

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-163114-001 DT

03/19/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

J MICHAEL JULIUS (001)

RICHARD D COFFINGER

REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2011-163114.

Defendant-Appellant J. Michael Julius (Defendant) was convicted in the University Lakes Justice Court of driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in not going through the proper submission colloquy, and contends the trial court could have imposed a different sentence. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 3, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28-1382(A)(1) (0.15 or more); failure to drive in one lane, A.R.S. § 28-729(1); and no proof of insurance, A.R.S. § 28-4135(C). On April 6, 2012, Defendant's attorney advised the trial court that Defendant was going to submit the matter on stipulated evidence. (R.T. of Apr. 6, 2012, at 3.) The trial court said this was the first time it had gone through that type of procedure. (*Id.*) Defendant's attorney presented to the trial court a Waiver of Trial by Jury document he had prepared, which was signed by Defendant, Defendant's attorney, and the prosecutor. (*Id.* at 3-4.) The trial court then signed that document. (*Id.* at 4.) The prosecutor presented to the trial court the documents to which the parties had stipulated, and the trial court took a recess to review those documents. (*Id.* at 4-5.) After reviewing those documents, the trial court found Defendant guilty of the three DUI charges and dismissed the civil traffic offenses. (*Id.* at 5.) Defendant's attorney asked the trial court to set sentencing for May 24, 2012, because of the possibility the Arizona Legislature would make changes in the sentencing provisions of the DUI statutes that could be retroactive. (*Id.* at 6-7.) The trial court set the sentencing for May 24, 2012. (*Id.* at 7.) The trial court then discussed the

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proceeding that had just taken place, and Defendant's attorney pointed out that it was not a guilty plea proceeding because Defendant had not plead guilty. (*Id.* at 8–10.) Defendant's attorney did not suggest the trial court should have done anything differently, such as addressing Defendant personally and advising him of the rights he was waiving and obtaining a knowing, voluntary, and intelligent waiver of those rights on the record. (*Id.* at 10.) Neither did the prosecutor suggest to the trial court that it had failed to do something that was required. (*Id.* at 14.)

The parties appeared on June 28, 2012, for sentencing. Defendant presented to the trial court a video in the nature of a public service announcement he had produced showing the extensive ramifications for DUI. (R.T. of Jun. 28, 2012, at 4–6.) He also produced a commercial showing the negative consequences of drinking and driving. (*Id.* at 7–9.) Defendant's attorney noted the DUI statute in effect at the time Defendant committed these offenses required him to spend 30 days in jail, and further noted the Arizona Legislature had modified the statute to require only 9 days in jail, and contended the trial court could impose sentence under this new statute. (*Id.* at 9–11.) The State contended the trial court had to impose the 30 days in jail. (*Id.* at 12.) The trial court continued the matter to July 12, 2012, so it could research the issue. (*Id.* at 12–14.)

When the parties reconvened, Defendant's attorney again argued that the trial court could sentence Defendant under the new statute. (R.T. of Jul. 12, 2012, at 4–5.) The trial court sentenced Defendant under the statute in effect at the time Defendant committed the offense. (*Id.* at 5.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

- A. *Has Defendant established he was prejudiced by the trial court's failure to advise him of the rights he was waiving by submitting the matter on a stipulated record.*

Defendant contends the trial court erred in failing to advise him of certain constitutional rights before it proceeded to determine his guilt solely on the basis of a submitted record, as is required by *State v. Avila*, 127 Ariz. 21, 24–25, 617 P.2d 1137, 1140–41 (1980). Defendant, however, failed to raise this issue before the trial court and therefore has forfeited appellate review, absent fundamental error. *See State v. Henderson*, 2120 Ariz. 561, 115 P.3d 601, ¶ 19 (2005). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). It is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996); *State v. West*, 176 Ariz. 432, 440–41, 862 P.2d 192, 200–01 (1993); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988).

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In the present matter, the trial court erred in not going through the required colloquy before accepting Defendant's waiver of rights and submission on the stipulated record. *State v. Bunting*, 226 Ariz. 572, 250 P.3d 1201, ¶ 11 (Ct. App. 2011); see *State v. Morales*, 215 Ariz. 59, 157 P.3d 479, ¶ 10 (2007). An inadequate colloquy does not, however, automatically entitle a defendant to relief under a fundamental error analysis; in order to obtain relief, a defendant must show both error and prejudice. *State v. Young*, 230 Ariz. 265, 282 P.3d 1285, ¶ 11 (Ct. App. 2012). In order to show prejudice, a defendant must show (1) the defendant did not know of the rights being waived and (2) if the defendant had known of the rights being waived, the defendant would not have proceeded with the submission:

We conclude, however, that the defendant must, at the very least, assert on appeal that he would not have admitted the prior felony conviction had a different colloquy taken place.

Young at ¶ 11. In the present case, it is entirely possible Defendant's attorney discussed the rights he was waiving by submitting the matter, and it is further possible, even if Defendant did not know exactly the rights he was waiving, he still would have submitted the matter even if he had know of those rights. Defendant makes no claim he did not know of the rights he was waving, and makes no claim he would not have submitted the matter on the stipulated record had a different colloquy taken place. Defendant thus has failed to allege prejudice.

Defendant contends, once he has shown error in not having a proper colloquy, this Court must remand to the trial court to provide him with the opportunity to prove prejudice. See *Bunting* at ¶ 11. That is contrary, however, to the requirement that, in order to obtain relief on appeal under a fundamental error analysis, the defendant must show **both** error **and** prejudice. *Soliz* at ¶ 11. If Defendant wants to establish prejudice, he will have to file a petition for post-conviction relief where he could allege he did not know of the rights being waived, if that is in fact what happened, and further allege, if he had known of those rights, he would not have proceeded with the submission, if that is in fact what Defendant would have done.

B. *Could the trial court have sentenced Defendant under the statute that did not go into effect until after the date Defendant committed his offense.*

Defendant contends the trial court could have sentenced him under the current version of A.R.S. § 28-1382(I), which provides a trial court may suspend all but 9 days of the 30 days of jail time if the defendant installs a certified ignition interlock device. The Arizona Court of Appeals recently rejected that contention in *State ex rel. Montgomery v. Harris (Maxwell)*, No. 1 CA-SA 12-0290 (Ariz. Ct. App. Mar. 14, 2013). In resolving that case, the court held as follows. Under A.R.S. § 1-244, no statute is retroactive unless expressly declared therein, and this statute contains no expressed declaration that it would apply retroactively. *Harris (Maxwell)* at ¶ 5. Although a procedural change may be applied retroactively, this is a substantive change. *Harris (Maxwell)* at ¶ 6. The inclusion of the language "at the time of sentencing" does not indicate a legislative intent that the statute should apply retroactively. *Harris (Maxwell)* at ¶ 7. No other language in the statute indicates a legislative intent that the statute should apply retroactively.

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Harris (Maxwell) at ¶ 8. A.R.S. § 1–246 expressly provides, when a penalty is changed, the new penalty “shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed,” thus the change would not apply to offenses committed before the effective date of the new statute. *Harris (Maxwell)* at ¶ 9. Thus, the trial court in the present matter was required to sentence Defendant under the statute as it existed on December 3, 2011, when Defendant committed this offense.

Defendant cites *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982), and *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983), in support of his position. Those cases held Arizona could apply its revised death penalty statute to crimes committed before the effective date of the statute without violating the *ex post facto* clause of the United States Constitution because those changes were both procedural and ameliorative. *Knapp*, 667 F.2d at 1262–63; *Adamson*, 136 Ariz. at 266, 665 P.2d at 988. Thus, if the Arizona Legislature had expressly provided defendants who committed their offenses prior to the effective date of the statute must be sentenced under the new version of the statute, that would not have violated the *ex post facto* clause of the United States Constitution. But the Arizona Legislature made no such expressed provision in the new statute, and thus as discussed above, A.R.S. §§ 1–244 and 1–246 required the trial court to punish Defendant under the law in force when Defendant committed the offense.

III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant failed to establish prejudice as a result of the submission colloquy and therefore has failed to establish he is entitled to relief under a fundamental error analysis, and further concludes the trial court properly sentenced Defendant under the statute as it existed at the time Defendant committed his offense.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the University Lakes Justice Court.

IT IS FURTHER ORDERED remanding this matter to the University Lakes Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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