarcerated parents who are unable to participate by telephone for the entire hearing. It does not justify a rule that only allows a parent to participate in the hearing to the extent of testifying. We therefore reject a rule that limits the telephone participation of an incarcerated parent ***236** in a hearing to terminate parental rights to giving testimony.

Instead, we adopt the standard that juvenile courts in this state must give incarcerated parents the opportunity to participate from the prison facility in the entire termination hearing by telephone or other similar means of communication that enables the parent to hear the testimony and arguments at the hearing. The interests of the parent, the child, and the state support this opportunity. In particular, it serves the compelling interest of the parent to hear the evidence offered in support of a termination petition and to respond effectively to the evidence. We agree with the observations by other courts that parents normally have unique and exclusive knowledge of evidence concerning the termination. After all, their conduct is at issue. The risk of error is too great if a parent does not have the opportunity to hear this evidence and to formulate a response to it.

The opportunity to participate by telephone means the juvenile court must preside over the proceedings in a manner

that will best meet this standard. It will require the type of technology commonly used in courtrooms today, with a dose of cooperation from prison officials. We, of course, recognize that circumstances may arise that will challenge the juvenile court's ability to enable a parent to participate in the entire hearing, such as restrictions imposed by prison officials limiting the ability of the incarcerated parent to be available for the entire hearing. *See Orville*, 759 A.2d at 597 (involving out-of-state prison that would not allow incarcerated parent to participate in entire hearing); *In re D.C.S.H.C.*, 733 N.W.2d at 908 (explaining juvenile court could not compel out-of-state prison to compel incarcerated parent to participate in entire hearing); *In re Baby K.*, 722 A.2d at 472 (remanding due to incarcerated parent's inability to hear proceedings via telephone connection). The problems can be particularly acute when out-of-state correctional officials decline to make a parent available for the entire hearing. The authority of the juvenile court to direct out-of-court officials to comply with the hearing process is limited. *See In re D.C.S.H.C.*, 733 N.W.2d at 908. This limitation, however, does not abate the continuing role of due process.

In the event prison officials from other states, or other circumstances, do not permit the standard to be met, the juvenile court shall provide an alternative process that allows the parent to review a transcript of the evidence offered at the hearing. In this instance, the court must direct an expedited transcript of those portions of the hearing that were closed to the parent be prepared and given to the parent to review prior to testifying by telephone, along with all exhibits admitted into evidence. This alternative means of participation not only permits the parent to testify by telephone or teleconference after having an opportunity to review the record, but to recall witnesses who testify for the state for additional cross-examination and to present other testimony and documentary evidence at the hearing. *Orville*, 759 A.2d at 600.

We recognize this requirement will likely add additional expense and require additional time to complete the termination process, but not more than other existing procedural requirements needed to ensure fairness in hearings where so much is at stake. It is in the best interests of children for the court process to proceed without delay, but it is also in the best interests of children that their parents have a full and fair opportunity to resist the termination of parental rights. The potential for error is enhanced if a parent is not informed of the evidence presented in support of the termination. Furthermore, time needed for ***237** courts to complete a hearing consistent with the notions of due process is not the type of delay that is contrary to the best interests of children. This same understanding applies to any expenses associated with the process of providing parents with a transcript. Transcripts are commonly prepared and used in our justice system, and using them as an alternative safeguard in a termination hearing is not an administrative burden for the state. A true and accurate record has always been a fundamental component of justice and can be used in many ways to promote confidence in a justice system. Additionally, time expended to prepare a transcript for an incarcerated parent during a termination hearing will reduce the time needed to file the transcript for the appeal. Furthermore, technology now allows transcripts to be prepared much faster than in the past, and some juvenile courts are now equipped with digital recording. Finally, the expense of producing a transcript or other record can be assessed as court costs.

In the end, the standard now established in this opinion for juvenile courts to follow in termination hearings involving incarcerated parents is compatible with what a justice system should do for all litigants who need a reasonable accommodation. More importantly, the role of the juvenile judge will continue to be the important driver of procedural fairness expected of courts.

Judges who preside over parent termination hearings must first seek to arrange for the incarcerated parent to participate in the entire hearing by telephone, teleconference, or other similar means, and only need to resort to the alternative procedure in response to uncooperative out-of-state prison officials after first seeking their cooperation. [3] Thus, the role of a juvenile judge to seek cooperation in managing the hearing becomes part of due process. Judges are leaders and must at times exercise leadership to help achieve justice. This leadership means juvenile judges may need to confer with prison officials prior to termination hearings to explain the importance of the court procedures and the need for their cooperation to help assure procedural justice. The authority of a court does not just come from the issuance of an order. It also can be found by creating an understanding of justice for others to see and respond. Justice, in the end, is not just for courts to give people. It is for all, and for all to give.

Upon review of the current procedure, we conclude juvenile court judges must follow a different procedure moving forward. First, what has been acknowledged as the better practice over the years will now be the standard practice. Juvenile judges must give incarcerated parents the opportunity to participate by telephone in the entire hearing.

Second, if the attorney representing the incarcerated parent is unable to obtain the cooperation of prison officials to make the incarcerated parent available for the entire hearing, the juvenile court must communicate with the prison officials to explain the importance of participation by the parent and the benefits of avoiding the alternative procedure. Finally, if the efforts of the juvenile court are unsuccessful in giving the parent an opportunity to participate in the entire hearing, the juvenile judge must follow the alternative procedure that gives the incarcerated parent the opportunity to review the record of the evidence presented by ***238** the state at the hearing before testifying. In the end, the new procedure simply means that the juvenile judge or court staff may need to make a phone call or send a communication, a court reporter may need to prepare a transcript, and the termination hearing may need to be bifurcated.

IV. Conclusion.

We vacate the decision of the court of appeals and reverse the termination order of the juvenile court. We remand the case to the juvenile court for additional expedited proceedings in accordance with this opinion.

DECISION OF THE COURT OF APPEALS VACATED; JUVENILE COURT DECISION REVERSED AND REMANDED.

All justices concur except Christensen, Waterman, and Mansfield, JJ., who concur in part and dissent in part.

CHRISTENSEN, Justice (concurring in part and dissenting in part).

I agree with the majority's holding that the juvenile court did not abuse its discretion in denying the mother's motion for continuance. I also agree this court should vacate the decision of the court of appeals, reverse the decision of the juvenile court, and remand the case for an expedited hearing. But, I cannot agree to the majority's onerous mandates for juvenile court judges and their effects on court reporters. As a matter of sound judicial administration, incarcerated parents generally should be permitted to participate by phone in the entire termination hearing as long as it is arranged by the parent's attorney and allowed by prison officials. Contrary to the majority's holding, failure to do so in this case was simply a lack of sound judicial administration, not a matter of constitutional due process. This case is about what is in the best interest of a child and achieving permanency. However, the majority unduly favors incarcerated parents by creating new, unwarranted burdens on the juvenile courts that will impede the paramount goal of protecting the best interests of children who so desperately need a permanent home.

I. Error Preservation. First, we should not decide an important constitutional matter on appeal when the mother failed to preserve her due process argument for appeal. By ignoring our error preservation rules, the majority is reversing the juvenile court for failing to credit an argument that the mother never made. While the mother did move to continue and appear by telephone, she did not raise due process arguments in juvenile court or her petition for appeal. The motion argues that "it would be unfair and unjust to hold a hearing regarding the placement" without her presence, but that is the closest the record comes to any form of due process argument. It is not close enough. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Due process claims obviously implicate constitutional issues, but neither the petition on appeal nor application for further review so much as cites the due process provision of the Iowa Constitution or the United States Constitution. Therefore, I would not leap to either constitution to decide this issue on constitutional grounds.

II. Procedural Due Process. Second, the juvenile court did not deprive the mother of her due process rights. The United States Constitution and the Iowa Constitution both provide Iowans with due process protections so that the state shall not "deprive any person of life, liberty, or property without due process of law." ***239** U.S. Const. amend. XIV, § 1; *see* Iowa Const. art. 1, § 9. Procedural due process mandates "notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked,' " before the government can deprive anyone of a protected interest. *In re C.M.*, 652 N.W.2d 204, 211 (Iowa 2002) (quoting *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002)).

In the past, we have recognized that termination proceedings "threaten[ ] to deprive the [parent] of [a] liberty interest in the care, custody, and control of [his or] her child." *Id.* at 211. Given the protected interest implicated in termination proceedings, we balance three competing interests to determine the constitutional requisites of the procedure. *Id.* at 212. These interests are

> (1) the private interest affected by the proceeding; (2) the risk of error created by the procedures used, and the ability to avoid such error through additional or different procedural safeguards; and (3) the countervailing governmental interests supporting use of the challenged procedures.

Id.

We examined these competing interests involved in termination proceedings in *In re C.M.*, in which we held that a parent's due process rights were not violated when the parent was limited to raising her claims of error on appeal in a petition rather than in a brief. *Id.* at 207, 211–12. In doing so, we noted the importance of the presence of counsel as a safeguard for the parent's due process rights. *Id.* at 212. Regarding the first factor, we concluded, "A parent has an interest in the custody of his or her child." *Id.* Regarding the third factor, we explained that it is in the state's interest to finalize the termination expediently "so as to meet the child's emotional and psychological need for a permanent home, as well as to control the financial drain on the State caused by needlessly protracted proceedings." *Id.* We also found the parent has an interest "in a speedy conclusion because of the potential of regaining custody." *Id.* Despite these competing interests, we cannot forget the paramount interest in termination proceedings is always the best interests of the child. *See, e.g.*, *In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014); *see also* Iowa Code § 232.1 (2017) ("This chapter shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferably in the child's own home, the care, guidance and control that will best serve the child's welfare and the best interest of the state.").

This case hinges on the second factor, which is "the risk of error created by the procedures used, and the ability to avoid such error through additional or different procedural safeguards." *In re C.M.*, 652 N.W.2d at 212. We have previously held that "[b]iological parents have a due process right to notice and a hearing before termination of their parental rights may occur." *In re J.C.*, 857 N.W.2d at 506. This requirement "serves the best interests of the child by ensuring that subsequent placements are not later upset, to the detriment of the child." *Id.* at 507. Nevertheless, a parent's right to notice and hearing does not mean the parent has a due process right to attend the termination hearing. *Cf. Webb v. State*, 555 N.W.2d 824, 826 (Iowa 1996) (per curiam) (citing *In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991)).

A termination of parental rights (TPR) proceeding is a civil matter. *In re D.J.R.*, 454 N.W.2d 838, 846 (Iowa 1990). In *In re J.S.*, a father argued the juvenile court violated his due process rights when it denied his request to be transported from prison to attend the termination hearing in ***240** person, claiming he had the "right to know the charges, allegations, and evidence presented against him, as well as a right to have the State present its case first." 470 N.W.2d at 51. The parent's counsel attended the hearing, and the parent's testimony was presented by deposition. *Id.*

The court of appeals concluded in a published opinion that a parent is not "deprived of fundamental fairness" so long as the "parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition." *Id.* at 52. In reaching this conclusion, the court of appeals noted the parent "mistakenly assert[ed] [S]ixth [A]mendment rights granted to a criminal defendant in a criminal case. The termination of parental rights is a civil case." *Id.* at 51–52.

In *Webb*, we cited *In re J.S.* to support our holding that a defendant's due process rights "did not include attendance at the [postconviction-relief] hearing." 555 N.W.2d 824, 826 (Iowa 1996). In *Webb*, the defendant seeking postconviction relief received notice of the hearing and telephone conference, was represented at the hearing by counsel, and was provided the opportunity to present his testimony by telephone. *Id.* at 826. We determined these safeguards adequately "accorded the fundamental fairness due to him." *Id.* (citing *In re J.S.*, 470 N.W.2d at 52).

In this matter, similar to the father in *In re J.S.* and the defendant in *Webb*, the juvenile court provided the mother with procedural safeguards necessary to afford her fundamental fairness to protect against the risk of erroneous deprivation of her parental rights. Although the mother did not participate telephonically for the entirety of the hearing, her attorney was present on her behalf for the entirety. Moreover, much of the evidence presented against the mother was well documented due to her criminal charges and record, as well as her past interactions with the department of human services due to the children's child-in-need-of-assistance

(CINA) adjudications. At the termination hearing, the State asked the juvenile court to take judicial notice of many of the same exhibits used in the CINA adjudications. Thus, not only did the mother have access to the CINA transcripts, but she also had access to the CINA exhibits, which were the same exhibits used in her termination hearing. The mother was aware of the claims being made against her, and many of the facts she disputes on appeal boil down to credibility determinations the juvenile court was within its discretion to make.

At the time the juvenile court issued its TPR order in May, the mother in this case was facing several criminal charges in the State of South Dakota, including (1) possession of a controlled substance with intent to deliver (class 3 felony), (2) possession of a controlled substance (class 5 felony), (3) three counts of possession of drug paraphernalia (class 2 misdemeanor), (4) possession with intent to deliver a controlled substance—methamphetamine (class 4 felony), (5) two counts of possession of a controlled substance —methamphetamine (class 5 felony), (6) possession of a controlled substance—clonazepam/klonopin (class 6 felony), (7) distribution of a controlled substance—methamphetamine (class 4 felony), (8) unauthorized ingestion of a controlled substance—methamphetamine (class 5 felony), (9) ingesting marijuana (class 1 misdemeanor), and (10) possession of two ounces or less of marijuana (class 1 misdemeanor). She also pled guilty to conspiracy to manufacture in the State of Iowa, a class C felony, and served time in prison from 2008 to 2010.

***241** The mother's failure to maintain a meaningful and significant relationship with the children is a further indicator of her inability to prioritize what is in their best interest. She had not had any authorized contact with her children in the five months preceding her termination and stopped visiting the children on her own prior to her arrest, though she did text M.D. from jail. M.D. subsequently attempted suicide and explained that her mother's text messages contributed to her suicide attempt.

The evidence shows the other children have also sustained significant emotional harm related to contact with their mother, as K.T., G.A., and E.A. have all participated in therapy to address behavioral concerns. K.T. has reported struggles with her emotions regarding her mother, and G.A.'s negative behaviors increased when her mother stopped visiting in January 2018. The only child who was not undergoing therapy at the time of the TPR hearing was S.A., who was less than two years old at the time.

The mother has failed to address her substance abuse issues and other mental health issues by refusing services offered to her to treat these issues. Though the mother claimed to have been sober for sixty days at her TPR hearing, she was also incarcerated during this time. There is a significant difference between remaining sober in the structured, monitored prison setting and maintaining sobriety outside of prison.

She previously had her parental rights terminated to two other children due in large part to her substance abuse. The evidence also shows the mother engaged in drug use and criminal activity before the children in this case were removed from her care, and she exposed at least some of these children to the various men she was using drugs with before the children's removal from her care. Nevertheless, the mother continues to deny her role in the abuse, claiming the children's emotional trauma is the result of her inability to be with them. *See In re L.H.*, 904 N.W.2d 145, 153 (Iowa 2017) ("An important aspect of a parent's care for his or her child is to address his or her role in the abuse of the child.").

Moreover, the mother continued to maintain unhealthy relationships with a number of men involved with drugs in the past while the CINA adjudication was pending in this case. Since 2015, she has relapsed with five different men. She began a relationship with one of these men in December 2017 and married him the month before the TPR hearing.

Notably, once the children were removed from the mother's care, all of them were placed with their respective biological fathers in stable homes. The fathers continue to participate in services to assist their children in receiving the treatment they need, and they have been working together to ensure the children spend quality time together as siblings. The juvenile court correctly found that these placements were in the best interests of the children and that clear and convincing evidence supported terminating the mother's rights. *See In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010) ("We will uphold an order terminating parental rights if there is clear and convincing evidence of grounds for termination under Iowa Code section 232.116. Evidence is 'clear and convincing' when there are no 'serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence.' " (quoting *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000))).

The majority's holding that the juvenile court violated the mother's due process rights because due process "give[s] incarcerated parents the opportunity to participate from the

prison facility in the entire ***242** [termination] hearing" goes too far and ignores settled law that has been followed for decades in termination proceedings. The majority's decision that mandatory participation in the entire hearing provides the parent with the opportunity to "recall witnesses who testifi[ed] for the state for additional cross-examination and to present other testimony and documentary evidence at the hearing," conflates the rights granted to a criminal defendant with those afforded to a parent in a civil termination hearing. Not only does this threaten the validity of *Webb*, but the majority's decision to provide parents with heightened due process rights in civil termination hearings also calls into question the validity of our juvenile rules of procedure.

Generally, the juvenile court operates under less strict procedural rules than other courts. "The tasks of the juvenile court and the procedures developed are somewhat akin to the tasks and procedures developed in administrative law." *In re Delaney*, 185 N.W.2d 726, 737 (Iowa 1971) (Becker, J., concurring specially). For example, rule 8.19 of our juvenile rules allows the use of hearsay evidence "in whole or in part" in child-in-need-of-assistance and termination proceedings as long as "there is a substantial basis for believing the source of the hearsay to be credible and for believing the information furnished." Iowa Ct. R. 8.19; *see also* Iowa Code § 232.96(4)–(6). However, the majority's decision to transform the termination hearing procedures from civil to quasi-criminal and prioritize the rights of a parent over the best interest of a child serves only to thwart this court's commitment to putting the welfare of Iowa's children first.

A number of courts provide juvenile court judges with discretion on this issue, "while finding that representation by counsel and the opportunity to appear via deposition are the two key components required in a due process analysis of a parent who is not in attendance at a proceeding" to terminate parental rights. *In re Involuntary Termination of Parent–Child Relationship of C.G.*, 954 N.E.2d 910, 921–22 (Ind. 2011) (surveying the procedural due process requirements of other states with regard to a parent's presence at a termination hearing). Other states that have departed from this procedure to enhance the rights of parents have at least provided guidance to aid juvenile courts in their determination of whether a parent's attendance is allowed at the entire termination hearing. For example, the Supreme Court of Nebraska provides the juvenile court with discretion on this issue but requires the juvenile court to make its determination after considering the following factors:

> the delay resulting from prospective parental attendance, the need for disposition of the proceeding within the immediate future, the elapsed time during which the proceeding has been pending before the juvenile court, the expense to the State if the State will be required to provide transportation for the parent, the inconvenience or detriment to parties or witnesses, the potential danger or security risk which may occur as a result of the parent's release from custody or confinement to attend the hearing, the reasonable availability of the parent's testimony through a means other than parental attendance at the hearing, and the best interests of the parent's child or children in reference to the parent's prospective physical attendance at the termination hearing.

In re L.V., 240 Neb. 404, 482 N.W.2d 250, 258–59 (1992). Not only is Nebraska in the same federal circuit as us, but it also has similar statutes governing children in need of assistance and the termination of parental rights. *Compare* Neb. Rev. Stat. Ann. § 43-283 (West, Westlaw through 2d Reg. ***243** Sess. of the 105th Leg. (2018)), *with* Iowa Code § 600A.7.

The majority points to a case in Delaware as an example in support of its position that incarcerated parents should be afforded the opportunity to participate in the entire termination hearing by telephone from prison. *See, e.g.*, *Orville v. Div. of Family Servs.*, 759 A.2d 595, 599 (Del. 2000). However, the majority should not rely on the Delaware court's interpretation of Delaware's statutes when they are fundamentally different from Iowa's statutes on the termination of parental rights. For example, when a child in Delaware has attained the age of one year, notice of termination must be given to every alleged father, whether or not he has registered with the Office of Vital Statistics. Del. Code Ann. tit. 13, § 8-405 (West, Westlaw through 81 Laws 2018, chs. 200–453). On the other hand, when a child has not attained the age of one year, the Delaware Code allows for the termination of parental rights "of a man who may be the father of a child" without notice if "[t]he man did not register

timely with the Office of Vital Statistics; and [t]he man is not exempt from registration under § 8-402." Del. Code Ann. tit. 13, § 8-404.

In contrast, Iowa does not treat the father of a six-month-old child any differently than the father of a six-year-old child. They are going to both receive notice of termination proceedings. Perhaps *Orville* requires telephonic participation for the entire termination hearing to make up for other procedural shortcomings such as notice. Overall, whatever the reason, Iowa does not need to have such a hard-and-fast rule. We have procedural safeguards in our CINA and TPR statutes to adequately accord fundamental fairness to parents. *See, e.g.*, Iowa Code § 232.88 (requiring reasonable notice be provided to parents, guardians, and legal custodians when a CINA petition has been filed); *id.* § 232.89 (providing the parent, guardian, or custodian identified in the CINA petition with a right to counsel for all CINA hearings and proceedings); *id.* § 232.113 (providing the parent identified in a TPR petition with the right to counsel for all TPR hearings and proceedings); *id.* § 232.112(1) (entitling parents, guardians, and legal custodians to receive notice of TPR proceedings).

Notably, Iowa law authorizes the juvenile court to temporarily excuse the presence of a parent "when the court deems it in the best interests of the child." *Id.* § 232.38(2). This confirms that the best interests of the child ought to prevail in the event of any conflict with a parent's asserted right of attendance. Does the majority believe this statute is unconstitutional?

Finally, the majority's holding is detached from reality, as it creates substantial practical problems and provides no guidance to resolve them. For example, termination hearings often times take several days to complete and involve numerous witnesses and voluminous exhibits to review. The Iowa Department of Corrections (DOC) is a state agency that operates within the executive branch of the government. Yet, the majority expects juvenile court judges to exert authority over the DOC's prison facilities by directing the facilities to divert their resources to ensure an incarcerated parent participates in the entire hearing by telephone or a similar means of communication. The problems merely increase if the parent is in federal prison. Despite the majority's emphasis on the ability of judicial leadership to persuade out-of-state correctional officials to make the parent available for the entire hearing, even the best leadership from juvenile judges may not be enough to ensure this cooperation.

***244** In those situations when arrangements cannot be made for an incarcerated parent to participate in the hearing, the majority mandates juvenile courts to order an expedited transcript of those portions of the hearing that the parent could not attend prior to testifying by telephone, along with all exhibits in evidence. The cost of a several-day transcript is certainly significant. Requiring court reporters to expedite a several-day trial even more than what is expected in an already expedited proceeding is unrealistic. [4]

Significantly, attorneys for parents routinely have to prepare their petitions on appeal without the benefit of a transcript. We have approved that procedure recognizing the importance of the expedited deadlines for processing juvenile cases. *See In re L.M.*, 654 N.W.2d 502, 506 (Iowa 2002). It is not realistic to put chapter 232 procedures on hold while transcripts are prepared.

The majority seems to turn a blind eye to the overarching directive of Iowa Code chapter 232 to achieve permanency for the child in a timely fashion and to always place the child's best interest first. The majority must be reminded that this is a *child welfare* proceeding—the termination of a parent's rights happens to be the vehicle by which a child's permanency is achieved when reunification has not been successful. An incarcerated parent's procedural due process rights cannot hinder the timely permanency for a child, and they cannot trump what is in the best interest of a child.

The facts in termination proceedings change frequently. This is especially the case when the juvenile court is dealing with parents who have a severe substance-related disorder and frequently participate in drug testing throughout the course of their termination proceedings. Even a delay of a few weeks could require the state to come back after it presented its case before the delay and present more evidence. This risks getting into a timely back-and-forth presentation of evidence between the parties that only delays the proceedings to the detriment of the children involved. [5]

In any event, if the majority is going to require an incarcerated parent's telephonic attendance through the entire termination hearing, the burden should be on the parent's attorney—not the presiding judge—to see that the parent's right to attend the hearing is being fulfilled. This aligns with our court-approved standards of practice for attorneys representing parents in juvenile court. Specifically, our standards include the following: "Take reasonable steps to communicate with incarcerated clients and to locate clients who become

absent. Develop representation strategies. Establish a plan for the client's participation in case-related events." Iowa Ct. R. 61(10). These standards also acknowledge the issues an incarcerated parent's participation raises and explains, "[T]he attorney ***245** should make arrangements with the incarcerated client's prison counselor to have the parent appear by telephone" if the parent wishes to participate in the hearing. *Id.* r. 61(10) cmt. [5].

If the prison facility is unwilling to make accommodations for the client to participate telephonically, or if the client is ineligible for telephonic participation because of behavior infractions while incarcerated, then the attorney should make a record of such barriers so that the juvenile court has an opportunity to address them accordingly. Nevertheless, it is unrealistic and improper to expect a juvenile court judge to use his or her judicial authority to advocate for arrangements to be made for an incarcerated parent to participate in the entire telephone hearing by telephone. It is the attorney's responsibility—not the court's—to make arrangements for meaningful participation in court hearings.

Further, the court's decision is certainly creating a slippery slope. It provides incarcerated parents with greater due process rights than nonincarcerated parents. While the majority expects our juvenile courts to make special arrangements and exceptions to accommodate the needs of incarcerated parents so they can be telephonically present for the entire termination hearing, it ignores the needs of nonincarcerated parents. What happens when a nonincarcerated father is unable to attend the termination hearing because his employer will not provide him with time off work?[6] Is the juvenile court judge now expected to contact the father's employer and throw his or her weight around in an effort to excuse the parent's absence from work to attend the termination hearing? Similarly, what happens when the case involves a parent who is incarcerated and another parent who is not incarcerated and the juvenile court cannot accommodate both the prison facility's schedule and that of the nonincarcerated parent?

Will this case provide legal authority for an incarcerated parent to demand the same services by a district court judge and court reporter in a dissolution, child custody, or paternity action?[7] If the majority is saying that an incarcerated parent in a civil matter is entitled to a judge becoming actively involved in making telephonic arrangements or, in the alternative, ordering an expedited transcript for the entire hearing, then it is not a stretch to answer that question with a yes.

Overall, I agree that the preferable practice in termination proceedings is to allow the parent to participate telephonically for the entire termination proceeding ***246** if allowed by prison officials. Absent juvenile court findings to support its decision not to allow the parent to participate telephonically for the entire termination hearing—findings that do not exist in this case—the juvenile court should have allowed the mother in this case to participate telephonically for the entire termination as a matter of sound judicial administration. My agreement to remand notwithstanding, the majority's decision to remand this case to the juvenile court should have stemmed from our supervisory authority rather than a constitutional mandate.

This court has inherent supervisory authority to direct the procedures to be followed in Iowa courts, and "our cases have consistently recognized the inherent common-law power of the courts to adopt rules for the management of cases on their dockets in the absence of statute." *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568–69 (Iowa 1976); *see also* Iowa Const. art. V, § 4 (stating that the supreme court "shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state"). This allows us to order what is best without constitutionalizing the matter. For example, we have used our supervisory authority to adopt the Pew Commission report that discussed "Fostering Judicial Leadership" and recommended "that courts use best practice approaches" to better "the lives of children in foster care and their families." Pew Comm'n, *Progress on Court Reforms: Implementation of Recommendations from the Pew Commission on Children in Foster Care* 4, 10 (2009), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/kawcourtsassessmentoctober2009pdf. pdf; *see* Iowa Supreme Ct. Resolution, *In Support of the Recommendations of the Pew Commission on Children in Foster Care* (Sept. 10, 2007). We have also regularly exercised our inherent authority to allow delayed appeals in criminal cases where the defendant can document that he or she attempted to initiate an appeal before the deadline, without ever finding that a due process violation actually occurred. This is done "to prevent unnecessary challenges," and on the theory that a valid due process argument "might" be advanced. *See Swanson v. State*, 406 N.W.2d 792, 793 (Iowa 1987). We have also "exercised our supervisory authority over the rules of procedure and evidence to prohibit the use of unstipulated polygraph

examinations in Iowa courts," although this holding "was not based on due process grounds." *See Dykstra v. Iowa Dist. Ct.*, 783 N.W.2d 473, 485 (Iowa 2010).

Instead of following settled law or using our supervisory authority to provide procedural direction, the majority throws a stick of dynamite into the juvenile court system by adopting a hard and fast approach holding incarcerated parents are entitled to participate telephonically for the entire termination hearing or, in the alternative, delaying the child's permanency by stopping the trial so that expedited full transcripts can be prepared. The majority is altering the constitutional landscape in our state based on an unpreserved constitutional claim without providing a cogent analysis of controlling constitutional precedent. "No particular procedure violates [due process] merely because another method may seem fairer or wiser." *In re C.M.*, 652 N.W.2d at 212 (alteration in original) (quoting *Bowers*, 638 N.W.2d at 691). Yet, this appears to be the basis for the majority's holding today. For these reasons, I concur in part and dissent in part.

Waterman and Mansfield, JJ., join this concurrence in part and dissent in part.

All Citations

921 N.W.2d 229

Footnotes

1 One of the most serious consequences for young children raised by opioid and methamphetamine addicted parents is the dramatic impact on brain development. *See* Asher Ornoy et al., *Developmental Outcome of School-Age Children Born to Mothers with Heroin Dependency: Importance of Environmental Factors*, 43 Developmental Med. & Child Neurology 668, 672–73 (2001).

2 The court of appeals identified the issue on appeal as whether the juvenile court violated the mother's procedural due process rights by restricting her participation at the hearing. The State also framed the issue in its brief on appeal as a due process claim, and we granted further review under that framework. After we granted further review and asked the State to file a response, the State argued for the first time that the mother failed to preserve error specifically as a due process claim. We decline to address this contention so late in the judicial process. Furthermore, any sound resolution of the issue in this case necessarily requires us to rely on considerations based on due process.

3 The burden remains with the attorney for incarcerated parents to coordinate their telephonic participation at the hearing. *See* Iowa Ct. R. 61(10). Nevertheless, our judges are facilitators of justice for all who utilize our court system. In that sense, it is important that they aid in ensuring parents are provided the appropriate due process.

4 Iowa is already experiencing a significant shortage of official court reporters. *See, e.g.*, Iowa Judicial Branch FY 19 Budget Request, https://www.iowacourts.gov/static/media/cms/2019_budgetrevenues_76551E67392EF.pdf ("There are 6 court reporter positions that have been vacant for over one year and 12 total current court reporter vacancies.").

5 It also represents a step backward from the vision and principles adopted by the Child Welfare Advisory Committee and Children's Justice State Council, which emphasize the urgency required to provide children with permanency. *See* Children's Justice State Council & Iowa Dep't of Human Servs., Child Welfare Advisory Comm., *Iowa's Blueprint for Forever Families* 1 (2011), https://idph.iowa.gov/Portals/1/Files/SubstanceAbuse/forever_families.pdf ("Permanence is treated with a sense of urgency as if the child were our own or a child of a family member.").

6 In Iowa, an employee who appears as a witness in obedience to a subpoena "in any public or private litigation *in which the employee is not a party to the proceedings*" is "entitled to time off during regularly scheduled work hours with regular compensation, provided the employee gives to the appointing authority any payments received for court appearance or jury service, other than reimbursement for necessary travel or personal expenses." Iowa Admin. Code r. 11—63.12 (emphasis added). However, this rule does not require employers to provide employees with time off and compensation to appear in obedience to a subpoena in a civil proceeding in which the employee is a party to the proceedings. Thus, even the power of a subpoena is not enough to prevent a nonincarcerated parent from being penalized at work for time off resulting from the parent's obedience to a subpoena to attend a TPR hearing.

7 *Cf. Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) ("[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (Citations omitted.)).

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IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

STATE OF IOWA, Plaintiff, vs. KAMIE JO SCHIEBOUT, Defendant.	No. FECR016068 FECR FECR (Include Dismissed Case #'s) **JUDGMENT AND SENTENCE** (Felonies)

Appearances:

Attorney Thomas Kunstle for the State
Attorney Billy Oyadare for the Defendant, and Defendant in person

☐ Interpreter_____appears. Interpreter sworn and administered oath. Pursuant to Iowa Code 622A colloquy is digitally recorded.

Plea/Verdict:

On the 5th day of September, 2018, Defendant

☐ pled guilty to the offense(s) shown below. **Defendant's guilty plea is accepted.**

☐ entered an Alford plea to the offense(s) shown below. Defendant enters a plea to the crime(s) set out below pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) and *State v. Knight*, 701 N.W.2d 83 (Iowa 2005). By direct conversation with the defendant on the record, the court finds Defendant understands the charge(s), the penal consequences, and the rights being waived. The court further finds there is a factual basis for the plea and the plea is knowing and voluntary. The court further finds Defendant has acknowledged that: (1) It is in Defendant's best interest to enter this plea; (2) Defendant has nothing to gain at trial and will gain much more by pleading; (3) There is strong evidence of actual guilt; and (4) Defendant wishes to take advantage of the State's plea offer. **Defendant's plea is accepted.**

☒ was found guilty following trial of the offense(s) shown below.

Charge(s)/Offense(s):

Case No.	Count	Offense Date	Iowa Code Section	Offense
FECR015523	1	May 22, 2017	124.401(5), 902.8 & 902.9(1)(c)	Possession of Methamphetamine, Third or Subsequent Offense while being a Habitual Offender

Presentence Investigation Report (PSI): Pursuant to Iowa Code § 901.2-.4

☒ **A presentence investigation report** is on file and has been distributed to counsel of record.

☐ **Defendant waived use of a presentence investigation**, waived time for sentencing, waived the right to file a Motion in Arrest of Judgment and requested immediate sentencing. The Court hereby orders that the Judicial District Department of Correctional Services prepare a presentence investigation report, file it with the Clerk of Court, and distribute copies as provided by law.

Allocution: Defendant was given an opportunity to speak in mitigation of the sentence. On inquiry made, no legal cause has been shown why sentence should not be pronounced.

Pronouncement of Judgment and Sentence: Based on the record made and pursuant to Iowa Code § 901.5-.6

IT IS NOW ORDERED AND ADJUDGED as follows:

☒ **Judgment of Incarceration and Fine.** Defendant is convicted of the following crimes. Pursuant to Iowa Code section(s) shown in paragraph above and the Iowa Code section(s) shown below at *, the defendant is sentenced to an indeterminate term of incarceration not to exceed that shown below plus fine and surcharge as follows:

Case No.	Count	Incarceration	Fine	Surcharge
FECR016068	1	Fifteen (15) years	None	35%
				35%
				35%

*Check all applicable code sections. (The descriptive parentheticals are only to aid in preparing the document and are not substantive parts of this order.)

☐ 911.1 (surcharge)
☐ 902.1 (life)
☐ 902.9(1) (99 yrs.)
☐ 707.3 (50 yrs.)
☐ 902.9(2) (25 yrs.)
☒ 902.9(1)(c) (15 yrs.)
☐ 902.9(4) (10 yrs. + $1k-10k)
☐ 902.9(5) (5 yrs. + $750-7500)
☐ 124.401(1)(a) (50 yrs+$0-1mil.)
☐ 124.401(1)(b) (25 yrs+$5k-100k)
☐ 124.401(1)(c) (10yrs.+$1k-50k)
☐ 124.401(e) (firearm 2x)
☐ 124.401(f) (off.weap 3x)
☐
☐ 124.411 (2nd off. up to 3x)
☐ 124.413 (1/3) min.
☐ 124.401A (1000 ft. + 5 yrs.)
☐ 124.401B (1000 ft. + 100 hrs.)
☐ 124.401C (minors + 5 yrs.)
☐ 124.401D (minors, 2nd, life)

Pursuant to Iowa Code §901.7, the defendant is committed to the custody of the Director, Iowa Department of Corrections. The sheriff of this county is ordered to transport the defendant (accompanied by a person of the same sex) to: Any male age 18 and older shall be transported to the Iowa Medical and Classification Center at Oakdale, Iowa; all women shall be transported to the Iowa Correctional Institution for Women; and any male under the age of 18 shall be transported to the Anamosa State Penitentiar

Consecutive/Concurrent. Pursuant to Iowa Code §901.5(9)(c) and §901.8, the above sentence(s) of incarceration will run concurrently or consecutively as follows:

☐ This paragraph is not applicable.
☒ The following counts and/or cases shall run **concurrently**: Sioux County FECR015523.
☐ The following counts and/or cases shall run **consecutively:** .
☐ .

Mandatory Minimum/Sentencing Enhancements. A mandatory minimum sentence of incarceration and/or sentencing enhancement:

☐ is not applicable.
☐ is waived.
☒ is imposed in Count 1, pursuant to Iowa Code §§(s):

☐ 124.413 (1/3)
☐ 901.10(1) (1st conviction)
☐ 901.10(2) (meth reduction)
☐ 902.10(3) (124.401D reduction)
☐ 902.7(5 yrs. ff + weap.)
☒ 902.8 (3 yrs. habit.)
☐ 902.8A (10 yrs., 124.401D 1st)
☐ 902.11 (1/2 if prior ff)
☐ 902.12 (50%-70% certain fel.)
☐ 708.2A(7)(b)(1 year- DA-3rd)

☐

☒ **Probation Denied.** Sentenced to Incarceration (Prison/County Jail). The above term of incarceration:

☒ **is not suspended.** (List case or count, if less than all).
Mitimus to issue:
☒ forthwith
☐ not applicable
☐ on _____

☐ The defendant shall be confined in the County Jail for a term of ( ) days with credit for time already served in connection with this offense.

☐ Confinement shall commence:
☐ immediately;
☐ within ( ) days of the date of this judgment and sentence.
☐

☐After the defendant has served ( ) days of the jail sentence, the remainder of the sentence is suspended.

☐ The defendant is granted work release and/or treatment release, if eligible.

☐ The defendant may serve this jail sentence in the County, Iowa jail. The defendant shall be responsible for filing proof that the jail sentence has been served with the County Clerk of Court. If no such proof has been filed within ( ) days of the date of this judgment, a warrant shall issue for the defendant's arrest.

Credit for Time Served. Pursuant to Iowa Code §903A.5 and §901.6, the defendant shall be given credit for all time served in connection with this case.

Reduction of Term. Pursuant to Iowa Code §901.5(9)(a), (b), the court publicly announced that Defendant's term of incarceration may be reduced from the maximum sentence because of statutory earned time, work credits and program credits; and Defendant may be eligible for parole before the sentence is discharged.

Fine and Criminal Penalty Surcharge (generally-35%). The above fine and Iowa Code 911.1surcharge:
☐ are not suspended. _____
☒ are suspended. _____
☐ _____
☐ Pursuant to Iowa Code §909.3A, the Court in its discretion orders the defendant to perform community service work of an equivalent value to the fine and surcharge. The fine plus surcharge divided by the minimum wage ($7.25) shall be the minimum number of community service hours. Hours less than the minimum will not satisfy the fine and surcharge, and the clerk will record an amount still due and owing. Defendant shall perform _____ hours of unpaid community service hours.

Additional Surcharges. Pursuant to Chapter 911, the **defendant shall pay all applicable surcharges. If multiple offenses, surcharge shall apply for each offense.**
*Check all applicable code sections. (The descriptive parentheticals are only to aid in preparing the document and are not substantive parts of this order.)
DARE Surcharge. Pursuant to §911.2, the Drug Abuse Resistance Education surcharge for violation of Iowa Code(s) §321J or §124, division IV:
☐ is not applicable or not applicable because judgment is suspended or deferred. See §911.2(2).
☒ is applicable. Pursuant to Iowa Code §911.2, the defendant is ordered to pay $10.

Human Trafficking/Prostitution/Pimping/Pandering surcharge. Pursuant to §911.2A, a human trafficking victim surcharge for violation of §§725.1(2)(prostitution), 710A.2, 725.2 (pimping) or Chapter 725.3(pandering):
☐ is applicable. Pursuant to Iowa Code §911.2A, the defendant is ordered to pay $1,000.

Domestic Abuse Assault, Sexual Abuse, Stalking, and Human Trafficking surcharge. Pursuant to §911.2B, a domestic abuse assault, sexual abuse, stalking, and human trafficking victim surcharge for violation of §§708.2A, 708.11, or 710A.2 or Chapter 709:
☐ is applicable. Pursuant to Iowa Code §911.2B(1), the defendant is ordered to pay $100.

Domestic Abuse Protective Order Contempt surcharge. Pursuant to §911.2C, a domestic abuse protective order contempt surcharge for violation of a domestic abuse protective order issued pursuant to Chapter 236:
☐ is applicable. Pursuant to Iowa Code §911.2C(1), the defendant is ordered to pay $50.

LEIS Surcharge. Pursuant to §911.3, the Law Enforcement Initiative Surcharge for a violation of Iowa Code(s) §§124; 155A; 453B; 713; 714; 715A; 716; 719.7; 719.8; 725.1; 725.2; or 725.3:
☒ is applicable and the defendant shall pay $125.

Victims. Iowa Code §915

☒ **Pecuniary damages** pursuant to Iowa Code §915.100:

☐ to the victim(s) as defined at Iowa Code §915.10(3) as follows: _____; or

☒ if no pecuniary statement of damages is available or only a partial statement is available at sentencing, the county attorney pursuant to Iowa Code §910.3 shall provide a statement no later than thirty (30) days after sentencing and provide a permanent, supplemental order, setting the full amount of restitution.

☐ Defendant believed no one suffered pecuniary damages (see Iowa Code §910.3)

☐ Joint and severable with _____

☒ **No Contact Order**. Pursuant to Iowa Code §664A.2 and §664A.5, a No Contact Order:

☒ is not applicable or not needed or not requested. Additionally, if a no contact order was previously entered and the court did not extend the no contact order at the time of final disposition, the no contact order shall be deemed canceled and no longer in effect.

☐ is applicable. Defendant shall have no contact with _____ for five (5) years, from the date of this judgment. If a no contact order was previously entered it shall be extended accordingly. The Court will issue a separate order to further implement this paragraph, if requested.

Restitution. Pursuant to Iowa Code §910.3, the defendant shall pay and judgment is imposed against the defendant as follows: (check all that apply)

☒ **Fines, penalties and surcharges** to the Clerk of Court as set forth above.

☐ **Crime Victim Assistance Program.** (See Iowa Code §13.31). Reimbursement pursuant to Iowa Code §910 and §915 in the amount of $_____.

☐ To public agencies pursuant to Iowa Code §321J.2(13)(b).

☒ **Court costs** in an amount that will be later certified by the Clerk of Court.

☐ **Correctional fees** pursuant to Iowa Code §356.7 in the amount of $ _____. DO NOT order room and board fees unless an amount is known and the defendant's financial ability to pay has been considered. See *State v Siemer*, 2013 WL 5498077.

☒ **Court-appointed attorney's fees.** Per Iowa Code §815.9, if the defendant is receiving court-appointed legal assistance, the Court finds upon inquiry, review of the case file and any other information provided by the parties, the defendant has the reasonable ability to pay restitution of fees, including expense of the public defender.

☒ in the amount approved by the State Public Defender

☐ or $_____ whichever is less.

Reasonable Ability to Pay Adjustment Option: Defendant is entitled to a restitution hearing if requested within 30 days of sentencing or an order or supplemental order per Iowa Code 910.3 and .7

☐ Defendant admits he/she has the ability to pay all restitution

☒ Defendant asserts s/he is financially unable to pay all fines, restitutions and costs requests adjustment of restitution based upon their reasonable financial ability to pay.

The court considers the defendant's present and future ability to pay over the life of the obligation and a determination not based merely on chance; further the court has considered education, marketable job skills, potential and proven business skills, value of existing assets as well as the defendant's ingenuity and capabilities as well as any other information provided by the parties

Pursuant to Iowa Code §910.2(1), the Court **FINDS** upon inquiry, review of the case file and when available, any affidavits of financial status, presentence investigation report and any other information provided by the parties as may be set forth on the record.

☐ The defendant has the reasonable ability to pay restitution due for the above items for reasons stated on the record.

☒ The defendant does not have the reasonable ability to pay and the following is/are waived ☒ court-appointed attorney fees;
☒ court costs
☒ correction fees.

☐ Restitution is modified as follows: _____

☐ _____

☐ Community Service Option: Pursuant to Iowa Code §910.2(2) and Rule 26.4, the Court finds the defendant is not reasonably able to pay the above items of restitution and, accordingly: (1) the total court debt owed is greater than $300; and (2) that community service will be prudent and effective for the defendant, and that the community service can be administered within existing court resources; and (3) the defendant is not reasonably able to pay the above _____ and, accordingly, shall perform _____ hours of public service at a governmental agency or for a private nonprofit agency which provides service to youth, elderly or poor of the community. The Judicial District Department of Correctional Services or designated individual shall provide for the assignment to perform the required service. The hours ordered are "approximately equivalent value to those costs."

Notice Regarding Financial Obligations:

All fines and costs, unless otherwise ordered, shall be paid on the day imposed. Payment of any fines, surcharges, court costs, restitution, or court-appointed attorney's fees may be paid: (1) **By mail**: Send your payment by check, cashier's check, certified check, or money order; (2) **In person**: At the Clerk of Court's office using the same payment methods listed above, including cash; (3) **By Phone**: Using VISA, MasterCard or Discover; and (4) **Online** at www.iowacourts.gov using VISA, MasterCard or Discover. If unable to pay your court debt by any of the above methods, see options below.

☐ **Rule 26.2 Installment Payment Option IF court debt exceeds $300.** Defendant shall pay $ down and pay $ (must be at least $50 per month) with the first payment due within 30 days (Iowa Code §909.3) of the date of this order and each month thereafter OR otherwise in accordance with a probation plan of payment adopted and approved in accordance with §907.8 or §910.7 until all that is owed is paid in full. A judge may not order an installment plan for any debt that is already delinquent, cannot forgive any installment payments, cannot modify, block, or rescind any installment plan made by the Court's third-party collection agency, county attorney,

DOT, county treasurer or other entities collecting delinquent court debt. Rule 26.2 (7). The Court's third-party collection agency and some county attorneys can arrange ONE installment plan for all delinquent court debt owed. The judge CANNOT do so. A judge can arrange one installment plan for all court debt owed if it is all current. Rule 26.2(12).

If any payment or installment payment is more than 30 days past due, the Clerk of Court will turn the matter over to a third-party collection agency. You may make arrangements for payment of delinquent court debt by calling (866) 857-1845. Their hours are: Monday – Thursday, 8-8; Friday, 8-5; and Saturday, 8-noon. **Note:** A late penalty of up to 25% will added to the unpaid delinquent amount under this payment option.

Failure to Pay Consequences: Defendant's motor vehicle registration or suspension of Defendant's driver's license, or both, may be initiated. The State of Iowa may intercept any state income tax refund due to the defendant, any vendor amounts due the defendant by the State of Iowa, or monetary amounts held by the Clerk of Court and payable to the defendant, even if installment payments are current. See Rule 26.6-Form 1 Note.

Contempt For Failure to Pay: Unless Defendant fully complies with all the requirements ordered in this judgment, including payment of the restitution, fine, surcharges, and court costs within the required time, the defendant may be ordered to appear in person before this court and show cause why the defendant should not be held in contempt of court. If the defendant is held in contempt of court, a jail term may be imposed. Defendant shall supply the Clerk of Court with his/her residential and mailing addresses and telephone numbers. Changes in any of this information shall be reported to the Clerk of Court whenever they occur. In any subsequent action, upon sufficient showing that diligent effort has been made to ascertain the location of the defendant, the Court may deem due process requirements for notice and service of process to be met upon the delivery of a written notice to the most recent residential address filed with the Clerk of Court. If Defendant fails to pay court debt owing, the State may file an application for rule to show cause and a warrant may be issued for the defendant's arrest.

Driver's License Revocation. Pursuant to §901.5(10):

☒ is not applicable.

☐ the Iowa Department of Transportation ("IDOT") shall revoke Defendant's driver's license or motor vehicle operating privilege for a period of 180 days or shall delay the issuance of a driver's license for 180 days after Defendant is first eligible if Defendant has not been issued a driver's license. If Defendant's operating privileges are suspended or revoked at the time of sentencing, then the 180-day revocation period shall not begin until all other suspensions or revocations have terminated. In the event Defendant qualifies, the IDOT shall grant a temporary, restricted driver's license to Defendant for the purposes of traveling to and from work, substance abuse counseling or treatment and for any other travel requirements imposed as conditions of Defendant's probation.

DNA Profiling. Pursuant to Iowa Code §81.2 and §901.5(8A)(a), Defendant shall submit a physical specimen for DNA profiling.

Appeal Bond. Defendant was informed of the right to appeal.

☐ If defendant was granted a deferred judgment, there is no right of appeal. 234N.W.2d 89

☐ Pursuant to Iowa Code §811.1(2), Defendant is not eligible for bond on appeal.

☒ Pursuant to Iowa Code §811.1, bond on appeal is set as follows:

Case No.	Count	Amount
FECR016068	1	$5,000 cash

		or surety

If an appeal bond is posted, the Court, upon the request of either party or on the Court's own motion, will set a hearing to determine if any special conditions of release should be imposed pending an appellate decision.

Defendant is advised that if he/she determines to appeal this ruling, a written notice must be filed within 30 days, he/she may be entitled to court-appointed counsel to represent him/her in an appeal. The defendant is advised that if he/she qualifies for court-appointed appellate counsel, then he/she can be assessed the cost of the court-appointed appellate attorney when a claim for such fees is presented to the Clerk of Court following the appeal. The defendant is further advised that he/she may request a hearing on his/her reasonable ability to pay court-appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. If the defendant does not file a request for a hearing on the issue of his/her reasonable ability to pay court-appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the defendant.

Bonds Exonerated. All outstanding bonds are exonerated.

Reasons for Sentence: Pursuant to Iowa Code §907.3, 907.5, 901.3 and 901.5, the reasons supporting this sentence include those set forth on the record and:

- ☒ The maximum opportunity for the rehabilitation of the defendant.
- ☒ Protection of the community from further offenses by the defendant and others.
- ☒ Defendant's age.
- ☒ Defendant's prior record (or lack thereof) as to convictions and deferments.
- ☒ Defendant's employment circumstances.
- ☒ Defendant's family circumstances.
- ☒ Nature of the offense committed.
- ☒ Contents of the presentence investigation.
- ☐ Plea agreement.
- ☒ The financial condition of the defendant.
- ☐ A weapon or force was used.
- ☐ Comments from the victim(s) of the crime.
- ☐ The sentences are consecutive based upon:
  - ☐ the separate and serious nature of the offenses
  - ☐ the plea agreement
  - ☐ to provide Defendant maximum incentive to comply with the terms and conditions of probation
  - ☐ crime of escape under §719.4 or crime committed while Defendant confined at a detention facility or penal institution (consecutive sentences are mandatory under Iowa Code §901.8)
  - ☐ crime committed while Defendant on parole/probation (consecutive sentences are presumed under Iowa Code §908.10-must still state reasons See St. v Hill, Iowa Supreme Court 4-22-16))

☐ If juvenile offender: The Court finds this sentence is not cruel and unusual. The Court has considered (1) the age of the offender and the features of youthful behavior, such as "immaturity, impetuosity, and failure to appreciate risk and consequences"; (2) the particular "family and home environment" that surround the youth; (3) the circumstances of the particular crime and all the circumstances relating to youth that may have played a role in the commission of the crime; (4) the challenges for youthful offenders in navigating through the

criminal process; and (5) the possibility of rehabilitation and the capacity for change. See *State v Lyle*, 854 N.W.2d 378 (Iowa 2014) footnote 10.

☐ Other factors:

Dismissal of Other Counts and Cases. Upon the recommendation of the State and/or under the terms of the plea agreement and/or by reason of acquittal, **the following counts/cases are dismissed**:
(REMINDER: List dismissed case numbers in the case caption above and file in all applicable cases.)

☐ Defendant is ordered to pay court costs on these counts/cases pursuant to the plea agreement. Pursuant to the plea agreement, if restitution is due on any of these counts/cases, the defendant is ordered to pay such restitution.

☐ Costs taxed to the State if on their motion, acquittal or if plea agreement is silent.

☐

IOWA CODE 901C.6 NOTICE: Under Iowa Code§901C, you may be entitled to have any dismissed or acquitted cases expunged from your record. After 180 days has passed from entry of the judgment of acquittal or order dismissing the case and if all court costs, fees and other financial obligations ordered by the court or assessed by the Clerk of District Court have been paid, you may make a formal written request to the court for expungement. If an objection or request for hearing is filed by the prosecutor, the matter will be set for a court hearing. This provision applies to Iowa Code §692.1, public offenses only. It does not apply to non-indictable offenses under Chapter 321 or local traffic ordinances.

Miscellaneous Notices.

Benefits: (drug offenses) Unless noted elsewhere, this judgment does not affect eligibility or disqualify the defendant from receiving any federal or state benefits. See 21 U.S.C. §862; Iowa Code §901.5 (11 or 12).

Voting: In Iowa, a person's voter registration is cancelled if the person is convicted of a felony. Iowa Code 48A.6. Voting rights may be restored after completion of the sentence, any required probation, parole, or supervised release, and all court costs, fees, and restitutions have been paid. This can change through Governor's Executive Order, and you may wish to contact your county auditor or the Iowa Secretary of State to determine if you are eligible to vote. Voting, when ineligible or disqualified, is a crime. Iowa Code 39A. The Governor's Office is responsible for the restoration of voting rights. For more information, call the Governor's Office at 515-281-5211 or visit their Restoration of Rights website.
https://sos.iowa.gov/elections/voterinformation/restorerights.htm

Firearms/Ammunition/Concealed Weapons Permit: People who have been convicted of felonies (in state or federal court) are not permitted to possess, ship, transport or receive a firearm, offensive weapon or ammunition in Iowa, unless they have been pardoned or had their civil rights restored. (Iowa Code §§ 724.8, 724.15, 724.26, 724.27.) The Governor's Office is responsible for the restoration of IOWA FIREARM RIGHTS FOR FELONIIES COMMITTED IN IOWA (ONLY). For more information, call the Governor's Office at 515-281-5211 or visit their Restoration of Rights website.
https://sos.iowa.gov/elections/voterinformation/restorerights.htm

Immigration Consequences: If you are not a citizen of the United States, a conviction for an aggravated misdemeanor or a felony will likely have immigration consequences. A conviction for an aggravated misdemeanor or a felony will likely result in (1) deportation or removal from the United States, (2) prevention of the defendant from ever being able to get legal status in the United States, and (3) prevention of the defendant from ever becoming a

United States citizen. These consequences may take place even if granted a deferred judgment and sentence or if the case is later expunged.

Booking/Fingerprinting: If the defendant has not been previously booked and fingerprinted for all charges listed in this judgment, the defendant shall report to the County Sheriff's Office within ( ) days of the date of this judgment. If the defendant is out of custody and the crime of conviction (or for which judgment has been deferred) is a domestic assault, public intoxication, theft or harassment, Defendant is ordered to report to the county jail with a copy of this order and government issued identification immediately to submit to fingerprinting and booking procedures.
Failure to complete this requirement will result in a warrant being issued for the defendant's arrest. Failure to comply with this requirement can be punished by contempt of court for which Defendant could receive up to six months in jail, a $500 fine, or both, and can also result in revocation of any probation granted by the court. The sheriff of this county is ordered to fingerprint the defendant if the defendant has not previously been fingerprinted with respect to this offense. If the defendant is in custody, the sheriff is ordered to fingerprint the defendant on this charge before release if such procedures have not already been completed.

Other.

☐
☐

JUDGMENT IS ENTERED ACCORDINGLY this 25th day of September, 2018.

Revised 4.25.2017

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
FECR016068	STATE V SCHIEBOUT, KAMIE JO

So Ordered

Patrick H. Tott

Patrick H. Tott, District Court Judge,
Third Judicial District of Iowa

2019 WL 4309062
Only the Westlaw citation is currently available.
NOTICE: FINAL PUBLICATION
DECISION PENDING
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff-Appellee,
v.
Kamie Jo SCHIEBOUT, Defendant-Appellant.

No. 18-1662
|
Filed September 11, 2019

Appeal from the Iowa District Court for Sioux County, Patrick H. **Tott**, Judge.

Kamie Jo Schiebout appeals her conviction and sentence for possession of methamphetamine as a habitual offender. **AFFIRMED IN PART, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Attorneys and Law Firms

Mark C. Smith, State Appellate Defender, (until withdrawal), and Melinda J. Nye, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Thomas J. Ogden, Assistant Attorney General, for appellee.

Considered by Tabor, P.J., and Mullins and May, JJ.

Opinion

MAY, Judge.

***1** Kamie Jo Schiebout appeals her conviction for possession of methamphetamine as aN habitual offender. She contends the district court erred in denying her motion to suppress and in imposing sentence. We affirm the district court's suppression ruling, but we remand for resentencing.

I. Facts and Prior Proceedings

In May 2017, Schiebout had an outstanding warrant for her arrest. On May 22, the Sioux County Sheriff's office received a tip that Schiebout could be located at an Orange City church. A deputy found Schiebout standing in the rear of the church. He informed Schiebout he was arresting her. He did not handcuff her to avoid her embarrassment. They exited the church. As they made their way to the deputy's squad car, Schiebout asked to wait a moment so she could confer with her mother, who was inside the church. The deputy agreed. Schiebout then walked about ten feet toward the church. She deposited her purse on the ground next to the church doors. She then walked away from the purse.

The deputy did not think this was normal or innocent. He was familiar with Schiebout's history of substance abuse. And he knew she was living with a local drug trafficker. Given this background, and Schiebout's attempt to abandon her purse, the deputy believed the purse contained contraband. So, he walked over and picked the purse up.

At this point, Schiebout's mother emerged from the church. Schiebout then "grabbed the purse" from the deputy "and gave it to her mom." The deputy responded by taking the purse away from Schiebout's mother. He secured the purse in his car and placed Schiebout in the backseat.

The deputy transported Schiebout and her purse to the sheriff's office. At the station, a drug-sniffing dog indicated the purse contained illegal drugs. The deputy then sought and obtained a search warrant for the purse. The subsequent search revealed several individual baggies of methamphetamine.

The State charged Schiebout with possession of methamphetamine, third or subsequent offense, with the habitual-offender enhancement. Schiebout moved to suppress the methamphetamine. The district court denied her motion. Schiebout agreed to a trial on the minutes. The district court found Schiebout guilty of possession of methamphetamine, third or subsequent offense, as an habitual offender, in violation of Iowa Code sections 124.401(5), 902.8, and 902.9(1)(c) (2017). Consistent with this verdict, the district court sentenced Schiebout to a term of incarceration not to exceed fifteen years with a mandatory minimum of three years. Schiebout appeals.

II. Scope and Standard of Review

Our review is de novo as to Schiebout's constitutional claims. *See State v. Vance*, 790 N.W.2d 775, 780 (Iowa 2010). "We are required to review the record and independently evaluate the totality of the circumstances." *State v. Hoskins*, 711 N.W.2d 720, 725 (Iowa 2006).

We review sentencing challenges for corrections of errors at law. *State v. Freeman*, 705 N.W.2d 286, 287 (Iowa 2005).

III. Analysis

We first address Schiebout's challenge to the district court's suppression ruling. [1] Schiebout has the right to be free from unreasonable searches and seizures. This right is protected by the Fourth Amendment of the United States Constitution, and by article I, section 8 of the Iowa Constitution. The State has the burden of showing that Schiebout's rights were not violated.

***2** Police seized Schiebout's purse without a warrant. Therefore, the seizure was per se unreasonable unless a recognized exception applies. *See State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006) ("Unless a recognized exception to the warrant requirement exists, searches and seizures conducted without a warrant per se unreasonable."). "These exceptions include searches based on consent, plain view, probable cause coupled with exigent circumstances, searches incident to arrest, and those based on the emergency aid exception." *Id.* at 272 (internal quotation marks and citation omitted). The State must prove an exception applies by a preponderance of the evidence. *Id.*

The State claims seizure of Schiebout's purse was justified by the search and seizure incident to arrest (SITA) exception. *See, e.g.*, *State v. King*, 867 N.W.2d 106, 133 (Iowa 2015) (Appel, J., dissenting) ("While the warrant requirement is central to search and seizure law, there have been well-recognized exceptions to it, including searches and seizures incident to arrest ...."); *State v. Halverson*, No. 16-1614, 2017 WL 5178997, at *2 (Iowa Ct. App. Nov. 8, 2017) ("A search incident to arrest is reasonable within the meaning of the Fourth Amendment and article I, section 8 of the Iowa Constitution."). This exception permits a "search [and seizure] of the person arrested and of the immediately surrounding area, meaning the area from which the person might gain possession of a weapon or destructible evidence." [2] *State v. Vance*, 790 N.W.2d 775, 786 (Iowa 2010); *see also Gaskins*, 866 N.W.2d at 15 ("Our decision today does not preclude a warrantless SITA under circumstances in which the security of an arresting officer is implicated ... or when the arrested person is within reach of contraband and thus able to attempt to destroy or conceal it.").

These conditions are met here. The deputy went to the church to execute a valid arrest warrant. When the deputy located Schiebout in the church, he notified Schiebout that he was placing her under arrest. Schiebout was not free to leave the area. As such, we conclude Schiebout was under arrest when, moments later, the deputy seized the purse from Schiebout's mother.

Moreover, we find the purse was in the immediately surrounding area—as demonstrated by her ability to grab the purse and hand it to her mother. This conduct exemplifies the need for SITA to preserve evidence: By taking the purse from the deputy and then handing it to another person, we find Schiebout was carrying out a last-ditch effort to dispose of her contraband. *See State v. Saxton*, No. 14-0124, 2014 WL 7343522, at *2 (Iowa Ct. App. Dec. 24, 2014) (finding SITA permissible because evidence in defendant's backpack was susceptible to destruction if the defendant was permitted to leave the backpack with another person).

***3** Schiebout contends the SITA exception does not apply because the deputy was not subjectively "concern[ed] about safety or weapons" and had no subjective "suspicion" that the purse contained contraband. We disagree for two reasons. First, as a factual matter, we find the deputy was subjectively concerned that the purse contained contraband. We accept his testimony that he "grabbed the purse away from her mother because the behavior with this whole purse was extremely unusual, and based on [his] experience with this, [he] had reason to believe that there was probably something illegal in that purse."

That aside, our law is clear that the legality of a search or seizure "does not depend on the actual motivations of the police officers involved." *Simmons*, 714 N.W.2d at 272. Rather, in deciding whether an exception to the warrant requirement exists, "the court must assess a police officer's conduct based on an objective standard." *Id.* As explained above, the objective circumstances justified the deputy's seizure of the purse under the SITA exception. The district court was correct, therefore, in denying the motion to suppress.

Schiebout also challenges her sentence. The State concedes resentencing is necessary. We agree.

Iowa Code section 124.401(5) criminalizes possession of methamphetamine. It states in pertinent part:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance .... Any person who violates this subsection is guilty of a serious misdemeanor for a first offense. A person who commits a violation of this subsection and who has previously been convicted of violating this chapter or chapter 124B or 453B, or chapter 124A as it existed prior to July 1, 2017, is guilty of an aggravated misdemeanor. A person who commits a violation of this subsection and has previously been convicted two or more times of violating this chapter or chapter 124B or 453B, or chapter 124A as it existed prior to July 1, 2017, is guilty of a class "D" felony.

The district court found Schiebout guilty of possession of methamphetamine as a third or subsequent offense, a class "D" felony under Iowa Code section 124.401(5). She was sentenced accordingly.

The parties agree, however, that a violation of section 124.401(5) is only considered a third offense—and a felony—when the defendant has been previously "convicted two or more times of violating [Iowa Code chapter 124] or chapter 124B or 453B, or chapter 124A as it existed prior to July 1, 2017." The parties also agree Schiebout has not been previously convicted "two or more times" under any of those chapters. She does have two prior drug convictions, one of which involved a violation of Iowa Code chapter 124. But her other prior drug conviction involved *federal* law, not the Iowa Code. Therefore, it does not "count" as a prior conviction for purposes of section 124.401(5).

Because Schiebout has only one relevant prior conviction, her current offense should be treated as an aggravated misdemeanor under section 124.401(5). We vacate her sentence and remand for resentencing.

AFFIRMED IN PART, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.

All Citations

Slip Copy, 2019 WL 4309062 (Table)

Footnotes

1 Because Schiebout abandoned her purse on the ground near the church doors and walked away from it, we question whether Schiebout has standing to challenge the seizure. *See State v. Bumpus*, 459 N.W.2d 619, 625 (Iowa 1990) (concluding a defendant did not have standing to challenge the search of a pouch after he abandoned it during a pursuit). However, because the State does not raise this issue, we assume Schiebout regained possession of the purse when she took it from the deputy.

2 While SITA challenges most often challenge the resulting search, we recognize the principles justifying SITA are equally applicable to seizures contemporaneous to arrest. *See State v. Gaskins*, 866 N.W.2d 1, 10 (Iowa 2015) (recognizing both searches and seizures incident to arrest); *King*, 867 N.W.2d at 133 (Appel, J., dissenting) (recognizing seizures incident to arrest as a well-recognized exception to the warrant requirement); *State v. Kramer*, 231 N.W.2d 874, 878 (Iowa 1975); *see also United States v. Robinson*, 414 U.S. 218, 236 (1973) (permitting seizure of defendant's property within immediate control during an arrest); *United States v. Fulton*, 192 F. Supp. 3d 728, 731 (S.D. Tex. 2016) (recognizing seizure incident to arrest as a recognized exception to the warrant requirement).

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E-FILED 2019 APR 15 2:42 PM WOODBURY - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

STATE OF IOWA, Plaintiff, vs. JESUS AGUSTIN DELGADO JIMINEZ, Defendant.	NO. FECR102958 RULING ON DEFENDANT'S MOTION TO SUPPRESS

On March 189, 2019, a hearing was held on the Defendant's Motion to Suppress filed herein on February 13, 2019, and the State's resistance to the motion filed February 19, 2019. The State appeared by Assistant Woodbury County Attorney Mark Campbell. The Defendant appeared personally along with his counsel, Jenny Van Kekerix. Evidence was presented through the testimony of Officer Joshua Tyler and Officer Michael Sitzman and State's Exhibit 1. The hearing was reported by Certified Shorthand Reporter Amy Lutgen.

STATEMENT OF FACTS

The charge against the Defendant and the underlying Motion to Suppress arise out of events that transpired on November 27, 2018. On that date at approximately 12:25 a.m., Officer Joshua Tyler observed a running 2012 Chrysler 300 in the 1800 block of Myrtle Street in Sioux City, Iowa. The vehicle was illegally parked several feet from the curb. Officer Tyler did not observe anyone in or near the vehicle. Officer Tyler ran the license plate on the vehicle and the registered owner came back as a person with the last name of Valentine that lived in the 4100 block of Gordon Drive, which is not near the location where the car was parked.

Officer Tyler decided to set up down the block to observe the vehicle as he was not sure what was going on and there had been a lot of stolen vehicles and drug activity in this part of the city. As soon as Officer Tyler established his position, he noticed that the vehicle was moving east bound on West 19th Street. Officer Tyler pulled in behind the vehicle and the vehicle almost immediately pulled into the parking lot of the Perry Creek Laundromat on West 19th Street. Officer Tyler continued to proceed on West 19th Street and observed the vehicle make a U-turn in the parking lot and go back onto West 19th Street, now behind Officer Tyler's squad car. Officer Tyler then stopped a couple blocks later at the red light at West 19th and Hamilton Blvd., and observed the vehicle pull into the parking lot of the Kum & Go Store located on the southwest corner of West 19th and Hamilton Blvd. Officer Tyler observed the vehicle pull up to a gas pump and Officer Tyler took a position to observe the vehicle. Approximately 5 to 10 minutes later, Officer Tyler observed the vehicle exit the Kum & Go parking lot and turn West onto West 19th Street away from Hamilton Blvd. After going a very short distance, the vehicle turned around and reentered the Kum & Go parking lot and parked in front of the store.

About this time, Officer Sitzman arrived as a cover car. Both Officers then watched the Kum & Go store for several minutes and did not observe the driver of the vehicle exit the store. The Officers then decided to get out of their vehicles and enter the store to try to determine what was happening with the driver in the store. As the Officers approached the store, they checked the vehicle and discovered that it was empty. The Officers also did not observe any illegal items inside the vehicle in plain sight. Upon entering the store, the store clerk spoke to the officers and indicated that

the driver had walked out of the store moments before the officers entered. The clerk stated to the officers that he was concerned about the driver who he said was acting very nervous, was pacing around the store and then just walked away. At this point Officer Tyler suspected that the vehicle might be stolen. Officers Tyler and Sitzman then called for assistance in locating the driver of the vehicle. A short time later Officer Talbott located the Defendant walking near W18th Street and Geneva, approximately two blocks from the Kum & Go store.

Officer Talbott determined that the person he stopped was Jesus Delgado and Officer Tyler confirmed that Mr. Delgado was the person who had been driving the vehicle. Officer Tyler testified that he was familiar with Mr. Delgado from having several prior contacts with him.

As Officer Talbott was detaining the Defendant at the corner of W18th Street and Geneva, Officer Sitzman ran his drug detection dog Zeus around the vehicle the Defendant had been driving that was parked in front of the Kum & Go store. Zeus gave an alert by the driver's side door of the vehicle. Officer Sitzman observed that the vehicle was locked.

Officer Talbott then determined that the Defendant was in possession of the keys to the vehicle and brought him back to the Kum & Go store. Officer Sitzman then obtained the keys to the vehicle and began his search of the vehicle. After entering the vehicle, Officer Sitzman observed a strong odor of marijuana and located a baggie with a white substance. The Defendant was detained in the back of one of the patrol vehicles during this search of the vehicle. The Defendant was then placed under arrest after Officer Sitzman located the drugs in the vehicle.

The Defendant contends that the search of the vehicle was in violation of his rights under Article 1 Section 8 of the Iowa Constitution and the Fourth Amendment of the United States Constitution. The Defendant contends that under the circumstances of this case law enforcement should have first obtained a search warrant before conducting the search of the vehicle.

PRINCIPLES OF LAW AND ANALYSIS

The State has the burden to show the stop of the Defendant and the subsequent search of the vehicle was constitutional. *State v. Wiese*, 525 N.W.2d 412, 414 (Iowa 1994) (overruled on other grounds by *State v. Cline*, 617 N.W.2d 277, 281 (Iowa 2000)). The failure to meet its burden requires all evidence obtained from the unlawful detention and/or search to be suppressed. *State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993).

The Fourth Amendment of the U.S. Constitution guarantees people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The Fourteenth Amendment makes the 4th Amendment binding on the states. *State v. Nitcher*, 720 N.W.2d 547, 553 (Iowa 2006). The Iowa Constitution also guarantees people the right to be secure against unreasonable searches and seizures. Iowa Const. Art. I, § 8. Evidence obtained in violation of the defendant's rights is inadmissible. *Mitchell,* at 693.

A police officer may approach and speak with a pedestrian without invoking the person's constitutional rights so long as the officer has not restrained the liberty of the citizen in any way. *State v. Harlan*, 301 N.W.2d 717 (Iowa 1981). However, if the actions of the officer restrain the citizen's liberty in any way, the officer must have "reasonable suspicion" that the citizen is involved in criminal activity before stopping the

individual. If the officer has "reasonable suspicion", he may stop and briefly detain the individual for purposes of investigation. *Terry v. Ohio*, 392 U.S. 1 (1968). The officer must have reasonable cause to believe a crime may have occurred or criminal activity is afoot. *State v. Mitchell*, 498 N.W.2d 691 (Iowa 1993). Reasonableness is measured by whether the facts available to the officer at the moment of the stop would warrant a person of reasonable caution to believe the action taken was appropriate. *State v. Haviland*, 532 N.W.2d 767 (Iowa 1995). An officer making an investigatory stop must have a well-founded and articulable suspicion of criminal activity, and not merely rely on "inchoate and unparticularized suspicion or hunch." *State v. Allen*, 994 So.2d 1192, 1193 (Fla.2008).

The test for probable cause/reasonable suspicion is objective not subjective. A court must independently scrutinize the objective facts to determine whether reasonable suspicion/probable cause exists. *State v. Gillespie*, 619 N.W.2d 345, 351 (Iowa 2000). There is no distinction between a stop based on probable cause and a stop based on reasonable suspicion as far as whether the test is objective or subjective. Therefore, so long as the necessary standard is established (i.e. probable cause for a search/arrest or reasonable articulable suspicion in the case of an investigatory stop/seizure) under an objective standard, a search or seizure will be upheld notwithstanding the officer's actual motivation. *State v. Hemminover*, 619 N.W.2d 353, 357 (Iowa 2000).

In the present case, Officer Tyler had observed several things that caused him to have suspicion that the Defendant may be engaged in criminal conduct. First, he observed the vehicle the Defendant subsequently was driving, parked, running and unoccupied several feet from the curb. He then observed the Defendant enter the

parking lot of the laundromat only to immediately leave the parking lot after the officer passed by and then go the Kum & Go Store twice in a short period of time, leaving his vehicle parked in the lot and leaving on foot after being in the store for nearly ten minutes. The store clerk then describing odd behavior by the Defendant while in the store. This behavior by the Defendant clearly provided the officers with reasonable suspicion to conduct an investigatory stop of the Defendant after he left the store on foot.

The Defendant's main argument, however, does not deal with the investigatory stop of the Defendant has he was walking a few blocks away from the Kum & Go. Rather the Defendant's issue is whether the search of the Defendant's vehicle was unlawful with the officers first obtaining a search warrant. Generally, "searches and seizures conducted by governmental officials without prior court approval are per se unreasonable unless they fall within one of the few exceptions to the Fourth Amendment's warrant requirement." *Katz v. United States*, 389 U.S. 347 (1967); *State v. Jackson*, 542 N.W.2d 842, 845 (Iowa 1996). The burden is upon the State to show that an exception to the warrant requirement exists. *State v. Bumpus*, 459 N.W.2d 619 (Iowa 1990).

One exception to the warrant requirement is the automobile exception, which allows for the search of a motor vehicle when probable cause and exigent circumstances exist. *Carroll v. United States*, 267 U.S. 132 (1925); *State v. Storm*, 898 N.W.2d 140 (Iowa 2017). The State contends that this exception applies in this case.

Probable cause exists to search a vehicle when the facts and circumstances, including what the officer has heard, what he knows, and what he observes as a trained

officer, would lead a reasonably prudent person to believe that the vehicle contains contraband. *State v. Hoskins*, 711 N.W.2d 720 (Iowa 2006). Suspicious movements by occupants of the vehicle contribute to probable cause. State v. Carter, 696 N.W.2d 31 (Iowa 2005). In this case, there is probable cause to believe that the vehicle contained contraband based on the alert given by Zeus as he circled the outside of the vehicle. The use of a drug dog on the exterior of a vehicle does not constitute a search and does not infringe upon any Fourth Amendment rights. *United States v. Pulido-Ayala,* 902 F.3d 315, 318 (8th Circuit 2018) citing *United State v. Williams,* 429 F.3d 767, 771 (8th Cir. 2005). The alert from Zeus as well as the Defendant's suspicious behaviors dealing with the manner in which he was driving the vehicle and his leaving the store on foot clearly establish probable cause for the search of the vehicle.

However, in order for the automobile exception to apply, the Court must also find that exigent circumstances exist to justify the search. In the typical automobile stop situation, exigent circumstances is basically assumed because of the inherent mobility of a motor vehicle. *State v. Storm,* 898 N.W.2d 140, 145 (Iowa 2017). Exigency, however, is to be determined at the time of the automobile is seized not at the time of the actual search. *State v. Edgington*, 487 N.W.2d 675, 678 (Iowa 1992) citing *Texas v. White*, 423 U.S. 67 (1975).

In this case, we do not have a typical automobile stop situation. In fact, the officers never conducted a traffic stop of the Defendants vehicle. On the contrary, the officers only examined the vehicle and ran the drug dog around it ten or fifteen minutes after the Defendant had legally parked the vehicle in the Kum & Go parking lot. While the Defendant may have engaged in suspicious behavior prior to that point, such

behavior had not yet risen to the level of probable cause the search the vehicle. Probable cause only existed after the Defendant mysteriously left the Kum & Go store and the drug dog alerted on the vehicle. Prior to that point, there was no probable cause to believe that the vehicle contained any illegal substances. Under the facts of this case, the officers seized the Defendant's vehicle after the dog sniff took place and while the Defendant was being detained two or three blocks away. Under these facts, the Court concludes that exigent circumstances to search the vehicle did not exist. At that time, two officers in separate patrol vehicles were present at the scene. The Defendant was detained blocks away. While the vehicle retains its "inherent mobility", there was no way the vehicle was going anywhere at that point. In light of the existence of probable cause, the officers had the right to obtain a search warrant for the vehicle regardless of whether the Defendant had been located or not. In actuality, the argument for exigent circumstances may have been greater had the Defendant not already been located away from the scene, as it could have been argued that the Defendant might reappear at any time. Under the facts as they exist in this case, however, the only reason the Defendant returned to the scene was because he was brought back by the officers.

Accordingly, as the Court concludes that exigent circumstances did not exist at the time the vehicle was seized, the automobile exception to the warrant requirement does not apply to this case and the Defendant's Motion to Suppress is granted.

IT IS THEREFORE ORDERED that the Defendant's Motion to Suppress is granted. Any evidence found as a result of the warrantless search of the Defendant's vehicle is suppressed.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
FECR102958	STATE VS DELGADO JIMENEZ, JESUS AGUSTIN

So Ordered

Patrick H. Tott

Patrick H. Tott, District Court Judge,
Third Judicial District of Iowa

2020 WL 115768
Only the Westlaw citation is currently available.
NOTICE: FINAL PUBLICATION
DECISION PENDING
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff-Appellant,
v.
Jesus DELGADO-JIMENEZ, Defendant-Appellee.

No. 19-0746
|
Filed January 9, 2020

Appeal from the Iowa District Court for Woodbury County, Patrick H. **Tott**, Judge.

The State appeals from the grant of a motion to suppress. **REVERSED AND REMANDED.**

Attorneys and Law Firms

Thomas J. Miller, Attorney General, and Sharon K. Hall, Assistant Attorney General, for appellant.

Mark C. Smith, State Appellate Defender, (until withdrawal) and Ashley Stewart, Assistant Appellate Defender, for appellee.

Considered by Bower, C.J., and May and Greer, JJ.

Opinion

GREER, Judge.

***1** We must decide if the district court properly granted a motion to suppress evidence. The State argues the automobile exception applies to the warrantless search of the vehicle Jesus Delgado-Jimenez drove. We find the State established the necessary probable cause and exigent circumstances to justify the automobile exception. As a result, we reverse the district court and remand for further proceedings.

I. Background Facts and Proceedings.

Shortly after midnight on November 27, 2018, Officer Josh Tyler with the Sioux City Police Department noticed a Chrysler vehicle that was running while parked several feet from the curb with no one in the area. Aware of a rash of stolen vehicles in the area, he ran a vehicle registration check that revealed it was registered to an address in a different part of the city.

Officer Tyler, suspecting the Chrysler was stolen or otherwise involved in criminal activity, started to observe it. Someone soon entered the Chrysler and drove away. Officer Tyler followed in his marked patrol vehicle. The Chrysler turned into a parking lot and—without stopping—turned back onto the same street to begin driving behind Officer Tyler. When Officer Tyler stopped at a red light, the Chrysler turned into a convenience store lot just before the light and stopped at a gas pump. Still suspicious, Officer Tyler called for assistance from Officer Michael Sitzman, a certified drug-sniffing-dog handler, and stopped to observe the Chrysler. After five to ten minutes, the Chrysler left the gas pump and turned onto the street, yet it immediately turned back into the same convenience store lot and parked in front of the store.

With no apparent purpose for the return to the store, Officers Tyler and Sitzman continued to watch the Chrysler. After several minutes of no observable activity, they left their patrol vehicles to investigate. On examination of the Chrysler, they saw no occupants or obvious signs of concern from the outside. Thinking they might locate the driver, they entered the store. The clerk offered that a man just left the store who was acting nervous. He told the officers the man "left on foot" after he exited the store. After calling for assistance to locate the man, other officers spotted a man about one-half block from the store matching the description. Identified as Jesus Delgado-Jimenez, Officer Tyler knew about previous investigations of Delgado-Jimenez for drug and traffic violations. He believed Delgado-Jimenez did not have a valid driver's license, so the other officers detained him.

At this point, Officer Sitzman used his dog to search for drugs in the Chrysler, directing the dog to sniff around the exterior of the vehicle. The dog detected an odor at the driver's door. The other officers transported Delgado-Jimenez to the store, and Officer Sitzman obtained the vehicle keys from him. Once Officer Sitzman opened the driver's side door, he immediately found a baggie containing a white powdery substance, believed to be methamphetamine or cocaine. The officers arrested Delgado-Jimenez.

***2** The State charged Delgado-Jimenez with possession of a controlled substance, third violation, and driving while his license was suspended. *See* Iowa Code §§ 124.401(5), 321J.21 (2018). On February 15, 2019, he moved to suppress

evidence from the search of the Chrysler. On March 18, the court held a hearing on the matter. On April 15, the court issued its ruling granting the motion to suppress. The State filed a motion to reconsider, which the court denied. The State applied for discretionary review. The Supreme Court granted the application and stayed the district court, and it transferred the matter to this court.

II. Standard of Review.

"When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, our standard of review is de novo." *State v. Brown*, 890 N.W.2d 315, 321 (Iowa 2017). "When we review a record de novo, we make 'an independent evaluation of the totality of the circumstances as shown by the entire record.' " *Id.* (quoting *In re Pardee*, 872 N.W.2d 384, 390 (Iowa 2015)). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of the witnesses, but we are not bound by those findings.' " *Id.* (quoting *Pardee*, 872 N.W.2d at 390).

III. Analysis.

The federal and state constitutions prohibit the State from conducting "unreasonable" searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8. "A warrantless search is presumed unreasonable," unless the State shows an exception applies. *State v. Moriarty*, 566 N.W.2d 866, 868 (Iowa 1997).

The State argues the warrantless search of the Chrysler was justified under the automobile exception. The automobile exception requires showing that "probable cause and exigent circumstances exist at the time the car is stopped by police." *State v. Storm*, 898 N.W.2d 140, 145 (Iowa 2017) (quoting *State v. Holderness*, 301 N.W.2d 733, 736 (Iowa 1981)). Probable cause may evolve during a proper investigation to justify a warrantless search. *State v. Edgington*, 487 N.W.2d 675, 678 (Iowa 1992). "The inherent mobility of motor vehicles satisfies the exigent-circumstances requirement." *Storm*, 898 N.W.2d at 145.

As for the first prong of the exception, the State argues the alert from the drug dog provides probable cause. *See State v. Bergmann*, 633 N.W.2d 328, 338 (Iowa 2001) ("Several cases have concluded that a reliable drug dog alert alone is enough to establish probable cause to search."). Delgado-Jimenez concedes the existence of probable cause. And we agree as well.

To address the second prong, the State argues exigent circumstances exist based on the mobile nature of the Chrysler. *See Storm*, 898 N.W.2d at 145. In contrast Delgado-Jimenez argues that under the facts here—the Chrysler was unoccupied and parked on private property—no exigent circumstances existed to justify the warrantless search. Yet our Supreme Court recently considered and retained the automobile exception, noting "exigent circumstances apart from the mobility of the vehicle are not required to justify a warrantless search." *Id.* at 146; *see also Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (same); *Holderness*, 301 N.W.2d at 737 (applying the automobile exception to a vehicle found unoccupied and parked on a public street where probable cause existed to believe it contained evidence of sexual abuse). In *Storm*, our supreme court "decline[d] to replace the easy-to-apply automobile exception with a case-by-case exigency determination." 898 N.W.2d at 145. Thus, the Chrysler's inherent mobility provides the needed exigent circumstances to satisfy the automobile exception. To the extent that Delgado-Jimenez asks us to reconsider the automobile exception, "[w]e are not at liberty to overturn Iowa Supreme Court precedent." *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990). Because the State satisfied the automobile exception, Delgado-Jimenez's motion to suppress should be denied.

IV. Disposition.

***3** We reverse the district court's grant of Delgado-Jimenez's motion to suppress. We remand for further proceedings.

REVERSED AND REMANDED.

All Citations

Slip Copy, 2020 WL 115768 (Table)

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Attachments regarding Question 18

Attached are the following items:

1. Johnson Propane, Heating and Cooling, Inc. v. The Iowa Department of Transportation, Woodbury County Case No. CVCV163078 Filed April 27, 2016

Supreme Court Decision affirming my ruling: Johnson Propane, Heating & Cooling, Inc., v. The Iowa Department of Transportation, 891 N.W.2d 220 (Iowa 2017)

2. United Real Estate Solutions, Inc. and United Commercial Real Estate LLC, d/b/a NAI United v. Richard Salem and Richard Salem Real Estate, Woodbury County Case No. EQCV176008, filed July 24, 2018.

Opinion not appealed.

3. State of Iowa v. Darius Wright, Woodbury County Case No. FECR096917 Filed July 5, 2017.

Court of Appeals Decision affirming my ruling: State of Iowa v. Darius Wright, 928 N.W.2d 151 (Table) (Iowa App. 2019)

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

JOHNSON PROPANE, HEATING AND COOLING, INC. Plaintiff-Appellant, vs. THE IOWA DEPARTMENT OF TRANSPORTATION, Defendant-Appellee. HERITAGE BANK, N.A., UNITED BANK OF IOWA, WOODBURY COUNTY TREASURER. Lienholders and Encumbrancers.	CASE NO. CVCV163078 RULING ON DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT

On April 1, 2016, an unreported hearing was held on the Defendant-Appellee's Motion for Summary Judgment filed on March 2, 2016, and the Plaintiff-Appellant's Resistance thereto filed March 15, 2016. Counsel of record appeared telephonically, Jacob Natwick for the Plaintiff-Appellant and Robin Formaker for the Defendant-Appellee. After considering the arguments presented, and having reviewed the contents of the file and applicable law, the Court finds and rules as follows:

STATEMENT OF FACTS

The Iowa Department of Transportation (hereinafter referred to as "the Department") has engaged in a highway improvement project along US Highway 20 in Woodbury County, Iowa. As part of that project, the Department exercised its right of eminent domain to acquire a portion of the property owned by the Plaintiff along Highway 20. None of the parties dispute that the exercise of eminent domain by the

Department was for a public purpose. The purpose of the project was to reconstruct and widen US Highway 20 near Correctionville, Iowa.

The Plaintiff, Johnson Propane, Heating and Cooling, Inc., (hereinafter referred to as Johnson) was served with a notice of assessment of its property in the condemnation proceedings on August 29, 2014. A hearing was held on October 28, 2014, in front of the Woodbury County Compensation Commission. Pursuant to the notice of assessment, the Department sought to acquire a .16 acre tract of the Plaintiff's .76 acre parcel, which was the only portion required for the highway improvement project. The Department did not seek to acquire the remainder of the Johnson parcel as it was not needed for the highway project and the Department had determined that the remaining .60 acre was not "an uneconomical remnant of no value or utility to the owner".

As part of the notice of assessment, the Department indicated that the value of the Johnson parcel taken was $11,500.00. The Department's appraiser found that the entire parcel had a value of $78,400.00 and that the remaining .6 acre parcel after the taking had a value of $66,900.00.

A hearing was held on October 28, 2014, by the Woodbury County Compensation Commission regarding the Department's Notice of Assessment. At said hearing, Johnson argued that under the proposal made by the Department, the remaining .60 acre parcel would be an uneconomic remnant and suggested that the remaining property had little or no value or utility to Johnson. At the hearing Johnson presented an appraisal to the commission which indicated that the entire .76 acre tract had a value of $200,000.00. Said appraisal, however, did not separately value the .16

acre tract or the remaining .60 acre tract under the Department's proposed taking. At the conclusion of the hearing, the Compensation Commission entered a ruling awarding Johnson $11,100.00 for the .16 acre parcel taken by the Department pursuant to its Notice of Assessment. In its ruling, the Compensation Commission notified Johnson that they may within 30 days appeal the ruling to the District Court as provided by law. Johnson subsequently filed its Notice of Appeal with the Iowa District Court for Woodbury County on November 21, 2014, and it's Petition on Appeal on November 25, 2014.

The Department then filed its Motion for Summary Judgment on March 2, 2016. In its Motion for Summary Judgment, the Department contends that Johnson's appeal was not timely under Iowa Code Section 6A.24(1) and that Iowa Code Section 6B.54(8) does not provide Johnson with a cause of action to challenge the Department's determination that the remaining .60 acre parcel was not an "uneconomical remnant". Johnson asserts that its appeal was timely because they are challenging the items and amount of damages and the Department's right or authority to condemn property. Further Johnson asserts that it has the right to bring an appeal of the "uneconomical remnant" issue under Iowa Code Sections 6B.18 through 6B.23 as the issue involves the items and amount of damages incurred.

STANDARDS FOR SUMMARY JUDGMENT

A matter may be resolved on summary judgment if the record reveals only a conflict concerning the legal consequences of undisputed facts. *City of Fairfield v. Harper Drilling Co.,* 692 N.W.2d 681 (Iowa 2005). The moving party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Iowa R.Civ.P. 1.981(3). An issue of fact is "material" only when the dispute involves facts which might affect the outcome of the suit, given the applicable governing law. *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988). The requirement of a "genuine" issue of fact means the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* In a motion for summary judgment, the nonmoving party enjoys the benefit of "every legitimate inference that could be reasonably deduced from the record." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001). A motion for summary judgment is considered as the court would a motion for directed verdict. *Dickerson v. Mertz,* 547 N.W.2d 208, 212 (Iowa 1996). Under this standard, summary judgment is inappropriate if reasonable minds would differ on how the issue should be resolved. *Keystone Elec. Mfg. Co. v. City of Des Moines,* 586 N.W.2d 340, 345 (Iowa 1998). The evidence must be viewed in the light most favorable to the nonmoving party. *Otterberg v. Farm Bureau Mut. Ins. Co.,* 696 N.W.2d 24, 27 (Iowa 2005). Summary Judgment is inappropriate if reasonable minds would differ on how the issues should be resolved. *Keystone Elec. Mfg. Co. v. City of Des Moines*, 586 N.W.2d 340, 345 (Iowa 1998).

"When a motion for summary judgment is properly supported, the nonmoving party is required to respond with specific facts that show a genuine issue for trial." *Otterberg,* at p. *27.* An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law. *Smith v. CRST Int'l Inc.,* 553 N.W.2d 890, 893 (Iowa 1996). "A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come

forward with evidence to demonstrate that a genuine issue of fact is presented." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Bitner v. Ottumwa Community School Dist.*, 549 N.W.2d 295, 300 (Iowa 1996).

ANALYSIS

The decisive issues in this Motion for Summary Judgment is first whether, in a partial taking eminent domain case, the property owner has the right to appeal the Department of Transportation's determination that the remaining parcel after the partial taking is an uneconomical remnant. If so, the second issue is whether the property owner's appeal must take place under Iowa Code Section 6A.24 within 30 days after the notice of appeal, or within 30 days after the Compensation Commission determines the amount of the award for the taking pursuant to under Iowa Code Sections 6B.18 through 6B.23.

Regarding the first issue, the Department argues that Johnson has no private cause of action under Section 6B.54(8) to challenge the Department's determination that Johnson was not left with an uneconomical remnant. However it is clear that the legislature intended that a property owner would have an avenue to object to such a determination. Without a mechanism to challenge the Department's determination on this issue, Section 6B.54(8) would be meaningless except to give the Department an excuse to take additional property than what was needed for the public purpose. It is clear that part of the rationale for Section 6B.54(8) is to provide a property owner from being stuck with a partial remnant of land that has little or no value or utility to them after

the partial taking.

From a review of the pleadings and the contents of the court file, it is clear that there is a factual dispute as to whether the .60 acre tract remaining after the condemnation of the initial .16 acre tract is "uneconomical remnant" under Section 6B.54(8) of the Iowa Code. Section 6B.54(8) provides:

> For any public use, public purpose, or public improvement for which condemnation is sought, an acquiring agency shall, at a minimum, satisfy the following policies:
>
> 8. If the acquisition of only a portion of property would leave the owner with an uneconomical remnant, the acquiring agency shall offer to acquire that remnant. For the purposes of this chapter, an "uneconomical remnant" is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, where the acquiring agency determines that the parcel has little or no value or utility to the owner.

The State argues that based on its appraisal the remaining .60 acre parcel has a value of $66,900.00. Johnson, on the other hand, focuses on the "no utility" portion of the statute instead of the "no value" portion asserting that the remaining parcel has no utility to its business. As a result there is clearly a factual dispute for the jury to resolve as to the value of the remnant under Section 6B.54(8) if Johnson has properly filed its Petition herein.

While the pleadings clearly show that there is a factual dispute between the parties whether Johnson was left with an uneconomical remnant or not after the partial taking in this case, the resolution of this summary judgment motion rests on the legal question of when Johnson must appeal the Department's finding regarding whether the remaining parcel is an uneconomical remnant or not.

The Department asserts that such an appeal must be taken under Iowa Code

Section 6A.24 within 30 days after the original notice of assessment. The Department argues that Johnson, in effect, is challenging the Department's exercise of eminent domain. Johnson, on the other hand, argues that they are actually appealing the compensation commission's determination of Johnson's "items and amount of damages occasioned by the condemnation". If the appeal must be taken pursuant to Section 6A.24, Johnson's Petition herein would be time barred as having been filed more than 30 days after the notice of assessment was given. On the other hand, if the appeal is to be made after the decision of the compensation commission, Johnson's Petition would not be time barred, and as there is clearly a factual dispute as to whether an uneconomical remnant remains, the motion for summary judgment should be denied.

Pursuant to the framework of Chapter 6A and Chapter 6B there are arguably two possible alternatives for Johnson to pursue an appeal. Chapter 6A establishes the Eminent Domain law in Iowa while Chapter 6B establishes the procedures to be followed under eminent domain. Iowa Code Section 6B.3A provides that "an owner of property described in an application for condemnation may bring an action to challenge the exercise of eminent domain authority or the condemnation proceedings in the district court... as provided in section 6A.24". Section 6A.24(1) provides:

> An owner of property described in an application for condemnation may bring an action challenging the exercise of eminent domain authority or the condemnation proceedings. Such action shall be commenced within thirty days after service of notice of assessment pursuant to section 6B.8 by the filing of a petition in district court. Service of the original notice upon the acquiring agency shall be as required in the rules of civil procedure. In addition to the owner of the property, a contract purchaser of record of the property or a tenant occupying the property under a recorded lease shall also have standing to bring such action.

Section 6A.24(2) further provides that the "acquiring agency" may also petition the

district for a determination that their proposed action is for a public use, public purpose, or public improvement necessary to support the taking.

A second possible avenue for Johnson would be to file an appeal under Iowa Code Section 6B.18 to appeal the appraisement of damages by the compensation commission. Section 6B.18(1) provides:

> After the appraisement of damages has been delivered to the sheriff by the compensation commission, the sheriff shall give written notice, by ordinary mail, to the condemner and the condemnee of the date on which the appraisement of damages was made, the amount of the appraisement, and that any interested party may, within thirty days from the date of mailing the notice of the appraisement of damages, appeal to the district court by filing notice of appeal with the district court of the county in which the real estate is located and by giving written notice to the sheriff that the appeal has been taken. The sheriff shall endorse the date of mailing of notice upon the original appraisement of damages.

The decisive factor is which avenue is the correct one for Johnson to take under the facts of this case. While the Department asserts that neither avenue is appropriate that position clearly deviates from the legislative intent under Section 6B.54(8) as discussed above. Johnson asserts that this is a situation in which the issue is one of a determination of the items and amount of damages incurred. It is clear that an appeal under Section 6B.54(8) is geared towards the amount of damages that the property owner should receive based on the taking made by the public authority. "The property owner's loss is usually measured by the extent to which the taking deprived it of an interest in its property." *Aladdin, Inc. v. Black Hawk County*, 562 N.W.2d 608, 611 (Iowa 1997).

A review of Iowa Code Chapters 6A and 6B establishes that there is a three-step analysis used in eminent domain/condemnation proceedings. First there is a

determination of whether there is a public use, public purpose, or public improvement necessary under the circumstances to support a taking of private property. If the answer to that question is yes, the second question becomes what private property is needed to accomplish the public use, purpose or improvement. The final step is then to determine what the appropriate compensation to be paid for said taking of the private property is. Johnson argues that the determination of whether there is an uneconomic remnant should be part of the third step of calculating damages after the initial taking is done. The Court believes that this analysis is incorrect and that a challenge to the Department's determination of whether there remains a uneconomical remnant remaining after the proposed taking should be made at the time the proposed taking is first presented to the property owner.

This conclusion logically follows from the framework of Chapters 6A and 6B. Under those provisions, the acquiring agency is required to provide notice to the landowner under Section 6B.3(2) of the land proposed to be taken by eminent domain. Section 6B.3A then gives the property owner the right to challenge the exercise of eminent domain **or the condemnation proceedings** (emphasis added) under Section 6A.24. Section 6A.24(1) then gives the landowner 30 days to bring an action to challenge the exercise of eminent domain **or the condemnation proceedings** (emphasis added). Any party may then give a 30-day notice of assessment under Section 6B.18 to have the damages from the exercise of eminent domain be assessed by the compensation commission. The compensation commission must then view the land to be taken under Section 6B.14 and assess the damages which the owner will sustain as a result of the taking prior to the compensation hearing. It is clear from the

language of the statute that the compensation commission must know what land it is dealing with before it makes its determination of the value for that property. If the commission does not know what ground is involved (a partial or full taking) it would be impossible for the commission to make an appropriate assessment of the damages sustained by the property owner.

From this framework it is clear that a determination of the property for which the landowner is to be compensated must be made prior to the compensation commission making its assessment of damages. Under Section 6B.14 the commission only assesses the property to be taken. On the other hand, the landowner has the ability to raise the uneconomic remnant issue up until 30 days after the notice of assessment is made under Section 6B.8. During that time the landowner would be aware of the property proposed to be taken and also would have an opportunity to have an appraisal done to present to the compensation commission at the compensation hearing. Certainly the landowner would be able to make a determination during that 30-day notice period as to whether the proposed taking would leave it with a "parcel that has little or no value or utility to the owner". The landowner knows what it uses the property for before the taking, knows what property would be left after the proposed taking and should be able to easily determine if the remaining land would have any utility to it after the taking. If the landowner reaches the conclusion that it would be left with a parcel with little or no value or utility it could appeal the "condemnation proceedings" under Section 6A.24 without necessarily challenging the authority of the acquiring agency to do the taking in general. The taking of the initial parcel could continue and the project would not be held up while the appeal dealing with whether additional property should

be taken or not proceeds. Under the other approach, the compensation commission could never do its statutory obligation until after the appeal of its decision had been made in cases where the landowner claims that the acquiring agency failed to also take an "uneconomic remnant".

As Johnson did not file an appeal in this case under Section 6A.24(1), for the reasons set forth above the Court finds that the Department's Motion for Summary Judgment should be granted.

The Court does not rule upon the Department's Motion to Strike Johnson's appraisal as the granting of the Motion for Summary Judgment makes said Motion moot. The Court does note, however, that it did consider the contents of Johnson's appraisal in reaching its ruling on the Motion for Summary Judgment.

RULING

Defendant/Appellee's Motion for Summary Judgment is granted.

So ordered this 27th day of April 2016.

E-FILED 2017 MAR 31 1:18 PM WOODBURY - CLERK OF DISTRICT COURT

IN THE SUPREME COURT OF IOWA

No. 16–0906

Filed March 3, 2017

JOHNSON PROPANE, HEATING & COOLING, INC.,

Appellant,

vs.

THE IOWA DEPARTMENT OF TRANSPORTATION,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Patrick H. Tott, Judge.

A landowner appeals a district court judgment finding the district court was without authority to decide whether a condemnation proceeding left the landowner with an uneconomical remnant. **AFFIRMED.**

Jacob B. Natwick and John C. Gray of Heidman Law Firm, L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, and Robin G. Formaker, Assistant Attorney General, for appellee.

ELECTRONICALLY FILED MAR 03, 2017 CLERK OF SUPREME COURT

WIGGINS, Justice.

The Iowa Department of Transportation (IDOT) condemned a portion of a landowner's property to complete the construction of a highway. The landowner waited until after the compensation commission decided damages to appeal its claim to the district court that the taking left it with an uneconomical remnant. The district court dismissed the petition on summary judgment finding the landowner's petition making its uneconomical remnant claim was untimely. On appeal, we affirm the district court judgment. We hold the district court was without authority to hear the case because the landowner failed to file an action within thirty days from the notice of assessment as required by Iowa Code section 6A.24(1) (2014) contesting the IDOT's exercise of eminent domain when the IDOT did not determine its acquisition left the landowner with an uneconomical remnant.

I. Background Facts and Proceedings.

Johnson Propane, Heating & Cooling, Inc. (Johnson Propane) owns property in the city of Correctionville, located in Woodbury County. The IDOT engaged in a highway improvement project along U.S. Highway 20 in Correctionville, and in order to complete the project, the IDOT exercised its right of eminent domain to acquire a portion of the property owned by Johnson Propane. On August 4, 2014, the IDOT initiated condemnation proceedings by filing an application with the chief judge of Woodbury County seeking to condemn a .16-acre tract of Johnson Propane's .76-acre parcel. The IDOT determined it did not need the entire plot of land for the highway improvement project and that the remaining .60-acre tract left after the condemnation was not an uneconomical remnant.

Thereafter on August 21, the chief judge appointed a compensation commission, whose purpose was to assess and appraise the damages sustained because of the condemnation of the .16-acre parcel. The IDOT served a notice of assessment upon Johnson Propane on August 29. The notice informed Johnson Propane of the condemnation sought by the IDOT, that the chief judge appointed a commission to appraise and award damages for the condemnation, and on October 28, the commission would view the property and meet to appraise damages.

The compensation commission held a hearing on the scheduled day. Johnson Propane operates a propane business on the property affected by the condemnation, and argued that as a result of the .16-acre condemnation, the remaining .60-acre tract had little or no value or utility to the business. Johnson Propane presented evidence of an appraisal declaring the fair market value of the entire .76-acre parcel before the IDOT's condemnation was $200,000. Johnson Propane explained that due to the partial taking of the property, it was "virtually impossible for propane trucks to safely enter and exit the property," and "[w]ithout the ability to operate trucks on its property to collect and haul propane, Johnson Propane will no longer be able to use the remaining property in its business." Thus, Johnson Propane contended that the remaining .60-acre parcel had little or no value or utility to the property owner and was an uneconomical remnant for which it should receive compensation.

The IDOT presented evidence of an appraisal concluding the market value of the entire .76-acre parcel before the taking was $78,400, and the value of the remaining .60-acre tract after the .16-acre taking was $66,900. Thus, the IDOT's appraisal estimated the just compensation for the .16-acre taking was $11,500. The appraisal noted

that the condemnation would remove two access drives to Johnson Propane's property along U.S. Highway 20, but determined the property would still have adequate access, and thus, there was no "diminution in value."

At the conclusion of the hearing, the compensation commission awarded Johnson Propane with $11,100 for the .16-acre taking. Johnson Propane filed a notice of appeal to the district court on November 21 and a petition on appeal on November 25. In its petition on appeal, Johnson Propane claimed that as a result of the .16-acre taking, it could no longer use the remaining property for its propane business. It also claimed that it was "virtually impossible for trucks to enter and exit the property." Johnson Propane further claimed that the IDOT's taking amounted to a complete taking because the remaining parcel has little or no value or utility to the owner. Because the remaining parcel has little or no value or utility to the owner, Johnson Propane claimed the IDOT left it with an uneconomical remnant. Johnson Propane also claimed the fair market value of the entire property before the condemnation by the IDOT was $200,000. Johnson Propane requested the district court find the condemnation of the .16 acre left it with an uneconomical remnant, the IDOT should have condemned the entire property, and the damage for the taking was $200,000.

On December 22, the IDOT filed an answer and jury demand. In its answer, the IDOT asserted four affirmative defenses, including one that alleged "[t]he claims made in the plaintiff's petition are untimely."

On March 2, 2016, the IDOT filed a motion for summary judgment, claiming there were no genuine issues of material fact and that Johnson Propane's petition failed "to state a claim upon which any relief may be granted" because (1) plaintiff's challenge to the taking was untimely

under Iowa Code section 6A.24(1), and (2) even if plaintiff's challenge to the IDOT's taking was timely, Iowa Code section 6B.54(8), which plaintiff relies upon as the basis for its claim, does not apply to this action.

Johnson Propane resisted the motion for summary judgment and filed a statement of disputed material facts and additional undisputed material facts. The IDOT replied to Johnson Propane's resistance, including a motion to strike Johnson Propane's appraisal. Johnson Propane resisted the motion to strike, and the IDOT replied.

The district court heard arguments on the IDOT's motion for summary judgment and entered an order granting the motion for summary judgment. The district court found Johnson Propane had to challenge the IDOT's determination of whether there is an uneconomical remnant by bringing an action challenging the IDOT's eminent domain authority or the condemnation proceedings within thirty days after the sheriff served the notice of assessment pursuant to Iowa Code section 6A.24(1). The court found Johnson Propane's notice of appeal filed on November 21, 2014, did not comply with the requirements of section 6A.24.1 and granted the IDOT's motion for summary judgment. The court did not rule on the IDOT's motion to strike Johnson Propane's appraisal, finding the motion moot because of its summary judgment ruling. Johnson Propane appealed.

II. Issue.

We must decide if the district court was correct that Johnson Propane's petition claiming the IDOT's taking of its property left an uneconomical remnant was untimely.

III. Standard of Review.

We review summary judgment rulings for correction of errors at law. *Sanon v. City of Pella*, 865 N.W.2d 506, 510 (Iowa 2015).

Additionally, this appeal requires us to interpret various statutory provisions concerning condemnation proceedings. We also review issues involving statutory construction for corrections of errors at law. *Id.* at 511.

IV. Condemnation Proceedings Under Iowa Law.

Generally, a condemnation proceeding is initiated by the acquiring agency filing an application with the chief judge of the judicial district in which the property sought to be condemned is located. Iowa Code § 6B.3(1). In making its application, the acquiring agency shall, at a minimum, satisfy the acquisition policies as set forth by the legislature. *Id.* § 6B.54. One such policy is that

> [i]f the acquisition of only a portion of property would leave the owner with an uneconomical remnant, the acquiring agency shall offer to acquire that remnant. For the purposes of this chapter, an "uneconomical remnant" is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, where the acquiring agency determines that the parcel has little or no value or utility to the owner.

Id. § 6B.54(8) (emphasis omitted).

After the acquiring agency files it application with the chief judge, the chief judge appoints a compensation commission to assess the damages to all property taken by the applicant. *Id.* § 6B.4(2). The applicant then is required to give a thirty-day notice of assessment of the time the commission will meet to assess the damages. *Id.* at 6B.8. Within thirty days after the notice of assessment, "[a]n owner of property described in an application for condemnation may bring an action challenging the exercise of eminent domain authority or the condemnation proceedings." *Id.* § 6A.24(1)[1].

[1]The Code does not state whether the compensation commission should still meet if an owner of property files an action under section 6A.24(1). However, because

When the commission meets, its sole task is to assess any damages the landowner will suffer due to the acquisition. *Id.* § 6B.14(1). The compensation commission calculates the measure of damages by first determining the fair market value of the property before the taking. *Townsend v. Mid-Am. Pipeline Co.*, 168 N.W.2d 30, 33 (Iowa 1969). If the acquiring agency takes the whole property, this is the measure of damages. *Id.* If the acquiring agency takes only part of the property, the compensation commission must calculate the difference between the fair market value of the whole property before acquisition and the fair market value of the property remaining after the acquisition. *Id.* This difference is the landowner's measure of damages. *Id.*

If the landowner is dissatisfied with the compensation commission's assessment of damages, the landowner can appeal the compensation commission's appraisement of damages to the district court. Iowa Code §§ 6B.18(1), .22(1). The only issue to be determined on the appeal is the amount of damages owed by the acquiring agency to the landholder due to the taking. *Id.* § 6B.23; *State ex rel. Iowa State Highway Comm'n v. Read*, 228 N.W.2d 199, 203 (Iowa 1975).

V. Analysis.

Johnson Propane has maintained throughout this proceeding that the only issue it seeks to be determined by the court is whether this taking created an uneconomical remnant requiring the IDOT to condemn the property in its entirety and award damages to it based upon the fair market value of the entire property it owned. It is seeking this remedy by appealing the determination of damages made by the compensation commission.

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the landowner did not file an action under section 6A.24(1), that question will be left for another day.

The sole issue on an appeal from the compensation commission determination is the amount of damages owed by the acquiring agency to the landholder due to the taking. *State ex rel. Iowa State Highway Comm'n*, 228 N.W.2d at 203. A determination of whether a taking leaves an uneconomical remnant is a determination the legislature gave to the acquiring agency, not the compensation commission. Iowa Code § 6B.54(8). The issue as to whether a taking leaves an uneconomical remnant is a challenge to the acquiring agency's authority to exercise its power of eminent domain. Section 6A.24(1) requires that a challenge to the acquiring authority's exercise of eminent domain must be brought by a separate action by filing an action in district court.

An appeal from a damage award by the compensation commission under sections 6B.18(1) and 6B.22(1) is not the proper method to challenge whether the taking left an uneconomical remnant. Consequently, Johnson Propane was required to challenge the IDOT's determination that the property remaining after the taking was not an uneconomical remnant by bringing a separate action under section 6A.24(1). Section 6A.24(1) requires a party to file an action within thirty days from the notice of assessment. Johnson Propane failed to file such an action. Failure to file an action in a timely manner deprives a court of authority to hear a particular case. *In re Prop. Seized for Forfeiture from Williams*, 676 N.W.2d 607, 613 (Iowa 2004). Therefore, we conclude Johnson Propane's uneconomical remnant challenge was untimely, and thus, the district court did not have the authority to consider that claim.

VI. Disposition.

The district court was without authority to hear Johnson Propane's uneconomical remnant challenge. Therefore, we affirm the judgment of the district court finding Johnson Propane's petition claiming it was left

with an uneconomical remnant was untimely under Iowa Code section 6A.24(1) and dismissing the action.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-0906	Johnson Propane v. Department of Transportation

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IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

UNITED REAL ESTATE SOLUTIONS, INC. and UNTIED COMMERCIAL REAL ESTATE, LLC, d/b/a NAI UNITED, Plaintiff, vs. RICHARD SALEM and RICHARD SALEM REAL ESTATE, Defendants.	NO. EQCV176008 RULING ON TEMPORARY INJUNCTION

Now on this 18th day of July 2017, the hearing on the Plaintiff's Motion for Temporary Injunction comes before the Court for hearing. Plaintiff appeared through its President Kevin McManamy and counsel Timothy Clausen. The Defendant Richard Salem appeared personally and by his counsel Richard Moeller. The matter was reported by certified court reporter Jamie Jorgensen.

Evidence was presented through the testimony of Kevin McManamy and Richard Salem. Additional evidence was presented through Plaintiff's Exhibits 1, 3 through 7, 9A, 9B, and 10 through 20 inclusive, and Defendants Exhibits 101 through 113 and 115 through 118 inclusive.

During the hearing the Court reserved ruling on the admissibility of Plaintiff's Exhibits 5 through 7 which the Defendants objected to as being protected by attorney-client privilege. At this time the Court over rules the Defendants objection to Exhibits 5 through 7 and admits the same into evidence. Pursuant to Iowa Code Section 622.10(1) communication between an attorney and client made in the course of the

attorney's representation of the client are privileged and may not be disclosed by the attorney. However the client may waive the privilege under Section 622.10(2) or it may be waived under other factual circumstances in which disclosure to outside persons is made. "Privilege under Iowa Code Section 622.10 extends only to communications 'entrusted' to a practicing attorney." *State v. Leufaimany*, 558 N.W.2d 200, 208 (Iowa 1998) citing *State v. Craney*, 347 N.W.2d 668, 677 (Iowa 1984). "Third party communications are unprivileged because the attorney-client privilege is not established to give the client an edge over others in litigation. It is not a strategic tool designed to enable a litigant or potential litigant to gain an advantage by keeping evidence to herself rather than sharing it with others." *Craney*, at 678 (citing Saltzburg, *Communications Falling Within the Attorney-Client Privilege,* 66 Iowa L.Rev. 811, 816 (1981)). In this case the Defendant's assertion of inadvertent disclosure is misplaced. The email sent by the Defendant to Ms. Hertz was done intentionally and was a "forwarded message" from his attorney. At the time the Defendant sent the email to Ms. Hertz, Ms. Hertz was an employee of NAI United i.e. United Commercial Real Estate LLC. As the benefit of the attorney-client privilege belongs to the client, Mr. Salem clearly waived said privilege by not only disclosing the communication to a third party, but to a third party who was employed by NAI United at the time. This was not an inadvertent disclosure of otherwise confidential communication with his attorney to a third party but an intentional disclosure so that appropriate announcement letters for the Defendant's new business could be generated.

Based on the evidence presented and received the Court makes the following findings of fact:

1. On June 15, 2017, Plaintiff United Real Estate Solutions, Inc. filed a motion for a temporary injunction seeking to enjoin Defendant Richard Salem and Richard Salem Real Estate from selling real estate in competition with Plaintiff. Subsequently Plaintiffs United Real Estate Solutions, Inc. and United Commercial Real Estate, LLC d/b/a NAI United then filed a petition against Defendants Richard Salem and Richard Salem Real Estate claiming (I) Breach of Contract, (II), Breach of Fiduciary Duty, and (III) seeking Injunctive Relief.

2. Richard Salem age 77 has been a licensed real estate broker for 47 years. For the last 32 years nearly all of the real estate broker services provided by Salem have involved the sale and leasing of commercial real estate.

3. Until 2000, Salem was a broker for Davenport and Associates in Sioux City. In 2000 Salem opened his own real estate brokerage business called "Richard J. Salem, Inc.". That corporation operated under the tradename "Salem Commercial Real Estate".

4. On April 9, 2001, United Real Estate Solutions, Inc. was incorporated by Ron McManamy. United Real Estate Solutions, Inc. was the merger of several local real estate companies which primarily provided residential brokerage services. At the time of the formation of United Real Estate Solutions, Inc. the company did very few commercial transactions and did not have any agents who specialized in commercial transactions.

5. In 2001 the owners of United Real Estate Solutions, Inc. determined that they desired to expand their business into the commercial real estate market and reached out to Richard Salem in an effort to get Salem to join their business. After discussions occurred Richard Salem d/b/a Salem Commercial Real Estate entered into an Asset

Purchase Agreement dated October 26, 2001. Pursuant to the Asset Purchase Agreement United Real Estate Solutions, Inc. as Buyer and Salem as Seller agreed as follows:

> "Buyer agrees to purchase, accept and acquire from Seller and Seller agrees to sell, transfer, assign, convey and deliver to Buyer, free and clear of all liens, claims and encumbrances, all property, equipment, including, but not limited to, office equipment, furniture, computer software used in the business, all inventory and fixtures presently owned by Seller, all intangible property, company name, telephone numbers of Seller, current and closed files, listing agreements, pending closings, consulting contracts, equipment and supplies used in the business, and goodwill and all other non-tangible assets of Seller."

6. The primary asset United Real Estate Solutions Inc. was interested in purchasing was the services of Richard Salem and Salem's name and for Salem to act as the manager of United Real Estate Solutions Inc.'s new commercial real estate division and to help get the new division established. The agreement also provided that United Real Estate Solutions Inc. would be entitled to use the name "Salem Commercial, a division of United Real Estate Solutions, Inc." for the business purchased.

7. Pursuant to the Asset Purchase Agreement, United Real Estate Solutions Inc. was to pay Salem $57,500.00 which amount included $7,500 which was to be paid towards Salem's existing lease obligations. In addition United arranged a $100,000 loan for Salem which was to be repaid over 60 months at 7.25% interest. Each party has fulfilled these financial obligations pursuant to the terms of the agreement.

8. The Asset Purchase Agreement further provided that Salem would enter into an Employment Agreement with United Real Estate Solutions Inc. Paragraph 4 of the Asset Purchase Agreement provided as follows:

NONCOMPETITION

Seller (Salem) will enter into an Employment Agreement with Buyer (United Real Estate Solutions, Inc.) on or before the closing date, and Seller agrees to be an active member of Buyer for a period of not less than five (5) years, unless prevented from doing so for health reasons as determined in writing by his physician, from closing date. During the term of employment and for a period of three (3) years thereafter, Seller shall not engage in any activity, including, but not limited to, association in any capacity whatsoever, whether as promoter, owner, officer, director, employee, partner, lessee, lessor, lender, agent or otherwise, considered to be in competition with Buyer, within eighty (80) miles from the city limits of Sioux City, Iowa. If Seller fails to keep and perform every covenant of this paragraph, Buyer shall be entitled to specifically enforce the same by injunction in equity in addition to any other remedies which Buyer may have. If any court in which Buyer seeks to have the provisions of this paragraph specifically enforced determines that the activity, time or geographic area hereinabove specified is too broad, said court may determine a reasonable activity, time or geographic area and shall specifically enforce this paragraph for such activity, time and geographic area.

As further consideration for this noncompetition provision United Real Estate Solutions Inc. agreed to pay Salem an additional $25,000 at the time of closing.

9. Simultaneously with the execution of the Asset Purchase Agreement, the parties executed a separate Agreement which implemented paragraph 4 of the Asset Purchase Agreement.[1] Pursuant to this agreement Salem would act as the Commercial Brokerage Manager of the Salem Commercial Division of United and would devote a majority of his time as manager of the division. The term of the agreement was to be for five years commencing on November 15, 2001, and ending on November 14, 2006. A commission based compensation scheduled for Salem was established and a "Covenant Not to Compete" was included which contained language that mirrored the

1 Both the Asset Purchase Agreement and the separate Agreement were prepared by United Real Estate Solutions, Inc.

Noncompetition language in the Asset Purchase Agreement.[2]

10. From October 2001 until May 2005 Salem acted as the Brokerage Manager for the commercial division of United Real Estate Solutions Inc. This division was a part of United Real Estate Solutions Inc. and operated under the names "Salem Commercial" and/or "Salem Commercial, a division of United Real Estate Solutions, Inc. During this time Salem and all the other commercial brokers were licensed to United Real Estate Solutions, Inc.

11. In May 2005, Salem requested that he be relieved of his responsibilities as the manager of the commercial division as he desired at that time to focus on sales. Salem and the management of United Real Estate Solutions Inc. discussed who should be brought it to take over the management duties for the commercial division. It was unanimously agreed that Chris Bogenrief, who was working for a competing firm at the time, should be approached to regarding his interest in taking over the managerial position. After this point, Salem was not involved in the negotiations between United Real Estate Solutions Inc. and Bogenrief.

12. Ultimately Bogenrief agreed to assume the responsibilities as the managing broker of the commercial division. In their negotiations Bogenrief required that he be given an ownership interest in the commercial division. As a result, Ron McManamy filed Articles of Organization of United Commercial Real Estate, L.L.C. with the Iowa Secretary of State on May 31, 2005. At that time the "owners" of United Commercial Real Estate L.L.C. were United Real Estate Solutions Inc. which held a 51% ownership

2 The Plaintiffs acknowledge that this Agreement terminated no later than November 14, 2006, as did Salem's obligations thereunder. The Plaintiffs assert that they are proceeding under the Noncompetition clause contained in the Asset Purchase Agreement only.

interest and Chris Bogenrief who held a 49% ownership interest.[3] After the formation of United Commercial Real Estate LLC was completed, United Commercial Real Estate L.L.C. then conducted all the commercial brokerage services which had previously been done by Salem Commercial, a division of United Real Estate Solutions, Inc. From that point forward United Real Estate Solutions Inc. stopped using the name "Salem Commercial, a division of United Real Estate Solutions, Inc.". The licenses for the commercial agents were also changed to United Commercial Real Estate L.L.C.

13. Other than the creation of the new limited liability company to operate the commercial division, all of the remaining day to day activities remained the same. The same physical location for the commercial agents remained the same and they continued to use the same office space, equipment, phone lines, staff, computer network, email server, etc. United Commercial Real Estate L.L.C. currently pays United Real Estate Solutions Inc. slightly less than $40,000 per year for these services.[4]

14. After the creation of United Commercial Real Estate L.L.C. Salem no longer had managerial responsibilities but continued on as a licensed broker for the newly formed L.L.C. Salem's license was now under United Commercial Real Estate L.L.C. and he was no longer compensated under the terms of the prior Agreement. Salem continued as a licensed broker for United Commercial Real Estate L.L.C. until June 2017 when he advised the management for United Real Estate Solutions Inc. that he would be leaving. Salem indicated that he did not desire to participate in the move of the commercial sales to the new offices in Dakota Dunes. Kevin McManamy testified

3 At the present time, the ownership interests of United Real Estate Solutions, Inc. and Chris Bogenrief remain the same in United Commercial Real Estate LLC. Beau Braunger currently has a non-voting interest in the LLC as well.

4 Kevin McManamy testified that the value of these services is well in excess of $40,000.00 per year.

that the commercial agents would be working primarily out of the new Dunes location while the residential agents would continue to work out of the Sioux City location. He did indicate that the agents were not required to move or work out of the particular offices however.

15. On June 8, 2017, Salem let United know of his intent to voluntarily terminate his independent contractor relationship with them. Salem's last day on the job for United Commercial Real Estate L.L.C. was June 9, 2017. At the time Salem left he remained one of United's top producing agents.

16. As of June 19, 2017, Salem opened a new brokerage firm called "Salem Real Estate" at 700 Pierce Street, Sioux City, Iowa. Salem testified that he intends to list and sell commercial real estate and multi-family units that have 5 or more units. Salem basically intends to go back to operating his own commercial real estate company in Sioux City as he was doing prior to entering the Asset Purchase Agreement with United Real Estate Solutions Inc. in 2001. Salem does not dispute that this will be in direct competition with United Commercial Real Estate LLC. He contends, however, that he will not be in competition in any way with United Real Estate Solutions Inc. as he will not be involved in any way with residential real estate. Salem has taken with him two employees of United Commercial Real Estate LLC to work with him at his new company.

17. While with United Commercial Real Estate LLC Salem was paid out of the general account for United Commercial Real Estate LLC. The staff person who wrote the checks was an employee of United Real Estate Solutions Inc. This is part of the services rendered to United Commercial Real Estate LLC by United Real Estate

Solutions for which the annual $40,000 payment is made.

18. Since starting his new brokerage company, United Commercial Real Estate LLC has transferred at least 12 commercial listings to Salem at the request of the property owner. While not legally obligated to do so, Mr. McManamy said the transfers were made as a business decision to avoid bad will with the customer involved. Also just prior to quitting United Commercial Real Estate LLC, Salem discussed a possible listing with Rex Smith for a commercial property in Sioux City. Mr. Smith delayed listing the property and listed the property for sale with Salem after Salem opened his new company.

19. Salem testified that he intends to send out a mass mailing using the Chamber of Commerce address list to announce the opening of his new business.

20. From 2005 until 2015 United Commercial Real Estate L.L.C. operated under the tradename "United Commercial". In November 2015 United Commercial Real Estate L.L.C. became affiliated with the franchisee NAI. Since January 2016 United Commercial Real Estate L.L.C. has operated under the name "NAI United".

21. United Real Estate Solutions Inc. has a policy that its residential agents not sell or list commercial property. Under the policy they are allowed to list and sell multi-family units that consist of 4 units or less as well as vacant commercial land. Likewise it is the policy of United Commercial Real Estate LLC that its commercial agents not sell or list residential properties and they only list or sell commercial properties or multi-family units that have 5 or more units. In general the commercial agents are to refer residential matters to the residential agents and vice versa. Mr. McManamy testified that he did not believe that Salem ever sold or listed any residential property since

2001. At the present time United Real Estate Solutions Inc. has only 1 vacant commercial property listed.

17. While it appears that United Real Estate Solutions Inc. and United Commercial Real Estate LLC operate in a fashion that would suggest that they are one entity, it is clear that United Real Estate Solutions Inc. and United Commercial Real Estate LLC are separate and distinct entities from a legal perspective. Each company has different owners, each company files their own tax returns, each company has their own principal broker(s) and separately licenses their agents and each company engages for the most part in different types of properties. While it may be true that United Commercial Real Estate LLC depends upon United Real Estate Solutions Inc. to exist in light of the low fee for services charged, this does not change the fact that they are separate legal entities.

18. Commercial real estate is different in many ways from residential real estate in that commercial real estate is customer driven while residential real estate is transaction driven. Commercial customers tend to be repeat clients and develop working relationships with their agents over time. It is much more cost efficient for a company to retain a current customer than to obtain new customers.

19. There is no doubt that by opening a new commercial brokerage company in Sioux City, Salem will be doing harm to United Commercial Real Estate LLC by being in direct competition with them.

LEGAL PRINCIPLES

a) General Principles Regarding Temporary Injunctions

The Iowa Rules of Civil Procedure provide, in part, as follows:

> **Rule 1.1501 Independent or auxiliary remedy.**
> An injunction may be obtained as an independent remedy by an action in equity, or as an auxiliary remedy in any action. In either case, the party applying therefor may claim damages or other relief in the same action. An injunction may be granted as part of the judgment; or may be granted by order at any prior stage of the proceedings, and is then known as a temporary injunction.
>
> **Rule 1.1502 Temporary; when allowed**
> A temporary injunction may be allowed under any of the following circumstances:
>
> **1.1502(1)** When the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff.
>
> **1.1502(2)** Where, during the litigation, it appears that a party is doing, procuring or suffering to be done, or threatens or is about to do, an act violating the other party's right respecting the subject of the action and tending to make the judgment ineffectual.
>
> **1.1502(3)** In any case specially authorized by statute.

The primary function of a temporary injunction is to preserve the status quo and protect the subject of the litigation until a final hearing so that a court may grant full, effective relief, if warranted. *Lewis Investments Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005).

The issuance or refusal of a temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case. *Lewis Investments*, 703 N.W.2d at 184. The issuance or refusal of a temporary

injunction is a delicate matter – an exercise of judicial power which requires great caution, deliberation, and sound discretion. *Kleman v. Charles City Police Dept.*, 373 N.W.2d 90, 96 (Iowa 1985).

Injunctive relief is an extraordinary remedy that is granted only to avoid irreparable harm/damage. *Show v. Goforth*, 618 N.W.2d 275, 277-78 (Iowa 2000).

> An injunction "should be granted with caution and only when clearly required to avoid irreparable damage." A court of equity will not grant injunctive relief "unless it appears there is an invasion or threatened invasion of a right, and that substantial injury will result to the party whose rights are so invaded, or such injury is reasonably to be apprehended." An injunction is appropriate only when the party seeking it has no adequate remedy at law. Before granting an injunction, the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunctive relief.

Worthington v. Kenkel, 684 N.W.2d 228, 232 (Iowa 2004) quoting *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995).

A party seeking an injunction must establish (1) an invasion or threatened invasion of a right, (2) substantial injury or damages will result unless an injunction is granted, and (3) no adequate legal remedy is available. *In Re Estate of Hurt*, 681 N.W.2d 591, 595 (Iowa 2004); Skow, 618 N.W.2d at 278.

The absence of a finding of irreparable injury is alone a sufficient ground to deny a preliminary injunction. *Dataphase Systems v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). Loss of income, ultimately recoverable upon a trial of the merits, does not usually constitute irreparable injury. Mere injuries, however substantial in terms of money, time and energy necessarily expended in the absence of an injunction, are not enough to constitute irreparable injury. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,

weighs heavily against a claim of irreparable harm. *Sampson v. Murray*, 94 S.Ct. 937 (1974). *Thrasher v. Grip-Tite Mfg. Co.*, 535 F.Supp.2d 937, 944 (S.D. Iowa 2008). *Mercatech Inc. v. Kiser*, 2006 WL 680894 (D. Neb.).

In addition, when seeking a temporary injunction, a party must show that it is likely to succeed on the merits of the underlying claim. *PIC USA v. North Carolina Farm Partnership*, 672 N.W.2d 718, 722 (Iowa 2003). The court in addressing the issue of whether the moving party is entitled to a preliminary injunction must view the facts in light of the applicable substantive law which will govern the merits of the claims made by the moving party. *Wachovia v. Stanton*, 571 F.Supp. 1014, 1033 (N.D. Iowa 2008). *APAC Teleservices v. McRae*, 985 F.Supp. 852, 858 (N.D. Iowa 1997).

Where the granting of a temporary injunction would grant essentially the same relief that the moving party would obtain if it won at trial, the movant's burden to prove that the balance of factors weighs in its favor is a heavy one. *APAC Teleservices Inc.*, 985 F.Supp at 857.

A denial of a temporary injunction does not deprive a plaintiff of the right to a trial on the merits of a petition seeking a permanent injunction, nor is it an adjudication against such right. The granting or denial of a preliminary injunction upon a finding of facts is not a final decree. It does not constitute an adjudication of the facts on which the preliminary ruling was made. The judge who hears the suit on the merits is not precluded from reconsidering the facts upon which a temporary ruling was based. *Economy Roofing v. Zumario*, 538 N.W.2d 641, 648 (Iowa 1995).

If the court determines that it is appropriate to enter an injunction, the injunction should be limited to the requirements of the particular case. The acts or things enjoined

should be definitely specified, and they should be set forth with certainty and clearness so that persons bound by the decree may readily know what they must refrain from doing without resorting to speculation or conjecture. *205 Corporation v. Brandow*, 517 N.W.2d 548, 552 (Iowa 1994).

A court will not issue an injunction unless the objected to acts are likely to occur in the future. The court in *Lemmon v. Hedrickson*, 559 N.W.2d 278 (Iowa 1997) in quoting from an earlier case stated:

> "Equity interposes by injunction to prevent future rather than past acts, and so acts and practices will not, as a rule, furnish a basis for injunctive relief when they have been discontinued or abandoned before institution of the suit to restrain them, or even after such suit is begun, particularly where there is noting to indicate a probability that they will be resumed...."

Conley v. Warne, 236 N.W.2d 682, 686 (Iowa 1975) (quoting 42 Am.Jur.2d *Injunctions* § 5, at 731 (1969)). *Lemmon*, 559 N.W.2d at 280.

b) Corporate Structure

A subsidiary corporation is one in which another corporation, a parent corporation, owns the majority of shares of its stock. Black's Law Dictionary 1280 (5th ed. 1979). Ownership by a parent corporation of the stock of another corporation does not create an identity of corporate interest between the two corporations so as to render acts by one to be the acts of another. *Schnoor v. Deitchler,* 482 N.W.2d 913, 915 (Iowa 1992) citing *Inn Operations, Inc. v. River Hills Motor Inn Co.*, 261 Iowa 72, 83-84, 152 N.W.2d 808, 815 (1967). Under ordinary circumstances, a subsidiary corporation is treated as an entity separate from its stockholders or in this case the parent corporation. *Inn Operations, Inc.,* at 815-816.

Corporate structure may be disregarded in certain circumstances. *Inn Operations, Inc.* at 815. Corporate structure may be disregarded by either piercing the corporate veil or as a result of a subsidiary company being a "mere instrumentality" of a parent company. *Moyle v. Elliot Aviation Inc.*, 715 N.W.2d 767 (Table) (Iowa App. 2006). Such exceptions, however, are "done where applying the corporate fiction 'would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim * * *.' Those who are responsible for the existence of the corporation are, in those situations, prevented from using its separate existence to accomplish an unconscionable result. *Inn Operations, Inc.* at 816.

"Ownership of capital stock in one corporation by another does not, itself, create an identity of corporate interest between the two companies, nor render the stockholding company the owner of the property of the other, * * *. Nor does the identity of officers of two corporations establish identity of the corporations." *Inn Operations Inc.,* at 815 citing *Divco-Wayne Sales Financial Corp. v. Martin Vehicle Sales, Inc.,* 45 Ill.App.2d 192, 195 N.E.2d 287, 289. Quoting from *Superior Coal Co. v. Department of Finance*, 377 Ill. 282, 289, 36 N.E.2d 354, 358.

ANALYSIS AND CONCLUSION

The burden upon the party seeking a temporary injunction is a heavy burden. To obtain an injunction, the party seeking it must show conduct detrimental to their rights, substantial injury or damage as a result of such conduct and that no other legal remedy is available. Further, the applicant must show that it is likely to succeed on the merits of its claim.

The Plaintiffs' argument herein is that the Defendant has breached the terms of

the Asset Purchase Agreement by opening a new commercial brokerage business in Sioux City that is in violation of the Noncompetition provision of that agreement. The noncompetition provision of the Asset Purchase Agreement prohibits the Defendant from engaging in any activity in any capacity that would be in competition with United Real Estate Solutions Inc. who was the buyer under the Asset Purchase Agreement during the term of Defendant's employment with United Real Estate Solutions Inc. and for a period of 3 years after the end of such employment.

The Defendant resists this argument in two primary regards. First the Defendant contends that the Asset Purchase Agreement and the second Agreement, both of which were executed on October 26, 2001, must be viewed together. If viewed together, the Defendant asserts pursuant to the clear language of the second agreement, that the Defendant's employment ended no later than November 14, 2006, and as a result any noncompetition agreement would have ended no later than November 14, 2009. The Court does not find this argument to be persuasive. While it is true that both agreements arose out the same transaction, United Real Estate Solutions Inc.'s desire to purchase Salem's existing business and to have Salem work for them, the purposes for each agreement differ somewhat. United Real Estate Solutions Inc.'s goal in entering into the Asset Purchase Agreement was to expand their brokerage business into commercial properties in addition to the residential market they had been serving. To do so, United Real Estate Solutions Inc. wanted to hire an experienced commercial broker who could lead their new endeavor and establish the commercial side of their brokerage business. As a broker with 30 + years of experience in the Sioux City commercial market at that time, Salem was an obvious target for United to pursue. The

Asset Purchase Agreement provided that Salem would agree to work for United Real Estate Solutions Inc. for *not less than* five years (emphasis added). Then during the term of such employment and for 3 years thereafter Salem would agree not to compete with United Real Estate Solutions Inc. The second Agreement was executed at the same time providing for the minimum 5 year term for Salem to work as a brokerage manager for United Real Estate Solutions. While this agreement only provided for one 5 year term, there was nothing preventing Salem from continuing to so work which he in fact did, just for a different corporate entity. From the evidence presented, it is clear to the Court that the intent of the parties at the time the Asset Purchase Agreement was entered into in 2001, was that Salem would work for United Real Estate Solutions in their new commercial division for at least 5 years but it could be longer, and that Salem would not compete with United Real Estate Solutions Inc. for 3 years after the time Salem stopped working. This analysis is consistent with Iowa law that views covenants not to compete in the context of a business sale situation less harshly than in the strict context of an employer/employee relationship. *Sutton v. Iowa Trenchless, L.C.*, 808 N.W.2d 744, 749 (Iowa App. 2011).

Secondly the Defendant contends that his employment with United Real Estate Solutions Inc. ended in 2005 upon the creation of United Commercial Real Estate LLC. Accordingly the Defendant argues that the three year noncompetition clause of the Asset Purchase Agreement began to run in late May or early June of 2005 when Salem's employment or agreement to work for United Real Estate Solutions Inc. ended. At that time all of the commercial brokerage activity that had previously been operated as Salem Commercial, a division of United Real Estate Solutions, Inc. was moved to the

new United Commercial Real Estate L.L.C. of which United Real Estate Solutions Inc. was a 51% owner and Chris Bogenrief was a 49% owner. While functionally the only change which was made was that Bogenrief was now the primary broker/manager for commercial sales the legal structure of what had previously been United Real Estate Solutions Inc. had been dramatically changed. A whole new and separate legal entity, United Commercial Real Estate LLC had been created. This was not some legal fiction but was the result of Mr. Bogenrief insisting upon having an ownership interest in order for him to leave his prior employment and to take over what had been Salem Commercial, a division of United Real Estate Solutions, Inc. Instead of giving Bogenrief an ownership interest in United Real Estate Solutions, Inc. the decision was made to create the new LLC and to give Bogenrief an ownership interest in the new entity while the owners of United Real Estate Solutions, Inc. maintained their sole ownership of that company.

When United Commercial Real Estate LLC was established and put into operation, Salem began to work for that company and no longer was employed by United Real Estate Solutions, Inc. For whatever reason, United Real Estate Solutions, Inc. did not sell or transfer its rights in the Asset Purchase Agreement to the new LLC nor did it assign the second "Employment" Agreement it had with Salem. Once Salem began work for the LLC it is clear that the "Employment" Agreement had ended as Salem's duties and compensation structure were changed.

The Plaintiffs' argument that the corporate structures should be disregarded at this time in light of how the two businesses function ignores the legal reality of the two entities. After 2005 if Salem was not paid the commissions he earned he would have

had no recourse against United Real Estate Solutions Inc. unless he sought to pierce the corporate veil of United Commercial Real Estate LLC or otherwise could establish a claim under the "mere instrumentality" rule. See *Moyle*. While it may be true under the circumstances as they exist that Salem may have been able to make a prima facie case to pierce the corporate veil in light of how the two entities are interrelated to each other, the right to seek such a remedy is premised on the idea that it is necessary to avoid the parent company from perpetrating a fraud or injustice of some type. Such remedies are not designed to give relief to the corporate entity itself. Despite Plaintiffs' contention to the contrary, the current relationship between United Real Estate Solutions Inc. and United Commercial Real Estate LLC d/b/a NAI United, is not the exact same relationship as it previously had with Salem Commercial, a division of United Real Estate Solutions, Inc. Previously Salem Commercial was just a division of the one company United Real Estate Solutions Inc., there was only one legal entity that being United Real Estate Solutions, Inc. Now United Real Estate Solutions Inc. and United Commercial Real Estate LLC are separate and distinct legal entities in their own rights. As distinct and separate entities they must be viewed separately in their own right and the rights of each must be determined separately.

At the present time United Real Estate Solutions Inc. is involved in the listing and sale of residential real estate. Salem has testified, and the Plaintiffs do not dispute, that Salem intends to only engage in the listing and sale of commercial real estate which would include multi-family properties that have more than 5 units. Accordingly while the evidence clearly shows that the Defendants' new business will be in direct competition with United Commercial Real Estate LLC d/b/a NAI United, the evidence

does not establish that it will compete in any way with United Real Estate Solutions Inc.

As the Plaintiffs have failed to meet their burden of proof, their request for a temporary injunction is denied.

IT IS THEREFORE ORDERED that the Plaintiffs' Petition for Temporary Injunction is denied.

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

STATE OF IOWA, **Plaintiff,** **vs.** **DARIUS ALBERTEZ RAMANTEZ WRIGHT,** **Defendant.**	**FECR096917** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND VERDICT**

NOW ON THE 25th and 26th days of April 2017, the above matter came before the Court for trial, the Defendant having waived his right to a jury trial on April 12, 2017. The State appeared by Assistant Woodbury County Attorney James Loomis. The Defendant appeared in person and by counsel Matt Pittenger. The proceedings were reported by Cristi Bauerly.

Evidence was presented by the State through the testimony of Nevon Wooten, Klorisse Rider, Gabriel Burlison, Alan Rave, Skyla Wabashaw, Angel Castillo-Martinez, Eric Silvas, Pete Babcock, Bryan Noll, Joshua Tyler, Jess Aesoph, Jamie Mattas, Justus Knudsen, John Fitch, Joshua Fleckenstein, John Sanders, Nick Thompson and Darius Wright. Further evidence was presented through State's Exhibits 1 through 58 which exhibits were accepted as offered. The Court also took judicial notice of the Booking Sheet contained in the court file filed February 13, 2017, for purpose of the fact that a grey sweatshirt was referenced therein. Finally, the Court gave evidentiary consideration to the Stipulation of the Parties filed April 20, 2017, in which the parties stipulated and agreed that Angel Castillo-Martinez sustained a serious injury on February 10, 2017, as a result of being shot twice, once in the chest and once in the

hip. Each party submitted written closing arguments which were considered by the Court.

FINDINGS OF FACT

The Defendant is charged herein with four counts: Count 1: Attempted Murder under Iowa Code Section 707.11; Count 2: Willful Injury under Iowa Code Section 708.4(1); Count 3: Intimidation with a Dangerous Weapon under Iowa Code Section 708.6; and Count 4: Robbery in the First Degree under Iowa Code Section 711.1 and 711.2.

During the evening of February 10, 2017, Nevon Wooten (Nevon) was at his home at 506 22nd Street in Sioux City, Iowa, with his friends Klorisse Rider (Klorisse) and Gabe Burlison (Gabe). At approximately 10:15 p.m. the three of them decided to walk to the Kum & Go store located at the southwest corner of 14th and Pierce Street in Sioux City. To get to the store they walked south down Pierce Street. Upon arriving at the Kum & Go store, Nevon purchased two Dr. Peppers, a bag of Flaming Hot Cheetos and a bag of Sour Patch Kids candy. It is approximately a 15-minute walk from Nevon's home to the Kum & Go store.

On the way back home from the Kum & Go store, the three of them were walking north on the west side of Pierce Street, with Gabe and Klorisse in front and Nevon a few steps behind them. As they were beginning their walk up Pierce Street, they observed another person approaching them from the north that was at about the midway point between 14th and 15th Street on Pierce Street. This person continued to approach them as they walked north, and after they had passed him the other person turned around and began to walk with them. Nevon, Gabe and Klorisse all identified the

Defendant as the individual they passed and who then turned around and walked with them.

As the Defendant walked with them, the Defendant repeatedly asked Nevon what he had in his pockets. Nevon repeatedly told the Defendant that it was none of his business. Nevon testified that at the time he thought the Defendant was crazy. While this discussion was going on, Nevon moved his cell phone from his left to right pants pocket. After this brief discussion the Defendant called out for "Tykel" and Nevon saw another man come over from the steps at a house on Pierce Street. Tykel came over to the group and placed himself to the left of Gabe and Klorisse, in front of Nevon and the Defendant.

At this point the Defendant grabbed Nevon by the left arm and started swinging at him. Nevon dropped the Kum & Go bag and tried to defend himself. At this point Gabe attempted to intervene but Tykel stepped in front of him to prevent him from doing so. After the Defendant and Nevon engaged in a brief struggle, the Defendant pulled a gun from behind his back , pointed the gun at Nevon's head and told Nevon to "give me what you got." Nevon indicated that he was afraid and threw his Galaxy cell phone at the Defendant and left the scene with Gabe and Klorisse to return home. Nevon indicated that he did not pick up the Kum & Go bag and left the scene without it. None of the three could indicate what had happened to the Kum & Go bag or its contents.

Several minutes after Nevon, Gabe and Klorisse had purchased the Dr. Peppers, Flaming Hot Cheetos and Sour Patch Kids candy, the Defendant entered the Kum & Go store with two Dr. Peppers and asked the Clerk if he could have a bag for the two Dr. Peppers. The Defendant claims that he had brought the Dr. Peppers from his house

and was taking them with him to 423 16th Street where he was planning to drink with friends. The Defendant 's testimony in this regard is not credible as both his residence and 423 16th Street are north of Kum & Go and there would be absolutely no reason for him to go to Kum & Go on his way to 423 16th Street.

Upon arriving back home with Gabe and Klorisse, Nevon told his brother Alan about what had just happened. After a brief discussion, Alan and Nevon decided to return to the area where the Defendant had confronted Nevon minutes earlier in an attempt to get his phone and snacks back. Before leaving Alan got a bb gun and Nevon took two knives with him. At that point all four of them began to walk back down Pierce Street, with Alan on the west side of the street and Nevon on the east side, with Gabe and Klorisse on the east side about ½ block behind them.

When Nevon reached 16th and Pierce he heard someone yell out "hey you." This person was standing on the porch of the residence at 423 16th Street, the side of which residence faces Pierce Street on the west side of Pierce Street. Nevon walked across Pierce Street and observed that it was the Defendant who had yelled out to him. Another older man was also on the porch with the Defendant at this time. Nevon then approached the residence at 423 16th Street and walked up three steps that lead up to this residence. At that point Nevon and the Defendant began to argue, with Nevon demanding that the Defendant return his stuff to him. During this argument Nevon and Alan each indicated that they saw the Defendant put his hand behind his back and that they could see the handle to the Defendant's gun. Alan then walked up and stood near Nevon while the argument took place. After about five minutes of arguing, the older man who was on the porch got in between Nevon and the Defendant and told the

Defendant to give the cell phone back to Nevon, which the Defendant did, and the older man left the area. At this point, despite having got his cell phone back, Nevon continued to argue with the Defendant about getting back his snacks he had bought at the Kum & Go. After arguing for a few more moments, the Defendant then knocked on the door to the residence and called for others to come out, at which point four or five additional people, one of whom was Tykel, came out of the residence. At this point Nevon and Alan began running down Pierce Street towards Kum & Go and were chased by the Defendant and several of these people. Upon seeing this, Gabe and Klorisse started back north on Pierce Street.

Upon arriving at the Kum & Go store Alan and Nevon entered the store and asked the store clerk to call the police. The Defendant and two others entered the store almost immediately thereafter and the store clerk tried to keep the parties separated as the police were called. During this time, Donte Drappeaux, who was one of the men who entered the store with the Defendant, tried to get around the clerk and was stabbed by Nevon. The Defendant left the Kum & Go during the time that the parties were waiting for the police to arrive.

At about this same time, Skyla Wabashaw (Skyla), Angel Castillo-Martinez (Angel) and Eric Silvas (Eric) were walking to Kum & Go from a friend's house that lived on 21st Street. As the three of them reached the corner of 18th and Pierce Street they encountered Gabe and Klorisse. Gabe and Klorisse told them that their mutual friend had just been robbed. Gabe and Klorisse then continued back towards Nevon's house and Skyla, Angel and Eric continued south in the alley between Douglas and Pierce Street towards Kum & Go.

As the three of them approached 16th Street, they saw a man running up the alley from the opposite direction. That man turned east when he reached 16th Street and went to the house at 423 16th Street. Angel and Eric then also turned east on 16th Street going in the direction of the house as Skyla stayed back. Eric and Angel saw a man on the porch of 423 16th Street and Eric crossed 16th Street to continue going east on the south side of 16th Street towards Pierce Street, while Angel continued going east on the north side of 16th Street towards the house. At this point Angel yelled at the man on the porch whether he was the one who had robbed his friend. The man on the porch was black with short dreadlocks and was wearing a blue shirt or windbreaker. Almost immediately after Angel asked this, four shots were fired in rapid succession, two of which hit Angel, one in the hip and one in the shoulder. The shots caused life-threatening injuries to Angel, a collapsed lung and broken ribs, and Angel immediately yelled out "he got me." Eric testified that he did not actually see the gun but did see flashes of light from the porch as the gunshots rang out, the flashes of light coming from where the black man was standing. Eric and Angel then ran to Kum & Go for help, which was two blocks away, and the man on the porch remained at 423 16th Street.

Multiple police officers arrived at the scene at Kum & Go after the 911 call from the store clerk. When the police arrived, Alan and Nevon were present as were Tykel Robinson and Donte Drappeaux. As indicated above, the Defendant had left the Kum & Go before the police arrived at approximately 11:30 p.m. After several officers had arrived, Eric and Angel were observed crossing 14th Street. By this time the officers had been advised that there had also just been a shooting a couple blocks up Pierce Street.

As Officer Noll spoke to Eric and Angel, he observed Tykel and Donte try to run from the back of the Kum & Go Store where they were stopped.

Several Officers then proceeded to 423 16th Street and Nevon and Alan were taken there as well to identify the scene. Nevon and Alan indicated that this is where the argument with the Defendant had taken place. Eric and Angel had also indicated that this was the residence from which Angel had been shot. Officers Fitch and Knudsen did locate two shell casings in the yard just below the porch at 423 16th Street. When officers knocked on the door at this residence, no one would come to the door despite the fact that the officers believed they saw persons looking from an upstairs window. Ultimately the police determined that the SWAT team needed to be called to the scene and they arrived. After no one would respond at the door, it was determined that a perimeter around the residence should be established and an application for a search warrant was prepared and submitted for approval. After obtaining the search warrant, but before actually executing it, the Defendant and Willie Williams exited the residence, which was about three hours after the officers had originally arrived at the scene. Initially the Defendant was calm when he came out of the residence, but after about five minutes he became verbally combative with the officers and demanded to see the search warrant. At this time the Defendant was wearing a grey zip-up sweatshirt.

After the Defendant and Mr. Williams exited the residence, the SWAT team entered the residence with the search warrant to verify that no other individuals were in the residence. As the residence was searched, in a bedroom the officers found a Kum & Go bag with a Sour Patch Kids candy inside. Also inside this same bedroom were

envelopes addressed to the Defendant and legal documents involving Tykel Robinson. In the kitchen to the residence was found a bottle of Dr. Pepper and a bag of Flaming Hot Cheetos. In another bedroom an open bottle of Dr. Pepper was found. In the closet to the back bedroom the Defendant's blue windbreaker/sweatshirt was found on the bottom of the closet under other clothes and pillows. This blue sweatshirt is the same sweatshirt Nevon, Gabe and Klorisse had seen the Defendant wearing earlier as well as the sweatshirt the Defendant was wearing both times he was seen on the security video from the Kum & Go store. During the search of the residence and the area surrounding the residence no firearm was discovered.

The Defendant was uncooperative with police during their investigation. During his interview by Detective Thompson, the Defendant claimed to have gone to bed at 11:30 p.m. and that the last time he had been to the Kum & Go store was 11:00 a.m. that morning. The video surveillance clearly contradicts this assertion.

A review of the video surveillance tape from Kum & Go shows that Nevon, Gabe and Klorisse first entered the store at 10:41 p.m. to buy the Dr. Peppers, Cheetos and candy. A few minutes after they left the store, the Defendant is shown entering the store at 10:48 p.m. asking for a bag for two bottles of Dr. Pepper. At 11:17 p.m. Nevon and Alan are shown reentering the store and asking the clerk to call the police, followed by the Defendant, Tykel and Donte. These time frames would be consistent with the Defendant walking up the alley between Pierce and Douglas Street at the time described by Angel and Eric.

PRINCIPLES OF LAW

a) General

The State is required to prove the defendant's guilt beyond a reasonable doubt. State v. Allen, 293 N.W.2d 16, 20 (Iowa 1980). There must be substantial evidence in the record to support a defendant's conviction. Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. In other words, evidence is substantial if a rational trier of fact could find each of the elements of the crime beyond a reasonable doubt. State v. Williams, 674 N.W.2d 69, 71 (Iowa 2004); State v. Webb, 648 N.W.2d 72, 76 (Iowa 2002); State v. Rivers, 588 N.W.2d 408, 409 (Iowa 1998); State v. Kostman, 585 N.W.2d 209, 211 (Iowa 1998); State v. McPhillips, 580 N.W.2d 748, 753 (Iowa 1998). Direct and circumstantial evidence are equally probative. State v. Schmidt, 588 N.W.2d 416, 418 (Iowa 1998). Evidence, whether direct or circumstantial, must do more than create speculation, suspicion or conjecture as to each essential element of the crime. Webb, 648 N.W.2d at 76; State v. Davis, 584 N.W.2d 913, 916 (Iowa App. 1998); Rivers, 588 N.W.2d at 409. The Court, as fact finder, has the right to believe some of a witness's testimony, all of a witness's testimony, or none of it. The Court, as fact finder, may choose to ignore the inconsistencies in the State's witnesses' testimony and choose to believe those elements of the State's witnesses' testimony that supported the charge. State v. Lopez, 633 N.W.2d 774, 786 (Iowa 2001). It is the function of the Court, as fact finder, to sort out the evidence presented and place credibility where it belongs. State v. Maring, 619 N.W.2d 393, 395 (Iowa 2000). It is the fact finder's duty to assign to the evidence presented whatever weight it deems proper. State v. Speaks, 576 N.W.2d 629, 632

(Iowa 1998). A fact finder may choose to believe one witness and not another. State v. Dalton, 674 N.W.2d 111, 118 (Iowa 2004). Discrepancies in testimony, in and of themselves, do not preclude proof beyond a reasonable doubt. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998). The fact finder's duty is to resolve the conflicts in the evidence by using its common sense and prior experience. Hopkins, 576 N.W.2d at 377; Speaks, 576 N.W.2d at 632; State v. Shortridge, 589 N.W.2d 76, 780 (Iowa App. 1998).

In deciding what the facts are, the fact finder may consider the evidence using his/her observations, common sense and experience. A fact finder should try to reconcile any conflicts in the evidence, but if that cannot be done, the fact finder may accept the evidence found to be more believable. In determining the facts, a fact finder may have to decide what testimony to believe. There are many factors which a fact finder may consider in deciding what testimony to believe, such as:

1. Whether the testimony is reasonable and consistent with other evidence you believe.

2. Whether a witness has made inconsistent statements.

3. The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts.

4. The witness's interest in the trial, their motive, candor, bias and prejudice.

State v. Capper, 539 N.W.2d 361, 365 (Iowa 1995); Iowa Uniform Criminal Instruction No. 100.7.

Proof beyond a reasonable doubt is explained in Iowa Uniform Criminal Instruction No. 100.10. That instruction provides, in part:

A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or from the lack or failure of evidence produced by the State.

A reasonable doubt is a doubt based upon reason and common sense – the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.

But if, after a full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

b) Elements of offense, Lesser Included Offenses and Definitions
Count I: Attempted Murder

The State must prove all of the following elements of Attempted Murder:

1. On or about the 10th day of February, 2017, the Defendant shot Angel Castillo-Martinez in the chest and hip/buttocks.

2. By his acts, the defendant expected to set in motion a force or chain of events which would cause or result in the death of Angel Castillo-Martinez.

3. When the defendant acted, he specifically intended to cause the death of Angel Castillo-Martinez.

(Iowa Code section 707.11 and Iowa Uniform Jury Instruction 700.19)

The lesser-included offenses are: 1) Assault with Intent to Inflict Serious Injury and 2) Simple Assault..

c) Elements of offense, Lesser Included Offenses and Definitions
Count II: Willful Injury

The State must prove the following elements of, Willful Injury:

1. On or about the 10th day of February, 2017, the defendant shot Angel Castillo-Martinez in the chest and hip/buttocks.

2. The defendant specifically intended to cause a serious injury to Angel Castillo-Martinez.

3. The defendant caused a serious injury to Angel Castillo-Martinez.

(Iowa Code section 708.4(1) and Iowa Uniform Jury Instruction 800.11.

A serious injury is defined as follows:

> A serious injury is a disabling mental illness or a condition which cripples, incapacitates, weakens or destroys a person's normal mental functions, or a bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily part or organ][an injury to a child that requires surgical repair and necessitates the administration of general anesthesia]. "Serious injury" includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the age of four years.

Iowa Criminal Jury Instruction 200.22 defines serious injury.

Specific intent is defined as follows:

> "Specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.

Iowa Criminal Jury Instruction 200.2.

The lesser-included offenses are: 1) Willful Injury (Class D Felony), 2) Assault Causing Serious Injury, 3) Assault with Intent to Inflict Serious Injury, 4) Assault Causing

Bodily Injury, and 5) Simple Assault.

d) Elements of offense, Lesser Included Offenses, Definitions
Count III: Intimidation with a Dangerous Weapon

The State must prove all of the following elements of Intimidation with a Dangerous Weapon:

1. On or about the 10th day of February, 2017, the defendant shot a gun within an assembly of people.

2. The gun was a dangerous weapon.

3. A member or members of the assembly of people actually experienced fear of serious injury and their fear was reasonable under the circumstances.

4. The defendant shot the gun with the specific intent to injure or cause fear or anger in the assembly of people.

(Iowa Code section 708.6 and Iowa Criminal Jury Instruction 800.1)

See definition of specific intent shown above.

Within an assembly of people means "into or through two or more persons at the same place." State v. Bush, 518 N.W.2d 778 (Iowa 1994); Iowa Criminal Jury Instruction 800.14.2.

A "dangerous weapon" is any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death. Iowa Code section 702.7; Iowa Criminal Jury Instruction 200.21.

The lesser-included offenses are: 1) Intimidation with a Dangerous Weapon

(Class D Felony) and 2) Simple Assault.

e) Elements of offense, Lesser Included Offenses and Definitions
Count IV: Robbery in the First Degree

The State must prove all of the following elements of Robbery in the First Degree:

1. On or about the 10th day of February, 2017, the defendant had the specific intent to commit a theft.

2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant: a) committed an assault on Nevon Wooten and/or b) aided and abetted Tykell Robinson who committed an assault on Gabe Burlison.

3. The defendant was armed with a dangerous weapon.

(Iowa Code section 711.1 and 711.2 and Iowa Criminal Jury Instruction 1100.1)

See definition of specific intent and dangerous weapon shown above.

The term "armed" means a conscious and deliberate possession of a dangerous weapon on or about one's person so it is available for immediate use. Iowa Criminal Jury Instruction 800.16.

The lesser-included offenses are: 1) Robbery in the Second Degree, 2) Robbery in the Third Degree, and 3) Simple Assault.

ANALYSIS AND CONCLUSION

A) ATTEMPTED MURDER (Count 1)

As to Count 1, the Court finds that there is a reasonable doubt as to whether the Defendant committed the offense of Attempted Murder. As discussed below in regards

to Count 2, there is evidence beyond a reasonable doubt that the Defendant did fire four shots at Angel and that he did so with the specific intent to cause a serious injury to Angel (see discussion of Count 2). However, in order to be convicted of Attempted Murder, the evidence must establish beyond a reasonable doubt that the Defendant by his acts expected to set in motion a force or chain of events which would cause or result in the death of Angel and that when he so acted, the Defendant had the specific intent to cause the death of Angel. It is certainly correct to state that by firing four rounds from his handgun the Defendant put in motion a chain of events which could have caused the death of Angel. The evidence is not as clear, though, as to whether the Defendant had the specific intent to cause the death of Angel when he fired those four shots.

As discussed above, "specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition the actor must be doing so with a specific intent in mind. In this case the Defendant must have had the specific intent to cause the death of Angel when he fired those shots. There is no doubt that the Defendant was aware that he was firing the handgun and was doing so voluntarily when he did. The issue is whether he was doing so specifically to kill Angel. "Intent, being a mental condition, must ordinarily be inferred from external circumstances." State v. Clarke, 475 N.W.2d 193, 196 (Iowa 1991) citing State v. Lass, 228 N.W.2d 758,766 (Iowa 1975). In the present case the Defendant did not know Angel and had not had any involvement with Angel earlier in the evening when the events with Nevon and Nevon's friends took place. The evidence is clear that the Defendant was upset regarding the events that had transpired earlier as he and his friends had just argued with and chased Nevon and his brother to the Kum & Go store after their argument about the robbery at 423 16th

Street. It is also clear that the Defendant did intend to cause serious injury to Angel as he fired at him four times, striking him twice. Intending to cause serious injury and intending to cause the death of another person, however, is not the same thing. After the Defendant fired the four shots, striking Angel twice, Angel walked across the street and he and Eric then walked to Kum & Go to get help. If the Defendant had the specific intent to kill Angel, he could have easily pursued him or continued to shoot at him as Angel and Eric walked away. The evidence does not reflect that he did either of these, even though the evidence showed that he did not hesitate to chase Nevon and Alan down the street a few minutes earlier. As the Court concludes that there is insufficient evidence to find that the Defendant intended to cause Angel's death, the Court finds that the Defendant is not guilty of Attempted Murder as set out in Count 1.

The Court must next consider the lesser included offense of Assault with the Intent to Inflict Serious Injury. In order to find the Defendant guilty of this lesser included offense, the State must prove all of the following elements:

1. On or about the 10th day of February, 2017, the Defendant did an act which was intended to cause pain or injury or result in physical contact which was insulting or offensive to Angel Castillo-Martinez.

2. The Defendant had the apparent ability to do the act, and

3. The act was done with the specific intent to cause a serious injury.

The evidence presented does establish each of these elements beyond a reasonable doubt. As discussed in regards to Count 2 below, the evidence shows that the Defendant did fire four shots at Angel and that he had the specific intent to cause a serious injury. The Defendant fired four shots at Angel, hitting him twice, which did in

fact result in serious injury to Angel.

Therefore, the Court finds that the State has established by proof beyond a reasonable doubt that the Defendant is guilty of the lesser included charge of Assault with Intent to Inflict Serious Injury in violation of Iowa Code Sections 708.1 & 708.2(1).

B) WILLFUL INJURY (COUNT 2)

The Court also finds that the State has established by proof beyond a reasonable doubt that 1) on February 10, 2017, in Sioux City, Woodbury County, Iowa, the Defendant shot Angel Castillo-Martinez in the chest and hip/buttocks area; 2) that the Defendant specifically intended to cause a serious injury to Angel Castillo-Martinez; and 3) that the Defendant caused a serious injury to Angel Castillo-Martinez.

The evidence presented shows beyond a reasonable doubt that Angel Castillo-Martinez was shot twice in the late evening hours of February 10, 2017, once in the chest and once in the hip/buttocks area. The parties stipulated that Angel suffered a serious injury as a result of being shot in that his injuries were life threatening. As four shots were fired, two of which struck Angel, it is also established beyond a reasonable doubt that the shooter had the specific intent to a cause a serious injury to Angel. No other conclusion can be drawn from someone firing a dangerous weapon four times at an individual, striking the individual twice. The only area of dispute is whether it was the Defendant who was the person who fired the gun with which Angel was shot.

While none of the witnesses could specifically identify the Defendant in open court as Angel's shooter, the evidence presented does establish beyond a reasonable doubt that it was in fact the Defendant who was the shooter. The shooting took place at 423 16th Street which is a residence where the Defendant had been at several minutes

earlier. Just prior to the shooting, the Defendant, Tykel and Donte had chased Nevon and Alan to the Kum & Go approximately two blocks to the south. While Tykel and Donte remained at the Kum & Go until police arrived, the Defendant left the Kum & Go. Angel, Eric and Skyla each described seeing a black man coming up the alley between Pierce and Douglas Street as they approached 16th Street in the alley from the opposite direction. This would be the alley the Defendant would have walked up to return to 423 16th Street from Kum & Go. They each testified that the black man they saw turned east on 16th Street and went towards 423 16th Street and was wearing dark or blue clothing with short afro hair. They also testified that the clothing the man was wearing matched State's Exhibit 54. They also each testified that the man who shot Angel also matched this description and that the man was standing on the porch of 423 16th Street when the shots were fired The evidence also indicates that Angel had asked the man if he had robbed his friends earlier, just moments before the shots were fired. Two shell casings were found in the yard in front of the porch were the man was described as standing. Viewing all of the evidence in its entirety, the Court finds that the evidence presented shows beyond a reasonable doubt that the Defendant was in fact the shooter. At the time of the shooting, Tykel and Donte were still at Kum & Go. The older man had left the area earlier. There is simply no reasonable doubt as to whether the Defendant was the shooter.

Therefore, the Court finds that the State has established by proof beyond a reasonable doubt that the Defendant is guilty of the charge of Willful Injury as set out in Count 2 of the Trial Information.

C) INTIMIDATION WITH A DANGEROUS WEAPON (Count 3)

As to Count 3, the Court finds that there is a reasonable doubt as to whether the Defendant committed the offense of Intimidation with a Dangerous Weapon. As discussed previously in regards to Count 2, there is evidence beyond a reasonable doubt that the Defendant did fire four shots at Angel and that he did so with the specific intent to cause a serious injury to Angel (see discussion of Count 2). However, the evidence also reflects that when the four shots were fired, Eric was already across the street and Skyla was at a location where she could not even see the house at 423 16th Street. An element of Intimidation with a Dangerous Weapon is that the weapon was fired within an assembly of people. An assembly of people means into or through two or more persons *at the same place.* While Eric, Angel and Skyla had been walking in close proximity to each other prior to encountering the Defendant, at the time the shots were fired they were separated, with Eric being on the other side of the street and Skyla apparently being back towards the alley. As such, the shots were not fired in the direction of more than one person, that person being Angel, when the shots were actually fired. Eric testified that he was across the street and was observing the event from the side and Skyla indicated that she had stayed back and could not even see the house.

In addition, there was no testimony from Angel, Eric or Skyla that any of them actually experienced fear. While fear may be assumed from being in close proximity to weapons fire, Angel actually testified that at first he thought it was a bb gun that had been fired and he didn't even realize the seriousness of his injuries for a brief period of time. While it would certainly have been reasonable for the three of them to have been

afraid as the shots were fired and immediately thereafter, there was no testimony given to that extent.

D) ROBBERY IN THE FIRST DEGREE (COUNT 4)

The Court also finds that the State has established by proof beyond a reasonable doubt that 1) on February 10, 2017, the Defendant had the specific intent to commit a theft; 2) that to carry out his intention the Defendant committed an assault upon Nevon Wooten; and 3) that during the course of these events the Defendant was armed with a dangerous weapon.

The evidence presented shows beyond a reasonable doubt that the Defendant on the night of February 10, 2017, in Sioux City, Woodbury County, Iowa, approached Nevon Wooten and Nevon's friends as they were walking north on Pierce Street. That after approaching Nevon, the Defendant repeatedly asked Nevon what he had in his pockets, and after being told several times by Nevon that it was none of the Defendant's business, the Defendant grabbed Nevon by the arm, began taking swings at him and after a brief struggle pulled out a handgun and demanded that Nevon give him what he had. In response Nevon dropped the Kum & Go bag and threw his cell phone at the Defendant and left the scene. The evidence is beyond a reasonable doubt that the Defendant took the cell phone, as he later returned the phone to Nevon when Nevon and his brother confronted him at 423 16th Street. Even then the Defendant only returned the phone after being told to do so by an older man who was at the residence.

The evidence is beyond a reasonable doubt that the Defendant took possession of Nevon's cell phone, and in the process the Defendant assaulted Nevon by hitting him and threatening him with the handgun. The evidence also shows beyond a reasonable

doubt that the Defendant did so with the intent to deprive Nevon of the cell phone, and at the time the Defendant took the phone it did in fact belong to Nevon. Therefore, the Court finds that the State has established by proof beyond a reasonable doubt that the Defendant is guilty of the charge of Robbery in the First Degree as set out in Count 4 of the Trial Information.

MERGER OF COUNT 1 AND COUNT 2

The Court finds that the convictions herein under Count 1 for Assault with Intent to Inflict Serious Injury and Count 2 for Willful Injury should merge. The evidence does not reflect that there were two separate assaults by the Defendant against Angel. "There is no question that as a general proposition, the crime of willful injury cannot be completed without also completing the crime of assault with intent." State v. Love, 858 N.W.2d 721, 725 (Iowa 2015). As the evidence shows that the Defendant's assault of Angel was one event and there was no break in the action, the Court cannot conclude that separate assaults took place and the conviction for Assault with Intent to Inflict Serious Injury in Count 1 shall merge into the conviction for Willful Injury in Count 2.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court finds the Defendant guilty of the crimes of: 1) Assault with Intent to Inflict Serious Injury, in violation of Iowa Code Sections 708.1 and 708.2(1) as a lesser included offense of Count 1; 2) Willful Injury in violation of Iowa Code Section 708.4(1) as set out in Count 2; and 3) Robbery in the First Degree in violation of Iowa Code Sections 711.1 and 711.2 as set out in Count 4.

IT IS FURTHER ORDERED that the conviction entered for Count 1 shall merge into the conviction for Willful Injury in Count 2.

IT IS FURTHER ORDERED that Count 3 is dismissed.

IT IS FURTHER ORDERED that the Defendant has 45 days from and after the entry of this verdict of guilty, but in no case not later than five days prior to the date of sentencing, to file any post-trial motions as set out in Rule 2.24 of the Iowa Rules of Criminal Procedure.

IT IS FURTHER ORDERED that a presentence investigation report shall be made by the Third Judicial District Department of Correctional Services. Copies of the presentence investigation report shall be furnished to the County Attorney and to the Defendant's attorney. The Defendant shall immediately contact the Department of Corrections to arrange for an interview with a presentence investigation report officer.

IT IS FURTHER ORDERED that the Defendant's bond is revoked and the Defendant shall be held without bail.

928 N.W.2d 151 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff-Appellee,
v.
Darius Albertez Ramantez WRIGHT, Defendant-Appellant.

No. 17-1639
|
Filed March 6, 2019

Appeal from the Iowa District Court for Woodbury County, Patrick H. Tott, Judge.

The defendant challenges the sufficiency of the evidence to support his convictions for robbery in the first degree and willful injury. **AFFIRMED.**

Attorneys and Law Firms

Rees Conrad Douglas, Sioux City, for appellant.

Thomas J. Miller, Attorney General, and Bridget A. Chambers, Assistant Attorney General, for appellee.

Considered by Potterfield, P.J., Doyle, J., and Blane, S.J. *

Opinion

POTTERFIELD, Presiding Judge.

***1 Darius Wright** appeals his convictions for robbery in the first degree and willful injury. He argues neither conviction is supported by substantial evidence. [1]

I. Background Facts and Proceedings.

In February 2017, **Wright** was charged with one count each of attempted murder, willful injury, intimidation with a dangerous weapon, and robbery in the first degree. All four counts involved allegations stemming from the night of February 10, 2017. **Wright** waived his right to a trial by jury, and the court heard the evidence at a bench trial in April 2017.

At trial, N.W. [2] testified that on the night of February 10, he and two of his friends—K. R. and G.B.—walked south from his home several blocks to a local gas station. The three entered the gas station at approximately 10:41 p.m. While there, N.W. purchased two Dr. Peppers, a package of Sour Patch Kids, and a bag of Flaming Hot Cheetos. [3]

On the return walk to N.W.'s home, N.W., K.R., and G.B. encountered a man that each identified as **Wright** at trial. **Wright** changed directions and began walking with the group, repeatedly asking N.W. what he was carrying in his pockets, to which N.W. told him, "None of your business." At some point, **Wright** grabbed N.W.'s arm and started throwing punches at him. N.W. dropped the gas station bag with the snacks and tried to defend himself. **Wright** then pulled what N.W., K.R., G.B. each testified was a gun from behind his back, pointed it at N.W., and told him to "[g]ive me what you got." N.W. threw his cell phone toward **Wright**, and N.W., K.R., and G.B. fled to N.W.'s home. Neither N.W. nor his friends picked up the gas station bag before they left.

At 10:48, **Wright** entered the gas station carrying two Dr. Peppers. He asked the clerk for a bag for the sodas, which he was given, and then left the store. As N.W., K.R., and G.B. testified, and as was captured by the surveillance cameras, **Wright** wore a blue, long-sleeve jacket or sweatshirt.

When N.W., K.R., and G.B. reached N.W.'s home, they reported to N.W.'s older brother, Alan, what had occurred. Alan and N.W. decided to try and get N.W.'s phone from **Wright**; they armed themselves with a BB gun and two knives. The four, including K.R. and G.B. then began walking from N.W.'s home toward the area they had encountered **Wright**.

***2** As they neared the area, **Wright**—who was standing on the porch of a corner home a few blocks from the gas station—yelled, "Hey you," to N.W. N.W. and Alan then approached the porch while K.R. and G.B. stayed on the other side of the street. N.W. and **Wright** argued about the fact that **Wright** had taken N.W.'s phone and whether he was going to return it. According to both N.W. and Alan, during the argument, **Wright** kept his hand behind his back. Alan testified he could see that **Wright** was holding on to the handle of a gun but that he never pulled it out or pointed it at anyone during that time. Eventually, an older man who was also on the porch told **Wright** to give N.W. his phone back, and **Wright** did so. The older man then walked away from the area. N.W. continued to argue with **Wright** about what had happened to his snacks and wanting them back. **Wright** went to the door of the home and yelled something. Four or five guys exited the house, and N.W. and Alan began running towards the gas station. At least

three of the guys chased them to the store. Another one or two started chasing K.R. and G.B. the other direction.

At 11:17, N.W. and Alan entered the gas station and asked the clerk to call 911. **Wright** and two friends, Donte Drappeaux and Tykell Robinson, entered the store about the same time. The store clerk tried to keep the two groups separate while **Wright** and his friends continued to attempt to reach N.W. and Alan. At some point, **Wright**, Donte, and Tykell exited the store. At 11:22, Tykell and Donte returned without **Wright**. According to the testimony of the gas station clerk, **Wright** had left the area by the time Tykell and Donte came back into the store. The first police officer arrived at the scene about one minute later.

Around the same time, Skyla Wabasha, Eric Silvas, and A.C.-M. were walking to the gas station. On the way they encountered a girl and a boy—presumably K.R. and G.B. [4]—who reported their mutual friend had been robbed of his phone. After imparting the information, the boy and girl walked away, and Skyla, Eric, and A.C.-M continued toward the gas station.

The three walked down the alley that passed directly behind the corner home where **Wright** had been standing when he argued with N.W. and Alan. As they approached the corner home, they saw a man running toward them in the alley, who then turned toward the corner home and disappeared from their view. When they got near the corner home, Eric and A.C.-M. saw a man on the porch of the corner home and approached it. The man was wearing a blue jacket and matched the description of **Wright**. At trial, neither A.C.-M, Eric, nor Skyla specifically identified **Wright** as the man on the porch. A.C.-M. shouted at the man, asking if he had taken his friend's phone. According to Eric's testimony, the man on the porch got defensive and "a little mad at [A.C.-M.] trying to be a hero"; during the interaction, the man "had, like, something on his back or whatnot. He had his hand behind his back the whole time." Almost immediately after A.C.-M shouted at the man, the man on the porch fired four shots in rapid succession. Two of the shots hit A.C.-M.—one in his hip and the other in the chest or shoulder area. Eric testified he did not see the man on the porch pull out a gun, but he saw the man on the porch pointing it A.C.-M. and saw "sparks or whatever a gun does" when he heard the first gunshot.

A.C.-M., Skyla, and Eric fled to the gas station, where police had already gathered based on the clerk's 911 call.

Based on a call reporting shots fired in the area—at approximately 11:30 p.m.—police officers were dispatched to the area near the corner home. Once they were in the area, a neighbor came outside and told the officers he heard arguing and gunshots "directly to the south part of the residence" of the corner home—where the porch is located. The officers searched the area and located two shell casings from a .22. One officer saw movement in an upstairs window; they tried to get any occupants of the home to come out. A number of hours later, during which the officers kept a perimeter around the home and the SWAT team arrived, **Wright** and Willie Williams exited the house. At the time he left the house, **Wright** was wearing a gray jacket. No one else was in the home.

***3** During their subsequent search of the house pursuant to a search warrant, officers located two Dr. Peppers. One of the Dr. Peppers was open in a bedroom. In the closet of that bedroom, officers found hidden under a number of pillows the blue jacket **Wright** was wearing in the gas station. Officers also found a bag of Flaming Hot Cheetos—the only food in the kitchen cupboard—and a package of Sour Patch Kids in a bag from the local gas station.

Police interviewed **Wright** after he exited the home in the early morning hours of February 11. During the interview, **Wright** lied to the officers, telling them he had not been at the local gas station since the previous morning.

At trial, **Wright** testified in his own defense. While testifying, he was asked by the State why he switched from wearing his blue jacket to his gray jacket. He said there was "no specific" reason why he changed his clothes and maintained he did not place the blue jacket under the pillows in the closet.

No other blue jackets or sweatshirts were located in the home during the execution of the search warrant.

Following the bench trial, the court pronounced judgment. The court acquitted **Wright** of attempted murder, finding the State had not established **Wright** had the specific intent to cause the death of A.C.-M. when he fired the gun at him. But the court found **Wright** guilty of the lesser-included offense of assault with intent to commit serious injury. The court also acquitted **Wright** of intimidation with a dangerous weapon. **Wright** was found guilty of willful injury and robbery in the first degree. The court determined the conviction for the lesser-included offense of assault with intent to commit serious injury merged with the conviction for willful injury.

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Wright was sentenced to a term of incarceration not to exceed ten years for the willful-injury conviction and twenty-five years for the robbery conviction. The court ordered **Wright** to serve the two sentences consecutively.

Wright appeals.

II. Standard of Review.

We review claims of insufficient evidence for correction of errors at law. *State v. Romer*, 832 N.W.2d 169, 174 (Iowa 2013).

III. Discussion.

Wright challenges the sufficiency of the evidence to support his convictions. When a sufficiency-of-the-evidence claim is made on appeal from a criminal bench trial, error preservation is no barrier. *State v. Howse*, 875 N.W.2d 684, 688 (Iowa 2016). This is because "the court is the fact finder and its findings of guilt necessarily includes a finding that the evidence was sufficient to sustain a conviction." *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997).

In reviewing the district court's finding of guilt, "we view the evidence in the light most favorable to the State." *Id.* "In determining if there was substantial evidence, we consider all of the evidence in the record, not just the evidence supporting a finding of guilt." *Id.* This includes making "legitimate inferences and presumptions that may reasonably be deduced from the evidence in the record." *State v. Armstrong*, 787 N.W.2d 472, 475 (Iowa Ct. App. 2010). It is the State's burden to prove every element of each of the crimes with which **Wright** is charged. *See id.* And "[t]he evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Id.* (citation omitted).

A. Robbery in the First Degree.

The district court defined the elements of robbery in the first degree as:

1. On or about the 10th day of February, 2017, [**Wright**] had the specific intent to commit a theft.

*4 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, [**Wright**]: a) committed an assault on [N.W.] and/or b) aided and abetted Tykell Robinson who committed an assault on [G.B.].

3. The defendant was armed with a dangerous weapon. [5]

Wright challenges only the third element. He maintains there is no evidence in the record to support the finding that the "gun" that N.W., K.R., and G.B. testified he pulled on N.W. was an actual working firearm, arguing it could have been a toy meant to look like a working gun.

In *State v. Dean*, No. 12-1876, 2013 WL 6118656, at *1 (Iowa Ct. App. Nov. 20, 2013), a panel of our court was asked to decide whether substantial evidence supported the defendant's convictions for intimidation with a dangerous weapon and for being a felon in possession of a firearm when "there was no physical evidence he had a 'real gun,' as opposed to a 'fake gun.' " Our court found the evidence substantial because there was "circumstantial and contextual evidence" the defendant possessed a functional gun. *Dean*, 2013 WL 6118656, at *3. We included as part of that evidence the facts that the defendant engaged in a fight with people and then made a point to retrieve the weapon. *Id.* Additionally, like here, the witnesses in *Dean* testified they saw the defendant pull out a gun and aim it at a person. *See id.*

Because **Wright**, while robbing N.W., brandished the weapon as if it were real, it appeared to the witnesses who testified about it that it was real, and there is no evidence in the record to suggest otherwise, substantial evidence supports **Wright**'s conviction of robbery in the first degree. *See State v. Allen*, 343 N.W.2d 893, 897 (N.C. 1986) ("In an armed robbery case, the jury may conclude that the weapon is what it appears to the victim in the absence of any evidence to the contrary."); *see also People v. Davis*, 26 N.E.3d 932, 935 (Ill. App. Ct. 2015) ("Both the supreme court and this court have consistently held that eyewitness testimony that the offender was armed with a gun, combined with circumstances under which the witness was able to see the weapon, is sufficient to allow a reasonable inference that the weapon was a real gun.").

B. Willful Injury.

The district court defined the elements of willful injury as:

1. On or about the 10th day of February, 2017, [**Wright**] shot [A.C.-M.] in the chest and hip/buttocks.

2. [**Wright**] specifically intended to cause a serious injury to [A.C.-M.]

3. The defendant caused a serious injury to [A.C.-M.] [6]

Wright challenges the court's determination that the State proved beyond a reasonable doubt that he was the individual who shot A.C.-M. He relies upon the fact that neither Eric, Skyla, nor A.C.-M. identified **Wright** as the shooter in open court. Additionally, he notes that while surveillance video and police testimony make it clear Tykell and Donte were not in the area of the corner home at the time of the shooting, the "older man" who had been on the porch during the confrontation between N.W. and **Wright** and one or two of the "four or five guys" who came out of the house at **Wright**'s call were not accounted for.

***5** We agree with the district court that substantial evidence supports the determination **Wright** was the shooter of A.C.-M. N.W., K.R., and G.B. testified **Wright** was wearing a blue jacket and carrying a gun at his back, presumably in his waistband, before he pulled out the gun and robbed N.W. **Wright** conceded in his testimony that the blue jacket recovered by police was his and that he had worn it into the gas station on the night in question. Before the police arrived, at 11:23 p.m., **Wright** had left the store. Around that time, A.C.-M., Skyla, and Eric were told that a kid had been robbed for his cell phone in the neighborhood. As they walked toward the corner house, a man in a blue jacket who matches **Wright**'s description came running up the alley from the direction of the gas station. The guy turned toward the corner home, and then A.C.-M. and Eric approached him when he was on the porch of the home. After A.C.-M. asked him if he had taken his friend's phone, the man became defensive, retrieved a firearm from behind his back, and fired four shots.

Police arrived at the home shortly thereafter, and only **Wright** and Willie were inside. The men refused to come out for a number of hours. When **Wright** finally did, he had changed into a gray jacket. Officers located the blue jacket—the only one in the home—hidden in a closet under a pile of pillows.

Although A.C.-M., Skyla, and Eric were unable to positively identify **Wright** in court, the identifying information they were able to provide, in addition to the circumstantial evidence, supports a finding **Wright** was the shooter. *See State v. Poyner*, 306 N.W.2d 716, 718 (Iowa 1981) ("[C]ircumstantial evidence is just as probative as direct."). The man, matching the description of **Wright** and what **Wright** was known to be wearing only a few minutes earlier, came running from the direction of the gas station. According to Eric's testimony, the kids who reported the robbery of their friend were still with them in the alley at that time and they pointed at the running man and said, "That's him right there." [7] The man ran to the corner home and was standing on the porch when A.C.-M. approached him and asked if he had stolen the phone of A.C.-M.'s friend. The man became defensive and retrieved a firearm from behind his back—the same place **Wright** had his gun before the altercation with N.W. While there may have been other people nearby at the time of the shooting, Eric testified there was only one person on the porch at the time of the shooting, and that was the man who matches **Wright**'s description and was wearing the blue jacket.

IV. Conclusion.

Because substantial evidence supports both of **Wright**'s convictions, we affirm.

AFFIRMED

All Citations

928 N.W.2d 151 (Table), 2019 WL 1056741

Footnotes

* Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2019).

1 **Wright** also filed a supplemental pro se brief. Insofar as he raises an equal protection claim, that issue was not raised before the district court and is not properly preserved for our review. *See Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citation omitted)). Additionally, to the extent we otherwise understand **Wright**'s pro se claims to involve the sufficiency of the evidence, we consider them in conjunction with the claims made by **Wright**'s appellate attorney.

2 A number of the individuals involved in the events on the night of February 10 were minors. We refer to them by their initials only. *See State v. Tyler*, 873 N.W.2d 741, 745 n.2 (Iowa 2016).

3 We understand this product to be "Flamin' Hot Cheetos," but it is in our record as "Flaming Hot Cheetos."

4 The district court concluded the girl and boy were K.R. and G.B.; neither of them testified about meeting or sharing information with anyone on their walk back to N.W.'s home, and none of the other witnesses named them in their testimony.

5 The court relied upon Iowa Criminal Jury Instruction 200.21 for the definition of dangerous weapon, which it defined as follows:

> A "dangerous weapon" is any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

6 Before trial, **Wright** stipulated that A.C.-M. suffered a serious injury as a result of being shot on February 10.

7 Eric testified he was unable to say whether the man he saw running in the alley who the kids pointed out to him was the same man he saw stand on the porch and ultimately shoot A.C.-M. But Skyla testified the man who was running who matched **Wright**'s description ran to the corner home and A.C.-M.'s testimony implied it was the same man in the alleyway as on the porch.

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