COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2011AP311
2011AP312

Cir. Ct. Nos. 1996CF965778
1999CF4849

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE C. SIMPSON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Willie C. Simpson appeals from orders denying his WIS. STAT. § 974.06 (2009-10) motions in two cases.[1] He additionally appeals from an order denying reconsideration in the first case. Simpson's general premise is that legislative changes to statutes, which were amended or enacted and first effective after Simpson's convictions, are *ex post facto* violations, thereby invalidating those convictions. We reject Simpson's argument and affirm the orders.

BACKGROUND

1. Appeal No. 2011AP311

¶2 In November 1996, Simpson was charged with one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (1995-96). The crime was alleged to have occurred between November 4-5, 1996. Simpson pled guilty and was sentenced in July 1997.

¶3 At the time, second-degree sexual assault of a child was a Class BC felony, punishable by a $10,000 fine and up to twenty years' imprisonment. *See* WIS. STAT. §§ 948.02(2) (1995-96) & 939.50(3)(bc) (1995-96). Simpson was sentenced to fifteen years' imprisonment, imposed and stayed in favor of five years' probation. In December 1999, Simpson's probation was revoked and he began serving the fifteen-year sentence.

¶4 In December 2010, Simpson moved to vacate his conviction because second-degree sexual assault of a child had subsequently become a Class C felony,

[1] These cases were consolidated for disposition on the court's own motion by order dated October 10, 2011. *See* WIS. STAT. RULE 809.10(3) (2009-10).

punishable by up to forty years' imprisonment, and Simpson alleged that this change was an *ex post facto* violation. The circuit court denied the motion, noting that the change had not affected Simpson. Simpson moved for reconsideration, but the circuit court denied that motion as well.

2. Appeal No. 2011AP312

¶5 In September 1999, Simpson was charged with two counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (1997-98). One offense allegedly occurred between January and July 1998; the other allegedly occurred between July 1998 and September 1999.[2] Simpson was convicted following a court trial and was sentenced in May 2000.

¶6 At the time, first-degree sexual assault of a child was a Class B felony punishable by up to forty years' imprisonment. *See* WIS. STAT. §§ 948.02(1) (1997-98) & 939.50(3)(b) (1997-98).[3] Simpson was sentenced to twenty-five years' imprisonment on each count, consecutive to each other and to any other sentence. Simpson had a direct appeal, and we affirmed. *See* ***State v. Simpson***, No. 2001AP2238-CR, unpublished slip op. (WI App Apr. 16, 2002). Simpson then brought a *pro se* postconviction motion, which was denied. He appealed and we summarily affirmed. *See* ***State v. Simpson***, No. 2004AP1647, unpublished slip op. & order (WI App Sept. 14, 2005).

[2] WISCONSIN STAT. § 948.02(1) was the same in both the 1997-98 and 1999-2000 versions.

[3] The 1999-2000 statutes, as officially published, provide that a Class B felony is punishable by up to sixty years' imprisonment. *See* WIS. STAT. § 939.50(3)(b) (1999-2000). However, that penalty increase was not effective until December 31, 1999. *See* 1997 Wis. Act 283, §§ 322, 456.

¶7 In January 2011, Simpson brought the current WIS. STAT. § 974.06 (2009-10) motion. He alleged that an *ex post facto* violation existed because first-degree sexual assault was increased to a Class A felony and an element of causing great bodily harm had been added. The circuit court denied the motion, concluding it was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

DISCUSSION

¶8 *Ex post facto* laws are prohibited by the United States Constitution in Article I, §§ 9-10, and by the Wisconsin Constitution in Article I, § 12. An *ex post facto* law is one "which imposes a punishment for an act which was not punishable at the time it was committed, or imposes an additional punishment to that then prescribed … or which alters the situation of the accused to his disadvantage[.]" *See* ***State v. Thiel***, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994) (internal quotation marks and citation omitted). The *ex post facto* clause is grounded in the notion that people have a right to fair warning of that conduct which will give rise to criminal penalties. *See* ***State v. Kurzawa***, 180 Wis. 2d 502, 511, 509 N.W.2d 712 (1994).

¶9 "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized … that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." ***Collins v. Youngblood***, 497 U.S. 37, 41 (1990). When we analyze whether application of an amended statute violates *ex post facto* prohibitions, we look to see whether that application violates one or more of the clause's recognized protections. *See* ***State v. Haines***, 2002 WI App 139, ¶6, 256 Wis. 2d 226, 647 N.W.2d 311. "Specifically, we determine whether application of

the new law: (1) criminalizes conduct that was innocent when committed; (2) increases the penalty for conduct after its commission; or (3) removes a defense that was available at the time the act was committed." ***Id.*** Simpson is concerned with laws that increase the penalty for conduct after its commission.

¶10 In appeal No. 2011AP311, Simpson notes that 2001 Wis. Act 109 repealed the BC class of felonies, reclassified second-degree sexual assault as a Class C felony, and increased the penalty for a Class C felony to forty years' imprisonment. *See* 2001 Wis. Act 109, §§ 551-553, 879. Simpson thus complains that he did not get "fair warning" of the penalty for his crime. Contrary to Simpson's apparent beliefs, however, these statutory changes are not retroactively applicable to his case.

¶11 Legislation presumptively operates prospectively unless there is express language or a necessary implication that it should apply retroactively. *See* ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶15, 244 Wis. 2d 720, 628 N.W.2d 842. Here, 2001 Wis. Act 109, § 9359(3) states that the changes "first apply to offenses committed on the effective date" for the subsection, and 2001 Wis. Act 109, § 9459 establishes the effective date as February 1, 2003. Simpson himself even acknowledges the effective date of those changes in his brief. The changes of 2001 Wis. Act 109 are plainly prospective only.

¶12 Because the statutory changes do not apply retroactively to "disadvantage" Simpson, the *ex post facto* clauses are not implicated. *Cf.* ***State v. Williams***, 2001 WI App 263, ¶¶11, 21, 249 Wis. 2d 1, 637 N.W.2d 791 (due process does not prohibit statutory changes and due process is not implicated absent retroactive application of those changes). The circuit court denied the

postconviction motion and reconsideration because it found that the changes in the act did not apply to Simpson.[4] We affirm those decisions.

¶13 In appeal No. 2011AP312, Simpson complains of changes imposed by 2001 Wis. Act 109, 2005 Wis. Act 430, and 2005 Wis. Act 437. However, the 2001 act made no changes applicable to WIS. STAT. § 948.02(1), and neither the 2001 act nor the 2005 acts changed the penalties for Class A or Class B felonies. Further, while both 2005 acts made substantive changes to § 948.02(1), those changes were evidently inconsistent, and only the alterations set forth in 2005 Wis. Act 437, the latter-enacted legislation, were implemented.

¶14 Simpson's *ex post facto* complaint here thus appears to be that 2005 Wis. Act 437 changed first-degree sexual assault of a child to a Class A felony, which carries a mandatory life sentence,[5] and that the act added an element of "great bodily harm" to the offense. Simpson also alleges that this additional element, which he contends the State would be unable to prove beyond a reasonable doubt, constitutes a due process violation.

¶15 Any changes imposed by 2005 Wis. Act 437 "first appl[y] to violations committed on the effective date" of the subsection. 2005 Wis. Act 437, § 7(1). By operation of WIS. STAT. § 991.11 (2003-04), the act's effective date was June 6, 2006. As in Simpson's other appeal, because any applicable changes

[4] Simpson does not show, nor even allege, that his sentence had been altered in any way to account for the increase in the maximum penalty.

[5] Life imprisonment has been the penalty for a Class A felony since at least 1995. *See* WIS. STAT. § 939.50(3)(a) (1995-96).

do not retroactively apply to him, neither the *ex post facto* clause nor due process concerns are implicated. *See* ***Williams***, 249 Wis. 2d 1, ¶21.

¶16 We additionally note that Simpson fails to appreciate the entirety of 2005 Wis. Act 437. The legislature used that act to create *two* definitions for first-degree sexual assault of a child.[6] Both prohibit "sexual contact or sexual intercourse with a person who has not attained the age of 13 years" but, "[i]f the sexual contact or sexual intercourse resulted in great bodily harm to the person[,]" the offense would be a Class A felony. 2005 Wis. Act 437, §§ 1-2. If there was no such harm, the offense remained a Class B felony, just as Simpson was charged and convicted.

¶17 The circuit court in this case denied Simpson's motion, concluding it was procedurally barred because issues had not been raised in the previous motions or appeals. We decline to determine whether the procedural bar of ***Escalona-Naranjo*** was properly applied here. Instead, we simply affirm the circuit court for a different reason than the one on which the circuit court relied. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[6] Currently, there are five definitions of first-degree sexual assault of a child. *See* WIS. STAT. § 948.02(1) (2009-10). One is a Class A felony; the other four are Class B felonies. ***Id.***