COURT OF APPEALS
DECISION
DATED AND RELEASED

May 8, 1997

NOTICE

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No. 96-2321-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIE MCCOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

EICH, C.J. Willie McCoy appeals from a judgment convicting him of conspiring to deliver crack cocaine in excess of 100 grams within 1000 feet of a

school (party to the crime), in violation of §§ 161.41(1)(cm)5, 161.49(1),(2)(a),[1] and 939.05(1), STATS. McCoy's sentence was subject to enhancement under § 161.48, STATS., because he was a repeat drug-law offender, and also under § 161.49 because, as indicated, the offense occurred within 1000 feet of a school.

On appeal, McCoy argues that: (1) the State improperly "aggregated" several separate incidents of delivery of smaller amounts of cocaine into a single count of conspiring to deliver more than 100 grams; (2) the trial court erroneously instructed the jury with respect to the existence of a conspiracy; and (3) the court erred in the manner in which it applied the sentence enhancers.

We conclude that McCoy waived any objection to the 100-gram charge by failing to raise the issue in the trial court, and we reject his claim of instructional error. We also conclude, however, that the court improperly applied one of the penalty-enhancement statutes. We therefore affirm in part and reverse in part, and remand to the trial court for further proceedings.

The facts are not in dispute. Beginning in the summer of 1994, McCoy allowed several people, including Emma Basada, Juan Cathey and Juan's uncle, Oliver Cathey (known as O.J.), to distribute crack cocaine from his house in La Crosse, which was located approximately 700 feet from an elementary school. Juan Cathey and Basada made at least ten trips to La Crosse between June and November 1994, each time bringing an ounce (approximately twenty-eight grams) of cocaine, which they had purchased in Milwaukee for $800, and selling it in La

[1] All references to chapter 161, STATS., are to 1993-94, STATS. Chapter 161 was renumbered in part and repealed in part by 1995 Act 448, §§ 243 to 266, effective July 9, 1996. The provisions we discuss in this opinion are now §§ 961.41(1)(cm)5, 961.48(2), and 961.49(1)(2)(a), STATS.

Crosse for approximately $4600. Juan Cathey and Basada and, on occasion, O.J. Cathey sold approximately half the cocaine from McCoy's house and the other half elsewhere. McCoy was "paid" with cocaine for his role as a "middleman," which involved lining up purchasers and collecting money. Juan Cathey testified that there was an "understanding" that he and Basada could distribute cocaine from McCoy's house; each time they left for Milwaukee to make a purchase, he would tell McCoy when they would return.

The jury convicted McCoy of the charged offense and he was sentenced to fifteen years in prison, the first six years to be served without eligibility for parole.

I. Aggregation of Charges: Waiver

Citing ***State v. Spraggin***, 71 Wis.2d 604, 613, 239 N.W.2d 297, 305 (1976) (quotations and quoted sources omitted), where the supreme court recognized that "[r]eceiving … different articles of stolen property at different times and on separate and unconnected occasions, … cannot be prosecuted as one crime ….," McCoy argues first that the delivery charges were improperly aggregated to total 100 grams because each transaction was a separate unrelated incident. The State argues waiver: that McCoy is attempting to raise the aggregation issue for the first time on appeal, which he may not do. *See* ***State v. Dietzen*****,** 164 Wis.2d 205, 212, 474 N.W.2d 753, 755, (Ct. App. 1991) (failure to raise an argument in the trial court waives any objection on appeal).

Conceding that he did not object to the charge with particularity, McCoy claims that the following remark his attorney made at the instruction conference should be considered sufficient to preserve the claimed error for appeal:

> [I]t still doesn't make any sense. It's just complexity, Your Honor, and I don't see any reason for it except to say that my client is the root of all evil and brought all the cocaine into La Crosse, and the reason that it's all here is because of Willie McCoy ….

Whatever the import of such a general remark, McCoy's counsel went on to expressly state that he had no objection to the trial court reading WIS J I–CRIMINAL 6001, which instructs the jury to consider whether the amount of cocaine involved was "more than 100 grams." At the close of the instruction conference, counsel informed the court that he "had the opportunity to review the verdict form"—which contains the "100 grams" question—and, when asked whether he had any objection, replied: "None, Your Honor." The jury was thus asked, without objection by McCoy, to answer the question, and the supreme court has held that, in such circumstances, we lack authority to review the instruction and verdict. ***State v. Schumacher***, 144 Wis.2d 388, 402, 408-09, 424 N.W.2d 672, 677, 679-80 (1988).[2]

We conclude, therefore, that McCoy waived any argument that the 100-gram charge resulted from an improper aggregation of several lesser offenses.

[2] We retain the authority, of course, to reverse and order a new trial in the interest of justice under § 752.35, STATS., if, as a result of the unobjected-to error, (1) the real controversy has not been tried, or (2) it is probable that justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990). McCoy advances neither argument on this appeal.

II. Jury Instruction: Conspiracy

McCoy also objects to the trial court's conspiracy instruction insofar as it includes O.J. as a principal.[3] He maintains that the evidence was insufficient to support instructing the jury on a single conspiracy involving Juan Cathey, Basada and O.J. Cathey. When considering a challenge to the evidence supporting an instruction, we view the supporting evidence in the light most favorable to the party requesting it, which here is the State. ***State v. Gaudesi***, 112 Wis.2d 213, 223, 332 N.W.2d 302, 306 (1983). The question is whether a reasonable

[3] The State raises a waiver argument here as well, claiming that McCoy failed to object to O.J. Cathey's inclusion in the instruction. The record indicates, however, that when counsel and the court were discussing, among other things, whether there was sufficient evidence linking Basada, Juan Cathey and O.J. Cathey in a single conspiracy, and McCoy's attorney was asked whether he had any objection to adding O.J. Cathey's name to the instruction, counsel stated: "That we would object to, of course." We think that is sufficient to reach the merits of McCoy's objection on appeal.

On appeal, however, McCoy argues that: (1) the court violated McCoy's "right to a fair trial" by "fail[ing] to affirmatively instruct the jury to separately identify the scope and participants of each conspiracy when the evidence demonstrates multiple conspiracies"; and (2) use of the connector "and/or" made the instruction "unintelligible" and lacking in unanimity. In essence, his argument is that the court should have instructed the jury on multiple conspiracies. But, as the State points out, McCoy did not request such an instruction: when the trial judge asked the parties whether they had proposed instructions they wished to submit, McCoy's counsel answered, "No, Your Honor"—and we agree that because McCoy did not object to the instruction on these grounds below and did not request a multiple conspiracy instruction, these additional arguments should not be considered. Section 805.13(3), STATS.; ***Wingad v. John Deere & Co.,*** 187 Wis.2d 441, 455, 523 N.W.2d 274, 280 (Ct. App. 1994) (argument different from the one offered when objection was made in trial court will not be considered on appeal); *see also* ***State v. Speese***, 191 Wis.2d 205, 226, 528 N.W.2d 63, 71 (Ct. App. 1995) (failure to object to standard jury instruction on unanimity constitutes waiver of any argument on unanimity), *rev'd on other grounds*, 199 Wis.2d 597, 545 N.W.2d 510 (1996).

Moreover, even if McCoy had properly raised this issue, we agree with the State that under the facts of the present case, the failure to give a multiple conspiracy instruction was harmless error. ***Berger v. United States***, 295 U.S. 78, 81, 82-83 (1935) (error is not material when indictment charged one conspiracy and evidence shows two as long as the defendant's substantial rights are not affected—the jury is not confused and defendant is protected against another prosecution for the same offense); ***Bergeron v. State***, 85 Wis.2d 595, 605, 271 N.W.2d 386, 389 (1978).

construction of the evidence would allow the jury to find the fact suggested by the instruction. ***State v. Coleman***, 206 Wis.2d 198, 212-13, 556 N.W.2d 701, 706-07 (1996).

McCoy claims that because O.J. Cathey distributed some of his cocaine separately from that of Juan Cathey and Basada, there could be no common objective, and thus no conspiracy, among the three of them. He says, in effect, that there really were two or more conspiracies, and the court was required to frame its instructions to ensure that the jury could "separately identify the scope and the participants of each conspiracy so as not to impute the acts or parties of … one [conspiracy] to any other."[4] And because the court did not do this, but instead presented the case to the jury on a single-conspiracy theory, he claims his right to a fair trial was violated.

We disagree. A conspiracy exists when the parties (1) knowingly join and participate in "a single overriding scheme"; (2) intend to aid in the realization of an illegal objective; and (3) seek a common end through the comprehensive plan. Section 939.31, STATS.; ***Bergeron v. State***, 85 Wis.2d 595, 606-07, 271 N.W.2d 386, 389 (1978).[5] We believe there was evidence in this case from which the jury could properly find that a single conspiracy existed—one to which O.J. Cathey was a party. There was testimony, for example, that when Juan

[4] McCoy's argument on this point is problematic because, as indicated, *see supra* note 3, he never objected to the trial court's instruction on the ground that there were multiple conspiracies, not a single conspiracy. Nor did he request the court to instruct the jury on the existence of a multiple conspiracy.

[5] In ***Bergeron*** the court said, "'While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with these core conspirators and others to achieve a common goal may be members of an overall conspiracy.'" ***Bergeron***, 85 Wis.2d at 607 n.6, 271 N.W.2d at 390 (quoting ***United States v. Varelli***, 407 F.2d 735, 742 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972)).

Cathey told O.J. Cathey, his uncle, about the opportunities available for profiting from drug sales in La Crosse, O.J. Cathey began showing up at McCoy's to also distribute the cocaine. Juan Cathey and O.J. Cathey were together at McCoy's residence at the same time on at least one occasion, and users were continuously coming to the house asking for cocaine, at least once while O.J. Cathey was present. Viewing this evidence in the light most favorable to the State's position, we believe a jury could reasonably conclude that O.J. Cathey had joined with Juan Cathey, Basada and McCoy to accomplish a common goal of distributing cocaine from McCoy's house and that each had an interest in the overall success of the operation.

Even if Juan Cathey, Basada and O.J. Cathey did not sell to the same people at the same time, or share in the same proceeds—or even if they occasionally disagreed—the cocaine they distributed at McCoy's house created a steady supply of potential customers from which they all profited. We agree with the State that "each ... was aware of the other's distribution of cocaine through McCoy['s] residence and [each] benefited from it." We see no error in adding O.J. Cathey's name to the conspiracy instruction.[6]

[6] Even if we were to find error in adding O.J. Cathey's name to the conspiracy instruction, the error would be harmless because the record contains sufficient evidence from which the jury could conclude that Juan Cathey, Basada and McCoy conspired to deliver over 100 grams of cocaine. Juan testified, for example, that he and Basada made ten trips from Milwaukee to La Crosse during the late summer and fall of 1994, bringing "approximately … 28 grams" each time and selling roughly half of it at McCoy's house. Half of 280 grams is 140 grams, well in excess of the 100 grams charged in the complaint. Basada confirmed that they made ten trips and sold the cocaine at McCoy's house and at another person's house.

Finally, McCoy complains of the trial court's use of the term "and/or" in identifying the parties in its discussion of the elements of conspiracy. For example, the instruction read in part: "That Juan Cathey and/or Emma Basada and/or Oliver J. Cathey delivered a substance …. that Juan Cathey and/or Emma Basada and/or Oliver J. Cathey knew … was … a controlled substance." He argues that use of the term rendered the instruction "hopelessly unintelligible" and violated his right to a unanimous verdict. He states:

(continued)

III. Sentence Enhancement

McCoy next challenges the manner in which the trial court applied the applicable penalty enhancers to his sentence.[7] It is a matter of statutory interpretation and application—a question of law which we review *de novo*. ***State v. Sostre***, 198 Wis.2d 409, 414, 542 N.W.2d 774, 776 (1996). The primary goal of statutory construction is to ascertain the legislature's intent, and the first step in the process is to look to the plain language of the statute. ***Id.*** And where the import of that language is clear and unambiguous, we simply apply the statute to the facts of the case. ***Cary v. City of Madison***, 203 Wis.2d 261, 264-65, 551 N.W.2d 596, 597 (Ct. App. 1996)

> The judge's multiple use of "and/or" permitted the jury to convict [McCoy] of conspiracy to deliver cocaine if he joined only with Oliver … when only Juan … and/or Emma … delivered cocaine. They could also convict if he joined only with Juan … and/or Emma … when only Oliver … delivered cocaine. There are nine different permutations whereby [McCoy] could join with only one of the three (3) named co-conspirators and only one of the three (3) co-conspirators delivered cocaine."

As a result, McCoy says, "it is impossible to be certain … which combinations this jury, or any reasonable jury[,] might have found," and his conviction must be reversed for "lack of unanimity." There is no dispute in the record, however, that Juan Cathey, Basada and O.J. Cathey each delivered cocaine, and the jury was properly instructed that its verdict must be unanimous. Indeed, the jurors were polled and expressed their agreement with the verdict after it was returned.

[7] The State argues that McCoy also waived this issue because he did not properly bring it before the trial court. While McCoy did not seek a sentence modification pursuant to § 973.19, STATS., s*ee* ***State v. Meyer***, 150 Wis.2d 603, 604, 442 N.W.2d 483, 484 (Ct. App. 1989) (defendant claiming the trial court erroneously exercised its sentencing discretion must move the court for modification under § 973.19 as a prerequisite to challenging the sentence on appeal), the issue here is whether application of the repeater provisions to McCoy's sentence is incorrect as a matter of law, not whether the trial court erred in exercising its sentencing discretion. Therefore, a sentence modification request was not a prerequisite to McCoy's challenge on appeal. ***State v. Wilks***, 165 Wis.2d 102, 107, n.6, 477 N.W.2d 632, 635 (Ct. App. 1991).

McCoy was convicted of violating § 161.41(1)(cm)5, STATS., which carries a minimum penalty of ten years and a maximum of thirty years' imprisonment. Section 161.41(1)(cm) is subject to a "repeater" or "habitual criminality" enhancer set forth in § 161.48(2), STATS., which provides, among other things:

> If any person is convicted of a 2nd or subsequent offense under this chapter that is specified in s. 161.41(1)(cm), ... *any applicable minimum and maximum fines and minimum and maximum periods of imprisonment under s. 161.41(1)(cm), ... are doubled.*

(Emphasis added.) The offense is also subject to enhancement if it occurs near a school. Section 161.49, STATS., states:

> (1) If any person violates s. 161.41(1)(cm), ... by distributing ... a controlled substance ... within 1,000 feet of any private or public school premises ..., *the maximum term of imprisonment prescribed by law for that crime may be increased by 5 years.*
>
> (2)(a) ... if any person violates s. 161.41(1) by distributing ... a controlled substance ... within 1,000 feet of any ... school premises ..., the court shall sentence the person to at least 3 years in prison, but otherwise the penalties for the crime apply.... *The person is not eligible for parole until he or she has served at least 3 years [of the sentence] ….*

(Emphasis added.)

The trial court first applied the § 161.49(1), STATS., school-zone enhancer by adding five years to the thirty-year maximum for the underlying offense, as authorized by subsection (1) to arrive at a maximum sentence of thirty-five years, and invoked the provision in subsection (2)(a), which provides for a parole ineligibility period of at least three years. Then, applying the "doubling" provisions of the repeater enhancement statute, § 161.48(2), the court increased

the ten-year minimum sentence to twenty years;[8] similarly, the thirty-five-year maximum increased to seventy years. Finally, the court doubled the §161.49(2)(a) parole ineligibility period from three to six years.

McCoy does not dispute the court's calculation of the minimum sentence. He claims, however, that it was error to (1) add the five-year school-zone enhancer to the underlying sentence prior to applying the doubling provisions of the repeater enhancer, and (2) also double the parole ineligibility period. He says this amounts to an "impermissible enhancement upon an enhancement." According to McCoy, the "correct calculation" is to "separately add" the repeater and school-zone enhancers to the underlying § 161.41(1) penalties with the result that "a conviction for delivery of 100 grams … results in a minimum sentence of 20 years, a maximum of 65 years, and at least three … years … non-eligibility for parole."

We first consider the trial court's enhancement of the underlying sentence by the school-zone five-year add-on prior to invoking the "doubling" provisions of the repeater enhancer. We begin by noting our agreement with the State's assertion that there are two separate classes of sentence enhancement statutes. One comprises those statutes that concern themselves with aggravating factors surrounding the underlying crime itself—such as committing a crime while concealing one's identity, or while armed with a dangerous weapon, or, as in this case, by committing an offense that is deemed particularly injurious to children in a school zone. While enhancers of this type are not themselves substantive offenses, they do operate to create an offense when they are charged in

[8] The court decided to deviate from the 20-year minimum. Making the requisite finding that the public would not be harmed by such a deviation, it sentenced McCoy to fifteen years.

conjunction with an underlying crime—such as committing a burglary while armed with a dangerous weapon; in that situation, the "enhancing" facts must be proved in order to sustain the conviction. ***State v. Villarreal***, 153 Wis.2d 323, 329, 450 N.W.2d 519, 522 (Ct. App. 1989).

The other class of statutes, which concerns the habitual criminality or "repeater" enhancer, is entirely different. It is neither based upon nor related to the factual circumstances surrounding the underlying crime. It is premised solely upon the defendant's previous adjudications of guilt, and it operates only to increase the penalty range for the underlying crime. Unlike the "aggravating circumstance" enhancer, one's status as a repeat offender does not change the essential nature of the underlying offense, nor does it add an element to the crime, the existence of which must be found by the jury. The defendant's repeater status is simply a factor affecting the length of his or her sentence. ***Villarreal***, 153 Wis.2d at 327, 450 N.W.2d at 521; ***State v. McAllister***, 107 Wis.2d 532, 537, 319 N.W.2d 865, 868 (1982).

With these considerations in mind, we conclude first that the trial court did not err in adding the five-year § 161.49(1), STATS., school-zone enhancer to McCoy's maximum sentence before doubling the sentence pursuant to § 161.48(2), STATS. In ***State v. Pernell***, 165 Wis.2d 651, 478 N.W.2d 297 (Ct. App. 1991), the defendant was charged with, among other things, three misdemeanors, each carrying a maximum jail sentence of nine months. Each charge was subject to enhancement under two separate statutes based on allegations that (1) he was a repeater (based on a prior felony conviction) and (2) he had committed the offenses while armed. Section 939.63(1)(a), STATS., provides that when a defendant commits a misdemeanor while armed, the maximum term of imprisonment may be increased by not more than six months.

Section 939.62(1), STATS., the general repeater statute applicable to non-drug-related offenses, states that if the defendant is a repeater:

> (a) A maximum term of one year or less may be increased to not more than 3 years.
>
> (b) A maximum term of more than one year but not more than 10 years may be increased by … not more than 6 years if the prior conviction was for a felony….

The defendant in ***Pernell*** was convicted of the three misdemeanors. At sentencing, the trial court first imposed the statutory maximum penalty of nine months in jail for each count. It then added six months to each sentence under the "while-armed" statute, increasing each sentence to fifteen months. Then, because the sentences exceeded one year, the court utilized § 939.62(1)(b), STATS., to add an additional six years to each one. ***Pernell,*** 165 Wis.2d at 654-55, 478 N.W.2d at 299. The defendant appealed, arguing that the trial court erroneously exercised its discretion in the manner in which it applied the two enhancers. We rejected the argument and affirmed the trial court's decision, concluding:

> Because the maximum sentence on each … misdemeanor charge was nine months, enhanced to fifteen months for the additional fact of being armed, the trial court did not abuse its sentencing discretion in applying the six-year habitual criminality enhancer based on the [prior felony] conviction. The trial court harmonized the plain meaning of both sentence enhancing statutes.

Id. at 660, 478 N.W.2d at 301.

We consider ***Pernell*** persuasive here. The drug-offender repeater statute serves the same purpose as the general repeater statute we considered in ***Pernell***, *see* ***State v. Ray***, 166 Wis.2d 855, 872, 481 N.W.2d 288, 295 (Ct. App. 1992), and the school-zone enhancer is the equivalent of the "while-armed" enhancer—it becomes an element of the underlying crime which must be

determined by the jury in order to take effect.[9] We conclude that the trial court did not err in applying the five-year school-zone enhancer before invoking the "repeater" doubling provisions of § 161.48(2), STATS., in fashioning McCoy's sentence.

McCoy also challenges the trial court's doubling of the parole-ineligibility period specified in § 161.49(2)(a), STATS. As we noted above, the statute provides that when the distribution of certain controlled substances—or their possession with intent to deliver—occurs within 1000 feet of a school, the defendant "is not eligible for parole until he or she has served at least 3 years" of the sentence imposed for the underlying offense.

The State concedes that the trial court's authority to "double" the parole-ineligibility provisions of § 161.49(2)(a), STATS., must be found in § 161.48(2), STATS., if it is to be found at all. Section 161.48(2) states plainly and unambiguously that if the defendant is a repeater the court may double "any applicable minimum and maximum periods of imprisonment" specified for the underlying crime. Neither § 161.48(2) nor § 161.41(1)(cm)5, STATS.—the "applicable" statute setting the minimum and maximum periods of imprisonment for possession of cocaine with intent to deliver—refers to parole eligibility or ineligibility in any manner or form. We conclude, therefore, that by applying § 161.48(2) to automatically double the three-year parole ineligibility provisions of § 161.49(2)(a), the trial court erred as a matter of law.

[9] The trial court in this case instructed the jury that:

> The information alleges not only that cocaine was delivered but also that it was delivered while within 1,000 feet of school premises. It you find the defendant guilty, you must answer the following question. "Was cocaine delivered while within 1,000 feet of school premises?"

As to the remedy, the trial court stated in sentencing McCoy that a significant prison term was "necessary" for a variety of reasons. When it sentenced McCoy to five years less than the presumptive minimum, *see supra* note 8, the court stressed that he would be serving at least the first six years without eligibility for parole:

> Now, that's [going to] give you six years to try and get your act together so that you can come out and be a good father to [your] children, and I sincerely hope that that sends a message to everybody out there that you just can't have a free house for people to come and do this kind of activity. We will not tolerate it in this community ….

It thus appears that, in sentencing McCoy, the trial court considered it important that he would not be eligible for parole for at least six years. Because we are unable to tell whether, and if so to what degree, the underlying purposes of the court's sentence might be frustrated by our conclusion that its determination of the minimum parole ineligibility period was error, we remand to the trial court. The court may, in the exercise of its discretion, either correct the error by amending that portion of the sentence to reflect a minimum parole-ineligibility period of not less than three years, or reconsider the sentence as a whole.[10] Further proceedings shall be consistent with this opinion.

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[10] We are mindful that, in ***State v. Zimmerman***, 185 Wis.2d 549, 559, 518 N.W.2d 303, 306 (Ct. App. 1994), we held that where the State failed to prove the prior conviction and the defendant had not admitted its existence, the trial court's application of the repeater enhancer resulted in imposition of a maximum penalty "in excess of that permitted by law," and commuted the defendant's sentence to the legally authorized maximum. There is, however, a statute so stating—§ 973.13, STATS.—and there is no comparable statute applicable to the factual situation before us on this appeal.

Finally, we note that, as the supreme court recognized in ***Grobarchik v. State***, 102 Wis.2d 461, 470, 307 N.W.2d 170, 175 (1981), resentencing should be available "to correct a sentence which is not in accord with the law."

By the Court.–Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.