OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

July 22, 2015

To:

Hon. James L. Carlson
Circuit Court Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Andrew Hinkel
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Allan W. Biesterveld, #462853
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2015AP82-CRNM State of Wisconsin v. Allan W. Biesterveld (L.C. #2003CF481)

Before Neubauer, P.J., Reilly, and Gundrum, JJ.

Allan W. Biesterveld appeals from a 2008 judgment resentencing him on his conviction for repeated sexual assault of the same child. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Biesterveld 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

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

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.

Biesterveld entered a guilty plea to repeated sexual assault of the same child and was sentenced to thirty years' imprisonment. On appeal the case was remanded for resentencing before a different judge. ***State v. Biesterveld***, No. 2005AP2138-CR, unpublished slip op. at ¶¶1, 19 (WI App Oct. 3, 2007). Biesterveld was resentenced to ten years' initial confinement and five years' extended supervision.[2] The sentence was ordered to be served consecutive to a sentence Biesterveld was serving on a Waukesha County conviction. Biesterveld was given credit for 1,364 days.

The no-merit report addresses whether there is any arguably meritorious claim for challenging the sentence. Specifically it considers whether the sentence was the result of an erroneous exercise of discretion, can be considered excessive, or was based on inaccurate information. The report also indicates that there is no suggestion of a new factor that could serve as grounds for seeking sentence modification. This court is satisfied that the no-merit report properly analyzes any challenge as without merit, and this court will not discuss the sentence further.

[2] Resentencing occurred February 20, 2008. Biesterveld filed a timely notice of intent to pursue postconviction relief requesting the appointment of a state public defender under WIS. STAT. RULE 809.30 but by clerical oversight no information was sent to the public defender's office. On September 6, 2013, this court extended the time for Biesterveld to pursue RULE 809.30 postconviction relief.

Biesterveld's response focuses on his discontent that under WIS. STAT. § 302.113(4),[3] he must serve all the confinement time for the consecutive sentences and then serve all the extended supervision time. He asserts that he has a meritorious argument that § 302.113(4) is unconstitutional and violates due process by extending a person's sentence beyond that imposed by the court, creating two distinct sentences by delaying implementation of the extended supervision portion of a sentence, and usurping the sentencing court's discretion.[4] He cites the common-law rule repeated in ***Dunne v. Keohane***, 14 F.3d 335, 336 (7th Cir. 1994), that "unless interrupted by fault of the prisoner (an escape, for example) a prison sentence runs continuously from the date on which the defendant surrenders to begin serving it." However, ***Dunne*** recognizes that the stated rule is not a constitutional command. ***Id.*** at 337. ***Dunne*** offers no support for Biesterveld's view that § 302.113(4) is unconstitutional.[5] Likewise, the discussion of the delayed implementation of a jail sentence in ***People v. Levandoski***, 603 N.W.2d 831, 835-37 (Mich. Ct. App. 1999), a case cited by Biesterveld, has no application and offers no support for a meritorious claim. Moreover, § 302.113(4) has been considered or applied in ***State ex rel. Thomas v. Schwarz***, 2007 WI 57, ¶47, 300 Wis. 2d 381, 732 N.W.2d 1, ***State v. Polar***, 2014 WI App 15, ¶13, 352 Wis. 2d 452, 842 N.W.2d 531, ***State v. Harris***, 2011 WI App 130, ¶9, 337

[3] WISCONSIN STAT. § 302.113(4) provides, "All consecutive sentences imposed for crimes committed on or after December 31, 1999, shall be computed as one continuous sentence. The person shall serve any term of extended supervision after serving all terms of confinement in prison."

[4] Biesterveld also suggests that WIS. STAT. § 302.113(4) disparately treats similarly situated persons—that is a person serving a single bifurcated sentence and a person serving consecutive bifurcated sentences. Those persons are not similarly situated and Biesterveld's claim lacks merit.

[5] ***Dunne v. Keohane***, 14 F.3d 335, 337 (7th Cir. 1994), recognizes that a challenge to the manner in which a sentence is implemented is not a challenge to the judgment of conviction. Even if ***Dunne*** had some application, we would question whether Biesterveld's constitutional challenge is properly made in this appeal from the judgment of conviction.

Wis. 2d 222, 805 N.W.2d 386, and ***State v. Collins,*** 2008 WI App 163, ¶13, 314 Wis. 2d 653, 760 N.W.2d 438, without any concern about its constitutionality. Biesterveld's claim that the provision is unconstitutional lacks merit.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrew R. Hinkel is relieved from further representing Allan W. Biesterveld in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals