STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 286092 Wayne Circuit Court
CHARLES TERRELL JONES, Defendant-Appellant.	LC No. 03-013861-FC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

In 2004, defendant was convicted of two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 10 to 15 years for each robbery conviction and 12 to 20 years for the home invasion conviction, to be served consecutively to a two-year prison term for the felony-firearm conviction. In a prior appeal, this Court affirmed defendant's convictions, but remanded for resentencing with regard to the home invasion conviction. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2005 (Docket No. 256613). On remand, the trial court again sentenced defendant to a term of 12 to 20 years' imprisonment for the home invasion conviction. Defendant appeals that sentence by delayed leave granted. We vacate defendant's sentence for home invasion and remand for resentencing before a different judge. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Initially, we reject defendant's argument that resentencing is required because the trial court considered facts not found by a jury to determine his sentence contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment the State of Washington's determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is determined by the fact-finder's verdict and the statute violated; the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

We also reject defendant's argument that the trial court was required to score and consider the sentencing guidelines for the home invasion conviction. In defendant's prior

appeal, this Court held that because the trial court scored the guidelines for armed robbery, the sentencing offense in the highest crime class, it "did not err when it failed to calculate a sentencing guidelines range for defendant's first-degree home invasion conviction." *Jones*, unpub op at 2-3. This Court's holding on this point is the law of the case. "Under the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

Nonetheless, we agree with defendant that the trial court's reasons for imposing a 12-year minimum sentence for home invasion, which was two years longer than the sentences it imposed for the higher class armed robbery convictions, were legally and factually flawed.

The trial court stated that it did not like home invasions because anything can happen on the street but one ought to be safe in his home. Thus, the court "imposed the greater sentence on the home invasion because [it] has a great sustain [sic] for home invasion." The principle of proportionality requires that a sentence imposed by a trial court be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). The principle of proportionality that guides judicial sentencing discretion is based on the recognition that the Legislature has "clearly expressed its value judgments concerning the relative seriousness and severity of individual criminal offenses" by "establishing differing sentence ranges for different offenses across the spectrum of criminal behavior." *Id*. In the statutory sentencing guidelines, the Legislature's intention to differentiate criminal behavior based on its judgment of the seriousness of an offense is manifested in the creation of different classes of crimes. The trial court's personal evaluation of the seriousness of home invasions in general should not take precedence over the Legislature's judgment. See *id*. at 645, 652-653 n 19, citing *People v Coles*, 417 Mich 523, 546, 339 NW2d 440 (1983). In formulating an appropriate and proportionate sentence for a given offense, the trial court must consider "the seriousness of the circumstances surrounding the offense and the offender," *Milbourn*, 435 Mich at 635, but its personal abhorrence of a given crime in general is not an appropriate consideration for determining an appropriate sentence for a particular offender.

Although the trial judge did examine the facts of this particular case, it misstated them in some respects. The court stated:

> In addition, I recalled in this case you followed this individual home and then you forced your way into her home. And when you got there she had a disabled brother that she was caring for who was in the home, and you went through the entire house and terrorized the disabled brother. I believe there was another child in the home at the same time. So this Court finds that the home invasion was quite repugnant, quite frankly. That it was—resulted not only in the taking of the personal property, but in the terrorizing of children and a disabled child to boot.

There was no evidence that defendant "terrorized the disabled brother." At trial, Javonna Croom testified that her brother was lying in the dark on the living room floor, when defendant entered the house. He appeared to be sleeping, but apparently he heard her come in. She told him, "Don't say nothing, don't move." At defendant's original sentencing proceeding, Croom described how the incident affected her, but did not mention that it affected her disabled brother.

The court also inaccurately referred to Croom's brother as a "disabled child." Croom's brother was 32 years old at the time of defendant's preliminary examination. The trial court was correct in stating that there was another child in the home, but the evidence at trial indicated that the child left the area after defendant entered the house, and the facts do not support the trial court's statement that defendant engaged in conduct that involved the "terrorizing" of that child. The trial court also inaccurately stated that defendant "went through the entire house." The evidence indicated that he went into the living room and then upstairs to Croom's bedroom before leaving the house.

In sum, because the trial court's reasons for imposing the 12-year minimum sentence are both legally and factually flawed, we vacate defendant's sentence and remand for resentencing.[1] See *People v Havens*, 268 Mich App 15, 18-19; 706 NW2d 210 (2005).

Defendant also requests that a different judge resentence him. In deciding whether resentencing should take place before a different judge, we consider the following factors:

> (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (citations and quotation marks omitted).]

The sentencing judge's statements explaining her decision to impose a higher sentence for home invasion than the sentences she imposed for the higher class armed robbery convictions, her personal dislike and disdain for home invasions generally, and her statement that she thought defendant's 12-year minimum sentence was a "gift," suggest that she would have difficulty putting aside her previously expressed beliefs. Although, reassignment will entail some duplication of judicial time, it is apparent that the trial court's understanding of the facts from the 2004 trial were flawed when defendant was resentenced in 2007. So, even if the same judge were to resentence defendant, she would still need to reacquaint herself with the record. We also note that there was inordinate delay after this Court remanded the case for resentencing before the resentencing occurred. Although the Supreme Court denied leave to appeal on April 28, 2006, defendant's resentencing was not held until more than a year later, in June 2007. Appointment of appellate counsel caused further delay. In light of this history, resentencing by a different judge would further the appearance of justice. The balance of these considerations weighs in favor of granting defendant's request that a different judge resentence him. Accordingly, on remand, the case shall be reassigned to a different judge for resentencing.

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[1] We note that in *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005), this Court questioned, but did not directly decide, whether a sentence for a conviction of a lesser class felony that is not scored under the guidelines could permissibly exceed the sentence imposed for a higher crime class felony and remain proportional. Because we are remanding for resentencing, we likewise do not decide that question in this case.

We remand with instructions that a different judge resentence defendant for first-degree home invasion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher