COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2048-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL D. CLAY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Samuel Clay appeals from a judgment convicting him as a party to the crime of possessing cocaine with intent to deliver. He also appeals from an order denying postconviction relief. Clay's conviction carried with it penalty enhancers under § 161.48(3), STATS., because he was a repeater, and under § 161.49, STATS., because the offense took place within 1000 feet of a

youth center. He raises issues concerning trial counsel's effectiveness, the sufficiency of the information, the constitutionality of § 161.49, the sufficiency of the evidence presented at the preliminary examination and the State's use of a co-defendant's out-of-court statements. We reject his arguments on these issues and affirm.

The complaint charged Clay as a party to the crime of possessing cocaine with intent to deliver, as a repeater. At the preliminary examination, the State did not present evidence on the § 161.49, STATS., penalty enhancer. The State subsequently filed an information, however, with words obviously omitted, that added the following allegation: "invoking the provisions of § 161.49 of the Wisconsin Statutes, the above offense occurred the Sommerset Community Center and, therefore, the maximum term of imprisonment may be increased ...." At trial, before the State presented its case, the court allowed an amendment to the information correcting the above-quoted allegation by adding the words "within 1000 feet" after "occurred."

The principal witness against Clay was his girlfriend and co-defendant Aretha Kimble. Appearing under a grant of immunity, she offered inculpatory testimony concerning Clay's involvement with possession and sale of cocaine on the night of their arrest. She offered exculpatory testimony as well. Over Clay's objection, the State also presented testimony from a police officer concerning inculpatory statements Kimble made about Clay during police interrogations.

Clay did not testify. His postconviction motion alleged that he wanted to but could not because counsel was not prepared to call him as a witness. She admitted as much, the reason being, in her recollection, that Clay made his own decision not to testify because of his extensive criminal record. The trial court believed counsel's testimony and denied relief.

Clay failed to demonstrate counsel's ineffectiveness in failing to prepare for his testimony. The trial court expressly believed counsel's reasons, and expressly disbelieved Clay's contrary assertion. That ends the matter. A trial court's credibility determinations are not subject to reversal. ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). If Clay voluntarily chose not

to testify, counsel had no reason to waste time preparing to call him as a witness.

The information provided Clay with sufficient notice of the § 161.49, STATS., enhancer. That section provides for an enhanced penalty for possessing drugs with intent to deliver them within 1000 feet of a public park, correctional facility, public housing project, public swimming pool, youth center or community center. Clay contends that because the information only cited the statute and named the Sommerset Community Center, it left him unable to prepare a defense because it did not tell him into what category within § 161.49 the Center fell. We disagree. Clay knew that the center necessarily fit into one of the listed categories. Clay was therefore able to prepare his defense with proof that, in fact, it fell into none of the categories. Additionally, the record shows that Clay had actual notice apart from the information that the State intended to prove that the center was a youth center as that term is used in § 161.49 and defined in § 161.01(22), STATS.

Section 161.49, STATS., is not unconstitutionally vague. A criminal statute is unconstitutionally vague if some ambiguity or uncertainty in the gross outlines of the prohibited conduct deprives persons of ordinary intelligence of fair notice of the prohibition and allows enforcers of the prohibition and those who adjudicate guilt to apply subjective or arbitrary standards. ***State v. Wickstrom***, 118 Wis.2d 339, 351-52, 348 N.W.2d 183, 190 (Ct. App. 1984). Here, § 161.49 contains no such ambiguity. It plainly identifies a set of acts to which a penalty enhancer applies if done within 1000 feet of a readily identifiable set of public areas. It therefore gives fair notice of the prohibition and sets up clear, objective standards for enforcement.

The State properly charged the § 161.49, STATS., penalty enhancer despite the absence of any evidence pertaining to that enhancer at the preliminary hearing. Clay relies on ***State v. Williams***, 186 Wis.2d 506, 508, 520 N.W.2d 920, 921 (Ct. App. 1994), in which this court held that the penalty enhancer must be established at the preliminary examination to be charged in the information in a multi-count prosecution. The supreme court has since reversed that holding, ***State v. Williams***, 198 Wis.2d 479, 483, 544 N.W.2d 400, 401 (1996), which, in any event, only applied to multi-count complaints.

The trial court properly allowed testimony concerning Kimble's out-of-court statements. Clay contends that admitting the statements violated his rights to due process and confrontation. However, the cases he relies on concern out-of-court statements made by a co-defendant who did not testify. Here, Kimble testified and Clay cross-examined her.

Additionally, Clay suggests that the statements were inadmissible because they do not fall within the scope of any exception to the hearsay rule. However, the record does not support that contention. In several respects, Kimble's trial testimony materially contradicted her earlier statements. A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination regarding the statement, and the statement is inconsistent with the declarant's testimony. Section 908.01(4)(a), STATS.

By the Court.—Judgment and order affirmed.

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