

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD R. LINZELL,

Defendant-Appellant.

UNPUBLISHED
September 6, 2002

No. 237942
Wayne Circuit Court
LC No. 00-004252

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals by leave granted the sentence for his plea-based conviction of second-degree home invasion, MCL 750.110a(3). The trial court originally sentenced defendant to a term of 6 to 15 years' imprisonment. Defendant appealed that sentence, and this Court, in lieu of granting leave to appeal, vacated defendant's sentence and remanded for resentencing.¹ At resentencing, the trial court reimposed the original sentence, sentencing defendant to a term of 6 to 15 years' imprisonment. We affirm.

Defendant's sole issue on appeal is that his minimum sentence violates the principle of proportionality. Because the instant offense occurred on March 19, 2000, defendant's sentence is governed by the legislative sentencing guidelines. MCL 769.34. The sentencing guidelines called for a minimum sentence of 12 to 24 months. On remand, the trial court sentenced defendant to a term of 6 to 15 years, which equates to a term of 72 to 180 months.

A sentencing court can depart from the recommended sentence only when it has "substantial and compelling" reasons for departure and states on the record the reasons for departure. MCL 769.34(3). The factors meriting departure must be objective and verifiable. *People v Babcock (Babcock I)*, 244 Mich App 64, 75; 624 NW2d 479 (2000). When reviewing a departure from the applicable guidelines range, the existence of a particular factor is a factual issue reviewed for clear error; the determination that a factor is objective and verifiable is reviewed as a matter of law; and the determination that the factors constituted substantial and

¹ *People v Linzell*, unpublished order of the Court of Appeals, entered January 25, 2001 (Docket No. 231359).

compelling reasons for departure is reviewed for abuse of discretion. *Babcock I*, *supra* at 75-76, quoting *People v Fields*, 448 Mich 58, 77-78l 528 NW2d 176 (1995).

The court cannot base a departure on an offense or offender characteristic already accounted for in the guidelines, unless the court finds from the facts in the record that the guidelines have given the characteristic inadequate or disproportionate weight. MCL 769.34(3)(b). Reasons to justify departure from the guidelines should irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Babcock I*, *supra* at 75.

On remand, the trial court considered the following factors for reimposing its original sentence: (1) the victim lost \$6,300 that had not been recovered; (2) the recommended sentencing guidelines range did not reflect the gravity of the crime – defendant violated the security of a citizen's home; (3) defendant's extensive criminal record; (4) the recommended sentence did not protect the public or deter crime; and (5) the victim's home had been broken into twice before in the same manner, which defendant did not dispute in the presentence investigation report.

The trial court appropriately considered the gravity of the crime committed against the victim when sentencing defendant. The trial court properly found on the record that in this case, the guidelines give inadequate weight to this factor. Further, the trial court did not err in finding that under the circumstances of this case, the need to protect the public, and other citizens like the victim, is a factor not adequately considered by the guidelines. See *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001), citing *People v Miller*, 165 Mich App 32, 51; 418 NW2d 668 (1987). The victim found his home ransacked and defendant still in the home. The trial court properly considered these factors in departing from the guidelines and sufficiently stated his reasons for the departure.

Moreover, at defendant's original sentencing, the victim testified that defendant had previously broken into his home. Defendant did not challenge this accusation. The presentence investigation report stated that the victim's home had been broken into on a previous occasion in the same manner as the instant case. Defendant agreed with the information in the report and did not challenge the information at sentencing or request an evidentiary hearing. A sentencing court is entitled to rely on the information in the presentence report, which is presumed accurate unless the defendant challenges the accuracy of the factual information. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Further, the court can consider facts not initially admissible in determining defendant's guilt, such as uncharged offenses. See *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley, J.), 473 (Boyle, J.); 458 NW2d 880 (1990). In this case, the extent to which the court relied on the alleged previous break-in as a factor in defendant's sentence is unclear. However, there is no evidence the court improperly relied on this information or improperly found defendant guilty of the uncharged crime. Under the circumstances, we conclude the trial court did not abuse its discretion in departing from the guidelines.

Finally, defendant argues the imposed sentence violates the principle of proportionality. As explained in *People v Babcock (After Remand) (Babcock II)*, 250 Mich 463, 468-469; ___ NW2d ___ (2002), there can be varying degrees of substantial and compelling circumstances that must be considered in reviewing the *extent* of a departure. "In other words, if there are

substantial and compelling reasons to slightly depart from the guidelines, e.g., a six-month departure, those same reasons may not be sufficient to support a more significant departure, e.g., a three-year departure.” *Id.* at 468. When reviewing the extent of a trial court’s departure from the legislative guidelines, the principle of proportionality can be considered. *Id.* at 468-469. Here, defendant argued only that the imposed sentence was disproportionate and failed to adequately explain how the extent of the trial court’s departure from the legislative sentencing guidelines was disproportionate to either him or the offense; therefore, this Court is not required to address this issue. However, given the nature of the crime and the circumstances of defendant’s case, we conclude that the extent of the trial court’s departure was proportionate.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder