

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1311-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CF-120

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT L. SNOW,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Nettlesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Scott L. Snow has appealed from judgments convicting him of the felony offense of criminal damage to property in violation of

WIS. STAT. § 943.01(2)(d) (1999-2000),¹ and misdemeanor offenses of theft in violation of WIS. STAT. § 943.20(1)(a) and entry into a locked building in violation of WIS. STAT. § 943.15(1). All convictions were as a party to the crime, and were entered pursuant to no contest pleas. Snow has also appealed from an order denying his motion for postconviction relief. We affirm the judgments and order.

¶2 Snow was sentenced to five years in prison for the criminal damage to property conviction, followed by five years of extended supervision. Sentence was withheld for the other two convictions, and Snow was placed on concurrent three-year terms of probation, to be served consecutively to the sentence for the criminal damage to property.

¶3 Snow's convictions arose from events on January 31, 2001, when, after a night of drinking, Snow and another man broke into and vandalized a high school, causing approximately \$125,000 of damage. Snow was scheduled to report to jail to commence serving a sentence after revocation the following day. He was nineteen years old at the time of these events.

¶4 Snow contends that the trial court erroneously exercised its discretion by sentencing him to the maximum five-year prison term for the criminal damage to property conviction. He contends that the sentence was excessive, that the trial court failed to give adequate consideration to his rehabilitative needs and other mitigating factors, and that the trial court penalized him for having an alcohol problem and a child out of wedlock. He also contends

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

that his sentence was disproportionate to the sentence imposed on his co-defendant.

¶5 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Rodgers*, 203 Wis. 2d 83, 93, 552 N.W.2d 123 (Ct. App. 1996). Appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record. *Id.* at 622-23.

¶6 The primary factors the trial court must consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. *Id.* at 623. Additional relevant considerations include the defendant's past criminal record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; his or her remorse and cooperativeness; the need for close rehabilitative control of the defendant; and the rights of the public. *Id.* at 623-24.

¶7 An erroneous exercise of discretion may be found when the sentence is so excessive and unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). It also might be found if the trial court failed to state on the record the material factors which influenced its decision, or if it gave too much

weight to one factor in the face of other contravening considerations. *State v. Larsen*, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987). However, the weight to be given to each of the relevant factors is particularly within the wide discretion of the trial court. *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered. *Id.*

¶8 At sentencing, the trial court heard the arguments of counsel and Snow's personal statement. It also was provided with an extensive presentence report and was aware of the nature of the underlying crime. In sentencing Snow, the trial court considered this information, and the relevant sentencing factors.

¶9 The trial court discussed the aggravated nature of Snow's offenses, noting that his actions caused more than \$100,000 of damage to the school, and left the school community feeling violated and afraid. The trial court also extensively discussed Snow's character, noting that his prior record was dismal, consisting of numerous offenses, including other thefts and acts of property damage. It discussed his poor adjustment on probation and at Lincoln Hills. It noted that he had failed to pay fines, had a poor adjustment at school and a poor work record, and had failed to assume any meaningful responsibility for his child. It also discussed Snow's extensive history of alcohol abuse, noting that alcohol use had contributed to the crimes for which he was being sentenced.

¶10 The trial court's findings and conclusions are supported by the record, including the presentence report, which details Snow's prior record, his poor educational and job history, and his poor adjustment under previous orders and placements. After discussing Snow's personal history, the trial court expressly considered the public's need for protection from him. Based on the

severity of the offense, Snow's lengthy record, his drinking problem, and his lack of insight into why he had committed these crimes, the trial court concluded that he presented a high risk to the community and that the public's need for protection from him was great. It also concluded that confinement was necessary for his rehabilitative needs and would permit him to get alcohol treatment and develop job skills. It also concluded that confinement would remove him from the friends and environment that contributed to his criminal activities until he matured.

¶11 After discussing these factors, the trial court stated that it was sentencing Snow to the maximum five years of imprisonment for the criminal damage to property charge, concluding that it was necessary based upon the severity of the offense, and to rehabilitate Snow and protect the public from him. The trial court thus considered facts which were relevant to sentencing, determined their impact on the three primary sentencing factors, and determined the weight to be accorded to each of the primary sentencing factors. We cannot say that imposition of the maximum sentence was unreasonable or excessive under the circumstances.

¶12 In concluding that the trial court properly exercised its discretion in imposing sentence, we reject Snow's argument that the trial court failed to consider mitigating factors, or penalized him for having a child out of wedlock. The trial court's discussion of Snow's child occurred in the context of discussing his failure to assume meaningful responsibility for him. Coupled with Snow's poor school and work record, this was an appropriate factor for the trial court to consider in assessing Snow's character.

¶13 While Snow's young age could have been considered as a factor which warranted a lesser sentence, the trial court was not required to reach this

conclusion, particularly after considering Snow's lengthy history of juvenile offenses. Similarly, the trial court acted within the scope of its discretion in considering Snow's alcohol problems, concluding that his alcohol abuse increased the likelihood that he would commit new offenses if he was not incarcerated. In light of Snow's history, this was a reasonable conclusion. Contrary to Snow's argument, the trial court was not required to conclude that community treatment programs would be adequate to solve Snow's alcohol problems or protect the public from further criminal activity by him.

¶14 We also reject Snow's argument that he is entitled to relief from his sentence because his co-defendant received probation. A disparity between the sentences of co-defendants is proper when the individual sentences are based upon individual culpability and the need for rehabilitation. *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). The mere fact that a defendant's sentence is different than others is insufficient to support a conclusion that it is unduly disparate. *State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). The defendant has the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing. *Id.*

¶15 Snow has made no showing that the disparity in sentences between him and his co-defendant was arbitrary or based upon improper factors. This argument therefore provides no basis for relief.

¶16 In his motion for postconviction relief, Snow contended that the trial court erroneously exercised its discretion by imposing an excessive sentence, and failed to adequately consider all relevant factors. However, as already discussed, the trial court's sentencing decision was both reasoned and reasonable. No basis

therefore exists to conclude that the trial court erroneously exercised its discretion in imposing the sentence, or in refusing to grant postconviction relief from it.

¶17 In affirming the order denying postconviction relief, we acknowledge that the trial court stated that no new factor was presented. Snow correctly points out that a sentence may be modified if the trial court erroneously exercised its discretion in imposing it, regardless of whether a new factor exists as defined in *State v. Michels*, 150 Wis. 2d 94, 96, 441 N.W.2d 278 (Ct. App. 1989). See *Toliver*, 187 Wis. 2d at 362-63. However, we construe the trial court's statement as indicating simply that no new information had been presented in the postconviction motion, and that based on the information before it at sentencing, the sentence imposed was appropriate. As already discussed, we agree and affirm the order denying postconviction relief.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

