STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARRETT STEVEN LANGOWSKI,

Defendant-Appellant.

UNPUBLISHED
March 7, 1997

No. 188390
Crawford Circuit
LC No. 94-001290

Before: Cavanagh, P.J., and Gage and D.A. Burress,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of home invasion in the second degree, MCL 750.110a; MSA 28.305(a), and was sentenced to eight to fifteen years' imprisonment. The trial court denied his motion for resentencing. Defendant now appeals his sentence as of right. We affirm.

In sentencing defendant, the trial court noted that there were no applicable guidelines for the offense of home invasion in the second degree. Defendant argues that the trial court erred in refusing to score and utilize the sentencing guidelines' minimum range for breaking and entering an occupied dwelling because, he contends, the elements and statutory maximum punishments of the two offenses are identical. We disagree.

The crimes of home invasion in the first and second degree were codified by the enactment of 1994 PA 270, which amended MCL 750.110; MSA 28.305, removing from its ambit instances of breaking and entering a dwelling, and created MCL 750.110a; MSA 28.305(a). The new home invasion statute provides in pertinent part:

> (2) A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the first

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* Circuit judge, sitting on the Court of Appeals by assignment.

degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exist:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

(3) A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the second degree.

(4) Home invasion in the first degree is a felony punishable by imprisonment for not more than 20 years or a fine of not more than $5,000.00, or both.

(5) Home invasion in the second degree is a felony punishable by imprisonment for not more than 15 years or a fine of not more than $3,000.00, or both.

(6) The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

(7) Imposition of a penalty under this section does not bar imposition of a penalty under any other applicable law.

When imposing a sentence, trial courts are required to use the applicable sentencing guidelines for offenses included in the guidelines. MCR 6.425(D)(1). However, as this Court noted in *People v Edgett*, ___ Mich App ___; ___ NW2d ___ (Docket No. 180885, issued 12/27/96), "the sentencing guidelines do not apply to a surprisingly large number of circumstances," including "any offenses created by the Legislature since October of 1988 onward (when the revised second edition of the guidelines' manual became effective)." *Id.* Home invasion is among the offenses we specifically cited in *Edgett*. *Id.*

Defendant contends that the intent of the Legislature in creating a commission to promulgate new guidelines and the intent of our Supreme Court in ordering that the guidelines be used by trial courts will be frustrated if breaking and entering is removed from the guidelines only because the Legislature changed the name of the felony. However, the Legislature did not simply change the name of the felony. The amended statute and the new statute together create three separate offenses -- breaking and entering, first-degree home invasion, and second-degree home invasion.

The preamendment version of the breaking and entering statute drew a distinction between occupied and unoccupied dwellings. The sentencing guidelines also distinguished between these offenses for imposing minimum sentences. Michigan Sentencing Guidelines (2d ed), p 12. Under the new home invasion statute, the Legislature discontinued this distinction. Instead, they distinguished those

circumstances in which an offender was either armed with a dangerous weapon or another person was lawfully within the dwelling as the more egregious offense of home invasion in the first degree. MCL 750.110a(2); MSA 28.305(a)(2). Home invasion in the second degree encompasses home invasion offenses in which neither of these conditions are present. MCL 750.110a(3); MSA 28.305(a)(3). Moreover, the Legislature provided additional discretionary penalties for the home invasion offenses. MCL 750.110a(4), (5), and (6); MSA 28.305(a)(4), (5), and (6).

Because of these changes in offense elements and the maximum statutory penalties, we conclude that the Legislature has not simply renamed a felony, as defendant argues, but rather has created new offenses. The trial court therefore did not err in refusing to utilize the sentencing guidelines for breaking and entering an occupied dwelling because the new home invasion offenses are not included within the guidelines. *People v Spicer*, 216 Mich App 270, 274; 548 NW2d 245 (1996); *People v Hill*, ___ Mich App ___; ___ NW2d ___ (Docket No. 186869, issued 2/7/97).

Defendant next argues that his sentence was disproportionate. Our review of sentencing is limited to determining whether the trial court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality articulated in *People v Milbourne*, 435 Mich 630; 461 NW2d 1 (1990). When sentencing a defendant, the court may consider the facts underlying uncharged offenses, pending charges, and acquittals. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Defendant was seventeen years old when he committed the instant offense, in which he and a companion kicked down the door of a home and stole a semi-automatic pistol, approximately 125 rounds of ammunition, and some cash. According to his presentence report, defendant used the stolen weapon in a subsequent assault. He already had a lengthy juvenile record, which included other burglaries and a weapons offense, and a history of drug abuse. At the time of sentencing, defendant faced approximately fifteen pending charges of armed robbery, breaking and entering, felonious assault, and carrying a concealed weapon. In addition, defendant had other charged counts that had been dismissed without prejudice. In sentencing defendant, the court indicated that it imposed the sentence after due consideration of the presentence report, "particularly the lengthy and extensive accomplished record of the defendant and those matters yet pending." The court further noted that the sentence was "reflective of the seriousness of the offense, where a gun was taken, but is not the maximum that the law would allow."

Home invasion in the second degree carries a maximum penalty of fifteen years. Under the two-thirds rule articulated in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), the trial court could have sentenced defendant to a ten- to fifteen-year sentence. Because of the seriousness of the offense, which included the theft of a gun subsequently used in a separate offense, and defendant's already extensive criminal history, we find that the sentencing court did not abuse its discretion in sentencing defendant. His eight- to fifteen-year sentence was proportionate to the offense and to this offender. *Milbourne, supra* at 651.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Daniel A. Burress