

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 09-0708
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOHN MORALES,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR1999-095331

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 Margaret M. Green, Deputy Public Defender
Attorneys for Appellee

I R V I N E, Judge

¶1 The State of Arizona timely appeals the trial court's
modification of John Morales's term of probation for attempted
sexual conduct with a minor 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

¶12 In 2000, Morales pled guilty to two counts of attempted sexual conduct with a minor, both class 3 felonies. Morales admitted he committed Count 2 between May 5, 1994, and March 1, 1998. He was sentenced to a presumptive term of ten years' imprisonment for Count 1 and given lifetime probation for Count 2. Morales successfully completed his prison sentence and began his term of probation.

¶13 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. The court notified the parties that APO filed a petition to modify Morales's probation. The State responded,

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.

objecting to the modification. Morales 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 the 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 offense was committed within the *Peek* time frame and modified Morales's probation to a term of five years. It ordered APO to calculate whether Morales has completed that term and to submit an Order of Discharge, "if warranted."

DISCUSSION

¶15 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).

¶16 The State incorrectly asserts that Morales'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

¶7 We affirm modification of Morales's probation.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge