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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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DEION KEALII BETHEA, *Petitioner,*

*v.*

THE HONORABLE GEORGE FOSTER, Judge of the SUPERIOR COURT  
OF THE STATE OF ARIZONA, in and for the County of MARICOPA,  
*Respondent Judge,*

STATE OF ARIZONA, *Real Party in Interest.*

No. 1 CA-SA 17-0048  
FILED 5-16-17

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Petition for Special Action from the Superior Court in Maricopa County  
No. CR2015-001444-001  
The Honorable George H. Foster, Judge

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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COUNSEL

Maricopa County Public Defender's Office, Phoenix  
By Seth M. Apfel  
*Counsel for Petitioner*

Maricopa County Attorney's Office, Phoenix  
By Andrea L. Kever  
*Counsel for Real Party in Interest*

**MEMORANDUM DECISION**

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Paul J. McMurdie joined.

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**NORRIS**, Judge:

¶1 This special action arises out of an order entered by the superior court “extending” the original period of Petitioner Deion Kealii Bethea’s probation beyond its original expiration date to “resolve” restitution issues. In seeking special action relief, Bethea argues the superior court abused its discretion in increasing his probationary period because it did not have a reasonable basis for doing so and had not entered an order requiring him to pay any specific amount of restitution. We agree with Bethea. Accordingly, we accept special action jurisdiction and grant relief. *See infra* ¶¶ 16, 19.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 In March 2015, a grand jury indicted Bethea on one count of leaving the scene of a serious injury accident, a class 2 felony. On July 20, 2015, Bethea entered a written plea agreement and agreed to plead guilty to the charge, but as a class 3 felony, in exchange for supervised probation for “up to 5 years.” Bethea also agreed to pay restitution to the victim in an amount not to exceed \$750,000, and stipulated he understood that if the court granted probation, “the terms and conditions thereof” were subject to modification during the period of probation.

¶3 On August 27, 2015, the superior court accepted Bethea’s guilty plea, suspended imposition of sentence, and placed Bethea on supervised probation for a period of 18 months to begin that same day. Thus, as originally imposed, Bethea’s probation would terminate on February 27, 2017 (“original termination date”). The superior court imposed several conditions of probation including restitution. Of significance to this special action, the court ordered Bethea to pay “all restitution . . . as imposed by the Court,” and Bethea agreed that if he failed to pay “restitution in full,” the court could extend his probation. The court

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did not, however, order Bethea to pay any specific amount of restitution and did not set a restitution hearing.<sup>1</sup>

¶4 On April 6, 2016, the State asked the court to set a restitution hearing. The court eventually scheduled a restitution hearing for July 22, 2016. On the day before the hearing, the State moved to vacate the hearing because it had learned of a possible civil settlement which might affect the amount of the requested restitution. The court granted the State's motion and vacated the restitution hearing. In September 2016, the State asked the court to schedule a restitution hearing. The court scheduled the hearing for December 9, 2016. One day before the hearing, the State disclosed approximately 200 pages of "restitution documents" to Bethea's counsel. Requesting time to review the documents, Bethea's counsel moved to continue the hearing. The court vacated the hearing and rescheduled the hearing for January 6, 2017. In so doing, the court advised the parties it could "extend the period of probation for purposes of [Bethea] fulfilling restitution obligations within the parameters of the law."

¶5 On January 4, 2017, the State moved to continue the restitution hearing because Bethea had filed a motion disputing the amount of restitution he could be required to pay<sup>2</sup> and the assigned prosecutor had a scheduling conflict with the January 6 hearing date. The court granted the State's motion and rescheduled the restitution hearing for January 26, 2017.

¶6 At the January 26, 2017 hearing, the court rejected Bethea's motion disputing the amount of restitution the court could order him to pay. The court scheduled a restitution hearing for March 10, 2017 over Bethea's objections to further restitution proceedings, even though Bethea's probation was scheduled to terminate on February 27, 2017. And, over Bethea's objection, the court "extend[ed]" Bethea's period of probation for one year to "resolve the restitution issues."

¶7 Bethea petitioned this court for special action relief on February 22, 2017. At the March 10, 2017 restitution hearing, the victim and a victim compensation advocate employed by the Maricopa County

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<sup>1</sup>The court also entered a "Judgment and Orders of Restitution, Fines and Fees" that ordered Bethea to pay restitution. That "judgment" did not, however, impose any specific amount of restitution.

<sup>2</sup>In his motion, Bethea argued he could not be ordered to pay restitution unless his criminal conduct – leaving the scene of an accident – had caused or aggravated the victim's injuries. We express no opinion on this issue.

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Attorney's Office testified. By minute entry filed March 15, 2017, the superior court ordered Bethea to pay \$10,266.42 in restitution to the victim and "modified" the terms of Bethea's probation by ordering that the "payment of the restitution shall be a condition of [Bethea's] probation."

¶8 On March 17, 2017, this court entered an order accepting special action jurisdiction. We vacated the superior court's February 6, 2017 order extending the term of Bethea's probation for one year to "resolve" restitution issues and the superior court's March 15, 2017 order in its entirety except for the superior court's quantification of the amount of restitution. Our order was without prejudice to the superior court's entry of a "criminal restitution order" pursuant to Arizona Revised Statutes ("A.R.S.") section 13-805 (Supp. 2016).<sup>3</sup>

**ISSUE PRESENTED AND SPECIAL ACTION JURISDICTION**

¶9 In his special action petition, Bethea argues the superior court abused its discretion in increasing his period of probation beyond the original termination date because it did not have a reasonable basis for doing so—he had not violated, nor had the State even alleged he had violated, any condition of his probation, and the court had not entered any order requiring him to pay any specific amount of restitution. Whether the superior court abused its discretion in increasing Bethea's probation beyond the original termination date under the circumstances presented here presents an issue appropriate for special action jurisdiction. *See Potter v. Vanderpool*, 225 Ariz. 495, 498, ¶ 6, 240 P.3d 1257, 1260 (App. 2010) (one basis for granting special action relief is when trial court commits an error of law and thereby abuses its discretion) (citation omitted). Further, improperly continuing a period of probation subjects a probationer to an "additional period during which his liberty is restricted. While the term continues, probation may be revoked and imprisonment imposed without the procedural guarantees provided to non-probationers." *State v. Korzuch*, 186 Ariz. 190, 193, 920 P.2d 312, 315 (1996). These concerns are especially important here as an appeal will not present Bethea with an equally plain, speedy, and adequate remedy. *See* Ariz. R.P. Spec. Act. 1(a). For these reasons, we accepted special action jurisdiction over Bethea's petition.

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<sup>3</sup>In our order accepting special action jurisdiction, we mistakenly stated that Bethea's probation expired on February 17, 2017. It expired on February 27, 2017. *See supra* ¶ 3.

## DISCUSSION

¶10 Chapter 9 of Title 13 generally governs probation for eligible defendants. Section 13-902(A) (Supp. 2016) specifies the statutory maximum probationary periods for felonies and misdemeanors. Section 13-901(A) (Supp. 2016) authorizes a court to suspend the imposition of sentence and to place a defendant on probation on “such terms and conditions as the law requires and the court deems appropriate[.]” Section 13-901(C) authorizes a court to modify or add to the conditions of probation at any time before the defendant’s period of probation has expired. Although a court has considerable discretion in modifying the conditions of probation, and may modify probation for reasons that would not warrant revocation of probation, *Korzuch*, 186 Ariz. at 193, 920 P.2d at 315; *Green v. Superior Court*, 132 Ariz. 468, 471, 647 P.2d 166, 169 (1982), nevertheless, a reasonable basis must exist to modify a condition of probation, *Burton v. Superior Court*, 27 Ariz. App. 797, 800, 558 P.2d 992, 995 (1977). We review a superior court’s modification of probation for an abuse of discretion. *State v. Dean*, 226 Ariz. 47, 50, ¶ 7, 243 P.3d 1029, 1032 (App. 2010) (citation omitted).

¶11 Consistent with these authorities, the superior court could have modified the conditions of Bethea’s probation by determining the amount of restitution he should pay and ordering him to pay it, but leaving the period of his probation unchanged. *See generally State v. Contreras*, 180 Ariz. 450, 885 P.2d 138 (App. 1994) (modifying conditions of probation to direct probationer to pay a specific amount of restitution despite absence of grounds to revoke probation when defendant had agreed to pay restitution in an amount not to exceed a specified sum and period of probation remained unchanged). Instead, the superior court increased Bethea’s period of probation beyond its original termination date even though he had not engaged in any improper behavior or conduct undermining the conditions of his probation, violated any condition of his probation, or taken any action to “run the clock out” on his probation before the court could determine the amount of restitution he should pay. Under these circumstances, the superior court did not have a reasonable basis to increase Bethea’s probationary period beyond the original termination date.

¶12 Tellingly, the State does not argue to the contrary in its response to Bethea’s petition for special action relief. Instead, it argues the court was authorized to “extend” the period of Bethea’s probation under A.R.S. § 13-902(C). We disagree.

¶13 Section 13-902(C) allows a court to “extend” a defendant’s probation beyond the statutory maximum period of probation for the

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defendant's offense to provide the defendant additional time to pay court-ordered restitution. Under A.R.S. § 13-902(C), when a court has ordered the defendant, as a condition of probation, to make restitution "for any economic loss related to the defendant's offense and that condition has not been satisfied," the court "at any time before the termination or expiration of probation may extend the period" of probation for a felony, by not more than five years, or for a misdemeanor, by not more than two years.

¶14 Here, although the superior court did not reference A.R.S. § 13-902(C) in extending Bethea's probation beyond the original expiration date, even if we assume the court relied on this statute when it extended Bethea's probationary period, *see supra* ¶ 6,<sup>4</sup> the court had not ordered Bethea to pay any specific amount of restitution before doing so. Although the State argues A.R.S. § 13-902(C) authorized the court to extend the original termination date because Bethea had agreed to pay restitution in his plea agreement and the court had imposed restitution as a condition of probation, A.R.S. § 13-902(C) conditions the authority of the court to extend probation to situations in which the restitution ordered by the court "has not been satisfied." A defendant cannot satisfy restitution as a condition of probation when the court has never entered an order requiring the defendant to pay any specific amount of restitution. *Cf.* Black's Law Dictionary (10th Ed. 2014) ("satisfaction" is the fulfillment of an obligation; the payment of a debt).

¶15 The statutes governing restitution drive this point home. Sections 13-603 and 13-804 authorize a court to order a person convicted of an offense to make restitution to the victim for economic losses caused by that person's conduct. A.R.S. § 13-603(C) (2010); A.R.S. § 13-804(A) (Supp. 2016). After determining the economic losses "caused by the criminal offense," A.R.S. § 13-804(B), and the amount of restitution the person should pay, *see* A.R.S. § 13-804(E), the court must enter a "restitution order" that sets forth the total amount of restitution the defendant owes to "all

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<sup>4</sup>Our probation statutes distinguish between "increasing" a probationary period and "extending" a probationary period. "Increasing" a period of probation refers to "enlarging the period of probation from that originally imposed to a longer one, but one that falls within the statutory limit." *State v. Quintana*, 195 Ariz. 325, 328, ¶ 15, 987 P.2d 811, 814 (App. 1999) (citation omitted). "Extending" the probationary period "refers to a period of probation that exceeds the statutory limits" imposed by A.R.S. § 13-902(A). Given this distinction, on its face A.R.S. § 13-902(C) was not applicable here.

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persons” and to “each person” and the manner in which the restitution is to be paid. A.R.S. § 13-804(H)(1)-(3). Here, not until after Bethea’s probationary period expired, did the superior court enter an order that specified the amount of restitution Bethea was to pay and the manner in which he was to pay it. *See generally State v. Nuckols*, 229 Ariz. 266, 268, ¶ 5, 274 P.3d 536, 538 (App. 2012) (trial court is obligated to determine, by sufficient evidence, amount of restitution owed by defendant unless defendant has agreed to pay a specific amount).

¶16 In short, we reject the State’s argument that A.R.S. § 13-902(C) authorized the superior court to “extend” the original termination date of Bethea’s period of probation under the circumstances presented here. We thus vacate the superior court’s orders extending Bethea’s period of probation beyond the original termination date, and requiring Bethea to pay the victim \$10,266.42 in restitution as a condition of probation. Pursuant to Arizona Rule of Criminal Procedure 27.5(a), we direct the superior court to order Bethea “discharged absolutely” from probation.

¶17 Although the superior court was not authorized by A.R.S. § 13-902(C) to extend Bethea’s probation or, as discussed above, to increase his period of probation beyond the original termination date, *see supra* ¶¶ 10-11, the superior court nevertheless retained jurisdiction to determine the amount of restitution the victim should receive and to enter a “criminal restitution order” under A.R.S. § 13-805. This court has held that A.R.S. § 13-805 allows a court to enter a criminal restitution order after a defendant’s probationary period has expired.

¶18 In *State v. Zaputil*, 220 Ariz. 425, 207 P.3d 678 (App. 2008), the defendant entered a guilty plea which, as here, stipulated he would pay restitution to the victim in an amount not to exceed a specified amount. *Id.* at 426, ¶ 2, 207 P.3d at 679. The court placed the defendant on probation and scheduled a hearing to determine the amount of restitution. *Id.* There, as here, the restitution hearing did not occur until after the defendant had completed his period of probation. *Id.* at 427, ¶ 5, 207 P.3d at 680. Applying A.R.S. § 13-805, this court held the superior court still had jurisdiction to enter a criminal restitution order despite the defendant’s completion of probation. *Id.* at 429, ¶¶ 14-16, 207 P.3d at 682. We explained that although the court could not order payment of restitution as a term of probation because the defendant’s probationary period had expired, it was nevertheless authorized to enter a “judgment,” that is, a “criminal

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restitution order,” in favor of the victim in the amount of the restitution ordered by the court.<sup>5</sup> *Id.* at 429, ¶ 17, 207 P.3d at 682.

**CONCLUSION**

¶19 For the foregoing reasons, we accept special action jurisdiction and grant relief. We vacate the orders entered by the superior court “extending” the original termination date of Bethea’s probation and requiring Bethea to pay the victim \$10,266.42 in restitution as a condition of probation. We direct the superior court to enter an order pursuant to Arizona Rule of Criminal Procedure 27.5(a) discharging Bethea from probation. The superior court may, however, enter a criminal restitution order pursuant to A.R.S. § 13-805, if it has not already done so.



AMY M. WOOD • Clerk of the Court  
FILED: JT

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<sup>5</sup>A criminal restitution order may be recorded and is “enforceable as any civil judgment,” bears interest, and does not expire until paid in full. A.R.S. § 13-805(E).