

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE DRAIN,

Defendant-Appellant.

UNPUBLISHED

January 20, 2004

No. 224539

Macomb Circuit Court

LC No. 233196

ON REMAND

Before: Fitzgerald, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

On October 3, 2003, the Michigan Supreme Court issued an order vacating this Court's opinion dated February 1, 2002, and remanding for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).¹ Although the broad language of the remand order suggests that this Court's opinion is vacated in its entirety, the Supreme Court could not have intended such a result given the limited purpose of the remand. Therefore, we address only the sentencing issue affected by *Babcock*, and our prior opinion shall otherwise stand as written.

Defendant was convicted of safe breaking, MCL 750.531(B), and first-degree home invasion, MCL 750.110a(2). He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of twenty to forty years for the safe-breaking conviction and ten to thirty years for the home invasion conviction.

The trial court departed from the sentencing guidelines of forty-three to 129 months for the safe breaking conviction. Defendant sought resentencing on appeal, arguing that the departure constituted an abuse of discretion. We disagreed, relying on *People v Babcock*, 244 Mich App 64; 624 NW2d 479 (2000) (*Babcock I*) and *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995). Following the remand ordered in *Babcock I*, this Court issued an opinion in *People v Babcock*, 250 Mich App 463; 648 NW2d 221 (2002) (*Babcock II*). Leave to appeal was granted by our Supreme Court in *Babcock II*, resulting in *Babcock III*, which now provides the framework by which we must review the guideline departure in this case.

¹ *People v Drain*, Order of the Michigan Supreme Court (Docket No. 121445, issued October 3, 2003).

In our previous opinion, we concluded that, “The factors identified by the trial court are objective and verifiable and therefore appropriate. . . . We find no abuse of discretion in the trial court’s findings that these factors were not adequately considered in the scoring of the guidelines and constitute substantial and compelling reasons to depart from the statutory minimum sentence.” Applying the relevant portions of the framework laid out in *Babcock III*, *supra* at 272-274, we again reach the same conclusion.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Kirsten Frank Kelly