STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1420-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES D. HEIDKE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
DAVID L. BOROWSKI, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

The opinion in this case should be published because the case involves a novel issue of law concerning the constitutionality of a statute.

Nevertheless, there is no need for oral argument because the arguments of both parties are simple, straightforward, easy to understand, and can be comprehensively conveyed in the briefs.

ARGUMENT

The statutory provision imposing a mandatory minimum sentence when a defendant is convicted of using a computer to attempt to have sex with a child does not deny equal protection, even though a person who is convicted of actually having sex with a child is not statutorily subject to a minimum penalty, because there is a rational basis for the classification.

The Wisconsin statutes presently provide that a person who has sexual contact or intercourse with a child under the age of sixteen is guilty of a Class C felony, punishable by up to forty years in prison, including twenty-five years of confinement. Wis. Stats. §§ 939.50(3)(c), 948.02(2), 973.01(2)(b)3. (2013-14).

A person who uses a computerized communication system to communicate with a person he believes or has reason to believe is under the age of sixteen with intent to have sexual contact or intercourse with that person is also guilty of a Class C felony, punishable by up to forty years in prison, including twenty-five years of confinement. Wis. Stats. §§ 939.50(3)(c), 948.075(1r), 973.01(2)(b)3. (2013-14).

However, an adult who is convicted of using a computer to attempt to have sex with a child is subject to a mandatory minimum penalty. A person eighteen or over who is convicted of violating § 948.075 must be sentenced to at least five years of confinement. Wis. Stat. § 939.617(1), (3) (2013-14).

There is no minimum penalty when a person is convicted of having sex with a child in violation of § 948.02(2).

The defendant-appellant, James D. Heidke, who was convicted of violating § 948.075, argues that he was denied equal protection because he had to be sentenced to at least five years of confinement for using a computer to attempt to have sex with a child while a person who actually sexually assaulted a child could be sentenced to something less.

In assessing whether a statute denies equal protection the ordinary rational basis test applies unless the statute interferes with a fundamental right or disadvantages a protected class. *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90; *State v. Jorgensen*, 2003 WI 105, ¶ 31, 264 Wis. 2d 157, 667 N.W.2d 318.

There is no fundamental right not to be incarcerated for criminal behavior. *State v. Annala*, 168 Wis. 2d 453, 468, 484 N.W.2d 138 (1992). And felons are not a constitutionally protected class. *State v. Thomas*, 2004 WI App 115, ¶ 26, 274 Wis. 2d 513, 683 N.W.2d 497. So differences in the treatment of criminal offenders, including differences in criminal penalties, are measured under the rational basis test. *State v. Lynch*, 2006 WI App 231, ¶ 14, 297 Wis. 2d 51, 724 N.W.2d 656; *Hilber v. State*, 89 Wis. 2d 49, 54, 277 N.W.2d 839 (1979).

Therefore, the rational basis test applies when a statute that imposes a mandatory minimum sentence is said to violate equal protection. *United States v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2011); *United States v. Nagel*, 559 F.3d 756, 760 (7th Cir. 2009).

When faced with a claim that a statute that reflects the considered will of the people is unconstitutional, a court cannot become mired with the merits of the legislation, but must

afford due deference to the determination of the legislature. *State v. Cole*, 2003 WI 112, ¶ 18, 264 Wis. 2d 520, 665 N.W.2d 328.

Respect for a co-equal branch of government demands that statutes must be presumed to be constitutional, and will not be found to be unconstitutional unless their invalidity is established beyond a reasonable doubt. *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶¶ 16-18, 279 Wis. 2d 169, 694 N.W.2d 344; *Cole*, 264 Wis. 2d 520, ¶¶ 11, 17 (and cases cited).[1] A court must indulge every presumption and resolve every doubt in favor of sustaining the law. *Ponn P.*, 279 Wis. 2d 169, ¶ 17; *Cole*, 264 Wis. 2d 520, ¶ 11.

The rational basis test is a paradigm of such deferential judicial restraint. *Smith*, 323 Wis. 2d 377, ¶¶ 17-18.

The rational basis standard does not preclude the state from treating even similarly situated persons differently. *State v. Smet*, 2005 WI App 263, ¶ 26, 288 Wis. 2d 525, 709 N.W.2d 474; *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989). The state retains broad discretion to create classifications, which need not be the best or wisest means of achieving a proper purpose or be free of any inequity. *Smith*, 323 Wis. 2d 377, ¶ 15; *Lynch*, 297 Wis. 2d 51, ¶ 17; *Smet*, 288 Wis. 2d 525, ¶ 26; *McManus*, 152 Wis. 2d at 131.

A classification will be upheld if there is any rational basis for it. *Jorgensen*, 264 Wis. 2d 157, ¶ 32; *State v. Burgess*, 2003 WI 71, ¶ 10, 262 Wis. 2d 354, 665 N.W.2d 124; *State v.*

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[1] Since the constitutionality of a statute presents a question of law, the need to demonstrate unconstitutionality beyond a reasonable doubt does not set an evidentiary standard of proof, but expresses the degree of certainty a court must have before invalidating a law. *Ponn P.*, 279 Wis. 2d 169, ¶¶ 14, 18.

Roling, 191 Wis. 2d 754, 764, 530 N.W.2d 434 (Ct. App. 1995). It is sufficient if the classification is reasonable and practical in relation to a legitimate government interest. *State v. Hezzie R.*, 219 Wis. 2d 848, 894, 580 N.W.2d 660 (1998); *McManus*, 152 Wis. 2d at 131.

A classification may be invalidated only if it is patently arbitrary, and without any rational relationship to a legitimate government interest. *Smith*, 323 Wis. 2d 377, ¶ 12; *Smet*, 288 Wis. 2d 525, ¶ 26; *Hezzie R.*, 219 Wis. 2d at 894; *McManus*, 152 Wis. 2d at 131. Any doubts must be resolved in favor of the reasonableness of the classification. *Hezzie R.*, 219 Wis. 2d at 894; *McManus*, 152 Wis. 2d at 131.

The legislature need not expressly state the purpose or rationale justifying the classification. *Smet*, 288 Wis. 2d 525, ¶ 21; *State v. Radke*, 2003 WI 7, ¶ 11, 259 Wis. 2d 13, 657 N.W.2d 66. Rather, a court must presume that there is a justification for the classification, *Smith*, 323 Wis. 2d 377, ¶ 15, and must find or devise, if possible, some reasonable basis for it. *Lynch*, 297 Wis. 2d 51, ¶ 17; *Radke*, 259 Wis. 2d 13, ¶¶ 11, 27; *Hezzie R.*, 219 Wis. 2d at 894-95.

The party challenging the statute has the burden of eliminating any reasonably conceivable state of facts that could provide a rational basis for the classification. *Nagel*, 559 F.3d at 760. *See State v. Pocian*, 2012 WI App 58, ¶ 6, 341 Wis. 2d 380, 814 N.W.2d 894 (a facial challenge requires the challenger to establish beyond a reasonable doubt that the statute is unconstitutional in all its applications, and that there is no situation where the law would be constitutional); *Smith*, 323 Wis. 2d 377, ¶ 10 n.9 (same).

The mere fact that the legislature enacts a mandatory minimum penalty for one offense but not for another similar offense does not make the mandatory minimum irrational.

United States v. Caparotta, 890 F. Supp. 2d 200, 214 (E.D. N.Y. 2012). There may be good reasons why a mandatory minimum sentence is appropriate for only one of the offenses.

In this case, the reason for mandating a minimum penalty for a violation of § 948.075(1r), while no minimum was imposed for a violation of § 948.02(2), was not that the legislature considered using a computer to attempt to have sex with a child to be a more serious offense than actually having sex with a child.

Prior to the creation of § 948.075, the conduct now proscribed by that statute could only be prosecuted as an attempted second-degree sexual assault of a child, *State v. Grimm*, 2002 WI App 242, ¶¶ 7-14, 258 Wis. 2d 166, 653 N.W.2d 284, punishable by one-half the maximum for a Class C felony, i.e., twenty years. Wis. Stat. § 939.32(1g)(b)1. (2013-14).

By creating § 948.075 and making the grade of, and maximum penalty for, this offense exactly the same as for § 948.02(2), the legislature indicated that it viewed both crimes as equally serious. *See State v. Davison*, 2003 WI 89, ¶ 48, 263 Wis. 2d 145, 666 N.W.2d 1.

Rather, the legislature mandated a minimum penalty for violations of § 948.075(1r), but not for violations of § 948.02(2), because it perceived that the courts were not viewing both crimes as equally serious, and were regularly imposing sentences for violations of § 948.075(1r) that were too lenient. The mandatory minimum was the legislature's way of forcing courts to impose sentences for violations of § 948.075(1r) that reflected the legislature's view of the seriousness of that offense.

The legislature was aware that in 2005 only four defendants who were convicted of violating § 948.075(1r) were

sentenced to incarceration, and then for an average of only thirty-three months (74:ex.2:3). Thirty-three defendants who were convicted of this felony were given probation (74:ex.2:3).

The legislature's first response to this problem was a measured effort to cajole courts into imposing more substantial sentences on defendants who violated § 948.075(1r). The legislature created a presumptive minimum sentence of five years, but allowed courts to impose a lesser sentence if they found that the interests of the community would be served and the public would not be harmed. 2005 Wisconsin Act 433, § 15 (creating Wis. Stat. § 939.617).

But a study conducted by investigators for a Milwaukee television station found that in 2009 judges were still "giving internet predators a slap on the wrist" (74:ex.1:1).

This study prompted Representative Mark R. Honadel to introduce 2011 Assembly Bill 209 for the purpose of "clos[ing] a gaping loophole in state law that allows convicted child predators, child pornographers, and those who prey on children online to serve less than their full sentence" (40:13-14).

Representative Honadel stated that the presumptive minimum had not worked well because the exception that allowed courts to impose a lesser sentence had become the rule, so that many defendants who committed internet crimes against children were not getting the prison sentences they deserved (40:13). Representative Honadel believed that the law was not being enforced as intended because some of these defendants were never being sent to prison (40:14).

Representative Honadel urged his colleagues in the legislature to now "make sure the law that we passed is enforced" (40:14). He said there was "absolutely no reason for leniency for those who abuse and take advantage of our

children" (40:14). So he proposed "eliminat[ing] the option of a lesser sentence and impos[ing] mandatory minimum sentencing for anyone . . . over the age of 18 who uses a computer to prey on children" (40:14).

The statements of those who propose legislation are authoritative evidence of the purpose of the statute. *State v. Champion*, 2002 WI App 267, ¶ 11, 258 Wis. 2d 781, 654 N.W.2d 242, *modified on other grounds, State v. Harbor*, 2011 WI 28, ¶¶ 47 n.11, 52, 333 Wis. 2d 53, 797 N.W.2d 838; *State v. Stevenson*, 2000 WI 71, ¶ 25 n.5, 236 Wis. 2d 86, 613 N.W.2d 90.

Representative Honadel's colleagues overwhelmingly agreed with him by enacting 2011 Wisconsin Act 272, which amended § 939.617 by eliminating the courts' discretion to impose anything less than a sentence of five years of confinement for violating § 948.075(1r), although they retain discretion to impose up to twenty years more. Wis. Stats. §§ 939.50(3)(c), 948.075(1r), 973.01(2)(b)3.

The legislature has broad authority to enact laws reflecting society's appreciation of the seriousness of one crime as opposed to another, and to measure the sanctions that, in the judgment of society, will best deter the commission of those crimes. *Radke*, 259 Wis. 2d 13, ¶ 29.

In the exercise of this authority, the legislature may "decide whether and to what extent the sentencing court's discretion should be limited." *In re Felony Sentencing Guidelines*, 120 Wis. 2d 198, 203, 353 N.W.2d 793 (1984). *Accord Chapman v. United States*, 500 U.S. 453, 467 (1991) (Congress has the power to define criminal punishments without giving the courts any sentencing discretion). *See Brucker*, 646 F.3d at 1019 (rejecting a separation of powers challenge to mandatory minimum sentences).

So a perceived need to prevent judicial lenience in imposing sentences for a crime the legislature deems serious provides a proper reason for requiring a mandatory minimum sentence. *Brucker*, 646 F.3d at 1017-18; *Nagel*, 559 F.3d at 761.

Indeed, the federal government has done essentially the same thing by imposing a mandatory minimum sentence of ten years for the crime of attempted sexual enticement of a minor, which can be committed, like in this case, by using a computer to attempt to have sex with a detective posing as a child, to prevent courts from being too lenient in sentencing for a crime Congress considered serious even though there was no actual child victim. *Nagel*, 559 F.3d at 758, 760-61, 764. *See also Caparotta*, 890 F. Supp. 2d 200 (upholding a five year mandatory minimum sentence for receiving child pornography).

Obversely, the legislature could have reasonably determined that there was no corresponding need to impose a mandatory minimum penalty for violating § 948.02 by actually having sex with a child.

It is possible to conceive a reasonable basis for the classification, *Lynch*, 297 Wis. 2d 51, ¶ 17; *Radke*, 259 Wis. 2d 13, ¶ 11; *Hezzie R.*, 219 Wis. 2d at 894-95, by attributing to the legislature a determination that there was no reason to force courts to treat violations of § 948.02 seriously because courts were already treating those violations seriously by imposing significant prison sentences for actually sexually assaulting a child.

A sampling of recent cases shows that the legislature could have come to that conclusion.[2]

[2] To obtain this sample the attorney general first turned to Westlaw to find cases where the defendant had been convicted of violating § 948.02 between the date § 948.075 was enacted and the date the minimum

Since a minimum sentence affects only the confinement portion of a bifurcated sentence, Wis. Stat. § 939.617, this list shows only the period of confinement rather than the total sentence including the period of extended supervision.

In Milwaukee County Case No. 2002CF3318 Raymond A. Rosa was sentenced to seven years of confinement for violating § 948.02(2).

In Milwaukee County Case No. 2001CF6756 Tyrone Booker was sentenced to nine years of confinement for violating § 948.02(2). Additional penalties were imposed for convictions of other crimes.

In Milwaukee County Case No. 2003CF2718 Randy McGowan was sentenced to twenty years of confinement for violating § 948.02(1).

In Kenosha County Case No. 2002CF388 Machon L. Williams was sentenced to five years of confinement for violating § 948.02(2). Additional penalties were imposed for convictions of other crimes.

In Washington County Case No. 2005CF10 Brian J. Homz was sentenced to twenty years of confinement for violating § 948.02(1).

In Richland County Case No. 2005CF49 Alan Keith Burns was sentenced to twenty-five years of confinement for violating § 948.02(2).

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sentence was made mandatory. CCAP was consulted to determine the sentences imposed on these defendants.

In Milwaukee County Case No. 2006CF6287 Tyrone Davis Smith was sentenced to ten years of confinement for violating § 948.02(1).

In Fond du Lac County Case No. 2007CF446 John A. LaGrew was sentenced for forty years of confinement for violating § 948.02(1). Additional penalties were imposed for convictions of other crimes.

In Waukesha County Case No. 2008CF120 Scott E. Ziegler was sentenced to thirty-five years of confinement for violating § 948.02(2). Additional penalties were imposed for convictions of other crimes.

In Milwaukee County Case No. 2007CF2341 Lenin Correa was sentenced to ten years of confinement for violating § 948.02(1).

In Milwaukee County Case No. 2011CF2293 Ondrea Ray Matthews was sentenced to sixteen years of confinement for violating § 948.02(2).

Although probation was imposed in a couple cases, a statutory scheme does not violate equal protection simply because it is not all-encompassing. *State v. Hanson*, 182 Wis. 2d 481, 488, 513 N.W.2d 700 (Ct. App. 1994). The legislature may recognize different degrees of harm and decide which more urgently needs repression. *State v. Block*, 222 Wis. 2d 586, 592, 587 N.W.2d 914 (Ct. App. 1998). "If the law addresses the evil where it is most felt, it should not be overthrown because it may have been applied in other instances." *Hanson*, 182 Wis. 2d at 488.

This sampling of cases cannot prove that the legislature decided to impose a mandatory minimum penalty for violating § 948.075, but not for violating § 948.02, because it saw a need

to prevent judicial lenience in the one case but not the other. But it shows that the legislature could have had that purpose in mind, and that is all that is necessary to justify the classification made by the legislature.

A legislature's decision to impose a mandatory minimum sentence for one offense because the legislature believes that the courts are being too lenient in sentencing for that offense, but not to impose a mandatory minimum sentence for another offense because the legislature believes that the courts are fashioning appropriately severe sentences for that offense, is a rational basis for that classification. *See Brucker*, 646 F.3d at 1017-18; *Nagel*, 559 F.3d at 760.

Other conceivable reasons for the difference in penalties are that using a computerized communication device in an attempt to have sex with a child makes it possible for the defendant to troll for multiple victims, makes it possible to lure children away from the safety of their homes and families, makes it less likely that a child who is induced to have sex will report a sexual assault to the authorities, and even if a sexual assault is reported, the anonymity offered by using a computer to communicate makes it less likely that a person who sexually assaults a child will be apprehended and punished. *See Hanson*, 182 Wis. 2d at 487 (enticement of a child is a social evil in and of itself).

Heidke also asserts that the mandatory minimum sentence is unconstitutional as applied to him, but his is just a typical case of using a computer to attempt to have sex with a person believed to be a child. Heidke fails to distinguish his case in any way from any other situation in which imposition of the mandatory minimum sentence is consistent with the equal protection provisions of both the state and federal constitutions.

Heidke was not denied his right to equal protection of the laws because he was sentenced to a mandatory minimum penalty of five years confinement for using a computer to attempt to have sex with a child, while someone who actually had sex with a child would not necessarily have to be confined for that length of time.

Heidke has failed to prove beyond a reasonable doubt that the mandatory minimum sentence imposed by Wis. Stat. § 939.617 for violating Wis. Stat. § 948.075 creates a classification that makes the statutes unconstitutional.

CONCLUSION

It is therefore respectfully submitted that the judgment of the circuit court should be affirmed, and that Wis. Stat. § 939.617 should be declared to be constitutional.

Dated: December 30, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,200 words.

Dated this 30th day of December, 2015.

_____
Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of December, 2015.

_____
Thomas J. Balistreri
Assistant Attorney General