STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2015AP1420-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JAMES D. HEIDKE,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable David L. Borowski Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Five-Year Mandatory Minimum for Using a Computer to Facilitate a Second-Degree Sexual Assault of a Child Violates Equal Protection, Both on Its Face and as Applied.

A. The mandatory minimum for using a computer to facilitate a second-degree child sexual assault is irrational on its face.

Heidke's principal brief argued that the five-year mandatory minimum for using a computer to facilitate, but not actually complete, a second-degree sexual assault of a child is constitutionally irrational on its face, given that there is no mandatory minimum for the more aggravated offense of actually completing a second-degree child sexual assault. (Heidke's Initial Br. at 10-17). In response, the State concedes the obvious – that using a computer to attempt to have sex with a child is not "a more serious offense than actually having sex with a child." (State's Resp. Br. at 6). The State also does not dispute that a person convicted of using a computer to facilitate a second-degree child sexual assault is similarly situated for sentencing purposes to a person convicted of an actual second-degree child sexual assault. Therefore, this point should be considered admitted, as well. *See* ***Brown County DHS v. Terrance M.***, 2005 WI App 57, ¶ 13, 280 Wis. 2d 396, 694 N.W.2d 458 ("Arguments not refuted are deemed admitted.").

Nevertheless, the State maintains that the challenged penalty scheme is not irrational. It posits that the legislature could have reasonably concluded there was a need prevent judicial leniency in cases involving using a computer to attempt a second-degree child sexual assault, but not in cases

involving second-degree child sexual assault because courts were already treating second-degree child sexual assault seriously by imposing significant prison sentences for that offense. (State's Resp. Br. at 6-12).[1]

This purported rationale, however, is not actually a rational basis for the challenged penalty scheme. Again, the classification at issue involves a statutory penalty scheme that punishes an attempted child sex crime (albeit a specific type of attempt) more severely than the actual completed child sex crime. Heidke argues that this is irrational under all circumstances because, regardless of the form the attempt might take, an uncompleted child sex crime is less aggravated than a completed one. To refute this argument, the State must offer some conceivable reason why it would be rational to conclude that the offense of using a computer to attempt a second-degree child sexual assault should be subject to a harsher statutory penalty than the completed crime of a second-degree child sexual assault.

The State offers no such reason. It does not argue that using a computer to attempt to have sexual contact or intercourse with a child is more aggravated, dangerous, or harmful than actually engaging in sexual contact or sexual intercourse with a child. Nor does it argue that someone who uses a computer to attempt a child sexual assault is in need of greater punishment or deterrence than someone who actually sexually assaults a child. The State thus fails to offer a rational basis for the disputed penalty scheme.

[1] The State concedes that there is nothing to suggest that the legislature actually made that determination. It simply claims that the legislature "could have reasonably" come to that conclusion. (State's Resp. Br. at 9-12).

Instead, the State offers a reason why the legislature may have believed the irrational penalty structure it created was *harmless*. Again, the State argues that the legislature could have reasonably concluded that there was no corresponding need to impose a mandatory minimum for second-degree child sexual assault because courts were already imposing appropriately harsh sentences for that offense. (State's Resp. Br. at 12). But that is not a rational reason for punishing a similar but less serious offense more harshly. To the contrary, it is nothing more than saying that the legislature could have concluded that the judiciary, based on its past sentencing practices, would mitigate the effect of the irrational penalty structure by continuing to impose severe sentences for second-degree child sexual assault. Even if that premise is true, the fact remains that the statutory penalty scheme itself still treats an uncompleted (and thus less aggravated) attempted child sex crime more severely than the completed child sex crime. That is not rational. And the belief that the judiciary may play some mitigating role changes nothing. An irrational penalty structure does not become rational simply because the legislature believes the judiciary will mitigate the irrationality. This court should reject that notion.

Moreover, even if the State's proffered rationale could a rational basis in theory, it would not a rational basis based on the record of this case. As an initial matter, the legislature could not simply have assumed that the judiciary was being too lenient in cases involving using a computer to facilitate a child sex crime, but not in cases involving second-degree child sexual assault. That type of conclusion cannot logically be based speculation or conjecture. It requires evidence of actual past sentences imposed for the crimes in questions – or at least a representative sampling of those sentences.

The only "evidence" presented by the State in this regard are the sentences from eleven cases where the defendants were convicted of violating Wis. Stat. § 948.02. (State's Resp. Br. at 9-11). However, the legislature could not have rationally concluded from these eleven cases that the judiciary was already imposing significant prison sentences for second-degree child sexual assault – such that the mandatory minimum imposed for Wis. Stat. § 948.075 was unnecessary for that offense. First, the eleven cases cited by the State include cases where courts imposed sentences for first-degree child sexual assault, as well second-degree child sexual assault. Only second-degree child sexual assault is relevant in this case. In addition, the State found these cases using Westlaw, which only includes cases that are appealed. (State's Resp. Br. at 9, n. 2). As this court is no doubt aware, cases that are appealed often tend to be cases where the defendants have received harsh sentences. Thus, the exclusion of all cases that were not appealed by itself skews this sample in a significant way. Furthermore, it is not at all clear whether these eleven cases are even a representative sampling of appellate cases involving sentences for child sexual assault from the relevant time frame.[2] The State simply refers to them as "[a] sampling of recent cases," without indicating how or why it picked these cases instead of others. (*Id.* at 9).

It would have been patently unreasonable for the legislature to conclude that no corresponding mandatory minimum was necessary for second-degree child sexual

[2] Given the relatively small number, it does not appear that these eleven cases are a comprehensive list of appellate cases involving violations of Wis. Stat. § 948.02 during the relevant time frame. Also, the State specifically noted that there were other cases where probation was imposed. (State's Resp. Br. at 11).

assault based on an unrepresentative sampling of eleven appellate cases. Furthermore, even if this conclusion were not somehow unreasonable, the State still has provided no evidence regarding the types of sentences that were imposed for violations of Section 948.075 during the time this offense was subject to a presumptive minimum sentence.[3] Thus, even if the legislature could have reasonably concluded that the judiciary was imposing appropriately severe sentences for second-degree child sexual assault, it still would have had no reasonable basis to conclude that "the courts were not viewing [violations of Section 948.075] as equally serious," such that it was necessary to go from a presumptive to a mandatory minimum for Section 948.075, while at the same time requiring no presumptive or mandatory minimum for second-degree child sexual assault. (State's Resp. Br. at 6).

The State also claims that there are "[o]ther conceivable reasons for the difference in penalties" at issue in this case (State's Resp. Br. at 12). In this regard, the State asserts that using a computerized communication system to attempt to have sex with a child makes it possible for a perpetrator to reach multiple victims, to lure children away from the safety of their homes, and to avoid apprehension due

[3] The State cites a Department of Administration fiscal estimate stating that thirty-three of thirty-seven defendants convicted of using a computer to facilitate a child sex crime received probation in 2005. (State's Resp. Br. at 6-7) (74:ex.2:3). However, this was before the presumptive minimum for Section 948.075 went into effect. *See* 2005 Wisconsin Act 433. The State also cites a 2012 news article that states in 2009 investigators for a Milwaukee television station discovered that judges were still "giving internet predators a slap on the wrist, sending just one out three *child porn convicts* to prison." (State's Resp. Br. at 7) (74:ex.1:1) (emphasis added). However, this article says nothing about the types of sentences that were imposed for using a computer to facilitate a child sex crime.

to the anonymity offered by the internet and because the victim may be less likely to report the offense to police. (*Id.*) However, even if all these assertions are true, they involve differences between using a computer to attempt to commit a child sex crime and other types of *attempted* child sex crimes. These differences might thus be rational bases for penalizing a violation of Section 948.075 more harshly than other forms of *attempted* second-degree child sexual assault. But that is not the issue in this case. The issue is whether there is any rational basis for penalizing using a computer to attempt a second-degree child sexual assault more harshly than *the actual completed crime* of second-degree child sexual assault.

No such rational basis exists. In the context of a child sexual assault, an attempt cannot be possibly be worse than the completed crime. No reasonable person and no reasonable parent in particular, would ever claim that using a computer to attempt a child sexual assault is worse than actually sexually assaulting a child. As such, a penalty scheme that punishes an attempted child sex crime more severely than the actual completed crime is irrational under all circumstances. This court should therefore hold that the five-year mandatory minimum for the portion of Section 948.075 that prohibits using a computer to facilitate a second-degree sexual assault of a child is unconstitutional on its face.

B. The mandatory minimum is irrational as applied in this case.

Heidke principal brief also argued that the mandatory minimum penalty for Section 948.075, as applied in this case, violates his equal protection rights. (Heidke's Initial Brief at 18-19). In response, the State claims that Heidke fails to distinguish his case in any way from any other situation in

which the imposition of the mandatory minimum is consistent with equal protection. (State's Resp. Br. at 12).

This argument overlooks the fact Section 948.075 prohibits using a computer to attempt either a first-degree or second-degree child sexual assault. Since mandatory minimums exist for most forms of first-degree child sexual assault, Heidke does not assert that the mandatory minimum at issue here would be unconstitutional as applied to persons convicted of using a computer to attempt a first-degree child sexual assault. Heidke's case is factually distinguishable from those cases, however.

Here, there is no allegation that Heidke ever attempted to commit a first-degree child sexual assault. The complaint charged him only with using a computer to facilitate a second-degree child sexual assault. Heidke is therefore similarly situated to a person convicted of second-degree child sexual assault for sentencing purposes. Moreover, in this case, the purported child did not actually exist. As such, under the facts of this case, there is no rational basis why Heidke should be subjected to a five-year mandatory minimum when a person convicted of the more aggravated offense of second-degree sexual assault of an actual child is not subject to any mandatory minimum. The five-year mandatory minimum, as applied in this case, therefore violates Heidke's equal protection rights.

CONCLUSION

The circuit court erred in denying Heidke's motion to strike the mandatory minimum penalty as unconstitutional. Heidke therefore respectfully requests that this court reverse the order of the circuit court, declare the mandatory minimum penalty at issue in this case unconstitutional, both on its face and as applied, vacate his sentence, and remand the matter to the circuit court for resentencing.

Dated this 19th day of January 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,037 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 19th day of January 2016.

Signed:

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