

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

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APR -9 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0210
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
JULIANNE MARI LANE,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112080001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General  
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Julianne Lane was convicted after a jury trial of fraudulent schemes and artifices and theft and/or financial exploitation of a vulnerable adult in the amount of at least \$4,000 but less than \$25,000. The trial court sentenced her to

presumptive, concurrent prison terms, the longer of which is 11.25 years. The court also reduced a restitution award and various fines, fees, and assessments to a criminal restitution order (CRO), further ordering that “no interest, penalties, or collection fees” would accrue “while the defendant is in the Department of Corrections.” On appeal, Lane asserts that the court was not permitted to reduce the restitution award, fines, fees, and assessments to a CRO until her sentences had expired and that the CRO therefore must be vacated. We vacate the CRO but otherwise affirm Lane’s convictions and sentences.

¶2 In *State v. Lewandowski*, this court held that A.R.S. § 13-805,<sup>1</sup> which governs the entry of CROs, applies only at the expiration of a defendant’s sentence or probation. 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). We reasoned the imposition of a CRO before the defendant’s probation or sentence has expired “constitutes an illegal sentence, which is necessarily fundamental, reversible error,” because the premature accrual of interest obligates the defendant to pay more than § 13-805 requires. *Id.* Thus, as the state concedes, the trial court’s reduction of the restitution award, fees, fines, and assessments against Lane to a CRO at sentencing was improper.

¶3 The state asserts, however, that we need not vacate the CRO because Lane did not object at sentencing and therefore has not met on appeal her burden of

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<sup>1</sup>Section 13-805 has been amended three times since Lane committed the offenses here. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1, ch. 99 § 4. We refer to the version in effect at the time of her offenses, *see* 2005 Ariz. Sess. Laws, ch. 260, § 6, but observe that, on these facts, the result would be the same under the current version.

demonstrating any error prejudiced her. In most circumstances, a defendant's failure to object to alleged error in the trial court forfeits review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). But this court held in *State v. Vermuele* that fundamental error review does not apply when the "alleged [sentencing] error[] . . . did not become apparent until the trial court pronounced sentence." 226 Ariz. 399, ¶¶ 14-15, 249 P.3d 1099, 1103 (App. 2011). Nothing in the record suggests Lane had an opportunity to raise this error until the court pronounced that sentence. Accordingly, she need not demonstrate resulting prejudice.

¶4 As the state correctly points out, however, sentencing error may be subject to harmless error review. *See Lewandowski*, 220 Ariz. 531, ¶ 10, 207 P.3d at 788; *see also Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607 (state has burden of demonstrating harmless error). The state asserts the error here is harmless because the trial court further ordered that no interest would accrue until Lane's sentences have expired. Thus, the state reasons, the harm described in *Lewandowski* is not present in this case because no premature interest will accrue.

¶5 But we agree with Lane that the trial court lacked authority to delay the imposition of interest, just as it lacked authority to enter a CRO in the first instance. Nothing in § 13-805 permits a court to delay or alter the accrual of interest when a CRO is "recorded and enforced as any civil judgment" pursuant to § 13-805(C). We are extremely reluctant to deem an unauthorized act harmless because of a second unauthorized act. And we decline to speculate whether the court's attempt to delay the accrual of interest would be of any legal effect should we permit the unauthorized CRO

to remain. *Cf. Jackson v. Schneider*, 207 Ariz. 325, ¶ 10, 86 P.3d 381, 383-84 (App. 2004) (when trial court exceeds sentencing authority, sentence void as to excess portion).

¶6 Finally, should Lane pay any of the restitution, fines, fees, or assessments while incarcerated, the CRO would be inaccurate at the completion of her sentence. Indeed, A.R.S. §§ 31-261(D) and 31-230(C) provide for the automatic payment of restitution from a prisoner’s trust fund, retention account, or spendable account, and the court here expressly ordered that “any wages” Lane earned while incarcerated would be garnished to make restitution payments. Thus, we conclude the state has not met its burden of demonstrating the error is harmless. *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607.

¶7 The CRO is vacated. Lane’s convictions and sentences are otherwise affirmed.

*/s/ Peter J. Eckerstrom*  
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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

*/s/ Joseph W. Howard*  
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JOSEPH W. HOWARD, Chief Judge

*/s/ Michael Miller*  
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MICHAEL MILLER, Judge