

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMMY ALLEN ROSENBERG,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262673

Barry Circuit Court

LC No. 02-100200-FH

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

On remand, defendant was sentenced as a fourth habitual offender, MCL 769.12, to 92 to 240 months’ imprisonment for delivery of a controlled substance less than 50 grams, MCL 333.7401(2)(a)(iv). Defendant appeals by right. We affirm in part and vacate in part.

After a jury convicted defendant, the trial court, relying on defendant’s 31 prior misdemeanor convictions, his two acquittals and a pending charge for criminal sexual conduct, and the threat his continuous criminal behavior posed to the community, sentenced defendant to 180 to 360 months’ imprisonment. Defendant’s sentence was a departure of more than double the recommended minimum sentence range under the legislative guidelines. On appeal, a panel of this Court affirmed defendant’s conviction but vacated his sentence of 180 to 360 months’ imprisonment and remanded for resentencing. *People v Rosenberg*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2005 (Docket No. 251930). In addition to finding that the trial court incorrectly scored two offense variables, the panel concluded that while the factors the trial court relied on to depart from the minimum recommended sentence range were objective and verifiable, the factors did not justify the extent of the trial court’s departure from the minimum sentence range. *Id.* On remand, the trial court sentenced defendant to 92 to 240 months’ imprisonment, a departure double the recommended minimum sentence range of 10 to 46 months under the recalculated legislative guidelines.

Defendant first claims that his sentence was disproportionate to the seriousness of his conduct and his criminal record. Defendant asserts that because he delivered less than five percent of the amount punishable by MCL 333.7401(2)(a)(iv), and because he already faced a significant guidelines augmentation due to his status as an habitual offender, a more proportionate sentence would have fallen within or just over the maximum of the recommended minimum sentence range. We review a departure from the recommended sentence range under the legislative guidelines to determine if the sentence imposed is proportionate to the seriousness

of the crime and the defendant's criminal history. *People v Babcock*, 469 Mich 247, 262, 264; 666 NW2d 231 (2003). A trial court abuses its discretion when it imposes a sentence that falls outside the principled range of outcomes. *Id.* at 269.

The principle of proportionality requires that the sentence the trial court imposes be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). For almost 20 years, from 1983 until his arrest in 2002, defendant continuously engaged in assaultive, violent, intimidating, and destructive behavior. He was convicted of 31 misdemeanors, and he was charged three times with criminal sexual conduct. In addition, there was evidence in the record of at least thirteen other instances where defendant engaged in criminal behavior. Defendant's behavior during those 20 years indicates that he harbored no respect for the law or any willingness to follow the law. The trial court recognized that defendant's unwillingness to alter his behavior reflected on his ability to be rehabilitated and that he posed an ongoing danger to his community. Even though the sentence the trial court imposed was double the recommended maximum/minimum under the legislative guidelines, it was proportionate to the seriousness of the offense and offender and was within the principled range of outcomes. *Babcock, supra* at 269. Thus, the trial court did not abuse its discretion.

Defendant next claims on appeal that the \$25,000 fine imposed by the trial court was excessive and violated the principle of proportionality. Specifically, defendant asserts that the fine was excessive and disproportionate because he was fined the maximum amount allowed by MCL 333.7401(2)(a)(iv) for delivering one of the least amounts necessary to violate the statute. Defendant did not appeal the amount of this fine in his prior appeal and reconsideration of the amount of the fine was outside the scope of remand. Thus, defendant has waived this issue. *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). Accordingly, there is no error for us to review. If we were to reach the issue we would find no error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). We affirm the \$25,000 fine.

Defendant also claims that the trial court erred in ordering him to pay \$500 in court costs. Defendant failed to object to the imposition of court costs. Appellee agrees. Accordingly, we vacate the trial court's order requiring defendant to pay \$500 in court costs.

Defendant finally claims on appeal that, pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), Michigan's sentencing scheme violates his Sixth Amendment right to have a jury make factual findings. Our Supreme Court has definitively ruled to the contrary, holding that *Blakely* does not affect Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

We affirm in part and vacate in part.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jane E. Markey