

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



DIVISION ONE
FILED: 12/14/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

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

STATE OF ARIZONA,) 1 CA-CR 09-0706
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JONATHON ROBERT GERRIE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1999-008755

The Honorable Warren J. Granville, Judge

AFFIRMED AS MODIFIED

William Montgomery, Maricopa County Attorney Phoenix
By Lisa Marie Martin, Deputy County Attorney
Attorneys for Appellant

Maricopa County Public Defender Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellee

I R V I N E, Judge

¶1 The State appeals from the trial court's order modifying Jonathon Robert Gerrie ("Jonathon")'s probation from a life term to five years pursuant to Arizona Rule of Criminal

Procedure 27.3 and *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008).¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The State charged Jonathon with four counts of sexual offenses committed against his minor sister between June 1 and July 31, 1997. Jonathon pled guilty to amended counts of attempted child molestation (Count 1) and attempted sexual conduct with a minor under the age of fifteen (Count 4), both Class 3 felonies and an attempted DCAC. The court imposed lifetime probation on each count, beginning March 3, 2000.

¶3 Sometime in 2009, the Adult Probation Office ("APO") began filing petitions to modify or discharge probation for probationers whose attempted DCAC crimes occurred during the *Peek* timeframe. In May 2009, the court notified the parties that APO filed a petition to discharge Jonathon's probation. The

¹ In *Peek*, 219 Ariz. at 182, ¶ 1, 195 P.3d at 641, the Arizona Supreme Court held that a defendant could not be sentenced to lifetime probation for second-degree Dangerous Crimes Against Children ("attempted DCAC") committed between January 1, 1994, and July 20, 1997 ("*Peek* timeframe"). It reasoned that before 1994, lifetime probation for attempted DCAC was available under A.R.S. § 13-604.01(I). *Id.* at 183, ¶ 8, 195 P.3d at 642. The legislature deleted § 13-604.01 in 1994, and supplanted it with A.R.S. § 13-902(E), which did not apply to attempted DCAC. *Id.* Effective July 21, 1997, the legislature reinserted language in A.R.S. § 13-902(E) that reinstated lifetime probation for attempted DCAC. During the *Peek* timeframe, five years was the maximum term of probation permitted for attempted DCAC.

State responded, objecting to modification. Jonathon filed a memorandum in support of termination.

¶14 At a consolidated hearing on July 21, 2009, the trial court heard arguments on this and several other *Peek* cases. It decided to examine the factual bases of each case individually and gave the State an opportunity to "pinpoint more precisely the dates of the offenses." When given an opportunity to do so at a hearing on September 2, 2009, the State presented no additional evidence to narrow the dates. The trial court reasoned that the rule of lenity required it to assume that the offenses were committed within the *Peek* time frame and modified Jonathon's probation to a term of five years on Count 4. It ordered APO to calculate whether Jonathon has completed that term and to submit an Order of Discharge, "if warranted."

¶15 The State timely appeals from modification of probation on Count 4.² We exercise special action jurisdiction because the State has no equally plain, speedy and adequate remedy by way of appeal, and it raises an issue of first impression involving purely legal questions of public importance that are pending in other cases or likely to recur. See *Jackson v. Schneider*, 207 Ariz. 325, 327, ¶ 5, 86 P.3d 381, 383 (App. 2004); *State v. Dean*, 1 CA-CR 09-0705 (Ariz. App. Dec. 9, 2010).

² The record does not show that Count 1 was ever modified before it was discharged on October 20, 2010. The State, however, has not appealed from that order.

DISCUSSION

¶16 The State incorrectly asserts that Jonathon's probation was terminated early. The record shows that his probation was modified pursuant to Rule 27.3. Therefore, the facts and issues presented here are virtually identical to those this Court addressed in *Dean*, 1 CA-CR 09-0705 (Ariz. App. Dec. 9, 2010). We find no reason to depart from our holding in *Dean*.

CONCLUSION

¶17 We affirm modification of Jonathon's probation.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge