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You are hereby notified that the Court has entered the following opinion and order:

2019AP2019-CR State of Wisconsin v. Angel Arvelo-Nieves (L.C. # 2016CF5592)

Before Brash, P.J., Donald and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Angel Arvelo-Nieves appeals a judgment entered after a jury found him guilty of four counts of delivery of a controlled substance and one count of delivery of a controlled substance by use of a dangerous weapon, all as a party to a crime. He also appeals an order denying his postconviction motion for sentence modification. He claims that the aggregate twenty-five-year term of imprisonment imposed was an unduly harsh sentence. Based upon our review of the briefs

and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

The relevant background facts are not in dispute. Feliberto Cruz-Rodriguez and his brother, Orlando Cruz-Rodriguez, acted as middlemen for a series of drug transactions between Arvelo-Nieves and J.H., a police informant.[2] In the first of these transactions, J.H. contacted Feliberto and arranged to buy twenty-five grams of fentanyl, a controlled substance. Feliberto said that his supplier would bring the drugs. On November 16, 2016, J.H. met Feliberto in an alley to complete the transaction. Feliberto refused to introduce J.H. to the supplier, but police conducting surveillance observed a person subsequently identified as Arvelo-Nieves drive into the alley in a Nissan Altima. J.H. paid Feliberto $2250 in exchange for a little more than twenty-five grams of fentanyl. Following the exchange, police observed Arvelo-Nieves drive away from the alley.

On November 29, 2016, J.H. arranged with Feliberto to purchase twenty-five grams of fentanyl and twenty-eight grams of cocaine for $3450. Feliberto told J.H. that Orlando would assist her in completing the transaction. J.H. met Orlando at his home, and police conducting surveillance observed an Altima drive into a nearby alley. Orlando got into the Altima and emerged with the drugs, which he exchanged with J.H. for $3450. Police followed the Altima after it left the alley and determined that Arvelo-Nieves was the driver.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Because this case involves two brothers with the surname Cruz-Rodriguez, we refer to each brother by his given name throughout the remainder of this opinion.

On December 7, 2016, J.H. arranged with Orlando to purchase twenty grams of fentanyl for $1800. J.H. met Orlando in an alley, and police conducting surveillance determined that Arvelo-Nieves delivered the substance that Orlando transferred to J.H. in exchange for the money.

Finally, on December 13, 2016, J.H. arranged to buy sixty grams of fentanyl for $5400 dollars. J.H. again met Orlando in an alley and got into his car. Arvelo-Nieves arrived in the Altima, approached Orlando, and handed him a bag. After seeing this transfer, J.H. got out of Orlando's car, stating that she would get the money to pay him. Police arrived on the scene moments later and arrested Orlando. A search of his car uncovered a bag containing approximately sixty-one grams of fentanyl. Meanwhile, a team of officers pursued Arvelo-Nieves and arrested him at a gas station. A search of the Altima he was driving uncovered a loaded handgun.

The State charged Arvelo-Nieves with five offenses. In each of counts one, two, and four, which arose out of the controlled buys on November 16, 2016, November 29, 2016, and December 7, 2016, respectively, the State charged Arvelo-Nieves, as a party to a crime, with delivery of a controlled substance, fentanyl, a Class E felony that carries maximum penalties of $50,000, and fifteen years of imprisonment. *See* WIS. STAT. §§ 961.41(1)(a), 961.16(3), 939.50(3)(e), 939.05. In count three, which also arose out of the controlled buy on December 7, 2016, the State charged Arvelo-Nieves, as a party to a crime, with delivery of more than fifteen grams but less than forty grams of a controlled substance, cocaine, a Class D felony that carries maximum penalties of $100,000 and twenty-five years of imprisonment. *See* WIS. STAT. §§ 961.41(1)(cm)3., 939.50(3)(d), 939.05. Finally, in count five, which arose out of the controlled buy on December 13, 2016, the State charged Arvelo-Nieves with another Class E felony, namely, delivery of fentanyl as a party to a crime, but also alleged that he committed the crime while armed with a dangerous weapon. Upon conviction, he faced maximum penalties of $50,000 and twenty

years of imprisonment. *See* §§ 961.41(1)(a), 961.16(3), 939.50(3)(e), 939.05; *see also* WIS. STAT. § 939.63(1)(b). Arvelo-Nieves pled not guilty to all of the charges and requested a jury trial.

Before the start of Arvelo-Nieves's trial, Feliberto and Orlando entered into plea agreements to resolve the charges that they faced for their respective roles in the controlled purchases that J.H. made. Feliberto pled guilty to one Class E felony for his role in the fentanyl transaction of November 16, 2016. Orlando pled guilty to three Class E felonies for his role in the fentanyl transactions of November 29, 2016, December 7, 2016, and December 13, 2016. As conditions of their plea agreements, both men agreed to testify truthfully at Arvelo-Nieves's trial, and the State agreed not to make sentencing recommendations.

The charges against Arvelo-Nieves proceeded to a jury trial. Both Feliberto and Orlando testified as witnesses for the State. The jury found Arvelo-Nieves guilty as charged.

While Arvelo-Nieves was awaiting sentencing, the circuit court sentenced Feliberto and Orlando. Feliberto was facing a fifteen-year term of imprisonment and a $50,000 fine. *See* WIS. STAT. § 939.50(3)(e). The circuit court imposed a three and one-half year term of imprisonment and stayed it in favor of a three-year term of probation. Orlando faced an aggregate forty-five-year term of imprisonment and $150,000 in fines. *See* ***id.*** The circuit court imposed three years of initial confinement and four years of extended supervision.

Arvelo-Nieves proceeded to sentencing a few weeks after the circuit court sentenced Feliberto and Orlando. Arvelo-Nieves faced an aggregate ninety-year term of imprisonment and fines totaling $300,000. In considering the appropriate disposition, the circuit court stated that the sentences it had earlier imposed on Feliberto and Orlando were "not severe," but the circuit court found that Arvelo-Nieves acted as the narcotics supplier, which was "the more serious aspect of

this case." Following an extended discussion of the crimes Arvelo-Nieves committed, his role in the offenses, his character, and the risks he posed to the community, the circuit court imposed: for count one, three years of initial confinement and one year of extended supervision; for count two, a consecutive sentence of four years of initial confinement and two years of extended supervision; for count three, a concurrent sentence of two years of initial confinement and one year of extended supervision; for count four, a consecutive sentence of three years of initial confinement and one year of extended supervision; and for count five, a consecutive sentence of six years of initial confinement and four years of extended supervision. The aggregate term of imprisonment was thus twenty-five years, bifurcated as sixteen years of initial confinement and nine years of extended supervision.

Arvelo-Nieves filed a postconviction motion seeking sentence modification. He alleged that he received an unduly harsh aggregate sentence and that the circuit court failed to explain its reasons for sentencing him more harshly than either Feliberto or Orlando. The circuit court rejected his claims, stating that it had set forth "a multitude of reasons" for the sentences it imposed on Arvelo-Nieves and finding that the aggregate sentence was neither unduly harsh nor unconscionable. Arvelo-Nieves appeals.

In this court, Arvelo-Nieves argues that his aggregate sentence is unduly harsh, "especially in light of" the sentences imposed on Feliberto and Orlando.[3] Our review of a sentencing decision "start[s] with the presumption that the circuit court acted reasonably." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We will not disturb a sentence unless the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

Wisconsin recognizes the importance of "individualized sentencing." *See* ***id.***, ¶48. Accordingly, the circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. In seeking to fulfill the sentencing objectives, the sentencing court must consider the primary factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community, *see* ***id.***, but the circuit court has discretion "to discuss only those factors it believes are relevant," *see* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. When a defendant challenges a sentence, the postconviction proceedings afford the circuit court an additional opportunity to

[3] Arvelo-Nieves also states that the circuit court did not order a presentence investigation report in his case and argues that "it does not seem fair to impose a sentence of twenty-five years on a defendant without having the benefit of such a report." Arvelo-Nieves, however, told the circuit court after the jury delivered its verdicts that he did not request a presentence investigation report because he believed that he could provide the information that the circuit court would need for sentencing. The circuit court honored his wishes and set the matter for sentencing without ordering a presentence investigation. Accordingly, Arvelo-Nieves's complaint that he was sentenced without the benefit of a presentence investigation report is barred by the doctrine of judicial estoppel. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (providing that a party may not pursue a claim on appeal that is directly contrary to the position that the party took in circuit court). We discuss the argument no further.

explain the sentencing rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). If the defendant thereafter pursues an appeal, we search the entire record for reasons to sustain the circuit court's exercise of sentencing discretion. *See* ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

Here, the circuit court indicated that punishment and community safety were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. The circuit court found that the offenses were serious, explaining that Arvelo-Nieves was involved in distributing large quantities of addictive and potentially lethal substances. In considering Arvelo-Nieves's character, the circuit court recognized that he did not have a prior criminal record and that he had played a positive role in his family as a "father and provider." The circuit court also found, however, that by involving himself in drug trafficking, Arvelo-Nieves took actions that would disrupt and hurt his family for many years. Moreover, the circuit court was troubled by the evidence—presented at trial pursuant to a stipulation between the parties—that Arvelo-Nieves's girlfriend attempted to post bail for him using $700 of marked money from the December 7, 2016 transaction. In the circuit court's view, this evidence raised questions about the extent to which he had involved third parties in his activities. Turning to the need to protect the public, the circuit court found that Arvelo-Nieves presented a threat to public safety, stating: "[t]hese were essentially hundreds of doses that could have been put into the community.... And unfortunately, every dose is a potential homicide situation."

The circuit court acknowledged that it had imposed relatively lenient sentences on Feliberto and Orlando. The circuit court explained, however, that Feliberto participated in only one of the charged crimes and that, as to all of the offenses, Arvelo-Nieves received the "lion's share" of the sale proceeds. Indeed, the record is uncontroverted that Feliberto received a total of

$125 for his part in the first of the transactions and Orlando received a total of fifty dollars for his part in two subsequent purchases. The circuit court went on to find that Arvelo-Nieves was the most culpable of the three men because he was the person who "pick[ed] up and suppl[ied] the drugs," and the circuit court expressed particular concern that he was able to produce drugs in substantial quantities whenever he was asked. The circuit court concluded that, in light of the totality of the sentencing considerations, Arvelo-Nieves's conduct called for a prison sentence, "and not a short one."

As the foregoing discussion reflects, the circuit court identified the factors that it considered when sentencing Arvelo-Nieves. The factors were appropriate and relevant to the sentencing objectives. Accordingly, the circuit court properly exercised its sentencing discretion.

Arvelo-Nieves nonetheless argues that the circuit court erroneously rejected his postconviction claim that he received an unduly harsh aggregate sentence. "We review a [circuit] court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion." ***State v. Cummings***, 2014 WI 88, ¶45, 357 Wis. 2d 1, 850 N.W.2d 915 (citations and emphasis omitted). This standard of review "is difficult to overcome in the best of cases." *See* ***Nelson v. Machut***, 138 Wis. 2d 301, 309, 405 N.W.2d 776 (Ct. App. 1987). This is not the best of cases.

> A sentence is unduly harsh when it is so excessive and unusual and so disproportionate to the offense committed so as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. A sentence well within the limits of the maximum sentence, however, is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

State v. Mursal, 2013 WI App 125, ¶24, 351 Wis. 2d 180, 839 N.W.2d 173 (citations, brackets, and quotations marks omitted). Here, each of Arvelo-Nieves's sentences was far less than the maximum sentence allowed by law upon conviction. Moreover, his aggregate penalty did not include any portion of the possible $300,000 aggregate fine, and the twenty-five-year term of imprisonment he received was less than a third of the aggregate ninety-year term that he faced. Such a sentence is not shocking or excessive. *See* ***id.***, ¶26.

Further, we are satisfied that the circuit court properly exercised its discretion when it concluded that the differences between the aggregate sentence imposed on Arvelo-Nieves and the sentences imposed on Feliberto and Orlando did not provide a basis for relief. A sentence imposed on a similarly situated co-defendant is relevant to the sentencing decision but is not controlling. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995). Here, however, Feliberto and Orlando were plainly not situated similarly to Arvelo-Nieves. Feliberto and Orlando were each convicted of fewer crimes and faced lesser aggregate penalties than Arvelo-Nieves; neither Feliberto nor Orlando was convicted of committing any offense in this case while armed with a dangerous weapon; and both Feliberto and Orlando accepted responsibility for their criminal behavior. Additionally, the circuit court found that Arvelo-Nieves played the most serious part in all of the crimes and was more culpable than either Feliberto or Orlando. In light of the substantial differences between Arvelo-Nieves's circumstances and those of Feliberto and Orlando, the sentences imposed on Feliberto and Orlando do not suggest that Arvelo-Nieves received an unduly harsh punishment for the crimes that he committed.

We also reject Arvelo-Nieves's suggestion that the circuit court failed to comply with the mandate of ***State v. Schael***, 131 Wis. 2d 405, 415, 388 N.W.2d 641 (Ct. App. 1986). According to Arvelo-Nieves, that case "held that the circuit court is required to fully explain the differences

in the conduct of the co-defendants, the differences in their prior records, and the differences in their relative remorse for their actions when it imposes sentences on the co-defendant." As the State accurately asserts, "[t]his Court held no such thing in ***Schael***." Rather, we observed in ***Schael*** that the circuit court discussed differences among the circumstances of the co-defendants and stated that "we were unpersuaded that these are considerations not pertinent to proper sentencing discretion." *See* ***id.*** An assessment in one case that certain matters were pertinent to the sentencing decision does not require a discussion of those same matters in every case. To the contrary, our sentencing jurisprudence recognizes that the circuit court has broad discretion to determine the factors that warrant discussion and to determine the weight to attach to those factors. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

Moreover, the circuit court in fact did discuss the differences between Arvelo-Nieves's circumstances and those of his co-actors that it deemed relevant to its sentencing decision. Indeed, Arvelo-Nieves recognizes that the circuit court engaged in such a discussion, specifically noting the circuit court's assessment that he was the most culpable of the three defendants because he could supply a dangerous drug "whenever demanded." He argues, however, that "the problem with the circuit court's ruling" is that the circuit court did not focus on the factors that he believes should have guided the sentencing decision and that, in his assessment, would have led to greater parity between his sentences and those of Feliberto and Orlando. Arvelo-Nieves goes on to describe his age, employment history, physical health problems, and lack of prior criminal record, and he urges us to conclude that "under the circumstances of this case," his sentence was unduly harsh. We decline. Arvelo-Nieves does not show that he received an unduly harsh sentence. He shows only that the circuit court did not weigh the sentencing factors as he would have preferred. That is not an erroneous exercise of discretion. *See* ***id.*** For all the foregoing reasons,

IT IS ORDERED that the judgment and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals