STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

        Plaintiff-Appellee,

v

LARRY CHARLES DINGER,

        Defendant-Appellant.

No. 192278
Barry Circuit Court
LC No. 93-000033-FC

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded guilty to breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, and was sentenced to six to fifteen years' imprisonment and ordered to pay $5,500 in restitution. He appeals as of right. We remand. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant was originally charged with safe breaking, MCL 750.531; MSA 28.799, breaking and entering, and habitual offender, third offense, MCL 769.11; MSA 28.1083. The plea agreement included, among other things, a dismissal of the safe breaking and habitual offender charges and a stipulation that the trial court would calculate the guidelines for the offense and could use that calculation in sentencing defendant. Because the guidelines do not apply to safe breaking, the court calculated the guidelines for robbery. The recommended range was two to six years, but the sentencing court sentenced defendant to ten to fifteen years' imprisonment.

This Court denied defendant's application for leave to appeal, *People v Dinger*, unpublished order of the Court of Appeals, entered 10/21/94 (Docket No. 173998), but the Supreme Court remanded the matter for resentencing. *People v Dinger*, unpublished order of the Supreme Court,

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*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.
**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

entered 11/7/95 (Docket No. 101508). The Supreme Court concluded that the sentencing court erred in departing from the guidelines in light of the plea agreement and also ordered that defendant be given the opportunity to withdraw his plea because guidelines for safe breaking do not exist. The sentencing court, by a different judge, again applied the guidelines' recommendation for robbery and sentenced defendant within the two- to six-year recommended range. This appeal followed.

A sentencing agreement is "reviewed in the context of its function to serve the administration of justice." *People v Swirles (After Remand)*, 218 Mich App 133; 553 NW2d 357 (1996). Where contract principles would achieve the goal of serving the administration of justice, they may be applied to plea agreements. *Id.* As in cases involving the interpretation of contracts, the intent of the parties to a plea agreement must be ascertained. *Id.* To be a valid contract, there must be a meeting of the minds, that is, mutual assent as to all the material facts. *Id*.

Here, there was a mutual mistake as to a material fact regarding the existence of the sentencing guidelines for the offense of safe breaking. Thus, the sentence agreement was not valid and can not be enforced as entered into. Moreover, this Court has noted that safe breaking is not like robbery, which is an assaultive offense. *People v Douglas (On Remand)*, 191 Mich App 660, 662-665; 478 NW2d 737 (1991). It was therefore inappropriate for the trial court to have applied the guidelines for robbery in lieu of those for safe breaking in the instant case.

Because the sentence agreement is invalid, we remand to the trial court to give both defendant *and* the prosecutor the opportunity to withdraw from the plea agreement and proceed to trial on the originally charged offenses. See MCR 6.312; *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995). If defendant and the prosecutor choose not to withdraw from the plea agreement, the trial court should calculate the guidelines for breaking and entering and resentence defendant based on that calculation.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Daniel F. Walsh
/s/ Robert P. Griffin
/s/ Walter P. Cynar