



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE of ARIZONA v. ERICK ANTONIO ESCALANTE
CR-17-0251-PR
242 Ariz. 375**

PARTIES:

Petitioner: Erick Antonio Escalante

Respondent: State of Arizona

Amici Curiae: Arizona Attorneys for Criminal Justice and Pima County Public Defender

FACTS:

Between April of 2014 and January of 2015, police officers in the Cottonwood, Arizona area received information that Escalante was selling drugs out of his Cottonwood apartment. Among other things, an informant told them that he was selling drugs. Also, “concerned citizens” told police Escalante was dealing drugs and that he had installed a security camera at his front door.

In January of 2015 officers obtained a warrant to plant a GPS tracking device on Escalante’s truck. On January 21, the tracking device on his truck showed that Escalante drove to Phoenix via I-17 and spent 15 to 20 minutes at an address near 35th Avenue and Indian School Road before heading back north on I-17 the way he’d come. When Escalante got near Camp Verde, officers saw him take the exit ramp from I-17 toward Cottonwood. As officers followed, they saw Escalante turn off the road into a residential area where they eventually stopped his truck.

Officers approached and told Escalante he was being stopped for having an illegal license plate light. As they spoke with Escalante, an officer saw a gun in the driver’s side door-pocket of the truck. They brought a drug-sniffing dog and it alerted to Escalante’s truck. Officers searched the truck and found no drugs. They also searched the road over which Escalante had driven and found no drugs. Officers arrested Escalante. They had his truck impounded and they searched it again. They found a loaded magazine that fit the gun they found in the door-pocket. They also found some knives, a machete and a flip-phone.

Approximately two hours after Escalante was stopped and arrested, a deputy again searched the road over which Escalante had driven. This time the deputy found 47.8 grams of methamphetamine in a plastic bag on the double yellow line in the middle of the road. Later, police searched Escalante’s truck a third time and found a digital scale with methamphetamine residue on it.

Escalante was charged with eight crimes:

- Count 1: Transporting a dangerous drug for sale
- Count 2: Possession of drug paraphernalia
- Count 3: Tampering with physical evidence
- Count 5: Misconduct involving weapons during the commission of the crime in Count 1
- Counts 4, 6, 7 and 8: Misconduct involving weapons for possessing the machete, two knives and a handgun while being a prohibited possessor.

The trial court severed counts 1, 2, 3 and 5 from counts 4, 6, 7, and 8 for trial and the case went to trial on counts 1, 2, 3, and 5 first. During opening statements, the prosecutor told the jury that it would hear testimony from police officers who were specialists in drug investigations, that these witnesses would describe their observations and explain the significance of those observations. The prosecutor further told the jury that Escalante's behavior was consistent with that of people involved in drug trafficking.

At trial, seven of the eight police witness called by the State testified as to common practices and traits of drug dealers. That testimony included discussions of source cities and neighborhoods, drug trafficking corridors, known drug areas, drug dealers' use of surveillance equipment, the use of homes for drug dealing, counter surveillance driving techniques used by drug dealers, and different roles played by various people in drug dealing organizations. Defense counsel did not object to any of this testimony.

At trial, the prosecutor also introduced evidence of the many out-of-court statements made to police by informants and others to the effect that Escalante was selling drugs out of his apartment in Cottonwood. These out-of-court statements spanned an eight-month period between April of 2014 and January of 2015.

During closing argument, the prosecutor spoke of a drug trafficking subculture, way of life, way of behaving, and way of working. He then pointed to the testimony of the police officers and argued that Escalante engaged in behavior that was characteristic of drug dealers. The jury found Escalante guilty of counts 1, 2, 3 and 5.

Escalante then waived his right to a jury trial on counts 4, 6, 7, and 8. The trial court found him guilty of those four counts. The trial court sentenced Escalante to concurrent prison terms on all eight counts, the longest of which was 14 years for Count 1.

On appeal, Escalante argued that the police officer testimony regarding the behavior of drug dealers was inadmissible "drug courier profile" evidence and that its admission was fundamental error. As a preliminary matter, the court of appeals stated that Escalante did not object at trial and, therefore, was required to prove that 1) error occurred; 2) that the error was fundamental; and 3) that the error caused him prejudice. Op. ¶ 11. The court of appeals agreed that the officers' testimony was inadmissible profile evidence offered as substantive evidence of Escalante's guilt as to Count 1. To establish that the error was fundamental, Escalante was required to show that the error goes "to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not receive a fair trial." Op. ¶ 35, citing *State v. Henderson*, 210 Ariz. 561, 568 ¶ 24 (2005). The court of appeals found that the improperly admitted evidence arguably went to the foundation of the case against Escalante on Count 1, but

that viewing the evidence in its totality the State presented substantial evidence to convict Escalante on Count 1 even absent the impermissible inferences from that evidence. Op. ¶ 36.

The court of appeals also found that Escalante had not proven the other elements of fundamental error: that he was deprived of a right essential to his defense or that the error was of such magnitude it is unlikely he received a fair trial. *Id.* ¶ 38. He was not deprived of a right essential to his defense because it appeared that Escalante’s failure to object to the profile evidence was part of his defense. *Id.* ¶¶ 42-44. Further, he did not show the error was of such a great magnitude that he did not receive a fair trial. *Id.* ¶ 38.

Despite any error in the admission of the improper profile evidence, the court of appeals found that Escalante had not shown that the evidence caused him prejudice. *Id.* ¶ 39. One is barred from arguing prejudice if one’s failure to object is a conscious strategic decision. *Id.* ¶¶ 41-45. The court of appeals acknowledged that defense counsel might have failed to object to the profile evidence because he did not know he could. In the court’s view, however, the record “most clearly suggests” that the failure to object was part of the defense strategy. *Id.* ¶ 43.

The court of appeals also found that there was sufficient evidence to support the convictions for counts 2 (possession of drug paraphernalia), 3 (tampering with physical evidence), and 5 (misconduct involving weapons). *Id.* ¶¶ 46-53. Escalante had not shown that the erroneous admission of the officers’ drug courier profile testimony constituted fundamental error and prejudicial error as to these counts.

Finally, the court of appeals rejected Escalante’s argument that his rights under the Confrontation Clause were violated when the court let the State’s police witnesses testify about information they received from informants and so-called concerned citizens. The court of appeals concluded that, even assuming the testimony was inadmissible hearsay, Escalante failed to prove that he suffered prejudice under fundamental error review. *Id.* ¶ 56.

The court of appeals affirmed Escalante’s convictions on all counts.

ISSUES:

- I. Does the admission of drug courier profile evidence amount to fundamental error?
- II. Does the admission of hearsay amount to fundamental error?

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