OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 5, 2017

To:

Hon. Daniel J. Bissett
Circuit Court Judge
P.O. Box 2808
Oshkosh, WI 54903

Melissa M. Pingel
Clerk of Circuit Court
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Scott A. Ceman
Winnebago County District Attorney's Office
Orrin King Bldg., 2nd Fl.
448 Algoma Blvd.
Oshkosh, WI 54901-4702

Jason D. Luczak
Kathryn A. Keppel
Gimbel, Reilly, Guerin & Brown, LLP
330 E. Kilbourn Ave., Ste. 1170
Milwaukee, WI 53202

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2016AP259-CR State of Wisconsin v. Dustin R. Nap (L.C. #2014CF411)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Dustin R. Nap appeals from a nonfinal order concluding that WIS. STAT. § 939.617 (2015-16)[1] requires that a minimum three-year prison term be imposed against him for violating WIS. STAT. § 948.12. Based upon our review of the briefs and the record and this court's decision in ***State v. Holcomb***, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100, we conclude

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm the order.

Twenty-seven-year-old Nap was charged with six counts of possession of child pornography in violation of WIS. STAT. § 948.12(1m). In four of the counts the children appeared to be seven to ten years old; in the other two counts, they appeared to be ten to thirteen. Nap filed a motion asking the circuit court to determine whether WIS. STAT. § 939.617, which provides the minimum penalty for violations of § 948.12, required the imposition of a three-year mandatory minimum prison sentence.

WISCONSIN STAT. § 939.617 reads in relevant part:

> **(1)** Except as provided in subs. (2) and (3), if a person is convicted of a violation of [WIS. STAT. §] 948.12, the court shall impose a bifurcated sentence under [WIS. STAT. §] 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.

Nap argued that the plain language of § 939.617(2) allows a lesser sentence if the "best interests" exception is met. The court concluded, however, that as Nap was more than forty-eight months older than the victims, it was required to impose a sentence of at least three years' initial

confinement. *See* § 939.617(2)(b). We granted Nap's petition for leave to appeal that non-final order. *See* WIS. STAT. RULE 809.50(3).

This court already has determined that WIS. STAT. § 939.617 is "plain and unambiguous." ***Holcomb***, 371 Wis. 2d 647, ¶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. Sec. 939.617(1). 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, Nap is far older than the victims and thus is subject to the three-year minimum. 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.

Nap also contends WIS. STAT. § 939.617 must be unconstitutionally vague, as Wisconsin circuit courts have applied it unevenly, and therefore it violates his due process right to fair-warning notice of the criminal penalty. *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 did so in ***Holcomb***. We conclude that courts that applied WIS. STAT. § 939.617 differently have misinterpreted its plain language. Further, the decisions Nap cites from circuit courts around the state that have interpreted the

statute as he would have us do all predate ***Holcomb***. Nap has no due process right to have either the circuit court or this court misinterpret and misapply the statute.

Finally, Nap asks that we reconsider our decision in ***Holcomb*** and either certify this appeal to the supreme court or decide his appeal based on ***Holcomb*** while stating our belief that it was wrongly decided. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). We stand by our decision and decline to take either path. Reversal of ***Holcomb*** was for the supreme court. ***Cook***, 208 Wis. 2d at 189-90. It denied the petition to review.

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