

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD R. LINZELL,

Defendant-Appellant.

UNPUBLISHED

January 13, 2004

No. 237942

Wayne Circuit Court

LC No. 00-004252

ON REMAND

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

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court.¹ In our previous opinion, we affirmed defendant's sentence of 6 to 15 years' imprisonment for his conviction of second-degree home invasion, MCL 750.110a(3).² The Supreme Court, in lieu of granting leave to appeal, remanded this matter to us for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Upon reconsideration, we affirm.

Because defendant's offense occurred after January 1, 1999, the statutory sentencing guidelines apply. MCL 769.34(2). In *Babcock, supra*, our Supreme Court reiterated that the trial court must choose a sentence that is within the recommended range unless there is a substantial and compelling reason to depart from that range. The majority of the Court agreed that the phrase "substantial and compelling reason" means an objective and verifiable reason that "keenly" or "irresistibly" grabs our attention, is "of considerable worth" in deciding the length of the sentence, and exists only in exceptional circumstances. *Id.* at 256-257. Further with regard to proportionality, the Court stated that in considering whether to depart from the guidelines, the trial court must determine whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate sentence than is available within the guidelines range. *Id.* at 264. "In other words, if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the

¹ *People v Linzell*, order of the Supreme Court, entered September 30, 2003 (Docket No. 122394).

² *People v Linzell*, unpublished opinion per curiam of the Court of Appeals, issued September 6, 2002 (Docket No. 237942).

seriousness of the defendant's conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines." *Id.*

With respect to this Court's standard of review, our Supreme Court agreed that the existence or nonexistence of a particular factor is a factual determination that is reviewed for clear error, the determination that a particular factor is objective and verifiable is reviewed as a matter of law, and the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the minimum sentence is reviewed for abuse of discretion. *Babcock, supra* at 264-265 (citations omitted). The Court found that the following "abuse of discretion" standard applies to sentencing decisions:

The Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference that is due is an acknowledgement of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender. The Court of Appeals is to conduct the thorough review required by ML 769.34(11), honoring the prohibition against departures not grounded in a substantial and compelling reason. MCL 769.34(3). In doing so, however, the Court must proceed with a caution grounded in the inherent limitations of the appellate perspective. [*Babcock, supra* at 270.]

In other words, "an abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principles range of outcomes." *Id.* at 274. A majority of the Court further determined that where the trial court articulates multiple reasons for its departure, some of which are substantial and compelling and some not, and this Court is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, this Court must remand to the trial court for resentencing or rearticulation. *Id.* at 270-271.

On that basis, we turn to defendant's sentence. As noted in our previous opinion, the sentencing court considered several factors for imposing defendant's sentence:³ (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. We previously determined that the trial court properly found on the record that the guidelines gave inadequate weight to the gravity of the crime committed against the victim – the victim found his home

³ We note that defendant was actually sentenced on two different occasions to the same sentence in this matter. After the initial sentencing, defendant appealed his sentence to this Court and, in lieu of granting appeal, this Court remanded for resentencing. See *People v Linzell*, order of the Court of Appeals, entered January 25, 2001 (Docket No. 231359). On remand, the trial court resentenced defendant to the same sentence and articulated its reasons for doing so.

ransacked and defendant still in the home. We also determined that under the circumstances of this case, the trial court properly found that the need to protect the public and other citizens like the victim was a factor not adequately considered by the guidelines. Finally, we found that the trial court properly considered the fact that the victim's house was previously broken into in the exact same manner as the instant break-in and the victim testified that it was defendant who had previously broken into his home. Applying the framework in *Babcock, supra*, we again reach the same conclusions.

The remaining factors relied on by the trial court include the amount the victim lost and defendant's extensive criminal record. The sentencing guidelines considered the victim's property loss. MCL 777.45. However, the guidelines do not account for the sentimental value of the property; therefore, the court could properly take into account the fact that the victim lost several thousand dollars that he was saving for his grandson's college to justify a departure. The sentencing guidelines also considered defendant's prior felony and misdemeanor convictions. MCL 777.52; MCL 777.55. With regard to this factor however, the trial court noted that with defendant's criminal history, the recommended guidelines would not deter him from committing another crime. In fact, the record indicates that defendant was on probation numerous times for other offenses and violated that probation several times. Thus, the trial court properly found that the recommended guidelines gave inadequate weight to defendant's criminal history. Under the circumstances, recognizing that the trial court was in a better position to make these determinations, *Babcock, supra* at 268, we will not substitute our judgment for that of the trial court. Moreover, we are convinced that the sentence imposed by the trial court was proportionate and did not fall outside the principled range of potential outcomes in this case. *Id.* at 262-264, 269.

Affirmed.

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