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DISTRICT I

September 6, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Brian Patrick Mullins
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Jennifer L. Vandermeuse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP238-CR State of Wisconsin v. Javoni Kwame Smith (L.C. # 2019CF5569)

Before White, C.J., Donald, P.J., and Dugan, J.

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).

Javoni Kwame Smith appeals from a judgment convicting him on one count of first-degree reckless homicide. He also appeals from an order denying his postconviction motion for sentence modification. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On July 26, 2019, Smith sold forty dollars' worth of heroin to B. ("Beatrice"), who purchased the drug for herself and A.L. ("Alice").[2] Beatrice used fifteen to twenty dollars' worth of the heroin with Alice; Alice used two dollars' worth and took the rest with her. Beatrice knew the heroin was "strong" and texted Alice to "be safe" and "don't do a lot of that stuff."

Later that day, West Allis police responded to a residence, where they found Alice unresponsive and not breathing. Chest compressions were administered, but Alice was pronounced dead that evening. Her cause of death was eventually determined to be mixed drug intoxication, with fentanyl as the primary cause, heroin as the secondary cause, and alprazolam as a tertiary cause, although the alprazolam was within therapeutic limits. Witnesses at the residence told police that Alice had a history of drug addiction. A search of Alice's phone led police to Beatrice, who was interviewed on July 27, 2019. She told police she had purchased heroin from "Elle," whom she later identified as Smith via photograph.

On July 29, 2019, police coordinated a controlled heroin buy between Smith and a confidential informant. When field tested, the purchased substance was inconclusive for opiates but positive for fentanyl. On July 30, 2019, police coordinated a second controlled buy for more heroin. When Smith arrived, he was arrested.[3] A search of Smith's car yielded approximately 130 doses of cocaine and 65 doses of fentanyl. Police also executed a search warrant for Smith's home. Under the basement stairs, police recovered $3,000 in cash in a shoe box; three boxes of plastic baggies, rubber gloves, and six digital scales in another box; the box for a gun; and an

[2] The criminal complaint does not contain a second initial for Beatrice; we have therefore assigned pseudonyms for ease of reading.

[3] The confidential informant also knew Smith as "Elle," and police set up the buys accordingly. Later, police confirmed that "Elle" was Smith by using video from the first controlled buy.

empty pistol magazine. When he was interviewed, Smith acknowledged he had sold heroin to Beatrice on July 26.

Smith was charged with first-degree reckless homicide by delivery of a controlled substance as party to a crime, delivery of fentanyl, possession with intent to deliver fentanyl, and possession with intent to deliver cocaine. Pursuant to a plea agreement, Smith pled guilty to the homicide charge; the three remaining counts were to be dismissed and read in. The State recommended a prison sentence without specifying a length. Defense counsel, noting that Smith was serving a five-year revocation sentence, asked the circuit court to impose a sentence under which Smith would be released from confinement in 2027. The circuit court ultimately imposed a sentence of eighteen years' initial confinement and ten years' supervision.

Smith filed a postconviction motion for sentence modification based on a new factor. He produced statistics showing his sentence was ten years longer than the average for defendants convicted of the same offense within Wisconsin in the year preceding his sentencing hearing, and eight years longer than the average of all defendants convicted of the same offense within Milwaukee County from 2016 to 2020. He argued that the statistics, which show a disparity between him and "similarly situated" offenders, were a new factor that demonstrated his sentence was unduly harsh. The circuit court denied the motion. Smith appeals.

A new factor is a fact or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must

demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. Whether a fact or set of facts is a "new factor" is a question of law. ***Id.*** If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

In rejecting Smith's postconviction motion, the circuit court determined that the sentencing statistics were not new because they existed and were available at the time of the sentencing hearing. Smith does not dispute that the data existed prior to sentencing, but contends that it was unknowingly overlooked by all of the parties. This, however, is a conclusory assertion. Smith points to no evidence that the statistics were "unknowingly overlooked" beyond the fact that the parties did not address them. The circuit court also determined that even if the statistics were not then existence or were unknowingly overlooked, they were not highly relevant to the imposition of sentence because "the basic premise that the average sentencing date for defendants convicted under the same statutes represents similarly situated individuals is based on nothing more than a mathematical construct and not on any individualized sentencing factors." We agree.

Wisconsin emphasizes the importance of "individualized sentencing." *See* ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Thus, defendants do not receive the same punishment simply because they are convicted of the same offense. *See* ***id.*** Rather, they are to be "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). "[N]o two convicted felons stand before the sentencing court on identical footing .... and no two cases will present identical factors." ***Gallion***, 270 Wis. 2d 535, ¶48 (citation omitted; brackets in ***Gallion***).

When imposing sentence, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The sentence imposed is ultimately a matter of circuit court discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶17.

Smith's only basis for concluding he and other defendants were similarly situated is that they were convicted of the same offense.[4] He makes no comparison between the sentencing factors considered by the court in this case versus the sentencing factors considered in the other cases. In this case, for instance, the circuit court considered the number of times Smith had delivered heroin around the time of the offense, the large amount of cocaine and fentanyl recovered as measured by the number of doses; the fact that Smith had two cell phones; recovery of the digital scales and large amount of cash; Smith's prior record; and the fact that this homicide occurred less than two months after Smith was released to extended supervision from a prior sentence. Further, the other defendants presumably were not sentenced by the same judge.

[4] In his reply brief, Smith recognizes that "comparing him to other defendants convicted of the same offense is an inexact practice." He explains that he "offered the sentencing statistics as a starting point for a range of reasonable sentences, which is the method used by the United States Sentencing Commission to formulate the United States Sentencing Guidelines."

The Wisconsin Supreme Court has at least twice rejected an invitation to require the use of sentencing guidelines, explaining that doing so would "constitute an unwarranted intrusion" into the circuit court's exercise of sentencing discretion. *See* ***In the Matter of Implementation of Felony Sent. Guidelines***, 113 Wis. 2d 689, 690, 335 N.W.2d 868 (1983); *see also* ***In the Matter of Judicial Admin.: Felony Sent. Guidelines***, 120 Wis. 2d 198, 200-01, 353 N.W.2d 793 (1984).

"By its very nature, the exercise of discretion dictates that different judges will have different opinions as to what should be the proper sentence in a particular case." ***Ocanas v. State***, 70 Wis. 2d 179, 187-88, 233 N.W.2d 457 (1975). Indeed, while a sentencing court is permitted to "consider information about the distribution of sentences in cases similar to the case before it," *see* ***Gallion***, 270 Wis. 2d 535, ¶47, it is not required to do so. We agree with the circuit court that the sentencing statistics do not constitute a new factor.

Smith also argues that the statistics demonstrate that his sentence was unduly harsh because while "[i]n isolation … [the] sentence of 18 years in prison might not appear unduly harsh considering the seriousness of the offense," his sentence "is disproportionate to the vast majority of sentences for offenders convicted of the same conduct[.]" We disagree.

A circuit court may not revise its sentence merely upon reflection but may consider whether the sentence imposed was unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. A sentence is unduly harsh or unconscionable if it is "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Cummings***, 2014 WI 88, ¶72, 357 Wis. 2d 1, 850 N.W.2d 915 (citing ***Ocanas***, 70 Wis. 2d at 185). "[I]n deciding whether a sentence is unduly harsh, the circuit court's inquiry is confined to whether it erroneously exercised its sentencing discretion based on the information it had at the time of sentencing." ***State v. Klubertanz***, 2006 WI App 71, ¶40, 291 Wis. 2d 751, 713 N.W.2d 116. We review a circuit court's conclusion that its sentence was not unduly harsh for an erroneous exercise of discretion. *See* ***Grindemann***, 255 Wis. 2d 632, ¶30.

When discretion is properly exercised during sentencing, disparity between sentences imposed on similarly situated defendants is not a basis for setting aside the harsher sentence. *See* ***Ocanas***, 70 Wis. 2d at 187-88. A sentence may only be set aside because of disparity between sentences if the disparity itself is arbitrary or the result of improper considerations. ***Id.*** at 187. A disparity between the sentences of even co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. *See* ***Jung v. State***, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966). Moreover, a sentence well within the limits of the maximum sentence is presumptively not unduly harsh, *see* ***Grindemann***, 255 Wis. 2d 632, ¶32, and leniency in one case does not transform a reasonable punishment in another case into a cruel one, *see* ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

Smith faced a potential sentence of forty years' imprisonment; he received a total of twenty-eight years' imprisonment. Smith's sentence is well within the maximum, and we are unpersuaded that the sentencing statistics he produced defeat the presumption that his sentence was not unduly harsh.

Therefore,

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

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

Samuel A. Christensen
Clerk of Court of Appeals