

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE DRAIN,

Defendant-Appellant.

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UNPUBLISHED

July 18, 2006

No. 261417

Saginaw Circuit Court

LC No. 99-017293-FC

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

This case is before us after remand to the trial court for resentencing. Defendant appeals by right his sentence of 129 months to 40 years in prison for safe breaking, MCL 750.531. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Following a jury trial, defendant was convicted of safe breaking and second-degree home invasion, MCL 750.110a(3). On November 8, 1999, defendant was sentenced as a habitual offender, third offense, MCL 769.11, to concurrent terms of 20 to 40 years in prison for safe breaking conviction and 10 to 30 years for home invasion. Defendant's sentence for safe breaking exceeded the sentencing guidelines range of 43 to 129 months. We affirmed defendant's convictions and sentences, but the Michigan Supreme Court vacated that decision and remanded for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).<sup>1</sup> On remand, we again affirmed defendant's sentences, stating that we had considered *Babcock*, *supra*. The Supreme Court again remanded with instructions to "provide a more thorough analysis and conclusion pursuant to the guidelines set forth in *Babcock*." *People v Drain (After Remand)*, 471 Mich 934; 689 NW2d 225 (2004). We subsequently held that the trial court failed to articulate substantial and compelling reasons for its sentence departure, and remanded the case to the trial court for resentencing or rearticulation of the court's reasons for departure. On March 3, 2005, defendant was sentenced to 129 months to 40 years in prison for safe breaking, with credit for 2,166 days served. His concurrent sentence of ten to 30 years for the home invasion conviction remained unchanged.

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<sup>1</sup> *People v Drain*, 469 Mich 916; 673 NW2d 103 (2003).

Defendant acknowledges that his safe breaking sentence now falls within the guidelines. He argues, however, that the trial court's decision to sentence him to the maximum sentence under the guidelines constitutes an abuse of discretion because the sentence is not proportionate. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree.

MCL 769.34(10) provides that if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm that sentence, "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Defendant concedes that his sentences are within the sentencing guidelines range. He raises no challenge to the guidelines scoring on appeal. Therefore, his sentence is not reviewable for proportionality. MCL 769.34(10); *People v Garza*, 469 Mich 431, 432; 670 NW2d 662 (2003); *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).

Defendant also appears to argue that the trial court's sentencing decision was the result of bias. This argument is not properly before us. In his statement of the question presented, defendant raises the issue of the proportionality of his sentence, but he does not raise any issue with the respect to judicial bias. Where a defendant fails to raise an issue in the statement of questions presented, review is inappropriate. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Furthermore, defendant's argument is without merit. The trial court based its initial sentencing decision, and then its resentencing decision, on defendant's criminal history, his pattern of continuing criminal history, and the impact defendant's actions had on his victims. While these considerations did not justify a sentence outside the guidelines, the use of these factors does not show judicial bias or vindictiveness so as to warrant the trial court's disqualification. *People v Wells*, 238 Mich App 383, 391-392; 605 NW2d 374 (1999).

Affirmed.

/s/ Janet T. Neff  
/s/ Richard A. Bandstra  
/s/ Brian K. Zahra