STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 12, 2017
v	No. 334877 Wayne Circuit Court
JOANNE THERESA ALICE-KNIGHT, Defendant-Appellant.	LC No. 13-010633-01-FH

Before: JANSEN, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3), and larceny in a building, MCL 750.360. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent sentences of 57 months to 30 years' imprisonment for the second-degree home invasion conviction and one to eight years' imprisonment for the larceny in a building conviction. We affirmed defendant's convictions and sentence. *People v Alice-Knight*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2015 (Docket No. 320835), rev'd in part 499 Mich 912 (2016). The Michigan Supreme Court then remanded to the trial court "to determine whether the court would have imposed a materially different sentence under the sentencing procedure described" in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).[1] The successor judge that presided over defendant's case on remand ruled that it would not have imposed a materially different sentence in light of *Lockridge* and reaffirmed the original sentence. Defendant appeals by right. We affirm.

A trial court's ruling on a motion for resentencing is reviewed for an abuse of discretion. See *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). We review de novo questions of law. *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

[1] *People v Alice-Knight*, 499 Mich 912 (2016).

In *Lockridge*, the Supreme Court held that Michigan's sentencing guidelines violated a criminal defendant's Sixth Amendment right to a jury trial "to the extent that [offense variables (OVs)] scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's 'mandatory minimum' sentence . . . ." *Lockridge*, 498 Mich at 373-374. The Court remedied the constitutional infirmity by making the sentencing guidelines advisory only and striking the statutory requirement that a sentencing court must give a substantial and compelling reason for departing from the guidelines range. *Id*. at 364-365. As for defendants previously sentenced under the unconstitutional scheme, in "cases in which facts admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced[,]…an unconstitutional constraint actually impaired the defendant's Sixth Amendment right." *Id*. at 395 (emphasis in original). In those cases, if the defendant's sentence was not subject to an upward departure, "the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error." *Id*. at 397. "If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Id*. That procedure is known as a "*Crosby*[2] remand." *Id*. at 398.

Defendant first contends that the successor judge that presided over the *Crosby* remand could not have possibly known if the original sentencing judge would have imposed a significantly different sentence. We disagree.

Under MCR 2.613(B), a successor judge has the authority to vacate orders entered by the predecessor judge. See *People v Herbert*, 444 Mich 466, 471-472; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). Hence, the successor judge had authority to set aside defendant's judgment of sentence and order resentencing. To make that determination, the successor judge had to consider whether a materially different sentence would have been imposed had the trial court been aware that the sentencing guidelines were advisory and departure sentences could be ordered without a substantial and compelling reason. Of course, the successor judge could not know if the sentencing judge would have imposed a materially different sentence under those circumstances. But we do not read the judge's ruling as speculation on that matter. Rather, the successor judge appears to have been explaining that *she* would not have imposed a materially different sentence. Indeed, the judge made her position clear when she stated that "[t]he sentence is reasonable and this Court would not resentence to a different term." As the successor judge, she had the authority to make that determination. MCR 2.613(B); *Herbert*, 444 Mich at 471-472.

Defendant also argues that the trial court misunderstood the "constitutional error" that it was supposed to consider during a *Crosby* remand. We disagree.

---

[2] *United States v Crosby*, 397 US F 3d 103 (CA 2, 2005).

The trial court ruled that it would not have imposed a materially different sentence "had it known that it had greater discretion to depart from the guidelines." Defendant argues that the "constitutional error" is "being sentenced based on guidelines inflated by judicial fact-finding" and it does not involve "what authority the trial court had to depart from the guidelines." But *Lockridge* specifically instructed that a trial court faced with a *Crosby* remand should consider "whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion." 498 Mich at 399. By acknowledging that it had greater discretion to depart from the guidelines, the trial court correctly analyzed the controlling issue on a *Crosby* remand.

Next, defendant argues that the proper remedy for the Sixth Amendment violation identified in *Lockridge* is to preclude the scoring of OVs with judge-found facts. We disagree.

In *People v Steanhouse*, 500 Mich 453, 466-467; 902 NW2d 327 (2017), the Supreme Court "reaffirm[ed] *Lockridge's* remedial holding rendering the guidelines advisory in all applications," even in "cases in which no judicial fact-finding occurs that increases the applicable guidelines range . . . ." Thus, the Court did not adopt the remedy proposed by defendant. Instead, courts must continue to assess the higher number of points possible for OVs, "whether using judge-found facts or not." *Lockridge*, 498 Mich at 392 n 28.

Finally, defendant argues that she is entitled to resentencing because her sentence was unreasonable. We disagree.

Defendant's minimum sentence was within the sentencing guidelines range. In *People v Schrauben*, 314 Mich App 181; 866 NW2d 173 (2016), we ruled that

> *Lockridge* did not alter or diminish MCL 769.34(10), which provides, in pertinent part, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." [*Id*. at 182 n 1.]

Defendant argues that *Schrauben* was wrongly decided but fails to identify any language in *Lockridge* that would indicate an intention to modify MCL 769.34(10).[3] Accordingly, a conflict opinion is unwarranted. See MCR 7.215(J)(2). Defendant also argues that the trial court relied on inaccurate information in sentencing her, but we previously rejected that argument. *Alice-Knight*, unpub op at 6. Therefore, consideration of that argument is barred by the law of the case doctrine. See *New Props, Inc v George D Newpower Jr, Inc*, 282 Mich App 120, 132; 762

[3] In *Steanhouse*, the Supreme Court declined to address "whether MCL 769.34(10)…survives *Lockridge*." *Steanhouse*, 500 Mich at 471 n 14.

NW2d 178 (2009). Because the trial court did not rely on inaccurate information or commit a scoring error, we must affirm defendant's non-departure sentence. *Schrauben*, 314 Mich App at 182; MCL 769.34(10).

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron