COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 7, 1997

NOTICE

No. 97-0781-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMANTHA M. PENKOSKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Samantha Penkoske appeals her concurrent six-year prison terms for two counts of burglary, having pleaded no contest to the charges. She and other gang members burglarized the residence of Charles and Jill Felch while they were on vacation. Penkoske and her cohorts stole thousands of dollars of personal property and extensively vandalized the home in the process,

evidently for the sport of it. Penkoske later concealed eleven of these items in her grandmother's garage. At sentencing, the trial court indicated its belief that it was sentencing Penkoske to less prison time than an accomplice, the gang ringleader, who the trial court understood had received a ten-year prison term. By postconviction motion alleging a "new factor," Penkoske clarified that the ringleader's ten-year term actually encompassed two consecutive five-year terms, one of which stemmed from an unrelated burglary. On appeal, Penkoske argues that her sentence was excessive, compared to the ringleader's, and that the trial court's misapprehension concerning the ringleader's sentence was a "new factor." She claims that her crime-free record, her unremarkable role in the crime, the ringleader's prior record, and his leadership role in gang activities made her culpability compare favorably to his, thereby meriting a proportionately lesser sentence. We reject these arguments and therefore affirm her sentence.

At first glance, Penkoske's two concurrent six-year sentences may very well compare unfavorably to the ringleader's two consecutive five-year sentences. Appearances are not controlling, however; the trial court made a discretionary decision, and we must uphold Penkoske's sentence if it had a reasonable basis in the record. *See* ***McCleary v. State***, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519-20 (1971). Penkoske's sentence must fit the gravity of the offense, the nature of her character, the public's need for protection, and the interests of deterrence. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). While whatever sentence Penkoske's accomplice received may be a relevant factor, *see* ***State v. Perez***, 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App. 1992), their disparate criminal backgrounds does not *per se* prove that Penkoske's sentence was excessive. Trial courts have the discretion to issue similar sentences for persons with different criminal

backgrounds who join in the same criminal offense. The nature of each wrongdoer's conduct and the harm each caused may very well counterbalance common mitigating factors, such as one wrongdoer's lack of a prior criminal record. *See* ***id.*** at 142-43, 487 N.W.2d at 634-35; ***State v. Jones***, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763-64 (Ct. App. 1989). Likewise, only "highly relevant" trial court misunderstandings are "new factors" meriting sentence modification. *See* ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975).

Here, Penkoske's accomplice may have been the gang's ringleader and may have had a criminal record. Nonetheless, Penkoske's six-year sentence was a reasonable exercise of sentencing discretion and not the result of a "highly relevant" misunderstanding. First, as noted by the trial court, the judge who sentenced the ringleader may have undersentenced him in terms of his culpability. If such undersentencing took place, as the trial court believed, it would not entitle Penkoske to a similar practice. The trial court, in its discretion, could rightfully insist that her sentence stand on its own merits and her own culpability. Those factors, not the ringleader's sentence, ultimately control the fairness of Penkoske's sentence. Second, other factors in some ways may have heightened Penkoske's culpability in comparison to the ringleader's. Penkoske was the one who broke the window, unlocked the door, and led the way in, all in the ringleader's absence. She later left the scene, got the ringleader, returned with him to the scene, and reentered the home. Penkoske and her cohorts removed thousands of dollars of personal property, and like the ringleader, she helped hide stolen goods, using her grandmother's garage. She had thirteen other counts read-in from the Felch incident, the ringleader only two; and the trial court told her that she would have gotten the same sentence had the ringleader never taken part. In the same vein,

Penkoske's long-term association with unsavory gang elements offset to some degree her lack of a criminal record.

Moreover, Penkoske participated in an incident that maliciously wrecked the Felch home, evidently for the fun of it. As the trial court noted, this was not an ordinary, everyday burglary; the participants went out of their way to ruin the residence. They spray-painted obscenities on interior walls, broke a bed loose from its headboard, flipped over the mattress and box springs, and scribbled on the sheets and bedding with bronze tanning gel. They emptied cupboards, drawers, and closets on the floor to the point that the police had to force open doors. They spray-painted symbols on windows, cupboards, and carpets. They ruined many pieces of personal property, including the sewing machine, sewing machine cabinet, jewelry box, hand painted ceramic cats, a chest and drawers, two wall shelves, three frames, a wreath, a computer desk, three wall bookshelves, an oil lamp, a couch spring, drapes, drinking glasses, counter tops, door locks, a porcelain doll, toy helmet, a Longaberger basket, windows, a ceramic lamp, shower curtain, back door, bedroom door, bedroom door frame, magnifying glass, a child's first communion frame, antenna cable, two ceramic kittens, ceiling fan and light, and a solar toy. All of this understandably traumatized the homeowners, and the trial court acknowledged its long-term psychological damage and scarring.

As noted by the trial court, this malicious and wanton destruction warranted a substantial sentence, and the trial court felt justified to imprison Penkoske for twenty years. The factors Penkoske offered in mitigation were comparatively wanting; they did little to offset the homeowners' loss or atone for her part in the destruction. She briefly apologized for her actions, calling them a mistake, and promised to reform herself. She expressed an intention to turn her life around, to go to college, and then to get into law enforcement. The trial court

doubted her sincerity; it questioned whether she had any real empathy for the homeowners or was merely currying the court's favor. Regardless, Penkoske had assumed a prominent role in the affair; the trial court could reasonably view this as the primary sentencing factor and give her professed remorse and regret little weight in its sentencing calculus. For the same reasons, the trial court could reasonably give little weight to her lack of a criminal record and her claim that she did not personally cause much destruction. In the final analysis, Penkoske's sentence was in line with her degree of culpability, the severity of her crime, and the need to deter her and like-minded wrongdoers from such home wreckings. Penkoske received less than one-half the prison time she could have received, and we see nothing excessive in her two concurrent six-year prison terms.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.