

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

---

STATE OF ARIZONA, *Appellee*,

*v.*

BRIAN ADRIAN ORTIZ, *Appellant*.

No. 1 CA-CR 15-0624  
FILED 12-6-2016

---

Appeal from the Superior Court in Maricopa County  
No. CR2013-453402-001  
The Honorable Jo Lynn Gentry, Judge

**AFFIRMED**

---

COUNSEL

Arizona Attorney General's Office, Phoenix  
By Jana Zinman  
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Mikel Steinfeld  
*Counsel for Appellant*

STATE v. ORTIZ  
Decision of the Court

---

**MEMORANDUM DECISION**

Presiding Judge Patricia K. Norris delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Margaret H. Downie joined.

---

**NORRIS**, Judge:

¶1 On appeal, Brian Adrian Ortiz argues the superior court should have granted his motion for a new trial because his attorney had a conflict of interest that adversely affected his attorney's representation in violation of his constitutional right to conflict-free counsel. Because Ortiz has not met his burden of establishing that the conflict adversely affected his attorney's representation, we affirm his convictions and sentences.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 In July 2014, a jury convicted Ortiz of one count of aggravated assault, a class 4 felony, one count of resisting arrest, a class 6 felony, and one count of criminal trespass, a class 6 felony (the "current case"). As discussed in more detail below, after the jury returned its guilty verdicts and while the jury was deliberating during the aggravation phase of the trial, Ortiz and his court appointed attorney, James Buesing, discussed Buesing's prior work as a prosecutor at the Maricopa County Attorney's Office.

¶3 As a consequence of that discussion, that evening Buesing looked at a sentencing minute entry which listed him as the prosecuting attorney in Ortiz's 2006 conviction for burglary in the third degree, cause number CR 2005-138464-001 (the "2006 conviction"). Buesing then realized that the State had used the 2006 conviction (as sanitized), along with two of Ortiz's other prior felony convictions, to impeach Ortiz's credibility when he elected to testify at trial. Further, the State had requested that the superior court impose an enhanced sentence based on the 2006 conviction, along with seven other prior felony convictions the State had timely identified before trial pursuant to Arizona Rule of Criminal Procedure 13.5.

¶4 Buesing filed a notice of conflict the next day. The superior court appointed Ortiz new counsel. New counsel moved for a new trial, and argued Ortiz's constitutional right to conflict free counsel had been

STATE v. ORTIZ  
Decision of the Court

violated because the State intended to use the 2006 conviction to enhance his sentence.

¶5 The superior court held an evidentiary hearing on the motion. At the evidentiary hearing, Buesing testified he was not aware of a potential conflict until his conversation with Ortiz when the jury was deliberating during the aggravation phase of the trial. During that conversation, Ortiz told Buesing he had been “on” Ortiz’s 2006 conviction. Buesing was not able to confirm what Ortiz had told him until later that evening when he looked at the 2006 conviction sentencing minute entry. Buesing further testified his prosecution of Ortiz in connection with the 2006 conviction had not affected his representation of Ortiz in the current case.

¶6 Ortiz also testified at the hearing. He generally testified he had raised the potential conflict with Buesing before trial. He testified he felt “less confident” with Buesing’s representation during trial because he believed Buesing had previously prosecuted him. Additionally, he asserted Buesing had been less than a zealous advocate because the State had used the 2006 conviction at trial to undermine his credibility and as a sentencing enhancement for his current convictions. Given the conflict claim, at the end of the evidentiary hearing, the State withdrew its allegation of the 2006 conviction as a prior felony for purposes of enhancement.

¶7 The superior court denied Ortiz’s motion for a new trial, ruling as follows:

At the Evidentiary Hearing on Defendant’s Motion, Mr. Buesing testified that he had no recollection of the Defendant or his prior [prosecution] of the Defendant nine years earlier. He further testified that his representation of the Defendant in the current case was not affected by the prior matter, because he was unaware of the prior [prosecution] until after the verdict of Guilty was returned on all three counts and while the jury was deliberating in the Aggravating Circumstances portion. By the time Mr. Buesing became aware of the claimed conflict, all substantive work had been completed, and he did no additional work before being relieved a week later.

STATE v. ORTIZ  
Decision of the Court

Defendant is requesting that his conviction be set aside because of the perceived conflict. The Defendant was aware of the perceived conflict but reportedly chose to disclose that information only after the jury convicted him of the three counts. The Defendant has presented no information or evidence that his case was prejudiced in any way because Mr. Buesing had previously convicted him. Since Mr. Buesing was unaware of their previous history, his work on the Defendant's behalf was not affected.

**DISCUSSION**

¶8 Ortiz argues the superior court should have granted his motion for a new trial because Buesing had an actual conflict of interest that adversely affected his representation, thus denying Ortiz his right to conflict free counsel under the Sixth Amendment of the United States Constitution and Article 2, Section 24, of the Arizona Constitution. Specifically, Ortiz argues the conflict of interest prevented Buesing from challenging the 2006 conviction for purposes of plea negotiations, impeachment, and sentencing enhancement. Reviewing the superior court's order denying Ortiz's motion for a new trial for an abuse of discretion, *see State v. Parker*, 231 Ariz. 391, 408, ¶ 74, 296 P.3d 54, 71 (2013) (appellate court reviews ruling on a motion for new trial for abuse of discretion) (citation omitted), Ortiz has failed to show that Buesing's involvement in the 2006 conviction adversely affected his representation in the current case.<sup>1</sup>

¶9 To establish a conflict of interest under the Sixth Amendment of the United States Constitution and Article 2, Section 24, of the Arizona Constitution, a defendant must demonstrate that his attorney had an "actual conflict" of interest, which adversely affected his attorney's

---

<sup>1</sup>To the extent Ortiz raises an ineffective assistance of counsel claim, that issue is not properly before us. *See State v. Tucker*, 205 Ariz. 157, 162-63, ¶¶ 24-26, 68 P.3d 110, 115-16 (2003) (defendant's claim that a conflict of interest prevented his attorney from pursuing a third-party defense must be brought under "Rule 32 proceedings" and "will not be addressed by appellate courts regardless of merit") (quotations and citations omitted); *Murdaugh v. Ryan*, 724 F.3d 1104, 1123 (9th Cir. 2013) ("Arizona courts treat conflict of interest claims as a species of ineffective assistance of counsel claims.") (citations omitted).

STATE v. ORTIZ  
Decision of the Court

effectiveness. *State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986) (analyzing *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)).

¶10 An attorney has an actual conflict if there is a viable plausible alternative strategy that might have been pursued by the attorney, but that alternative conflicted with the attorney's other loyalties or interests. *See State v. Martinez-Serna*, 166 Ariz. 423, 425, 803 P.2d 416, 418 (1990) (attorney who represented co-defendants had an actual conflict because it prevented him from pursuing plausible defense strategies for one of the defendants); *cf. In re Ockrassa*, 165 Ariz. 576, 577-79, 799 P.2d 1350, 1351-53 (1990) (affirming disciplinary sanctions against a prosecutor in a DUI case because he previously represented the defendant in two prior DUI cases; prosecutor "switched sides" and had conflict of interest under ethics rules governing duties to former clients, as validity of prior DUI convictions was directly at issue when used to enhance defendant's sentence in third DUI conviction secured by the prosecutor).

¶11 Here, the superior court did not explicitly find Buesing had an actual conflict of interest. But, by addressing the "perceived conflict" in its ruling, it appears the court assumed Buesing had an actual conflict. Thus, assuming Buesing had an actual conflict, the issue is whether Buesing's actual conflict adversely affected his representation of Ortiz.

¶12 We agree with Ortiz the superior court did not articulate the applicable legal standard in finding Ortiz had failed to present any evidence that he was "prejudiced" by the conflict. Instead, as recognized in *Jenkins*, a defendant must only show that the actual conflict adversely affected his attorney's effectiveness; a defendant is not required to show the conflict prejudiced his case, that is, "the attorney's conflict reduced his effectiveness so severely that it resulted in or contributed to [the] defendant's conviction." 148 Ariz. at 467, 715 P.2d at 720 (citation omitted). Even so, Ortiz has failed to demonstrate the conflict adversely affected Buesing's representation.

¶13 First, Ortiz's argument that a conflict-free attorney could have challenged the 2006 conviction is speculative. Ortiz presented no evidence that he had any basis to challenge the 2006 conviction. Second, at trial, the State impeached Ortiz with two other prior felonies. Thus, even without the 2006 conviction, the State still would have been able to impeach Ortiz. Third, the 2006 conviction had no effect on the current case for purposes of sentencing because the State withdrew the allegation before sentencing. Moreover, even if Buesing had successfully challenged the 2006 conviction

STATE v. ORTIZ  
Decision of the Court

it would not have affected Ortiz's sentencing range. Excluding the 2006 conviction, the State alleged seven other prior felony convictions before trial. *See supra* ¶ 3. Thus, Ortiz was subject to an aggravated sentence as a category three repetitive offender regardless of the 2006 conviction. *See* A.R.S. § 13-703(C) (Supp. 2015) (category three repetitive offender requires, in part, two or more historical prior felony convictions). And, at the sentencing hearing, the superior court found Ortiz had four other historical prior felony convictions and sentenced Ortiz as a category three repetitive offender.

¶14 Finally, as discussed above, *see supra* ¶ 6, although Ortiz testified at the evidentiary hearing that he lacked confidence in Buesing, he did not present any evidence the conflict had any impact, let alone the required substantial impact, on Buesing's effectiveness. *See Martinez-Serna*, 166 Ariz. at 426, 803 P.2d at 419 (adverse effect on representation due to conflict of interest must be "substantial") (citation omitted). This is particularly significant given, first, Buesing did not recall the prior representation until alerted to it by Ortiz when the jury was deliberating during the aggravation phase of the trial, and, second, Buesing's testimony that the conflict did not affect his ability to serve as an effective attorney.

¶15 On the record before us Ortiz failed to demonstrate that Buesing's conflict of interest adversely affected his representation.<sup>2</sup>

CONCLUSION

¶16 For the foregoing reasons, we affirm Ortiz's convictions and sentences.



AMY M. WOOD • Clerk of the Court  
FILED: AA

---

<sup>2</sup>Given Ortiz's failure to demonstrate that Buesing's conflict adversely affected his representation, we do not need to address any issue of waiver, given that Ortiz apparently knew of the issue during the trial, but did not raise it with anyone until after the guilty verdicts and after the jury had begun deliberating during the aggravation phase of the trial.