



¶1 After submitting on the record, Petitioner Ernestine Moreno Pena was convicted in Phoenix Municipal Court of Driving Under the Influence (DUI) and Extreme DUI, in violation of Arizona Revised Statutes (A.R.S.) sections 28-1381(A)(1) and - 1382(A)(1) (2013) respectively.<sup>1</sup> Prior to her submission on the record, the municipal court failed to fully advise Pena of the rights that she was waiving as required by Arizona Rule of Criminal Procedure 17.2.

¶2 Given that defective colloquy, Pena timely appealed to the superior court claiming fundamental error and seeking reversal. The State confessed error, admitted the colloquy failed to comply with *State v. Bunting*, 226 Ariz. 572, 250 P.3d 1201 (App. 2011) and, quoting *Bunting*, stated the superior court "should remand this matter 'to the [municipal] court for an evidentiary hearing to determine whether [Pena] would have agreed to submit the case to the court if a proper colloquy had been conducted.'" "

¶3 In a July 3, 2013 minute entry, the superior court found the municipal court "erred in not going through the entire required colloquy before accepting [Pena]'s waiver of rights and submission on the stipulated record." The superior court noted *Bunting* held such a failure "was fundamental error" and that

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<sup>1</sup> Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

*Bunting* remanded to the trial court to provide defendant "the opportunity to establish prejudice." The superior court, however, stated *Bunting* "was conflating fundamental error with structural error" and, effectively finding *Bunting* was wrongly decided, affirmed Pena's convictions, adding the "proper procedure is to require [Pena] to file a petition for post-conviction relief and allege prejudice." After the superior court denied a timely motion for reconsideration, Pena filed this special action challenging the superior court's decision.

#### **ANALYSIS**

##### **I. Special Action Jurisdiction.**

¶4 Pena has no appeal as of right from the superior court's decision. See A.R.S. § 22-375(B). "The petition presents an issue of statewide importance potentially affecting numerous DUI cases." *Cicoria v. Cole*, 222 Ariz. 428, 430, ¶ 9, 215 P.3d 402, 404 (App. 2009). Because the issue raised presents a purely legal question, and because Pena has no equally plain, speedy or adequate remedy by appeal, this court accepts special action jurisdiction. See Ariz. R.P. Spec. Act. 1(a).

##### **II. The Superior Court Erred In Affirming The Convictions Without Remanding To The Municipal Court.**

¶5 To be reversible, fundamental error requires (1) an error; (2) that was extreme to the point of being fundamental and (3) resulting prejudice to defendant. *State v. James*, 231

Ariz. 490, 493, ¶ 11, 297 P.3d 182, 185 (App. 2013) (citing cases). As the superior court acknowledged, the deficient colloquy in this case was fundamental error. See *Bunting*, 226 Ariz. at 576-77, ¶ 11, 250 P.3d at 1205-06 (citing cases). Instead of remanding "to the trial court for an evidentiary hearing" to address prejudice, as directed by *Bunting*, 226 Ariz. at 576-77, ¶¶ 11-12, 250 P.3d at 1205-06, the superior court affirmed Pena's convictions finding she had not shown prejudice resulting from the fundamental error.

¶6 Although the superior court construed *Bunting* as "grant[ing] relief without requiring [defendant] to establish prejudice," more accurately, *Bunting* remanded for an evidentiary hearing to determine whether defendant could show prejudice. *Id.* Indeed, *Bunting* reserved judgment on whether any relief would be proper pending the outcome of the evidentiary hearing:

If the trial court finds that *Bunting* would not have agreed to submit her case under the circumstances, the court is instructed to vacate the conviction and grant her a new trial. See *State v. Carter*, 216 Ariz. 286, 292, ¶ 27, 165 P.3d 687, 693 (App. 2007) (holding that if, on remand, the defendant could prove he was prejudiced by the trial court's failure to engage in a Rule 17.6 colloquy, his sentence must be vacated and the defendant must be resentenced). In the alternative, if the court determines that *Bunting* would have agreed to submit her case if a proper colloquy had been conducted, *Bunting's* conviction and sentence are affirmed.

226 Ariz. at 577, ¶ 12, 250 P.3d at 1206. As such, *Bunting* did not establish any sort of "per se rule" requiring reversal for fundamental error without regard to prejudice, a concern expressed by the superior court. Rather, *Bunting* set forth a specific procedure to determine whether prejudice resulted from fundamental error in the unique setting of an inadequate colloquy regarding submission on the record.

¶7 In this court, quoting *Bunting*, the State acknowledges "the superior court should have remanded this matter back to the trial court 'for an evidentiary hearing to determine whether [Pena] would have agreed to submit her case to the judge if a proper colloquy had been conducted.'" The State summarizes the application of *Bunting* to this case as follows:

As shown by *Bunting* and [*State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007) (cited in *Bunting*)], the appellate courts treat differently cases in which the [fundamental] error complained of was the trial court's failure to conduct an adequate Rule 17 colloquy. In that instance, if the appellant failed to object to the trial court's omission, the appellate courts deem the omission to be fundamental error but do not require the appellant to show prejudice from the appellate record. Rather, the appellant is generally given another opportunity to demonstrate prejudice [on remand].

Both the municipal and the superior courts were bound to follow the procedure directed in *Bunting*. In failing to do so, the superior court erred.

**CONCLUSION**

¶8 This court accepts special action jurisdiction and grants relief. The superior court's July 3, 2013 minute entry is vacated and this matter is remanded to the Phoenix Municipal Court for an evidentiary hearing to determine whether Pena would have agreed to submit her case on the record if a proper colloquy had been conducted.

/S/  
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/  
PETER B. SWANN, Presiding Judge

/S/  
MAURICE PORTLEY, Judge