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**DISTRICT II**

January 22, 2014

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

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2013AP2148-CRNM State of Wisconsin v. Andrew L. Torstenson (L.C. #1992CF261)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Andrew L. Torstenson appeals from a judgment imposing a ten-year prison sentence after the revocation of probation on his conviction of incest with a child[1] and an order denying in part his postconviction motion for resentencing. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[2] and ***Anders v. California***, 386 U.S. 738 (1967).

[1] The crime was committed in 1992 and at that time, it was a class C felony subject to a maximum indeterminate prison sentence of ten years.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Torstenson has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, we conclude that the judgment and order may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. Rule 809.21.

After serving a fifteen-year sentence on a conviction for first-degree sexual assault of a child, Torstenson began serving a consecutive ten-year term of probation on the incest with a child conviction. Torstenson's probation was revoked and the maximum prison sentence imposed in order to protect the public from Torstenson's continuing sexual fantasies involving children. Torstenson filed a postconviction motion asserting that he had not been afforded the right of allocution at the sentencing after revocation hearing. The prosecution did not oppose the motion and at a separate hearing Torstenson exercised his right of allocution. The sentencing court determined that Torstenson's remarks did not present any new information and denied resentencing.

The no-merit report addresses the potential issues of whether Torstenson was afforded his right of allocution by the postsentencing remedy, whether the sentence imposed after the revocation of probation was the result of an erroneous exercise of discretion, was based on inaccurate information, was unduly harsh and excessive, or was otherwise illegal, and whether Torstenson was denied the effective assistance of counsel at sentencing. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

Torstenson's response questions whether the sentencing court failed to consider applicable sentencing guidelines as required by WIS. STAT. § 973.017(2) (2007-08), whether it

was improper for the sentencing court to consider "other acts" evidence via the revocation summary, whether the sentence violates the prohibition against double jeopardy and constitutes cruel and unusual punishment, whether evidence Torstenson would like to present about his whereabouts on his global positioning system during probation and being coached to give a statement to his probation agent is a new factor warranting sentence modification, and whether he was denied the right to request judicial substitution based on the sentencing judge's prior dealings with child custody hearings. The response does not suggest issues of arguable merit. Not only did the sentencing court confirm that sentencing guidelines had not been developed for the crime of incest with a child, any issue with respect to sentencing guidelines is moot because the sentencing guideline commission was defunded, the guidelines are outdated, the statute requiring consideration of the guidelines was repealed, and it is now impossible to order a defendant resentenced and to have the sentencing guidelines considered. ***State v. Barfell***, 2010 WI App 61, ¶9, 324 Wis. 2d 374, 782 N.W.2d 437. At sentencing after revocation, the court is free to consider the defendant's conduct during probation. ***State v. Schordie***, 214 Wis. 2d 229, 234, 570 N.W.2d 881 (Ct. App. 1997); ***State v. Verstoppen***, 185 Wis. 2d 728, 738-39, 519 N.W.2d 653 (Ct. App. 1994). The sentencing court properly exercised its discretion in imposing the maximum sentence and the sentence does not violate the prohibition against double jeopardy or constitute cruel and unusual punishment. The evidence Torstenson wants to present as a new factor bears on the grounds for revocation of his probation and the sentencing court need not address revocation. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent from the underlying criminal action). Torstenson does not explain what involvement the sentencing judge may have had in prior child custody hearings to suggest grounds for judicial substitution. Even if the judge had such prior dealings,

there was no mention of those dealings at sentencing and absolutely no suggestion of any bias by the sentencing judge.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment and order, and discharges appellate counsel of the obligation to represent Torstenson further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and order denying resentencing are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gregg H. Novack is relieved from further representing Andrew L. Torstenson in this appeal. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*