

IN THE COURT OF APPEALS OF IOWA

No. 0-914 / 10-0920
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RAUL LOUIS LIENDO,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton,
District Associate Judge.

Defendant appeals his conviction and sentence based on his guilty plea to
animal neglect. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, Michael J. Walton, County Attorney, and James J. Cosby,
Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Miller, S.J.* Tabor, J.,
takes no part.

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.**I. Background Facts & Proceedings**

The minutes of evidence in this case show the following facts. On January 26, 2010, Raul Liendo came home from drinking at a friend's house. He was intoxicated and stated he had been having a bad day. Josephina Ponce stated Liendo was mad because his two-month old pit bull puppy, "Co-Co," was barking. Ponce stated Liendo grabbed the puppy with both hands, lifted him above his head, and threw him at the wall. She stated the puppy walked a short distance, then died. Another witness, Miguel Meeina, also stated Liendo had picked the puppy up and thrown him at the wall before the puppy died.

When officers arrived Liendo first stated he had kicked the dog because "I was pissed," and it was in his way. He then stated the puppy was biting at his ankle and he kicked it in an attempt to get it away from his feet. Liendo was arrested and charged with animal neglect, in violation of Iowa Code section 717B.3(3) (2009), a serious misdemeanor. Liendo signed a written guilty plea that stated, "I am admitting there is a factual basis for the charge(s), and admitting that at the time and place charged in the Trial Information I injured a dog by stepping on it, causing its death."

Liendo was sentenced, in relevant part, to one year in the county jail, with credit for time served. The court ordered the sentence to run concurrently with any sentence imposed in a separate, pending, unresolved case, OWCR 328468, in which Liendo was charged with operating while intoxicated (OWI). Liendo

appeals, claiming he received ineffective assistance of counsel and he received an illegal sentence.¹

II. Guilty Plea

Liendo contends he received ineffective assistance because his defense counsel permitted him to plead guilty to animal neglect when there was no factual basis for the charge. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). A defendant claiming ineffective assistance of counsel concerning a guilty plea must prove that, but for counsel's breach, there was a reasonable probability he would have insisted on going to trial. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

A court may not accept a guilty plea without first determining the plea has a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). It is ineffective assistance for counsel to allow a defendant to plead guilty where there is no factual basis for the charge. *Id.* In determining whether there is a factual basis for a plea, the court may consider (1) statements by the defendant; (2) facts related by the prosecutor; (3) the presentence report,² or (4) the minutes of

¹ In his pro se notice of appeal, Liendo stated he was appealing because he had been misrepresented regarding the plea bargain.

² We may not consider a presentence investigation report unless it was available to the court at the time of the guilty plea proceedings. *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980).

testimony. *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010); *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1974).

The record must disclose facts sufficient to establish each element of the crime. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). There is “no requirement that [the] trial court must in all cases wring from defendant a detailed confession satisfying each element of the offense charged.” *State v. Watson*, 284 N.W.2d 204, 206 (Iowa 1979) (quoting *State v. Hansen*, 221 N.W.2d 274, 276 (Iowa 1974)). “[W]e have held the record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate facts that support the offense.” *Ortiz*, 789 N.W.2d at 768. It is sufficient if the court is satisfied the facts support the crime. *Id.*

The definition of animal neglect is found in section 717B.3(1):

A person who impounds or confines, in any place, an animal is guilty of animal neglect, if the person does any of the following: fails to supply the animal during confinement with a sufficient quantity of food or water; fails to provide a confined dog or cat with adequate shelter; or tortures, deprives of necessary sustenance, mutilates, beats, or kills an animal by any means which causes unjustified pain, distress, or suffering.

Liendo points out that the statute applies to a person who “impounds or confines” an animal. From the minutes of evidence it is clear the puppy was in Liendo’s home, and his appellate brief admits as much (“According to the minutes, the animal was in the house when it was killed.”). Liendo asserts the statute requires evidence that he impounded or confined the puppy within the house. He states that the fact that an animal is sometimes in the house does not mean it is confined to the house.

In interpreting statutory terms, we are guided by dictionary definitions and common usage. See *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). The term “impound,” is defined as “to shut up in a pound or other enclosure, as a stray animal,” “to confine within an enclosure or within limits,” or “to seize and retain in custody of the law, as a document for evidence.” Dictionary.com, LLC, <http://dictionary.reference.com/browse/impound> (based on the Random House Dictionary 2011) (last visited Jan. 18, 2011). The term “confine” is defined as “to enclose within bounds; to limit or restrict,” or “to shut or keep in; prevent from leaving a place because of imprisonment, illness, discipline, etc.” Dictionary.com, LLC, <http://dictionary.reference.com/browse/confine>.

We first determine that there is no requirement in the statute that an animal be confined or impounded beyond being kept in a home with no means to leave the home without human intervention. The statute applies if an animal is kept in “an enclosure or within limits,” “enclose[d] within bounds,” or “shut or [kept] in.” We determine it would be sufficient to show the puppy was kept or confined within the house, and could not leave the house without human help.

In looking at the minutes of testimony, we find that the incident occurred on January 26, 2010. Police officers were dispatched to the home at 1:47 a.m., in the nighttime. Common sense and experience informs us it is often cold in Iowa at this time of the year, particularly at night. The doors of the home would have been shut so the puppy could not get outside on its own. Once the puppy was in the home, the puppy was confined within the home because it could not leave without human intervention. We also note the incident involved a two-

month old puppy, which would be dependent upon humans for its food, water, and care.³ No one would expect the puppy to survive living outdoors on its own.

Looking at the minutes of evidence, we conclude there is a sufficient factual basis to support Liendo's guilty plea to animal neglect, including the element that the animal had been impounded or confined. We determine Liendo has not shown he received ineffective assistance because his counsel permitted him to plead guilty to this charge.

III. Sentence

Liendo contends the court imposed an illegal sentence by ordering his jail sentence in this case to run concurrently with any sentence imposed in OWCR 328468. Liendo states he was acquitted of the OWI charges in OWCR 328468, and his sentence in the present case cannot run concurrently with a sentence that was never imposed. The State acknowledges that Liendo was subsequently acquitted on the OWI charge. Liendo also points out that the sentence in the present case was entered on May 17, 2010, and that the trial on the OWI charges did not even commence until June 14, 2010, almost a month later.

We agree with Liendo's contention that the court cannot order a sentence to run concurrently with a sentence that has neither been earlier imposed nor is contemporaneously imposed. We also agree, however, with the State's contention that Liendo's arguments on this issue do not present a justiciable controversy. See *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 831 (Iowa 1978) ("In order for there to be a justiciable controversy, there must be a dispute

³ There was no mention of other dogs, such as the puppy's mother, being in the home.

capable of judicial resolution.”). For there to be a justiciable controversy there must be “a live dispute between the parties.” *Id.*

Liendo does not claim that he has been or will be required to serve any additional time in jail due to the court’s improper order that the sentence in this case be served currently with any sentence in OWCR 328468. Liendo has not claimed or shown that he has been or will be adversely affected by the court’s action. We conclude that although the challenged portion of the sentencing order was improper, there is no reason to reverse and remand for resentencing.

We affirm the decision of the district court.

AFFIRMED.