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DISTRICT II

October 19, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1813-CR State of Wisconsin v. Aaron B. Reigle (L.C. #2014CF409)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Aaron B. Reigle appeals from a nonfinal order concluding that WIS. STAT. § 939.617 (2013-14)¹ requires that a minimum three-year prison term be imposed against him. Based upon our review of the briefs and the record and this court's recent decision in *State v. Holcomb*, 2016 WI App 70, ___ Wis. 2d ___, ___ N.W.2d ___, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm the order.

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

Thirty-nine-year-old Reigle was charged with two counts of possession of child pornography in violation of WIS. STAT. § 948.12(1m). The children depicted appeared to be under the age of twelve. Because Reigle is more than forty-eight months older than the victims, the circuit court concluded it was required to impose a sentence of at least three years' initial confinement. It denied Reigle's motion seeking a determination to the contrary. We granted Reigle's petition for leave to appeal that non-final order. *See* WIS. STAT. RULE 809.50(3).

WISCONSIN. STAT. § 939.617 provides the minimum penalty for violations of WIS. STAT. § 948.12. Section 939.617 reads in relevant part:

(1) Except as provided in subs. (2) and (3), if a person is convicted of a violation of ... [§] 948.12, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least ... 3 years for violations of s. 948.12....

(2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may impose a sentence that is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances:

....

(b) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months older than the child who engaged in the sexually explicit conduct.

(3) This section does not apply if the offender was under 18 years of age when the violation occurred.

WISCONSIN STAT. § 939.617 is "plain and unambiguous." *Holcomb*, ___ Wis. 2d ___,

¶15. As we said in *Holcomb*,

When faced with a conviction for possessing child pornography [under WIS. STAT. § 948.12], subsec. (1) requires the court to impose a bifurcated sentence with at least three years' initial confinement.... Subsection (2) allows the court to depart from this

minimum and impose less initial confinement or probation *only if* the defendant is not more than forty-eight months older than the child-victim. Sec. 939.617(2)(b).

Id. (emphasis added). Like Holcomb, Reigle is far older than the victims and thus is subject to the three-year minimum for each conviction. Because the statute is unambiguous, the rule of lenity does not apply. *State v. Luedtke*, 2015 WI 42, ¶73, 362 Wis. 2d 1, 863 N.W.2d 592.

Reigle contends WIS. STAT. § 939.617 is unconstitutionally vague as evidenced by the fact that some circuit courts around the state have interpreted it differently. Due process requires fair notice. See *State v. Ehlenfeldt*, 94 Wis. 2d 347, 355, 288 N.W.2d 786 (1980). “A statute must at least be sufficiently definite to permit one inclined to obey it, even if for no other reason than to avoid its penalties.” *Id.*

We will not declare a statute to be unconstitutionally vague if we can give its language “any reasonable and practical construction.” *State v. Thomas*, 2004 WI App 115, ¶14, 274 Wis. 2d 513, 683 N.W.2d 497 (citation omitted). We have done so in *Holcomb*. We conclude that courts that applied WIS. STAT. § 939.617 differently have misinterpreted its plain language. We agree with the State that Reigle has no due process right to have either the circuit court or this court misinterpret and misapply the statute in this case.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals