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**DISTRICT III**

May 14, 2024

*To*:

Hon. Michael A. Schumacher
Circuit Court Judge
Electronic Notice

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
Electronic Notice

Kathilynne Grotelueschen
Electronic Notice

Anne Christenson Murphy
Electronic Notice

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

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2022AP806-CR State of Wisconsin v. Beau D. Morrow
(L. C. No. 2019CF968)

Before Stark, P.J., Hruz and Gill, 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).**

Beau Morrow appeals a judgment, entered upon a jury's verdicts, convicting him of two counts of possession of child pornography, contrary to WIS. STAT. § 948.12(1m). Morrow challenges the circuit court's determination that it lacked the authority to place Morrow on probation in this matter. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. We reject Morrow's arguments and we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The State charged Morrow with three counts of possession of child pornography, based on images and videos discovered on Morrow's computer and cell phone. A jury found Morrow guilty of two counts of possessing child pornography and it acquitted him of the remaining count. Morrow submitted a presentencing memorandum in which he acknowledged that under WIS. STAT. § 939.617, the circuit court was required to impose a minimum of three years of initial confinement for each count of possession of child pornography of which he was convicted. Morrow asserted, however, that the statute did not restrict the court from imposing the mandatory minimum, but then staying that sentence and placing Morrow on probation. Morrow therefore asked the court to impose and stay concurrent five-year sentences consisting of three years of initial confinement followed by two years of extended supervision, and place Morrow on probation for five years on each count with nine to twelve months in jail as a condition of probation.

The State opposed Morrow's recommendation, and the circuit court ultimately determined that it was not permitted to place Morrow on probation. Out of a total potential sentence of fifty years, the court imposed concurrent six-year terms, resulting in three years of initial confinement followed by three years of extended supervision. This appeal follows.

On appeal, Morrow argues that the circuit court erred by concluding that it lacked the authority to place Morrow on probation. As an initial matter, the State asserts that Morrow failed to preserve this claim because he did not file a postconviction motion challenging the sentence. Whether a defendant has properly preserved his or her right to appellate review of a particular claim is a question of law that this court reviews independently. ***State v. Klapps***, 2021 WI App 5, ¶15, 395 Wis. 2d 743, 954 N.W.2d 38 (2020).

As noted by the State, a person must file a motion for postconviction relief before a notice of appeal is filed "unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." *See* WIS. STAT. RULE 809.30(2)(h); *see also* WIS. STAT. § 974.02(2). Here, Morrow filed a presentencing memorandum on the issue presently before us; the parties argued the issue at the sentencing hearing; and, the circuit court considered those arguments before rejecting defense counsel's recommendation. Because the issue on appeal was previously raised and addressed by the court, we conclude that Morrow preserved his claim for appeal.

Turning to the merits, this appeal involves statutory interpretation, which is a question of law that we review de novo. *See* ***State v. Neill***, 2020 WI 15, ¶14, 390 Wis. 2d 248, 938 N.W.2d 521. When interpreting statutes, we begin with the statutory language, and if the meaning of the text is plain, we go no further. ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Context and statutory structure are both important in determining a statute's meaning. ***Id.***, ¶46. Thus, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** We also "give reasonable effect to every word, in order to avoid surplusage" when possible. ***Id.***

WISCONSIN STAT. § 939.617 requires a "[m]inimum sentence for certain child sex offenses" where the offender is at least eighteen years of age. The statute provides, in relevant part, that "if a person is convicted of [possession of child pornography], the court *shall* impose a bifurcated sentence under [WIS. STAT. §] 973.01" and "[t]he term of confinement in prison portion of the bifurcated sentence shall be at least … 3 years." Sec. 939.617(1) (emphasis added). The statute further provides: "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 place the person on probation" if the offender "is no more than 48 months older than the child[.]" Sec. 939.617(2)(b).

Because Morrow could find no Wisconsin case that prohibits imposing and staying a sentence in a possession of child pornography case, he asserts that probation is authorized under WIS. STAT. § 973.09(1)(a). That statute provides that unless "probation is prohibited for a particular offense by statute," a court "may withhold sentence or impose sentence under [WIS. STAT. §] 973.15 and stay its execution, and in either case place the person on probation." After briefing was complete in Morrow's appeal, however, this court rejected a similar argument in ***State v. Shirikian***, 2023 WI App 13, ¶35, 406 Wis. 2d 633, 987 N.W.2d 819.

That case involved the interpretation of WIS. STAT. § 346.65(2)(am)5., which applies to convictions for operating while intoxicated as a fifth or sixth offense, and requires a circuit court to impose a bifurcated sentence that includes at least one year and six months of initial confinement unless the court finds "that the best interests of the community will be served and the public will not be harmed." The ***Shirikian*** court determined that WIS. STAT. § 973.09(1)(a) did not authorize probation because "when a statute directs that a circuit court 'shall' impose a particular sentence, the circuit court must comply with the statute." ***Shirikian***, 406 Wis. 2d 633, ¶35. Here, as in ***Shirikian***, the subject statute directs that a circuit court "shall" impose a particular sentence for Morrow's crimes. *See* WIS. STAT. § 939.617(1). Therefore, the circuit court properly determined that it was precluded from staying the imposed sentence and placing Morrow on probation.

To the extent Morrow suggests that the absence of the word "mandatory" in the title of WIS. STAT. § 939.617 means that the circuit court is permitted to place a defendant on probation if accompanied by an imposed and stayed sentence, we observe that the title to WIS. STAT. § 346.65 also does not include the word "mandatory." Given the directive language of both statutes, we are not persuaded that the absence of the word mandatory in the title renders the language permissive.

Upon the foregoing,

IT IS ORDERED that the judgment 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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*Samuel A. Christensen*
*Clerk of Court of Appeals*