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58 P.3d 1080

[Judges and Attorneys](#)

Colorado Court of Appeals,
Div. II.
The PEOPLE of the State of Colorado, Plaintiff-Appellee,
v.
Scott CAMPBELL, Defendant-Appellant.

No. 01CA0446.
May 9, 2002.
Rehearing Denied June 6, 2002.
Certiorari Granted Nov. 25, 2002.

Defendant was convicted upon guilty plea in the District Court, Boulder County, [Roxanne Bailin](#), J., of possession of controlled substance. Defendant appealed. The Court of Appeals, [Webb](#), J., held that: (1) different classifications for unlawful possession of controlled substance and unlawful use of controlled substance did not violate equal protection; (2) state was not required to charge and prove that defendant charged with unlawful possession of controlled substance also had intent to distribute; (3) guilty plea was knowing and voluntary; and (4) imposition of ten-year sentence was not abuse of discretion.

Affirmed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

- ↳ [92](#) Constitutional Law
 - ↳ [92XXVI](#) Equal Protection
 - ↳ [92XXVI\(F\)](#) Criminal Law
 - ↳ [92k3781](#) k. Creation and Classification of Offenses. [Most Cited Cases](#)
(Formerly 92k250.1(2), 92k250.3(1))

If a criminal statute sets different penalties for identical conduct, a person subject to the harsher penalty is denied equal protection unless reasonable differences exist between the proscribed behaviors. [U.S.C.A. Const.Amend. 14](#); [West's C.R.S.A. Const. Art. 2, § 25](#).

[2]  [KeyCite Citing References for this Headnote](#)

- ↳ [92](#) Constitutional Law
 - ↳ [92XXVI](#) Equal Protection
 - ↳ [92XXVI\(F\)](#) Criminal Law
 - ↳ [92k3781](#) k. Creation and Classification of Offenses. [Most Cited Cases](#)
(Formerly 92k250.1(2))


Statutory classification of crimes must be based on differences that are real in fact and reasonably related to the general purpose of the criminal legislation, in order to survive challenge based on violation of equal protection. [U.S.C.A. Const.Amend. 14](#); [West's C.R.S.A. Const. Art. 2, § 25](#).

[3]  [KeyCite Citing References for this Headnote](#)

- ↳ [92](#) Constitutional Law
 - ↳ [92XXVI](#) Equal Protection
 - ↳ [92XXVI\(E\)](#) Particular Issues and Applications
 - ↳ [92XXVI\(E\)17](#) Tort or Financial Liabilities
 - ↳ [92k3758](#) k. Penalties and Sanctions in General. [Most Cited Cases](#)
(Formerly 92k247)

The General Assembly may impose greater penalties for acts that it perceives to have graver social consequences, for purposes of equal protection analysis, even if the differences are only a matter of degree. [U.S.C.A. Const.Amend. 14](#); [West's C.R.S.A. Const. Art. 2, § 25](#).

[4]  [KeyCite Citing References for this Headnote](#)

- ↳ [92](#) Constitutional Law
 - ↳ [92XXVI](#) Equal Protection
 - ↳ [92XXVI\(F\)](#) Criminal Law
 - ↳ [92k3781](#) k. Creation and Classification of Offenses. [Most Cited Cases](#)
(Formerly 92k250.1(2))
- ↳ [96H](#) Controlled Substances  [KeyCite Citing References for this Headnote](#)
 - ↳ [96HI](#) In General
 - ↳ [96Hk4](#) Statutes and Other Regulations
 - ↳ [96Hk6](#) k. Validity. [Most Cited Cases](#)
(Formerly 138k43.1 Drugs and Narcotics)

Classification of possession of controlled substance as class four felony, when unlawful use of controlled substance was classified as class five felony with smaller

sentence, did not violate constitutional right to equal protection; classification was based on real difference in that possession did not necessarily involve use, and, as long as defendant had it in his possession, he had capability to distribute or dispense it, and thereby posed greater danger to society. [U.S.C.A. Const.Amend. 14](#); [West's C.R.S.A. Const. Art. 2, § 25](#); [West's C.R.S.A. §§ 18-18-404, 18-18-405](#).

[5]  [KeyCite Citing References for this Headnote](#)

↳ [76A](#) Chemical Dependents

↳ [76AI](#) In General

↳ [76Ak2](#) k. Constitutional and Statutory Provisions. [Most Cited Cases](#)

↳ [92](#) Constitutional Law  [KeyCite Citing References for this Headnote](#)

↳ [92XXVI](#) Equal Protection

↳ [92XXVI\(F\)](#) Criminal Law

↳ [92k3789](#) k. Decision to Prosecute; Discretion. [Most Cited Cases](#)
(Formerly 92k250.3(1))

That district attorney's consent was required for defendant to obtain drug treatment and suspension of criminal proceedings upon conviction for felony possession of controlled substance, when such consent was not required on conviction for illegal use of controlled substance, did not violate equal protection; right to obtain treatment and suspension of proceedings on conviction for "use" was not automatic, but was a determination which rested in court's discretion. [U.S.C.A. Const.Amend. 14](#); [West's C.R.S.A. Const. Art. 2, § 25](#); [West's C.R.S.A. §§ 18-18-404, 18-18-405](#).

[6]  [KeyCite Citing References for this Headnote](#)

↳ [110](#) Criminal Law

↳ [110I](#) Nature and Elements of Crime

↳ [110k29](#) Different Offenses in Same Transaction

↳ [110k29\(5\)](#) Particular Offenses

↳ [110k29\(8\)](#) k. Drugs and Narcotics Offenses. [Most Cited Cases](#)

State was not required to charge and prove that defendant charged with unlawful possession of controlled substance also had intent to distribute, in light of legislative determination that person convicted of possession posed danger to society because of ability to distribute; prosecutor had discretion to charge either one or both distinct offenses. [West's C.R.S.A. § 18-18-405](#).

[7]  [KeyCite Citing References for this Headnote](#)

↳ [110](#) Criminal Law

↩ [110XV](#) Pleas

↩ [110k272](#) Plea of Guilty

↩ [110k273](#) In General

↩ [110k273\(4\)](#) Requisites and Proceedings for Entry

↩ [110k273\(4.1\)](#) k. In General. [Most Cited Cases](#)

↩ [110](#) Criminal Law  [KeyCite Citing References for this Headnote](#)

↩ [110XV](#) Pleas

↩ [110k272](#) Plea of Guilty

↩ [110k273.1](#) Voluntary Character

↩ [110k273.1\(4\)](#) k. Ascertainment by Court; Advising and Informing Accused. [Most Cited Cases](#)

Guilty plea to unlawful possession of controlled substance was knowing and voluntary; providency court provided clear factual basis for charge, defendant admitted to having been in control of some amount of cocaine apart from the amount he and friends had used, and he stated that he had no trouble understanding charges and that his attorneys had been thorough in briefing him as to proceedings.

[8]  [KeyCite Citing References for this Headnote](#)

↩ [92](#) Constitutional Law

↩ [92XXVII](#) Due Process

↩ [92XXVII\(H\)](#) Criminal Law

↩ [92XXVII\(H\)4](#) Proceedings and Trial

↩ [92k4585](#) Pleas

↩ [92k4587](#) k. Guilty Pleas. [Most Cited Cases](#)
(Formerly 92k265.5)

To satisfy the requirements of due process, the record as a whole must show that the defendant understood the critical elements of the crime to which he or she pleaded guilty and that the plea was knowing and voluntary. [U.S.C.A. Const.Amend. 14](#); [West's C.R.S.A. Const. Art. 2, § 25](#).

[9]  [KeyCite Citing References for this Headnote](#)

↩ [110](#) Criminal Law

↩ [110XV](#) Pleas

↩ [110k272](#) Plea of Guilty

↩ [110k273.1](#) Voluntary Character

↩ [110k273.1\(4\)](#) k. Ascertainment by Court; Advising and Informing Accused. [Most Cited Cases](#)

Before accepting a guilty plea, a trial court must explain the critical elements of the offense in terms which are understandable to the defendant.

[10]  [KeyCite Citing References for this Headnote](#)

↪ [110](#) Criminal Law

↪ [110XV](#) Pleas

↪ [110k272](#) Plea of Guilty

↪ [110k273.1](#) Voluntary Character

↪ [110k273.1\(4\)](#) k. Ascertainment by Court; Advising and Informing Accused. [Most Cited Cases](#)

The degree of explanation of an offense that a judge is required to give before accepting a guilty plea depends on the nature and complexity of the offense, the defendant's personal characteristics, and the defendant's representation by counsel, but when the crime is relatively simple and the elements are not so technical in nature as to be beyond the understanding of persons of normal intelligence, the reading of the information is an acceptable method of advising a defendant of the nature of the offense.

[11]  [KeyCite Citing References for this Headnote](#)

↪ [110](#) Criminal Law

↪ [110XV](#) Pleas

↪ [110k272](#) Plea of Guilty

↪ [110k273.1](#) Voluntary Character

↪ [110k273.1\(4\)](#) k. Ascertainment by Court; Advising and Informing Accused. [Most Cited Cases](#)

Defendant's request to consult with counsel after trial court advised defendant regarding elements of felony possession of controlled substance did not render his subsequent guilty plea involuntary, where defendant did not suggest to court that counsel contradicted court's advisement, and defendant did not request clarification regarding statutory knowledge or possession elements.

[12]  [KeyCite Citing References for this Headnote](#)

↪ [110](#) Criminal Law

↪ [110XV](#) Pleas

↪ [110k272](#) Plea of Guilty

↪ [110k273.4](#) Waiver of Defenses and Objections

↪ [110k273.4\(1\)](#) k. In General. [Most Cited Cases](#)

Defendant waived challenge to sufficiency of evidence that he possessed cocaine other than cocaine he used, when he pled guilty to felony possession of controlled substance. [West's C.R.S.A. § 18-18-405](#).

[13]  [KeyCite Citing References for this Headnote](#)

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HI](#) Punishment in General
 - ↳ [350HI\(B\)](#) Extent of Punishment in General
 - ↳ [350Hk31](#) k. Discretion of Court. [Most Cited Cases](#)

Because the trial court has greater familiarity with a defendant and the circumstances of the case, the trial court is accorded wide latitude in its decisions on sentencing matters.

[14]  [KeyCite Citing References for this Headnote](#)

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HI](#) Punishment in General
 - ↳ [350HI\(C\)](#) Factors or Purposes in General
 - ↳ [350Hk58](#) k. Manner and Effect of Weighing or Considering Factors. [Most Cited Cases](#)

In determining a defendant's sentence, the court may not place undue emphasis on any one of the sentencing factors to the exclusion of the others. [West's C.R.S.A. § 16-11-101\(2\)\(a\)](#).

[15]  [KeyCite Citing References for this Headnote](#)

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HI](#) Punishment in General
 - ↳ [350HI\(C\)](#) Factors or Purposes in General
 - ↳ [350Hk58](#) k. Manner and Effect of Weighing or Considering Factors. [Most Cited Cases](#)

The fact that a sentencing court finds aggravating factors to be more compelling than any arguably mitigating factors does not constitute an abuse of discretion or indicate that the court failed to consider evidence of mitigation. [West's C.R.S.A. § 16-11-101\(2\)\(a\)](#).

[16]  [KeyCite Citing References for this Headnote](#)

- ↳ [96H](#) Controlled Substances

← [96HIII](#) Prosecutions

← [96Hk100](#) Sentence and Punishment

← [96Hk100\(2\)](#) k. Extent of Punishment. [Most Cited Cases](#)
(Formerly 138k133 Drugs and Narcotics)

Imposition of ten-year sentence for unlawful possession of controlled substance was not abuse of discretion, despite mitigating factors such as defendant's long-standing drug addiction, his bipolar disorder, and fact that he was entering in-patient rehabilitation facility for drug treatment, in light of aggravating factors such as defendant's extensive criminal history, his multiple convictions for drug-related offenses, and his failure to overcome his addiction, even after witnessing deaths of wife and girlfriend due to drug overdoses. [West's C.R.S.A. § 16-11-101\(2\)\(a\)](#).

[17]  [KeyCite Citing References for this Headnote](#)

← [350H](#) Sentencing and Punishment

← [350HI](#) Punishment in General

← [350HI\(E\)](#) Factors Related to Offender

← [350Hk105](#) k. Substance Abuse and Addiction. [Most Cited Cases](#)

Trial court could consider evidence that defendant was present on both occasions when wife and girlfriend died from drug overdoses, that he failed to seek help when it became apparent that they had overdosed, and that he failed to seek treatment after witnessing the deaths, in consideration of aggravating factor for refusal to take addiction seriously, in sentencing defendant to ten years for unlawful possession of controlled substance. [West's C.R.S.A. § 16-11-101\(2\)\(a\)](#).

[18]  [KeyCite Citing References for this Headnote](#)

← [350H](#) Sentencing and Punishment

← [350HI](#) Punishment in General

← [350HI\(E\)](#) Factors Related to Offender

← [350Hk92](#) k. Offender's Character in General. [Most Cited Cases](#)

← [350H](#) Sentencing and Punishment  [KeyCite Citing References for this Headnote](#)

← [350HI](#) Punishment in General

← [350HI\(E\)](#) Factors Related to Offender

← [350Hk93](#) Other Offenses, Charges, Misconduct

← [350Hk94](#) k. In General. [Most Cited Cases](#)

A trial court may consider unusual aspects of a defendant's character, past conduct, and habits and other factors consistent with a pattern of conduct that may suggest a danger to society. [West's C.R.S.A. § 16-11-101\(2\)\(a\)](#).

[19]  [KeyCite Citing References for this Headnote](#)

↳ [96H](#) Controlled Substances

↳ [96HIII](#) Prosecutions

↳ [96Hk100](#) Sentence and Punishment

↳ [96Hk100\(2\)](#) k. Extent of Punishment. [Most Cited Cases](#)
(Formerly 138k133 Drugs and Narcotics)

Even if trial court should not have considered evidence that defendant had witnessed drug overdose deaths of wife and girlfriend, and that he failed to seek treatment thereafter, imposition of ten-year sentence for unlawful possession of controlled substance was justified in light of defendant's multiple prior convictions for drug-related offenses and extensive criminal history. [West's C.R.S.A. § 16-11-101\(2\)\(a\)](#).

[20]  [KeyCite Citing References for this Headnote](#)

↳ [350H](#) Sentencing and Punishment

↳ [350HI](#) Punishment in General

↳ [350HI\(E\)](#) Factors Related to Offender

↳ [350Hk93](#) Other Offenses, Charges, Misconduct

↳ [350Hk94](#) k. In General. [Most Cited Cases](#)

↳ [350H](#) Sentencing and Punishment  [KeyCite Citing References for this Headnote](#)

↳ [350HI](#) Punishment in General

↳ [350HI\(E\)](#) Factors Related to Offender

↳ [350Hk93](#) Other Offenses, Charges, Misconduct

↳ [350Hk97](#) k. Similarity to Present Offense. [Most Cited Cases](#)

↳ [350H](#) Sentencing and Punishment  [KeyCite Citing References for this Headnote](#)

↳ [350HI](#) Punishment in General

↳ [350HI\(E\)](#) Factors Related to Offender

↳ [350Hk105](#) k. Substance Abuse and Addiction. [Most Cited Cases](#)

Imposition of aggravated range sentence of ten years for unlawful possession of controlled substance was not improper punishment based on defendant's status as drug addict, but was within range required by law, and supported by ample evidence of defendant's extensive criminal history and convictions for drug-related offenses. [West's C.R.S.A. § 16-11-101\(2\)\(a\)](#).

[21]  [KeyCite Citing References for this Headnote](#)

[↩ 350H Sentencing and Punishment](#)[↩ 350HVII Cruel and Unusual Punishment in General](#)[↩ 350HVII\(E\) Excessiveness and Proportionality of Sentence](#)[↩ 350Hk1490 k. Drugs and Narcotics. Most Cited Cases](#)

Ten-year sentence was not grossly disproportionate to severity of class 4 felony possession of controlled substance; sentence was below maximum allowable for offense, even after recognition of aggravating factors including defendant's extensive criminal history, numerous convictions for drug-related offenses, and refusal to seek treatment after witnessing overdose deaths of wife and girlfriend. [U.S.C.A. Const.Amend. 8](#); [West's C.R.S.A. § 18-1-105\(6\)](#).

[\[22\] !\[\]\(c90a7b4281affcc3e767d20eb96d3e69_img.jpg\) KeyCite Citing References for this Headnote](#)[↩ 350H Sentencing and Punishment](#)[↩ 350HVII Cruel and Unusual Punishment in General](#)[↩ 350HVII\(E\) Excessiveness and Proportionality of Sentence](#)[↩ 350Hk1482 k. Proportionality. Most Cited Cases](#)

The constitutional prohibition against cruel and unusual punishment does not require strict proportionality between the crimes committed and the sentence imposed; instead, it forbids only extreme sentences that are grossly disproportionate to the crime. [U.S.C.A. Const.Amend. 8](#).

[\[23\] !\[\]\(705a35d094974a6f17c3f594679010bd_img.jpg\) KeyCite Citing References for this Headnote](#)[↩ 350H Sentencing and Punishment](#)[↩ 350HVII Cruel and Unusual Punishment in General](#)[↩ 350HVII\(E\) Excessiveness and Proportionality of Sentence](#)[↩ 350Hk1482 k. Proportionality. Most Cited Cases](#)

In determining the constitutional proportionality between the defendant's crime and sentence, a reviewing court need not compare the defendant's sentence with sentences imposed on other criminals in the same jurisdiction or with the sentences imposed for the commission of the same crime in other jurisdictions, unless the threshold analysis of the crime committed and the sentence imposed leads to an inference of gross disproportionality. [U.S.C.A. Const.Amend. 8](#).

[\[24\] !\[\]\(2617fc1ed08eafb338bfa05920a21ed7_img.jpg\) KeyCite Citing References for this Headnote](#)[↩ 350H Sentencing and Punishment](#)[↩ 350HVII Cruel and Unusual Punishment in General](#)[↩ 350HVII\(E\) Excessiveness and Proportionality of Sentence](#)

↩ [350Hk1490](#) k. Drugs and Narcotics. [Most Cited Cases](#)

Defendant's ten-year sentence for class 4 felony possession of controlled substance was not unconstitutionally disproportionate to codefendants' deferred sentences for class one misdemeanor possession of controlled substance, where codefendants merely used cocaine that defendant provided to them. [U.S.C.A. Const.Amend. 8](#).

[25]  [KeyCite Citing References for this Headnote](#)

↩ [350H](#) Sentencing and Punishment

↩ [350HI](#) Punishment in General

↩ [350HI\(C\)](#) Factors or Purposes in General

↩ [350Hk56](#) k. Sentence or Disposition of Co-Participant or Codefendant. [Most Cited Cases](#)

Sentencing is individualized; no rule requires that codefendants must receive similar sentences.

***1082** [Ken Salazar](#), Attorney General, [Peter J. Cannici](#), Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee.

[Thomas K. Carberry](#), Denver, Colorado, for Defendant-Appellant.

Opinion by Judge [WEBB](#).

Defendant, Scott Campbell, appeals the judgment of conviction entered following his guilty plea to possession of a controlled substance. He also appeals the sentence imposed. We affirm.

Police officers who were investigating two empty cars parked in a no-parking area stopped defendant to determine whether he owned one of the cars. Defendant told the officers that he did and, upon further questioning, ***1083** led the officers to an area where he and three companions had been sitting. The officers found a box containing cocaine, two vials of liquid, and hypodermic needles.

The officers then conducted a pat-down search of defendant and discovered marijuana and a marijuana pipe. After being advised of his rights, defendant told the officers that he had been using cocaine. Upon searching defendant at the police station, the officers found a hypodermic syringe and a switchblade in his pockets.

Defendant was charged with possession of an illegal weapon and several drug-related crimes, including illegal use of a controlled substance, simple possession of a controlled substance, and distribution of a controlled substance.

Defendant's companions were also arrested. They told the officers that the cocaine

belonged to defendant and that he had offered to let them use it. Two of defendant's companions later pleaded guilty to possession of a controlled substance (a class one misdemeanor) and received deferred judgments and sentences in exchange for their agreement to testify against defendant. The People dismissed the charges against defendant's third companion.


Defendant filed various pretrial motions. Although defendant did not specifically argue that the unlawful possession statute, [§ 18-18-405\(1\)\(a\), C.R.S.2001](#), violates equal protection guarantees, the People responded to the motions as if he had.



Before the trial court ruled on the motions, the parties entered into a plea agreement whereby defendant pleaded guilty to possession of a controlled substance, and the People agreed to dismissal of the remaining charges. The plea agreement provided that, upon ruling on defendant's motions, the trial court would determine whether the offense to which he pleaded guilty was a class four or a class five felony and that either party could appeal the trial court's ruling.

At the sentencing hearing, the trial court rejected defendant's equal protection challenge to the statute, concluded that the offense was a class four felony, and denied all other motions. The court then sentenced defendant to ten years in prison.

I.

Defendant contends that the statutory scheme contained in the possession of a controlled substance statute, [§ 18-18-405, C.R.S.2001](#), and the unlawful use of a controlled substance statute, [§ 18-18-404, C.R.S.2001](#), violates equal protection principles. We note that in [People v. Warren, 55 P.3d 809 \(Colo.App. 2002\)](#), a division of this court rejected a similar argument, and we do likewise here.

[1]  Equal protection of the laws is guaranteed by both the Fourteenth Amendment and [art. II, § 25 of the Colorado Constitution](#). [People v. Mozee, 723 P.2d 117 \(Colo.1986\)](#). Under the Colorado Constitution, if a criminal statute sets different penalties for identical conduct, a person subject to the harsher penalty is denied equal protection unless reasonable differences exist between the proscribed behaviors. Compare [People v. Richardson, 983 P.2d 5 \(Colo.1999\)](#), with [United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 \(1979\)](#).

[2]  [3]  The statutory classification of crimes must be based on differences that are real in fact and reasonably related to the general purpose of the criminal legislation. [People v. Mumaugh, 644 P.2d 299 \(Colo.1982\)](#). However, the General Assembly may impose greater penalties for acts that it perceives to have graver social consequences, even if the differences are only a matter of degree. [People v. Gonzales, 973 P.2d 732 \(Colo.App.1999\)](#).

[4]  Defendant first argues that [§ 18-18-405](#) violates equal protection because it

classifies simple possession of a controlled substance as a class four felony, while [§ 18-18-404](#) classifies use of a controlled substance as a class five felony. Defendant contends that use necessarily includes possession, yet the "lesser" offense of possession carries a harsher penalty. We are not persuaded.

In [People v. Cagle, 751 P.2d 614 \(Colo.1988\)](#), the supreme court rejected this argument, ***1084** holding that "use" and "possession" are two separate offenses. "Possession of a controlled substance does not necessarily involve use... [A person] does not use [a controlled substance] until he ingests [it]." [People v. Cagle, supra, 751 P.2d at 620](#). Consequently, the statutory classification is based on real differences.

Further, penalizing possession more harshly than use is justified because, as long as one has possession of a controlled substance, he or she has the capability to distribute or dispense it. Because one who possesses a controlled substance poses a greater threat to the public peace, health, and safety, the imposition of a more severe sanction is justified. *People v. Cagle, supra*.

Defendant argues that we must revisit the question because, he contends, [People v. Villapando, 984 P.2d 51 \(Colo.1999\)](#), effectively overruled *People v. Cagle*. We do not agree.


The defendant in *Villapando* was charged with both use and possession of a controlled substance based solely on a toxicology report that showed marijuana residue in his system. The trial court dismissed the possession charge, relying on the statement in [People v. District Court, 964 P.2d 498, 501 \(Colo.1998\)](#) (*District Court I*), that "proof of the elements of the unlawful use offense does not establish the elements of the unlawful possession offense." The supreme court held that, because of the limited nature of a preliminary hearing, the trial court had erred in dismissing the possession charge after having found probable cause for the use charge.

The supreme court went on to say that "while an individual may unlawfully possess a controlled substance without voluntarily using it, it is simply not feasible for an individual to voluntarily use a controlled substance without also possessing it." [People v. Villapando, supra, 984 P.2d at 54](#). In this regard, the court observed, "Thus, our conclusion that the statutory scheme analyzed in *District Court I* comports with the requirements of equal protection principles is incorrect." [People v. Villapando, supra, 984 P.2d at 54](#). However, in the prior paragraph the court cited *People v. Cagle, supra*, with approval. Hence, we cannot read *Villapando* as overruling *Cagle*.

In addition to the fact that neither *District Court I* nor *Villapando* was decided on equal protection grounds, the factual predicate for the equal protection arguments in both of these cases-no evidence of possession beyond the evidence of use-is not before us. See [People v. McKenzie, 169 Colo. 521, 528, 458 P.2d 232, 235 \(1969\)](#) (rejecting equal protection argument where record included evidence of


possession), *overruled in part on other grounds by [People v. Lowe, 660 P.2d 1261 \(Colo.1983\)](#)*. Here, in contrast, defendant specifically acknowledged at the providency hearing that his "physical possession" of drugs was "separate from mixing it up and putting it in a syringe and injecting it in [his] leg and separate from offering it to [his] friends."

This factual difference defeats defendant's equal protection argument. Here, because the drugs possessed were not the drugs used, the two offenses are distinct. They would not be distinct only where all of the drugs possessed were used, in which event the evidence of use would not support a prosecution for possession. *Cf. [Patton v. People, 35 P.3d 124 \(Colo.2001\)](#)* (because possession and manufacture of a controlled substance are distinct offenses, criminal liability for both does not offend double jeopardy protections, unless they are based on the same incident). We interpret *Villapando* as recognizing that the particular facts, not rigid application of the strict elements test, should have defined the equal protection analysis in *District Court I*.

[5]  Defendant next argues that, because those charged with using a controlled substance can obtain treatment and the suspension of criminal proceedings without consent of the district attorney, while those charged with possession require such consent for the same benefits, the statutory scheme violates equal protection. We disagree.


Even if a defendant is found guilty of use of a controlled substance, treatment and suspension of proceedings are not automatic. Rather, that determination rests in the court's discretion. See [People v. Drake, 983 P.2d 135 \(Colo.App.1999\)](#). Thus, no violation of equal protection exists on that basis.


***1085** We reject defendant's argument that treatment and suspension of the criminal proceedings should not depend on whether drugs were discovered in the person's bloodstream or in his or her pocket. As stated in *People v. Cagle, supra*, this distinction is precisely the point. Those who possess controlled substances can distribute them to others; those who use controlled substances cannot.


[6]  Finally, defendant attacks *Cagle's* recognition of societal dangers inherent in possession by contending that before relying on this rationale, the People should be required to charge and prove possession with intent to distribute. However, prosecutorial discretion to charge one or both of two distinct offenses has been held constitutional. [People v. Haymaker, 716 P.2d 110 \(Colo.1986\)](#).


In sum, because the cocaine defendant used and the cocaine he possessed were different, the record does not support his assertion that he should have been charged only with use, and not also with possession. Accordingly, we reject his argument that the statutory scheme violates equal protection.

II.

[7]  Defendant also contends that his plea was not knowingly and voluntarily entered because at the providency hearing, the court did not explain the meaning of the terms "knowingly" and "possession" and thus did not adequately advise him regarding the elements of the offense. We disagree.

[8]  To satisfy the requirements of due process, the record as a whole must show that the defendant understood the critical elements of the crime to which he or she pleaded guilty and that the plea was knowing and voluntary. [Lacy v. People, 775 P.2d 1 \(Colo.1989\)](#); [Waits v. People, 724 P.2d 1329 \(Colo.1986\)](#).

[9]  Before accepting a guilty plea, a trial court must explain the critical elements of the offense "in terms which are understandable to the defendant." [People v. District Court, 868 P.2d 400, 403 \(Colo.1994\)](#).

[10]  The degree of explanation required depends on a number of factors, including the nature and complexity of the offense, the defendant's personal characteristics (such as intelligence), and the defendant's representation by counsel. When the crime is relatively simple and the elements are not "so technical in nature as to be beyond the understanding of persons of normal intelligence," the reading of the information is an acceptable method of advising a defendant of the nature of the offense. [People v. Drake, 785 P.2d 1257, 1269 \(Colo.1990\)](#) (internal quotations omitted) (implicitly concluding that the term "knowingly" is readily understandable to persons of normal intelligence); see also *Lacy v. People, supra*.

Here, although the providency court did not read the information to defendant, it reminded him of the factual basis for the charges during the following colloquy:

THE COURT: [According to the police officers, they] had a discussion with you and at some point in that discussion you stated that you and your friend were using cocaine by injection.

There was other evidence presented [at a previous hearing] from the police officers who had interviewed the other three people who were there that night. They stated that the cocaine was yours and that you had bought the cocaine and that you had used it and offered other people the opportunity to use it.

Now, the important part of that hearing for purposes of this hearing [is] that there was testimony that you were in possession of, meaning actual physical control of, cocaine on that evening. And so what I need to hear from you is whether you agree ... that you had actual physical control over some cocaine of some amount and that you knew that you had it. Do you agree that occurred?

THE DEFENDANT: Just a moment, Your Honor.

(Defendant conferred with counsel.)

DEFENSE COUNSEL: If I can have just a moment, Judge.

THE COURT: Okay. Are you all ready?

THE DEFENDANT: Yes, Your Honor.

***1086** THE COURT: So ... what is the answer to my question? My question was do you agree that on [the day of the offense] ...

THE DEFENDANT: Yes.

THE COURT: ... that at a time when you knew what you were doing, you were in actual physical possession of some amount of cocaine?

THE DEFENDANT: Yes.

THE COURT: And that's separate from mixing it up and putting it in a syringe and injecting it in your leg and separate from offering it to your friends. None of that is before the Court at the moment. I am just asking you whether you were in physical possession of some amount of cocaine on that evening.

THE DEFENDANT: Yes, Your Honor.


THE COURT: Okay. Now, that-it's a very simple charge, and that's what it means. On [the date of the incident] at a time when you knew what you were doing and understood what was going on around you, you were in possession of a Schedule II Controlled Substance; that is, cocaine.


The court also explained the constitutional challenges to the statutes that defendant made in his motions, and defendant indicated that he understood.

The court then invited defendant to consult with his attorney before proceeding, but defendant indicated that there was no need to do so and assured the court that his attorneys had been "very thorough [in] briefing [him] as to what [he was] doing." The court determined that defendant had attended college, and when asked whether he had "any trouble understanding anything" the providency court told him, defendant responded that he had not.

Based on this record, we reject defendant's claim that the trial court's advisement was inadequate and that he did not understand the meaning of the terms "knowingly" and "possession," or that he was confused about the difference between simple

possession and possession with intent to distribute. See [People v. Stephens, 837 P.2d 231 \(Colo.App.1992\)](#)(defendant was adequately apprised of the nature of the charge where the prosecution read information in court, defendant's attorney had discussed the matter with the defendant, and the defendant acknowledged that he understood the charge).


[11]  Contrary to defendant's contention, the fact that he conferred with counsel following the court's advisement regarding the elements of the offense, but before he told the court he understood the advisement, does not require that we reach a different result. Defendant did not suggest to the court that counsel had contradicted the court's advisement and did not request clarification from the court regarding either the "knowingly" or "possession" elements of the offense or regarding the difference between simple possession and possession with intent to distribute. The court's advisement was clear, and defendant cannot now claim that he was unaware of that element and would not have pleaded guilty if he had been. Cf. [Craig v. People, 986 P.2d 951 \(Colo.1999\)](#)(noting that defendant confirmed at the providency hearing that he understood the written plea documents and did not express confusion or request clarification from the court regarding the claimed differences between the written and oral plea advisements).

[12]  Moreover, to the extent defendant claims insufficiency of evidence that he possessed cocaine other than the cocaine he used, and that he thus had a defense to the possession charge, he waived that claim when he entered his guilty plea. See [People v. Sandreschi, 849 P.2d 873 \(Colo.App.1992\)](#).

III.

We likewise reject defendant's contentions that no aggravating evidence supported the imposition of an aggravated range sentence and that his sentence is disproportionate both to his crime and to the disposition of his codefendants' cases.

A.

[13]  Sentencing is by its very nature a discretionary function. Because the trial court has greater familiarity with a defendant and the circumstances of the case, the trial court is accorded wide latitude in its ***1087** decisions on such matters. [People v. Fuller, 791 P.2d 702 \(Colo.1990\)](#). A trial court's sentencing decision will not be disturbed absent a clear abuse of discretion. [People v. Watkins, 684 P.2d 234 \(Colo.1984\)](#).

In exercising its sentencing discretion, a trial court must consider the nature and elements of the offense, the character and rehabilitative potential of the offender, any aggravating or mitigating circumstances, and the public interest in safety and deterrence. [Section 16-11-101\(2\)\(a\), C.R.S.2001](#); [People v. Piro, 701 P.2d 878 \(Colo.App.1985\)](#).

[14] [15] The court may not place undue emphasis on any one of these factors to the exclusion of the others. *People v. Piro, supra*. The fact that a sentencing court finds aggravating factors to be more compelling than any arguably mitigating factors, however, does not constitute an abuse of discretion or indicate that the court failed to consider evidence of mitigation. [People v. Hernandez-Luis, 879 P.2d 429 \(Colo.App.1994\)](#).


[16] We reject defendant's argument that the sentence imposed constitutes an abuse of discretion because the trial court overemphasized aggravating factors and did not give sufficient consideration to arguably mitigating factors, particularly his claimed rehabilitative potential. The record reflects that the trial court considered defendant's evidence of mitigation, including his long-standing addiction to drugs, his [bipolar disorder](#), and the statements made by both his father and his attorney at the sentencing hearing indicating that they had found a private, in-patient rehabilitation facility for defendant.


The court also considered defendant's extensive criminal history, his several prior convictions for drug-related offenses, and the charges in his previous cases involving violent crimes. The court also noted defendant's failure to overcome his addiction, despite having been convicted of drug crimes before and witnessing the deaths of both his wife and his girlfriend as a result of drug overdoses. The court found that a lengthy sentence was appropriate based on these aggravating factors and that none of the arguably mitigating evidence justified a more lenient sentence.

[17] [18] We also reject defendant's contention that the trial court should not have considered evidence regarding the overdose deaths of his wife and his girlfriend. A trial court may consider unusual aspects of a defendant's character, past conduct, and habits and other factors consistent with a pattern of conduct that may suggest a danger to society. [People v. Phillips, 652 P.2d 575 \(Colo.1982\)](#).

In its findings, the court noted that defendant was with both women when they used the drugs that killed them, did not seek help for one of them after it was apparent that she had overdosed, and failed to seek treatment for his own addiction after witnessing two drug-related deaths. Thus, the court considered the evidence not because it demonstrated that defendant was somehow responsible for the deaths, but because the deaths highlighted his failure to take his addiction seriously. This analysis suggests that, despite the availability of an in-patient treatment program, defendant was unlikely to respond to yet another opportunity for treatment.

Under these circumstances, the trial court's consideration of the challenged evidence was within its discretion. The court did not, as defendant suggests, blame him for the deaths. And, because the record shows no connection between the court's sentencing decision and defendant's gender, we reject his claim that the court's consideration of the evidence was "an extraordinary sexist act."


[19]  Moreover, even if the court's consideration of the drug overdose deaths was questionable, reversal is not warranted because other evidence in the record supports the sentence imposed. See [People v. Broga, 750 P.2d 59 \(Colo.1988\)](#) (where sentencing court finds several factors justifying a sentence, only one of those factors need be legitimate to support court's decision). We conclude the record shows that the trial court would have imposed the same sentence, even if it had not considered the challenged factor. See [People v. Young, 987 P.2d 889 \(Colo.App.1999\)](#).


[20]  ***1088** Finally, the record does not support defendant's assertion that, by imposing an aggravated range sentence, the trial court punished him on the basis of his status as a drug addict.

Based on our review of the record, we find no abuse of discretion in the sentence imposed. It is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case. See *People v. Fuller, supra*. And, because there is ample support in the record for the sentencing court's decision, we will not disturb it on review. See [Rocha v. People, 713 P.2d 350 \(Colo.1986\)](#); [People v. Warren, 200 Colo. 110, 612 P.2d 1124 \(1980\)](#).

B.



[21]  We also reject defendant's proportionality challenge to his sentence.

[22]  The constitutional prohibition against cruel and unusual punishment does not require strict proportionality between the crimes committed and the sentence imposed. Instead, it forbids only extreme sentences that are "grossly disproportionate" to the crime. [People v. Mershon, 874 P.2d 1025, 1030 \(Colo.1994\)](#). Thus, the threshold proportionality review measures the relationship between the nature and number of offenses committed and the severity of the sentence imposed.

[23]  Under the narrow proportionality review applicable where, as here, the offense is serious, a reviewing court need not compare the defendant's sentence with sentences imposed on other criminals in the same jurisdiction or with the sentences imposed for the commission of the same crime in other jurisdictions, unless the threshold analysis of the crime committed and the sentence imposed "leads to an inference of gross disproportionality." [People v. Hayes, 923 P.2d 221, 229 \(Colo.App.1995\)](#); see [People v. Merchant, 983 P.2d 108 \(Colo.App.1999\)](#).

Despite recognition of the aggravating factors discussed above, including past violent offenses, the trial court did not sentence defendant to the maximum allowable term under the sentencing statutes. See [§ 18-1-105\(1\)\(a\)\(V\)\(A\), C.R.S.2001](#) (presumptive range of sentences for class four felonies is two to six years); [§ 18-1-105\(6\), C.R.S.2001](#) (aggravated range of sentences for class four felonies is seven to

twelve years). Making a threshold comparison, we conclude that defendant's sentence is not disproportionate to the severity of his crime.

[\[24\]](#)  [\[25\]](#)  Although this conclusion obviates the need for further inquiry, we also reject defendant's contention that his sentence was impermissibly disproportionate to the dispositions received by his codefendants. Sentencing is individualized; no rule requires that codefendants must receive similar sentences. *People v. Hayes, supra*. Here, defendant provided cocaine to his companions. They merely used it.

The judgment and sentence are affirmed.

Judge [PLANK](#) and Judge JONES concur.

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