

IN THE COURT OF APPEALS OF IOWA

No. 0-595 / 10-0419
Filed September 9, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHAD LEE STERNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Cedar County, J. Hobart Darbyshire (plea) and Paul L. Macek (sentencing), Judges.

Chad Sterner appeals from the sentence imposed upon his plea of guilty to child endangerment causing bodily injury in violation of Iowa Code section 726.6(1)(a) (6) (2007). **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Sterling L. Benz, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Chad Sterner was responsible for caring for his girlfriend's sixteen-month-old child on April 30, 2009. Sterner picked up the crying child, swung the child around, and tossed the child into the air. Sterner did not catch the child cleanly and the child's head struck Sterner's shoulder with force. The child later had a seizure. Sterner recognized that the child had a seizure but failed to call for medical assistance. As a result of the incident, Sterner was charged with child endangerment causing serious bodily injury in violation of Iowa Code section 726.6(1)(a), (b), and (d),¹ and 726.6(5) (class "C" felony if serious injury results).

On January 8, 2010, the parties filed a "Memorandum of Plea Agreement Proceedings" indicating Sterner would plead guilty to a lesser-included offense, child endangerment resulting in bodily injury, in violation of section 726.6(1)(b) and (6) (class "D" felony), and make restitution. The plea agreement did not provide for Sterner to request or consent to a deferred judgment. "In all other respects, Defendant's plea is 'open' with the State and Defendant free to recommend such sentence as deemed appropriate."

¹ All statutory citations are to the 2007 version of the Iowa Code.

Under Iowa Code section 726.6(1) a person having custody or control over a child commits child endangerment when the person:

(a) Knowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety.

(b) By an intentional act or series of intentional acts, uses unreasonable force, torture or cruelty that results in bodily injury, or that is intended to cause serious injury.

(d) Willfully deprives a child or minor of necessary . . . healthcare or supervision appropriate to the child or minor's age, when the person is reasonably able to make the necessary provisions and which deprivation substantially harms the child or minor's physical, mental or emotional health. . . .

On that same date, January 8, Sterner appeared before the district court and entered a plea of guilty to the lesser charge. However, during the proceeding, both defense counsel² and the district court (Judge Darbyshire)³ used the language of section 726.6(1)(a) and the colloquy with the defendant established a factual basis under that subsection. A calendar entry was filed on January 8, 2010, accepting the plea agreement.

A sentencing hearing was held on February 12, 2010, at which the district court (Judge Macek) noted that the record reflects that Sterner entered a plea of guilty to 726.6(1)(b). The State recommended Sterner pay the minimum fine and, “as per the presentence investigator’s recommendation, incarceration in this matter.” The defense asked that the court consider probation because the child had recovered fully; Sterner was employed and paying child support for a daughter; and this was his first felony conviction. After noting Sterner’s age, the district court stated:

The victim of this offense was 16 months—a helpless child that was placed in your care. A head injury and the damages resulting from a head injury may not become apparent for years. Because of the nature of the offense prison is appropriate.

Pursuant to your plea of guilty to the charge of Child Endangerment Resulting in Bodily Injury in violation of sections 726.6(1)(b) and 726.6(6) it is the judgment and sentence of this Court that you be committed to the custody of the Iowa Department of Corrections for a period of not to exceed 5 years,

² Defense attorney stated:

Mr. Sterner and I have discussed the lesser-included charge that he is pleading to, and the acts that he committed that would allow you to accept a guilty plea, and I think under 726.6(1) the acts that [defendant will] tell you about in a minute, that he *knowingly acted in a manner that created a substantial risk to the child’s physical health fits*.

³ The Court: “Are you satisfied that that establishes *the element of knowingly acts in a manner that creates a substantial risk to the child’s physical, mental, emotional health or safety*, [county attorney] Mr. Benz?”

The court also ordered Sterner to pay a fine, restitution, and costs. The sentencing order appears as a calendar entry and notes the defendant pleaded guilty to child endangerment causing bodily injury under Iowa Code section 726.6(1)(b) and (6).

Sterner appeals, contending the district court abused its discretion in sentencing him to serve a five-year prison sentence. This sentence is well within the court's discretion for a conviction under section 726.6(1)(a). See Iowa Code §§ 902.3, 902.9 (allowing five-year sentence for class "D" felony). However, the sentencing court entered judgment and sentence under section 726.6(1)(b). And while the sentence imposed is also available under section 726.6(1)(b), the record does not contain a factual basis for conviction under that section. Cf. *State v. Schminkey*, 597 N.W.2d 785, 792 (Iowa 1999) (noting two possible remedies where no factual basis exists for the plea).

Both Sterner and the State assert there is a factual basis for the guilty plea under section 726.6(1)(a) and that the calendar entry is an error and should be corrected by means of a nunc pro tunc order.

The district court may correct a clerical error by issuing a nunc pro tunc order. Iowa R. Crim. P. 2.23(3)(g). "An error is clerical in nature if it is not the product of judicial reasoning and determination." *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995). If a clerical error is reflected by the record, we will remand instructing the district court to enter a nunc pro tunc order to correct the written judgment. *Id.* After a review of the record, we agree that there was a clerical error in the record of the guilty plea as clearly there is a factual basis for the plea entered under section 726.6(1)(a) and (6) rather than 726.6(1)(b).

However, we cannot characterize the error in the calendar entry that serves as the record of the sentencing order as a “clerical error” subject to correction by an order nunc pro tunc.

Sterner entered his guilty plea before one judge and was sentenced by another. The guilty plea proceeding referenced and established a factual basis under section 726.6(1)(a). But the sentencing judge referenced section 726.6(1)(b) at the beginning of the hearing and entered judgment under section 726.6(1)(b), which is the subsection cited in the parties’ “Memorandum of Plea Agreement Proceedings.” It is unclear whether the difference in code section would affect the sentencing judge’s decision. We believe the proper remedy here is to vacate the sentence and remand for sentencing. Generally, “[a] sentence will not be upset on appellate review unless the defendant demonstrates an abuse of discretion or a defect in the sentencing procedure such as trial court consideration of impermissible factors.” *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983). We view the consideration of the wrong alternative of a criminal offense as an impermissible factor constituting a defect requiring resentencing.

We vacate the sentence and remand for entry of judgment of conviction and sentencing under Iowa Code section 726.6(1)(a) and (6). We also direct a nunc pro tunc order be entered to correct the January 8, 2010 calendar entry to reflect the proper code section to which the defendant pled.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.