DIVISION ONE
FILED: 12/16/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0709
	)	
Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
EUGENE NEAL PROPST,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2000-003828

The Honorable Warren J. Granville

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Stephen R. Collins, Deputy Public Defender,
Attorneys for Appellee

W I N T H R O P, Presiding Judge

¶1 The State appeals from the trial court's September 3, 2009 order modifying the term of probation for Eugene Propst

("Appellee") and ordering the Adult Probation Office ("the APO") to calculate whether probation has been completed and to submit an order of discharge if warranted. The State argues that the trial court abused its discretion and misapplied the law by failing to review the order of discharge under Rule 32 of the Arizona Rules of Criminal Procedure and then erred in actually modifying the order. For the following reasons, we affirm the trial court's order.

FACTS AND PROCEDURAL HISTORY

¶2 On March 8, 2000, Appellee was indicted on Count One, molestation of a child under the age of fifteen years, a class two felony, and Count Two, furnishing obscene or harmful items to a minor, a class four felony.[1] On July 19, 2000, Appellee entered a plea agreement. He pled guilty to Amended Count 1, attempted child molestation, a class three felony, and he also pled guilty to Count 2. Both offenses were committed on or between January 1, 1997, and December 31, 1997. The court accepted the plea agreement and on August 30, 2000, it suspended imposition of the sentence and placed Appellee on lifetime probation for Count 1 and 10 years' probation for Count 2. The lifetime probation for Count 1 is the only issue on appeal.

[1] We note that in Appellee's brief, counsel refers to Appellee as "Dean" though his name is "Propst." We urge counsel to take greater care in reviewing their briefs before submission to this court.

¶3 In November, 2008, the Arizona Supreme Court held in *State v. Peek*, 219 Ariz. 182, 183, ¶8, 195 P.3d 641, 642 (2008), that lifetime probation imposed between January 1, 1994 and July 21, 1997, ("the *Peek* period") for convictions of attempted child molestation were unauthorized by statute, and therefore, illegal. *Peek*, 219 Ariz. at 185, ¶ 20, 195 P.3d at 644. Accordingly, the APO registered an order of discharge of Appellee's probation based on the holding in *Peek*. On July 14, 2009, Appellee filed a memorandum in support of the APO's motion. Almost half of the alleged range of dates of Appellee's offense fell within the *Peek* period, with the other half straddling the end of the *Peek* period.

¶4 A hearing was held on July 21, 2009, and the court ordered a subsequent hearing to allow the State to prove that Appellee's offense occurred outside of the *Peek* period. The subsequent hearing was held on September 2, 2009, and the State presented no further evidence. Accordingly, on September 3, 2009, the court ordered a modification of Appellee's probation under Count 1, decreasing the period of probation from lifetime to five years.[2] The court also directed the APO to calculate whether the modified probation term had been completed, and if

[2] A term of five years' probation was the maximum term of probation available for Appellee's offense during the *Peek* period.

so, ordered that the probation be discharged. This appeal followed.

JURISDICTION

¶5 The State contends that we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4032(4) (2010). Without deciding whether we have jurisdiction under those statutes, we instead exercise our discretion to accept special action jurisdiction pursuant to A.R.S. § 12-120.21(A)(4) and Arizona Rules of Procedure for Special Actions 8(a). Special action jurisdiction is proper when "an issue is one of first impression of a purely legal question, is of statewide importance, and is likely to arise again . . . ." *Vo v. Superior Court In and For County of Maricopa*, 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992); *see also Summerfield v. Superior Court In and For County of Maricopa*, 144 Ariz. 467, 469, 698 P.2d 712, 714 (1985) (accepting special action jurisdiction when several pending cases involved the same issue and finding that "[n]ormal appellate procedures will result in unnecessary cost and delay to all litigants"). In the instant case, the State asks us to resolve an issue of first impression that is a pure legal issue of statewide importance. Further, multiple cases involving the same issues are either presently before us or pending, rendering normal appellate procedures inefficient. Accordingly, these factors lead us to conclude

that accepting special action jurisdiction in this case is appropriate.

ANALYSIS

¶6 In *State v. Dean*, 1 CA-CR 09-0705, 2010 WL 5014334 (Ariz. App. Dec. 7, 2010) (refiled as amended Dec. 9, 2010), this court already considered a similar fact scenario and rejected virtually identical arguments as those presented in this case. We find no reason here to depart from our holding in *Dean*.

¶7 On its brief, the State relies on evidence that was not introduced at trial that suggests that Appellee's offense occurred outside of the *Peek* period. The State newly presented evidence consists of a statement made by Appellee's spouse in a presentence investigation that inconclusively suggests that Appellee's offense may have occurred outside the *Peek* period. The State does not claim to have presented this evidence during the modification evidentiary hearing, nor does anything in the record suggest that the State presented or relied on this purported statement at the time of Appellee's initial sentencing. Accordingly, we do not find that the court erred in determining that the State failed to demonstrate that the offense occurred outside the *Peek* period.

CONCLUSION

¶8 For the aforementioned reasons, we affirm the trial court's order modifying Appellee's period of probation.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Judge

_____/S/_____
PATRICK IRVINE, Judge