



NO. 32684-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

FILED

SEP 30 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

v.

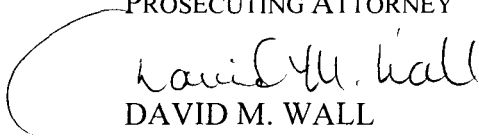
DENNIS WAYNE JUSSILA

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 14-1-00051-2

SUPPLEMENTAL BRIEF OF RESPONDENT

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A THE COURT HAS INVITED SUPPLEMENTAL
BRIEFING TO ADDRESS THE QUESTIONS;

Should this court follow the lead of Division I in State v. Tyler, No. 73564-1, 2016 WL 4272999 (Div. I Aug. 15, 2016), and determine that the case of State v. Hickman, 135 Wn.2d 97 (1998) is no longer good law in light of the U.S. Supreme Court's decision in Musacchio v. United States, 136 S.Ct.709 (2016)?

If Musacchio does overrule Hickman, how does that impact Mr. Jusilla's claims for relief?

B ARGUMENT

Musacchio v. United States, 136 S.Ct.709 (2016) [hereinafter Musacchio], as interpreted in State v. Tyler, N 73564-1, 2016 WL 4272999 (Div.I Aug 15, 2016) {hereinafter Tyler} does overrule State v. Hickman, 135 Wn.2d 97 (1998) [hereinafter Hickman] and, accordingly, the defendant's conviction should be affirmed.

As the State argued in its original response brief and Division I held in Tyler, the sufficiency of the evidence challenge analysis found in Hickman is no longer a correct application of the law and has been overruled in Musacchio.

The Tyler court specifically rejected the defendant's argument, found in Hickman and this appeal, that Washington's law of the case doctrine requires a reviewing court to assess the evidentiary sufficiency of the State's proof against the elements found in the to-convict instruction,

despite the fact that these additional elements are unnecessary to support a conviction. To reach this decision, the Tyler court looked to the recent United States Supreme Court's decision in Musacchio.

In Musacchio the Supreme Court held that, "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." Musacchio, at 715. In reaching its holding, the Court explained that "[a] reviewing court's limited determination on sufficiency review thus does not rest on how the jury was instructed." Musacchio, at 715. Rather, "[s]ufficiency review essentially addresses whether "the government's case was so lacking that it should not have even been submitted to the jury." Musacchio, at 715 (quoting Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)). The Court found "[a]ll that a defendant is entitled to on a sufficiency challenge is for the court to make a 'legal' determination whether the evidence was strong enough to reach a jury at all." Musacchio, 136 S.Ct. at 715

The law-of-the-case doctrine does not apply to change this result, the Court held, because an evidentiary sufficiency challenge is not properly influenced by how the jury was instructed. Musacchio, 136 S.Ct. at 715. Indeed, the law-of-the-case doctrine "does not bear on how to assess a sufficiency challenge when a jury convicts a defendant after being

instructed, without an objection by the Government, on all charged elements of a crime plus an additional element." Musacchio, 136 S.Ct. at 716.

Rather, a reviewing court conducting an evidentiary sufficiency inquiry must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Musacchio, 136 S.Ct. at 715 Furthermore, the Court continued "the Government's failure to introduce evidence of an additional element does not implicate the principles that sufficiency review protects." Musacchio, 136 S.Ct. at 715.

Because Washington courts apply the federal constitutional standard for evidentiary sufficiency review, decisions of the United States Supreme Court are the paramount authority on the standard's proper application. N. Pac. Rv. Co. v. Longmire, 104 Wash. 121, 125, 176 P. 150 (1918). "The United States Supreme Court is, of course, the ultimate authority concerning interpretation of the federal constitution." State v. Hess, 12 Wn.App. 787, 792, 532 P.2d 1173, aff'd, 86 Wn.2d51, 541 P.2d 197 (1975) accord S.S. v. Alexander, 143 Wn.App. 75, 92, 177 P.3d 724 (2008) (United States Supreme Court is the ultimate authority concerning the interpretation of federal law). Accordingly, Musacchio supersedes all inconsistent interpretations by the courts of this state.

This framework is in accordance with the understanding that it is the legislature, and not the trial court, that possesses the constitutional authority

to create a crime. See, e.g., State v. Feilen, 70 Wash. 65, 70, 126 P. 75 (1912) ((legislature has "the inherent power to prohibit and punish any act as a crime" (internal quotation marks omitted) State v. Danis, 64 Wn.App. 814, 820, 826 P.2d 1096 (1992) ("The Legislature has extremely broad, almost plenary authority to define crimes."). The guarantee of the Fourteenth Amendment applies only to actual crimes, duly enacted. It does not apply to crimes created by mistake in an erroneous jury instruction.

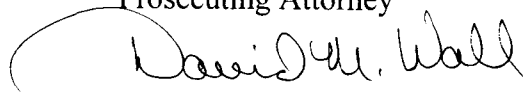
As argued in the State's original response brief, the descriptions of the weapons simply offered language that allowed for a jury to distinguish the various counts from each other and did not add additional elements to each count. However, should this court find that the descriptive language did in fact add additional elements, which the jury did find beyond a reasonable doubt, the rulings and analysis of Taylor and Musacchio require the defendant's conviction be affirmed.

CONCLUSION

The US Supreme Court's decision in Musacchio, as applied by Division I in Tyler, overrules Hickman and requires that the conviction in this matter be affirmed.

Respectfully submitted this 27th day of September, 2016.

DAVID R. QUESNEL
Prosecuting Attorney

A handwritten signature in black ink that reads "David M. Wall". The signature is written in a cursive style with a large, sweeping flourish on the left side that loops back under the first part of the name.

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