

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



DIVISION ONE
FILED: 02/22/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0955
)
Appellant,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
ROBERT GARY ARNOLD,) (Not for Publication -
) Rule 111, Rules of the
Appellee.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1999-094689

The Honorable Warren J. Granville, Judge

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 Edith M. Lucero, Deputy Public Defender
Attorneys for Appellee

J O H N S E N, Judge

¶1 The State appeals the superior court's order reducing Robert Gary Arnold's term of probation from lifetime probation

to a term of five years. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2000, Arnold pled guilty to one count of attempted molestation of a child, a Class 3 felony and dangerous crime against children, which, according to the plea agreement, he committed "on or between June 1, 1997, and August 31, 1997."¹ The crime carried a presumptive sentence of ten years' incarceration. Ariz. Rev. Stat. ("A.R.S.") § 13-604.01(H) (Supp. 1997). The superior court accepted the plea agreement, suspended imposition of the sentence and placed Arnold on lifetime probation.

¶3 In November 2008, the Arizona Supreme Court held the relevant law did not allow lifetime probation to be imposed for attempted child molestation occurring between January 1, 1994 and July 20, 1997 ("the *Peek* period"). *State v. Peek*, 219 Ariz. 182, 183-85, ¶¶ 8-10, 20, 195 P.3d 641, 642-44 (2010); see A.R.S. § 13-902 (Supp. 1994). Several months later, because Arnold's plea agreement provided that he committed the offense during a period that straddled the *Peek* period, the Adult Probation Office petitioned the superior court to modify Arnold's probation term.

¹ Arnold also pled guilty to one count of sexual abuse. This appeal does not concern that conviction or the court's order suspending sentence and imposing probation for that crime.

¶14 Before ruling, the superior court provided the State with an opportunity to prove the attempted child molestation occurred outside the *Peek* period. The State conceded it was unable to do so. Accordingly, the court modified Arnold's probation term to five years, the maximum permitted by statute for attempted child molestation during the *Peek* period. The court then ordered the probation office to calculate whether the term was completed and, if so, to submit an order of discharge. See A.R.S. § 13-902(A) (Supp. 1994).²

DISCUSSION

¶15 The State contends 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 Rule of Procedure for Special Action 8(a).

¶16 On appeal, the State argues the superior court's modification of Arnold's term of probation constitutes an "end run around [Arizona Rule of Criminal Procedure] 32" and that the

² Notwithstanding the State's argument that the superior court erred by terminating Arnold's probation, the State has appealed only from the order modifying the term of Arnold's probation. Subsequent to the State's notice of appeal, the court discharged Arnold upon his completion of probation on the attempted child molestation charge. After the order of discharge, Arnold moved to dismiss the State's appeal as moot. We decline to dismiss the appeal as moot, and in our discretion, will reach the merits of the appeal.

court abused its discretion in "terminating" Arnold's probation without finding that Arnold's conduct while on probation warranted termination pursuant to A.R.S. § 13-901(E) (2010). It also argues that by entering into the plea agreement, Arnold admitted he committed attempted child molestation on all dates "up to and including the last date alleged in the charge." In *State v. Dean*, 226 Ariz. 47, 243 P.3d 1029 (App. 2010), this court rejected each of these arguments in affirming an order modifying a term of lifetime probation that had been imposed on a defendant who pled guilty to attempted child molestation over a period that straddled the *Peek* period. The State has not presented any argument not raised in *Dean*; we have no reason in this case to depart from our holding in that case.

CONCLUSION

¶7 For the foregoing reasons, we affirm the superior court's order modifying Arnold's term of probation.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
DONN KESSLER, Presiding Judge

/s/
SHELDON H. WEISBERG, Judge