

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 04-20-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 09-0555
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
HENRY J. PACHEL,) (Not for Publication -
) Rule 111, Rules of the
Appellee.) Arizona Supreme Court)
)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-0000970111

The Honorable Howard D. Hinson, Judge (Retired)

APPEAL DISMISSED FOR LACK OF JURISDICTION

Sheila Sullivan Polk, Yavapai County Attorney Prescott
By Dennis M. McGrane, Deputy County Attorney
Attorneys for Appellant

DeRienzo and Williams PLLC Prescott Valley
By Daniel J. DeRienzo
Attorneys for Appellee

D O W N I E, Judge

¶1 The State appeals the superior court's determination that Henry J. Pachel need not continue sex offender registration after being discharged from probation. For the following

reasons, we conclude that we lack jurisdiction and thus dismiss this appeal.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1997, Pachel pled guilty to two counts of sexual conduct with a minor in violation of Arizona Revised Statutes ("A.R.S.") section 13-1405 (2010), both class 6 felonies. On June 2, 1997, he was sentenced to five years of supervised probation. The written Conditions of Probation ordered Pachel to "REGISTER AS A SEX OFFENDER DURING TERM OF PROBATION." The minute entry from the sentencing hearing directed Pachel to "register as a sex offender during the term of probation." Pachel successfully completed probation and was discharged effective June 2, 2002.

¶3 On March 18, 2009, Pachel filed a "Request to Successfully Terminate Sex Registration."¹ Pachel argued, *inter alia*, that the court had ordered him to register only during his term of probation, which had expired. The State opposed the motion, arguing that, once imposed, sex offender registration under A.R.S. § 13-3821 (2010) is a lifelong obligation. Pachel replied that the State had waived any challenge to his sentencing terms by failing to object or appeal and that he was "simply asking [the] Court to enforce its order."

¹ According to defense counsel's statements in the superior court, the probation department and the sheriff's office advised Pachel he must maintain lifetime sex offender registration.

¶14 At the hearing on Pachel's motion, defense counsel reiterated that he was not asking the court to modify the terms of probation or sentence, but to enforce previously ordered terms. He argued the State had waived any challenge to the legality of Pachel's sentence by failing to object or appeal in 1997. After considering the parties' arguments, the court stated: "I made a determination registration should be for the term of probation at the time of Mr. Pachel's sentence." The court indicated it would grant Pachel's motion "for what I believe is an order reconfirming that this Court meant what it said in its 1997 sentencing order, that registration would be for the term of his probation only." In a subsequent minute entry, the court stated:

For the reasons as stated on the record, the Court GRANTS the Defendant's motion for order *confirming* that his sex offender registration requirement was to be for the term of the Defendant's probation only.

(Emphasis added.) The court signed an order submitted by defense counsel (the "2009 order"), which stated, in pertinent part:

The Court finds that in 1996, at the time of the offense, the law did not require lifetime registration . . . and therefor, [sic] the sentencing provision stating that the "Defendant shall register as a sex offender *during the term of probation*" was not and is not an illegal sentence. While case law suggests that lifetime registration was not unconstitutional in 1997 . . . the

Court finds that "lifetime registration was not required by A.R.S. 13-3821 in 1997". [sic]

The Court further finds that the state did not object to the "judgment and sentence" at the time of sentencing in 1997 nor was there reference to a "length of the" term of registration in the plea agreement.

The State filed a timely notice of appeal from the 2009 order.

DISCUSSION

¶15 Pachel challenges this Court's jurisdiction, arguing the State failed to timely appeal the 1997 sentence and cannot establish how the 2009 order affects its substantial rights. We agree.

¶16 This court has jurisdiction to consider only those direct appeals authorized by statute. See Ariz. Const. art. 6, § 9; Ariz. Rev. Stat. ("A.R.S.") § 12-120.21(A)(2003); *State v. Jimenez*, 188 Ariz. 342, 344-45, 935 P.2d 920, 922-23 (App. 1996). The State cites A.R.S. § 13-4032(4) (2010), without explaining how it authorizes this appeal.² That statute permits the State to appeal post-judgment orders "affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request." A.R.S. § 13-4032(4). The State does not suggest its appeal was filed

² The State did not file a reply brief addressing the jurisdictional challenges raised in Pachel's answering brief.

at a victim's request. We therefore construe the State's jurisdictional citation as a reference to a post-judgment order "affecting the substantial rights of the state." See A.R.S. § 13-4032(4).

¶17 The State frames its appeal as one from the 2009 order. The superior court, however, issued the 2009 order to "reconfirm[] that this Court meant what it said in its 1997 sentencing order, that registration would be for the term of his probation only." The 1997 sentencing minute entry and the terms of probation required Pachel to register as a sex offender "during the term of probation." Although the superior court understandably could not recall in 2009 why it made this "specific pronouncement" in 1997, because it was "out of the ordinary," the court believed it was a "purposeful determination on [the court's] part."³

³ At the time of sentencing, the superior court had before it a risk assessment of Pachel. That assessment found "little chance of [Pachel] re-offending" if he continued in personal and marital counseling and did not himself act as a counselor or therapist to others. The evaluator further stated:

Under these circumstances he is highly likely to be successful in his probation, which I understand is to be a minimum of three years duration.

Apparently he is obliged to register as a sex offender under the current statute for this violation. *Perhaps the requirement that he be so registered might end at the period of his probation.*

¶18 On this record, we conclude that the 2009 order does not affect substantial rights of the State, as is necessary for appellate jurisdiction. See *Jimenez*, 188 Ariz. at 345, 935 P.2d at 923 (holding that we had no jurisdiction to consider defendant's direct appeal of post-judgment order denying motion to modify terms of probation because it did not change sentence, and accordingly, did not affect defendant's substantial rights). The 2009 order simply affirmed the 1997 sentencing terms, which required sex offender registration for a finite term.⁴

CONCLUSION

¶19 For the reasons stated, we dismiss this appeal for lack of jurisdiction.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge

(Emphasis added.)

⁴ In its opening brief, the State argues that "the state of the law in 1996 was lifetime registration" and that "lifetime registration has been the rule since the inception of sex offender registration in Arizona, with limited exceptions." Even assuming *arguendo* that the State is correct, it did not appeal the sentence it now claims was illegal from its inception.