



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. ANTHONY DURAN  
CR-13-0087-PR**

**PARTIES:**

*Appellant:* Anthony Duran

*Appellee:* State of Arizona

**FACTS:**

Duran was charged with three counts of aggravated assault and one count of first-degree burglary. He pled guilty pursuant to a plea agreement to one count of attempted aggravated assault in exchange for the dismissal of the remaining charges. At the change-of-plea hearing, Duran admitted to being present at the victim's house on the day of the incident and to being an accomplice to the assault; however, after Duran denied any participation in the incident during his interview for the presentence report, the trial court rejected the plea agreement, and the matter proceeded to trial.

Before trial, Duran filed a motion in limine to preclude the State from using the statements he had made during the change-of-plea hearing to impeach him at trial. The trial court ruled that, while the State could not use the statements in its case-in-chief or to impeach Duran's witnesses, it could use them to impeach Duran if he testified inconsistently with them.

Duran did not testify at trial, and the jury found him guilty on all counts. Subsequently, he filed a motion for a new trial, arguing the trial court had erred in ruling that he could be impeached with his change-of-plea statements if he chose to testify inconsistently with those statements. The trial court conceded its ruling was erroneous but nevertheless denied the motion, stating it could not determine whether Duran had been "prejudiced or legally harmed" by the error. Duran appealed.

The court of appeals found the trial court's ruling directly conflicted with Ariz. R. Evid. 410 and Ariz. R. Crim. P. 17.4(f), both of which "plainly preclude[] the state from using statements a defendant made during 'the plea discussion,' that is, statements made in a discussion that precedes the plea agreement and anything in the agreement itself, as well as statements made during a change-of-plea hearing." *State v. Campoy*, 220 Ariz. 539, 544-45 ¶¶ 13-14, 207 P.3d 792, 797-98 (App. 2009). But, while the trial court's ruling constituted error, the question whether it was reversible or harmless error remained.

Applying policy considerations set forth in *Luce v. United States*, 469 U.S. 38 (1984), and *State v. Allie*, 147 Ariz. 320, 710 P.2d 430 (1985), the court affirmed the trial court's denial of Duran's motion for a new trial. His decision not to testify – and the resulting absence of his statements from the record – rendered the question of harmless error "wholly speculative." As such, the court refused to categorize the pre-trial ruling as reversible error. The court further explained

that requiring Duran to testify to preserve his appeal right in this situation prevented him from manufacturing a basis for appeal by falsely alleging the threat of impeachment deterred him from taking the stand. *State v. Conner*, 163 Ariz. 97, 102, 786 P.2d 948, 953 (1990).

#### **ISSUES:**

1. By failing to actually testify at trial following a trial court's erroneous pre-trial ruling that would have allowed him to be impeached by statements he made during a change-of-plea proceeding, Appellant waived his ability to challenge the pretrial ruling, thus extending the rule of *State v. Allie*, 147 Ariz. 320, 327, 710 P.2d 430, 437 (1985), and *Luce v. United States*, 469 U.S. 38, 43 (1984), regarding statements made at motions to preclude impeachment with priors to include statements made at change-of-plea hearings.
2. That Appellant's altering of his trial strategy by deciding to not testify was "speculative," and that the Court of Appeals would not conclude that Appellant had been prejudiced by the erroneous pre-trial ruling without his actually testifying at trial.

#### **RELEVANT RULES:**

*Ariz. R. Evid. 410*: At the time of Duran's trial, this rule stated:

Except as otherwise provided by an applicable Act of Congress, Arizona statute, or the Arizona Rules of Criminal Procedure, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere* or no contest, or an offer to plead guilty, *nolo contendere*, or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers is not admissible against the person who made the plea or offer in any civil or criminal action or administrative proceeding.

*Ariz. R. Crim. P. 17.4(f)*: At the relevant time, this rule stated:

When a plea agreement or any term thereof is accepted, the agreement or such term shall become part of the record. However, if no agreement is reached, or if the agreement is revoked, rejected by the court, or withdrawn or if the judgment is later vacated or reversed, neither the plea discussion nor any resulting agreement, plea or judgment, nor statements made at a hearing on the plea, shall be admissible against the defendant in any criminal or civil action or administrative proceeding.

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