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**DISTRICT IV**

December 14, 2017

To:

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

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2016AP1251-CR                      State of Wisconsin v. Peter M. Hunstiger (L.C. # 2015CF335)

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Peter Hunstiger appeals a nonfinal order of the circuit court regarding the proper interpretation of a state sentencing provision.<sup>1</sup> Hunstiger argues that the provision at issue gives the circuit court discretion to impose a sentence that is below the statutory minimum for his offense. Based upon our review of the briefs and record, we conclude at conference that this

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<sup>1</sup> This court granted leave to appeal the order. *See* WIS. STAT. RULE 809.50(3) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version, the current version. We cite the current version because there have been no changes during the relevant time period.

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reject Hunstiger's arguments and affirm.

Hunstiger was charged with nine counts of possessing child pornography in violation of WIS. STAT. § 948.12.<sup>2</sup> He filed a pretrial motion in circuit court seeking clarification of the applicable sentencing provision, WIS. STAT. § 939.617. This provision requires a circuit court to impose a bifurcated sentence that includes a mandatory minimum term of three years of confinement for a violation of § 948.12, with two specified exceptions. *See* § 939.617(1).<sup>3</sup> Hunstiger asked the circuit court to clarify the first exception, which provides, in relevant part:

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<sup>2</sup> Specifically, Hunstiger was charged with violating WIS. STAT. § 948.12(1m), which states:

Whoever possesses, or accesses in any way with the intent to view, any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances may be penalized [for a Class D felony]:

(a) The person knows that he or she possesses or has accessed the material.

(b) The person knows, or reasonably should know, that the material that is possessed or accessed contains depictions of sexually explicit conduct.

(c) The person knows or reasonably should know that the child depicted in the material who is engaged in sexually explicit conduct has not attained the age of 18 years.

<sup>3</sup> This provision states, in relevant part:

Except as provided in subs. (2) and (3), if a person is convicted of a violation of s. ... 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.

WIS. STAT. § 939.617(1).

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.

See § 939.617(2).

Hunstiger is in his sixties and, thus, the “48 months older” provision in WIS. STAT. § 939.617(2)(b) does not apply to him. However, he seeks clarification on whether the circuit court could impose a below-minimum sentence even without a favorable finding under subsection (b). The circuit court concluded that § 939.617(2) allows a court to impose a sentence that is below the minimum term of confinement only if the court finds that “it is in the best interests of the community and the public will not be harmed, and the defendant is not more than 48 months older than the child who engaged in the sexually explicit conduct.” Hunstiger sought leave to file this appeal, which we granted.

Hunstiger contends that the sentencing provision is ambiguous, and that the word “or” can reasonably be read as disjunctive. Hunstiger’s interpretation means that the age requirement in WIS. STAT. § 939.617(2)(b) applies only if the court is sentencing a defendant to probation. This interpretation would also mean that the court may impose a sentence that is below the minimum based solely on its determination that the best interests of the community will be served and the public will not be harmed. Hunstiger argues that the legislative history supports his interpretation. He further contends that the rule of lenity requires us to choose the interpretation that favors him. See *State v. Cole*, 2003 WI 59, ¶67, 262 Wis. 2d 167, 663 N.W.2d

700 (noting the general rule that “ambiguous penal statutes should be interpreted in favor of the defendant”). Finally, Hunstiger points out that several circuit courts have imposed below-minimum sentences on defendants who were more than 48 months older than the victims depicted in their child pornography.

All of Hunstiger’s arguments are foreclosed by our decision in *State v. Holcomb*, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100. In *Holcomb*, we determined that the meaning of WIS. STAT. § 939.617(2) is “plain and unambiguous.” *Holcomb*, 371 Wis. 2d 647, ¶15. We concluded that this provision requires a court to impose a sentence that includes a three-year minimum term of confinement if the defendant is more than 48 months older than the child victim. *Id.*

We are bound by our 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.”). Accordingly, we reject Hunstiger’s arguments that the statute is ambiguous. The circuit court’s order is consistent with our decision in *Holcomb*, and so we affirm it.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*