**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 4, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal Nos. 2015AP2128-CR**
**2015AP2129-CR**
**2015AP2130-CR**

**Cir. Ct. Nos. 2013CF3291**
**2013CF3922**
**2013CF4952**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEMETRIUS ANTOWN BROWN,**

**DEFENDANT-APPELLANT.**

---

APPEAL from judgments of conviction and orders of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Demetrius Antown Brown appeals judgments of conviction and postconviction orders denying him sentence modification or resentencing. He pled guilty to four crimes, and the circuit court imposed an

aggregate sentence of five years of initial confinement and four years of extended supervision. On appeal, Brown mounts two related challenges to the sentencing decision: (1) the circuit court erroneously exercised its sentencing discretion by allegedly mischaracterizing the facts underlying the convictions; and (2) the circuit court's reliance on its alleged mischaracterization of the facts violated Brown's due process right to be sentenced on accurate information. We reject his claims and affirm.

## BACKGROUND

¶2 In three criminal complaints, the State alleged that Brown committed seven offenses during a three-month period in 2013. We briefly review the allegations and Brown's resolution of the charges.

¶3 In Milwaukee County Circuit Court case No. 2013CF3291, which underlies appeal No. 2015AP2128-CR, the State alleged that on July 19, 2013, officers responded to a complaint of armed drug dealing on a Milwaukee street. They observed Brown interact with a group of men near a car and then drop a clear plastic baggie later determined to contain methylenedioxymethamphetamine (MDMA). The officers detained Brown and found he had a semi-automatic pistol in his waistband fully loaded with six hollow-point cartridges. The State charged Brown with one count of possession with intent to deliver not more than three grams of a controlled substance while possessing a dangerous weapon. *See* WIS. STAT. §§ 961.41(1m)(hm)1., 939.63(1)(b) (2013-14).[1] Brown pled guilty as charged.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 In Milwaukee County Circuit Court case No. 2013CF3922, which underlies appeal No. 2015AP2129-CR, the State alleged that on August 30, 2013, after Brown posted bail in case No. 2013CF3291, police stopped him for a traffic violation and observed him discard a clear plastic baggie later determined to contain MDMA. The State charged Brown with one count of felony bail jumping and one misdemeanor count of possessing a controlled substance. *See* WIS. STAT. §§ 946.49(1)(b)., 961.41(3g)(b). Brown pled guilty to the felony; the misdemeanor count was dismissed and read in for sentencing purposes.

¶5 In Milwaukee County Circuit Court case No. 2013CF4952, which underlies appeal No. 2015AP2130-CR, the State alleged that on October 26, 2013, after Brown posted bail in case No. 2013CF3291, police saw him leaning into the open window of a parked car. He fled at the sight of the officers, and as he ran he discarded a baggie later determined to contain MDMA. An officer gave chase and eventually handcuffed him after a struggle. The State charged Brown with one felony count of possession with intent to deliver more than ten but less than fifty grams of a controlled substance, one misdemeanor count of resisting or obstructing an officer, and two counts of felony bail jumping. Brown pled guilty as charged to possession with intent to deliver a controlled substance and to resisting or obstructing an officer. *See* WIS. STAT. §§ 961.41(1m)(hm)3., 946.41(1). The two counts of bail jumping were dismissed and read in.

¶6 At sentencing, the State recommended a global disposition of sixty-six months of imprisonment stayed in favor of probation, with a further recommendation of six to eight months in the House of Correction as a condition of probation. In the State's view, the primary mitigating factor was that Brown's only prior record consisted of misdemeanor theft and disorderly conduct

convictions in 2006. The State went on to discuss the factors it deemed aggravating, pointing first to Brown's commission of seven crimes in three months. The State next noted that, while Brown had a concealed carry permit for the handgun he had with him during the July 2013 offense, he carried the permit along with the MDMA, which the State considered an aggravating circumstance. Additionally, the State argued, "permit or not, drugs and guns are a really bad combination," and in this case, the gun was loaded with hollow-point bullets, "which are designed for the maximum amount of damage possible." Most aggravating in the State's view were the circumstances of Brown's third arrest, because not only was Brown facing multiple charges at the time, but he also resisted the police. The State described how officers grabbed Brown's coat as he ran, how he struggled with them, and how he "was able to break free and run." When officers caught up and tackled him, he again struggled, then buried his hands underneath his waist as police attempted to handcuff him.

¶7 The circuit court rejected the State's recommendation for probation, observing that Brown faced a maximum aggregate penalty of more than forty-seven years of imprisonment and finding that the facts underlying the convictions were "extreme." The circuit court acknowledged that Brown had only a minor prior criminal record. The circuit court also took into account the mitigating factors described by the defense, noting that Brown was only twenty-six years old, had a high school equivalency degree and some employment history, and that he provided care for his children. In the circuit court's view, however, probation was not an appropriate disposition in light of the "incredibly aggravated and violent nature of these crimes." The circuit court emphasized that Brown carried a fully loaded gun while selling drugs and stated "it would be hard to get much more aggravated facts short of [] actually firing the gun." The circuit court went on:

> [i]n August, despite what occurred in July [Brown was] again [involved] with criminal activity and that's aggravating, and then finally ... in October we have the incident where [Brown] ha[d] even a larger quantity of drugs. [He's] engaging in the same sort of activities. So basically a repeat of August, and then we have this crazy run/fight with the officers just to make matters even worse in October.

¶8 The circuit court explained that probation is inappropriate when, *inter alia*, confinement is necessary to protect the community. The circuit court concluded here that probation "would depreciate the nature of the offenses and just would send a terrible message."

¶9 The circuit court sentenced Brown to an aggregate, nine-year term of imprisonment, comprised of five years of initial confinement and four years of extended supervision. Specifically, for the July 2013 drug offense, the circuit court imposed an evenly bifurcated four-year term of imprisonment. For the August 2013 bail jumping conviction, the circuit court imposed a consecutive six-month sentence. Finally, for the October 2013 crimes, the circuit court imposed a consecutive, evenly bifurcated four-year term of imprisonment for the drug offense and a consecutive six-month sentence for resisting or obstructing an officer.

¶10 Brown filed a postconviction motion alleging, as relevant here, that the circuit court erroneously exercised discretion by characterizing his conduct as "extremely aggravated and violent" and that, by allegedly mischaracterizing his conduct, the circuit court violated his right to due process and sentenced him based on inaccurate information. The circuit court entered an order denying the motion without a hearing, and Brown appeals.

## DISCUSSION

¶11 Brown first asserts the circuit court erroneously exercised its sentencing discretion. "When a criminal defendant challenges the sentence imposed by the circuit court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Moreover, "we start with the presumption that the circuit court acted reasonably." ***Id.*** We will not disturb the sentencing decision absent an erroneous exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

¶12 The circuit court must consider the primary sentencing 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.*** The circuit court should specify the objectives of the sentence which include, but are not limited to, "the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. Additionally, the circuit court must explain the link between the sentencing objectives and the sentence imposed. ***Id.***, ¶46. The circuit court is not required, however, to explain a sentence with mathematical precision. ***Id.***, ¶49. Rather, we expect "an explanation for the general range of the sentence imposed." ***Id.*** We will sustain a circuit court's exercise of sentencing discretion if the circuit court applied the proper legal standards to the facts before it and reached a decision that a reasonable judge could reach. *See* ***State v. Cummings***, 2014 WI 88, ¶75, 357 Wis. 2d 1, 850 N.W.2d 915.

¶13 Brown claims here that the circuit court erred by mischaracterizing his conduct. He alleges that the circuit court wrongly described his crimes as "incredibly aggravated and violent" and wrongly characterized his conduct during the October 2013 arrest as "fighting with officers."

¶14 We first consider Brown's argument that the July 2013 crime was not violent. Brown contends that because he did not fire the gun he carried, his conduct should be characterized as only "potentially violent," not "actually violent."

¶15 In the postconviction order, the circuit court explained its sentencing remarks and described Brown's conduct as:

> [of a] violent *nature*, violent in the context of the defendant's absolute ability to resort to an instrument of instant death, if necessary as is the known custom surrounding drug dealing activity in the big city. The defendant had a loaded weapon with a bullet in the chamber while he busied himself with his drug dealing activities. Although the defendant did not point the gun or draw the gun, there was the potential for doing so given the type of activity in which he was engaged, and that puts a violent edge to the defendant's particular action.

¶16 "The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon an appellate court." ***State v. Friday***, 147 Wis. 2d 359, 370, 434 N.W.2d 85 (1989). The circuit court's discussion here reflects a characterization of the July 2013 crime that is reasonably based on Brown's conduct. Moreover, the circuit court's conclusions are well within the norms of Wisconsin sentencing law. As the State points out, under Wisconsin's former voluntary sentencing guidelines, possession of a firearm during the commission of a felony rendered an offense "violent." *See* ***Wisconsin Sentencing Guidelines Notes***, 15 Fed. Sent. Rep. 23, 28 (Oct. 1, 2002). The

circuit court's similar determination in this case was therefore a conclusion that a reasonable judge could reach and, thus, a proper exercise of discretion. *See* ***Cummings***, 357 Wis. 2d 1, ¶75.

¶17 Brown goes on to complain that the postconviction order uses language to discuss the violent nature of his July 2013 conduct that differs in some respects from the language used at sentencing to describe that conduct. This complaint does not identify an error. To the contrary, when a defendant challenges a sentence, the postconviction proceedings afford the circuit court an additional opportunity to explain the sentencing rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶18 Brown next argues that his struggle with police during his arrest in October 2013 cannot be characterized as "fighting with officers." The postconviction order, however, clarified why the circuit court described Brown's actions as it did:

> the defendant's actions could objectively and reasonably be perceived to be of a violent nature when he resisted and struggled with police. The State apprised the court that there was a struggle with the officers after they tackled him *aggressively*. This does not describe a peaceful arrest. This describes a person who is fighting with police to get away from them again. It is non-passive, combative behavior that demonstrates violent tendencies.

¶19 Brown disagrees with the circuit court's description of his actions and contends the circuit court should have viewed his conduct during the October 2013 arrest as merely "noncompliant or evasive." Brown's contention reflects only a difference of opinion about how to view his conduct. The decision, however, ultimately rests with the sentencing court. The essence of sentencing discretion is the task of assessing the facts and drawing conclusions from those

facts. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Brown would have preferred that the circuit court assess his conduct differently, but the circuit court's assessments and conclusions here do not constitute an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 (our inquiry is whether discretion was exercised, not whether the circuit court might have exercised discretion differently).

¶20 Brown next claims the circuit court erroneously exercised its discretion by deeming his conduct "incredibly aggravated." In the postconviction order, the circuit court explained:

> the offense in [July 2013] was aggravated by the existence of the loaded gun with one bullet in the chamber. The thumbing of his nose at the rules on the bail form was aggravated. His complete disregard for the law of this state was aggravated. In fact, his commission of *six additional offenses* in a three-month period while out on bail in the first case was the most aggravating factor about this trio of cases.

¶21 Again, we perceive no error. A sentencing court has broad discretion to determine whether a factor is aggravating. *See* ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992). Indeed, ***Thompson*** teaches that a sentencing court may, in its discretion, determine that even laudable factors are aggravating. *See* ***id.*** Thus, although Brown emphasizes that he had a permit to carry a concealed handgun, the circuit court could properly view his conduct as aggravated when he exercised his rights under the permit by selling controlled substances while armed. Moreover, the circuit court considered a variety of antisocial factors to reach the conclusion that Brown's conduct was "incredibly aggravated" under the circumstances. Brown may disagree with the circuit court, but a pattern of undesirable behavior is a well-established sentencing

consideration, *see* ***Harris,*** 119 Wis. 2d at 623, and we have recognized that a circuit court properly exercises its discretion by considering that a defendant has committed one crime—let alone six crimes—after posting bail for another offense. *See* ***State v. Morgan***, No. 2009AP3081-CR, unpublished slip op. ¶¶14-15 (WI App Nov. 23, 2010).[2]

¶22 We also reject Brown's claim that "the circuit court said nothing to explain the jump from probation to such a substantial prison sentence." Preliminarily, we remind Brown that the circuit court was not required "to provide an explanation for the precise number of years chosen." *See* ***State v. Taylor,*** 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. Nonetheless, the circuit court here explicitly explained that numerous factors, including the substantial imprisonment Brown faced for his crimes, his drug dealing while carrying a gun loaded with hollow-point bullets, the need to protect the community, and the related need to send a message to others about respect for the law, all required rejecting a probationary disposition and imposing five years of initial confinement and four years of extended supervision. The court's comments thoroughly illuminated the reasons for the disposition selected.

¶23 Last, we address the claim that because the circuit court characterized the offenses as "incredibly aggravated and violent," and because it described Brown as "fighting with officers" during his October 2013 arrest, the circuit court sentenced Brown based on inaccurate information. A defendant has a due process right to be sentenced upon accurate information. ***State v. Tiepelman***,

[2] Pursuant to WIS. STAT. RULE 809.23, an unpublished, authored opinion released by this court on or after July 1, 2009, may be cited for its persuasive value.

2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a denial of this right, the defendant must show both that the disputed information was inaccurate and that the sentencing court actually relied on the inaccurate information. *See* ***id.***, ¶26. Whether a defendant has been denied the due process right to be sentenced on accurate information is a constitutional question we review *de novo*. ***Id.***, ¶9.

¶24 Brown fails to identify any misinformation in the circuit court's discussion of the events surrounding his criminal activity. Rather, he complains that the words the circuit court used in its discussion constituted a "mischaracterization of [] Brown's offenses." Sentencing, however, is not a game of magic words. *See* ***Gallion***, 270 Wis. 2d 535, ¶49. A difference of opinion between the circuit court and Brown about the words that most precisely describe his conduct does not violate Brown's constitutional rights.

¶25 Because Brown does not show that his sentencing involved any inaccurate information, he does not satisfy the first ***Tiepelman*** prong. We need not consider the second. *See* ***id.***, 291 Wis. 2d 179, ¶26. We affirm.

*By the Court.*—Judgments and orders affirmed.

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