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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 IV

January 28, 2021

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
Branch 15
215 S. Hamilton St., Rm. 7107
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Kara Lynn Janson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

David R. Karpe
Karpe Law Office
448 W. Washington Ave., No. 101
Madison, WI 53703

Ismael R. Ozanne
District Attorney
Rm. 3000
215 S. Hamilton St.
Madison, WI 53703

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

2019AP759-CR State of Wisconsin v. Michael J. Bahneman (L.C. # 2017CF261)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, 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).

Michael Bahneman appeals a judgment of conviction and sentence for possession of child pornography. Bahneman contends that the three-year mandatory minimum sentence under WIS. STAT. § 939.617 (2017-18)[1] is unconstitutional by denying Bahneman equal protection and due

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

process. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Bahneman was convicted of one count of possession of child pornography. Prior to sentencing, Bahneman moved to declare the three-year mandatory minimum sentence under WIS. STAT. § 939.617(1) unconstitutional on its face and as applied to him. The circuit court denied the motion and sentenced Bahneman to the mandatory minimum.

Bahneman contends first that WIS. STAT. § 939.617(1) is unconstitutional on its face because it lacks a rational basis. *See* ***State v. Heidke***, 2016 WI App 55, ¶6, 370 Wis. 2d 771, 883 N.W.2d 162 ("The equal protection clause requires that the legislature have reasonable and practical grounds for the classifications that it draws …. Under this 'rational basis' test, equal protection is violated if there is no plausible policy reason for the classification or the classification is arbitrary …." (citation omitted)). He contends that there is no rational basis for imposing a three-year mandatory minimum sentence for possession of child pornography because, he asserts, the legislative history shows that the mandatory minimum was based on an irrational animosity toward viewers of child pornography. In support, Bahneman cites ***City of Cleburne v. Cleburne Living Ctr.***, 473 U.S. 432, 448 (1985), for the proposition that legislative animosity toward a class of individuals does not serve a legitimate government interest under the rational basis test.[2] He asserts that there can be no rational basis for the three-year mandatory

[2] In discussing the level of scrutiny that should apply, Bahneman's attorney appears to draw a comparison between viewers of child pornography and individuals with developmental disabilities. Any such comparison is both inapt and offensive.

minimum for possession of child pornography when there is no mandatory minimum sentence for child sexual assault.

The State responds that Bahneman has not proven beyond a reasonable doubt that WIS. STAT. § 939.617(1) is unconstitutional on its face. *See* ***State v. Smith***, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90 ("A statute enjoys a presumption of constitutionality…. To overcome that presumption, a party challenging a statute's constitutionality bears a heavy burden…. [to] 'prove that the statute is unconstitutional beyond a reasonable doubt.'" (citations omitted)). The State argues that we already decided in ***Heidke*** that mandatory minimum sentences for certain child sex crimes have a rational basis. It points out that, in ***Heidke***, 370 Wis. 2d 771, ¶16, we concluded that the five-year mandatory minimum sentence under § 939.617(1) for using a computer to facilitate a child sex crime has a rational basis because the legislative history showed it was premised on concerns regarding increasing online sex offender activity and the particular dangers that activity poses to children. The State argues that the same analysis applies here. It points out that the mandatory minimums for possession of child pornography and using a computer to facilitate a child sex crime were both passed as part of the same legislative act, 2011 Wis. Act 272; that the legislative history shows that the legislature viewed possession of child pornography as a morally reprehensible and dangerous crime; and that, as in ***Heidke***, 370 Wis. 2d 771, ¶16, imposing "strong measures" to eliminate that criminal activity is rational.

We conclude that Bahneman has not shown beyond a reasonable doubt that the mandatory minimum sentence under WIS. STAT. § 939.617(1) is unconstitutional on its face. While Bahneman contends that § 939.617(1) lacks a rational basis, he fails to develop a legal argument as to why that is so. Rather, Bahneman relies on conclusory assertions that the mandatory minimum is unfair. We reject Bahneman's facial challenge on that basis. *See* ***State***

v. McMorris, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (we may decline to consider arguments that are insufficiently developed). Moreover, we agree with the State that the analysis in ***Heidke*** as to the facial constitutionality of § 939.617(1) defeats Bahneman's facial challenge.[3]

Next, Bahneman contends that WIS. STAT. § 939.617(1) is unconstitutional as applied to him because there was no evidence that Bahneman had actually sexually assaulted a child or that he had demonstrated a willingness to do so. He contends that the mandatory minimum under § 939.617(1) deprived him of his right to equal protection under the law because he was penalized more severely than other defendants who are convicted of sex crimes against children that do not carry mandatory minimum sentences. Bahneman argues that ***Heidke*** leaves open the possibility that the mandatory minimum sentence does not apply if a defendant lacked the intention to engage in a "hands-on" child sex crime. *See* ***Heidke***, 370 Wis. 2d 771, ¶19 (holding that the penalty enhancer for using a computer to facilitate a child sex crime, where there was no actual child victim, was constitutional as applied to the defendant because his "intentions were to engage in a child sex crime"). Bahneman also argues that the mandatory minimum sentence disproportionately punishes defendants convicted of child pornography by failing to distinguish between consumers and producers or between consumers based on the number of images possessed.

[3] In his reply brief, Bahneman fails to dispute the State's argument that the question of whether the mandatory minimum is facially constitutional was already answered in ***State v. Heidke***, 2016 WI App 55, ¶19, 370 Wis. 2d 771, 883 N.W.2d 162. We therefore deem this argument conceded. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in respondent's brief may be taken as a concession).

The State responds that Bahneman has failed to develop an argument that WIS. STAT. § 939.617(1) is unconstitutional as applied to him. It contends that Bahneman has pointed to nothing that distinguishes him from any other defendant so as to render the mandatory minimum sentence unconstitutional in this case.[4]

We conclude that Bahneman has not sufficiently developed an as-applied challenge to the mandatory minimum sentence under WIS. STAT. § 939.617(1), and we reject Bahneman's as-applied challenge on that basis. *See* ***McMorris***, 306 Wis. 2d 79, ¶30. Bahneman asserts in conclusory fashion that the mandatory minimum should not apply to him because it is unfair based on the facts of his case. Those assertions are insufficient to establish beyond a reasonable doubt that the mandatory minimum sentence is unconstitutional as applied to Bahneman. *See* ***Smith***, 323 Wis. 2d 377, ¶¶8-9.

Finally, Bahneman contends that WIS. STAT. § 939.617 deprived him of liberty without due process by depriving the circuit court of its sentencing discretion under ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.[5] The State responds that it is well settled that

[4] The State also asserts that Bahneman has not developed an argument as to why ***Heidke*** supports his as-applied challenge or why it matters that Bahneman demonstrated no intent to engage in a "hands-on" child sex crime. It argues that, even if ***Heidke*** left open the door to an as-applied constitutional challenge to the mandatory minimum *for use of a computer to facilitate a child sex crime* where the defendant lacked intent to engage in a child sex crime, this is not that case. In reply, Bahneman argues that if the as-applied challenge has been left open for a charge of use of a computer to facilitate a child sex crime, it must be left open for a charge of possession of child pornography as well. Bahneman does not explain why that correlation necessarily exists. In any event, we reject Bahneman's as-applied challenge as insufficiently developed, whether or not such a challenge has been left open.

[5] Within this section of the appellant's brief, Bahneman also argues that the mandatory minimum for defendants who viewed child pornography in their own homes attacks the right to privacy and is rooted in suspicion that consumers of child pornography are undetected "hands-on" offenders. Bahneman does not support these assertions or connect them to his claim of a due process violation based on imposition of the mandatory minimum sentence.

mandatory minimums are not unconstitutional on the ground that they deprive sentencing courts of discretion. *See* ***Chapman v. United States***, 500 U.S. 453, 467 (1991). We conclude that Bahneman's due process argument is insufficiently developed, *see* ***McMorris***, 306 Wis. 2d 79, ¶30, and that he has not established beyond a reasonable doubt that § 939.617(1) is unconstitutional by depriving defendants of due process at sentencing, *see* ***Smith***, 323 Wis. 2d 377, ¶8. Accordingly, we affirm.[6]

Therefore,

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

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

Sheila T. Reiff
Clerk of Court of Appeals

[6] To the extent that we have not specifically addressed any arguments raised in Bahneman's brief, we deem those arguments insufficiently developed to warrant a response. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322.