

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 163957

LC Nos. 92-060226-FHA

92-060288-FHA

RICHARD JOHN KIESSEL,

Defendant-Appellant.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

No. 165420

LC Nos. 92-060226-FHB

92-060288-FHB

v

TODD WILLIAM KIESSEL,

Defendant-Appellant.

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Before: Saad, P.J., and Marilyn Kelly and M. J. Matuzak,\* JJ.

SAAD, P.J. (concurring and dissenting)

I concur in remanding for resentencing of Richard Kiessel, and dissent from the remand for resentencing of Todd Kiessel.

I agree with the majority's reasoning and holding that the sentencing court erred in relying upon his own estimation of the age at which Richard Kiessel would "outgrow" the urge to be involved in criminal conduct. On this basis, I therefore concur in remanding his case for resentencing.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

However, I disagree with the majority's treatment of the sentencing guidelines issue, which both defendants raise. The transcripts indicate that the sentencing judge was well aware that there were no sentencing guidelines for the offense of safe braking, according to *People v Douglas*, 191 Mich App 660, 665; 478 NW2d 737 (1991). However, the lower court nonetheless used the armed robbery guidelines *by analogy* to score both defendants, in order to have an initial point of reference. Indeed, Richard's counsel urged the court to "take a look at the lower end of the [armed robbery] guidelines."

*Douglas'* statement that, if safe breaking were to be included in the sentencing guidelines, it would be most appropriately included as part of the burglary crime list (rather than the robbery crime list), is dicta. *Douglas*, 191 Mich App at 665; 478 NW2d 737. It was not improper for the trial judge to consider the armed robbery guidelines as a starting point in fashioning appropriate sentences in this case, where the court unambiguously indicated that it was doing so *by analogy*.

Todd also urges that his sentence of four to twenty years was disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). I would find the sentence proportionate to the offense and the offender. Although Todd primarily played the role of an aider and abettor in these offenses, the sentencing court gave proper weight to the number of similar offenses that were committed by Todd and Richard. Further, the fact that Todd was sentenced following a plea bargain which resulted in a reduction in charges supports the proportionality of Todd's sentence. *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990).

Accordingly, I would affirm Todd Kiessel's sentence.

/s/ Henry William Saad