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DISTRICT II

June 7, 2017

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

2016AP712-CR State of Wisconsin v. Cory R. Bonlender (L.C. #2015CF401)

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

Cory R. Bonlender was charged with multiple counts of possession of child pornography in violation of WIS. STAT. § 948.12 (2015-16).¹ Bonlender challenged the provisions of WIS. STAT. § 939.617(1)-(2) which provides that a court shall impose an initial term of confinement of not less than three years for a violation of § 948.12 if the defendant is forty-eight months or older than the child-victim. Based upon our review of the briefs and the record and this court's recent 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. *See* WIS. STAT. RULE 809.21. We affirm the order.

Bonlender argues that the plain meaning of WIS. STAT. § 939.617 allows a court to impose less than three years of initial confinement, the rule of lenity dictates that any ambiguity be resolved in the defendant’s favor, and a defendant’s due process right to “fair warning” notice of criminal penalties would be violated by imposition of a mandatory three-year term of initial confinement. The circuit court denied Bonlender’s motion, and we granted leave to appeal.²

Bonlender’s arguments were answered in *Holcomb*, where we found that WIS. STAT. § 939.617 is “plain and unambiguous” and that one convicted of possessing child pornography has a mandatory three years of initial confinement if the defendant is forty-eight months or older than the child-victim. *Holcomb*, 371 Wis. 2d 647, ¶15; *see also State v. Luedtke*, 2015 WI 42, ¶73, 362 Wis. 2d 1, 863 N.W.2d 592 (finding where a statute is unambiguous, the rule of lenity does not apply). We are bound by this court’s decision in *Holcomb*. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (“[O]nly the supreme court ... has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.”). We further find that Bonlender had fair warning that his conduct was criminal, and Bonlender has no due process right to rely on another court’s sentence that misapplied or misinterpreted § 939.617.

² We granted Bonlender’s petition for leave to appeal a nonfinal order on May 3, 2016. *See* WIS. STAT. RULE 809.50(3). We further placed this case on hold pending our resolution of *State v. Holcomb*, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100.

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

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. § 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals