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Court of Appeals

Division III

State of Washington

NO. 32960-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

GENE CAMARATA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Doug Federspiel, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT

HICKMAN REMAINS GOOD LAW AND REQUIRES REVERSAL OF CAMARATA'S CONVICTIONS.

This Court invited supplemental briefing on two questions: (1) Should this Court follow Division One in State v. Tyler¹ in holding that Musacchio v. United States² overruled State v. Hickman,³ and (2) If Musacchio overruled Hickman, how does that affect Camarata's appeal? As to the first question, this Court should not follow Tyler. Hickman remains good law despite Musacchio because of the substantial differences between Washington's law of the case doctrine and the federal variant of the doctrine that was before the Court in Musacchio. As to the second question, even if this Court follows Tyler, Camarata's convictions should be reversed on the other grounds argued in the previous briefing.

The law of the case doctrine in Washington differs substantially from the federal law of the case doctrine as discussed in Musacchio. As the Musacchio court explained, the federal law of the case doctrine refers only to the general practice of courts to "refuse to reopen what has been decided." 136 S. Ct. at 716. It does not limit the court's power. Id. Specifically,

¹ State v. Tyler, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 4272999 (No. 73564-1, Aug. 15, 2016).

² Musacchio v. United States, ___ U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016).

³ State v. Hickman, 136 Wn.2d 97, 954 P.2d 900 (1998)

appellate courts are not bound by trial court legal rulings under the federal law of the case doctrine. Id.

By contrast, Washington's law of the case doctrine, which has existed since before statehood, dictates that unobjected-to jury instructions become the law of the case and are binding in future determinations in the same case. Hickman, 135 Wn.2d at 101-02 (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)). This doctrine serves to ensure that the appellate court review the case under the same legal standards as the jury. State v. Calvin, 176 Wn. App. 1, 316 P.3d 496 (2013), as amended on reconsideration (Oct. 22, 2013), rev. granted in part, cause remanded on other grounds, 183 Wn.2d 1013 (2015). Washington's less common⁴ variant of the law of the case doctrine was not at issue in Musacchio because it is not part of the federal law of the case doctrine that the Musacchio court considered.

Musacchio involves the interplay between the due process right to have a criminal conviction proved beyond a reasonable doubt and the *federal* law of the case doctrine. 136 S. Ct. at 716 (holding federal law of the case doctrine does not bear on assessment of sufficiency challenge). This case, by contrast, involves the interplay between that same due process right, but applied to Washington State's law of the case doctrine. Nothing in

⁴ See Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 602 (1987).

Musacchio dictates that Washington must abandon its well-established law of the case doctrine. Federal cases addressing only federal matters do not override state common law. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 303, 178 P.3d 995, 999 (2008); Erie R.R. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Because Hickman does not conflict with Musacchio, it remains binding precedent in this state unless determined to be both incorrect and harmful. In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Federal due process requires that essential elements of a criminal offense be proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But federal constitutional law does not establish what constitutes the elements of a crime. That is a matter of state law. “The *Jackson* standard . . . is concerned with the quantum of proof supporting a conviction, not with what acts must be proved.” State v. Phuong, 174 Wn. App. 494, 535, 299 P.3d 37 (2013).

Under Washington state law, specifically, the common law doctrine of law of the case, unobjected to jury instructions create additional elements that must be proved. Hickman, 135 Wn2d at 101-02. When the same federal due process principles are applied in the context of Washington’s law

of the case doctrine, the outcome of Hickman is correct, and requires reversal of Camarata's conviction.

This Court should not follow Tyler because the Tyler decision fails to appreciate the role that that case law plays in defining the contours of criminal offenses. Courts of this State have held that elements were essential to a criminal offense and must be proven to the jury beyond a reasonable doubt, even though the Legislature did not see fit to mention them in the statute defining the crime. See, e.g., Phuong, 174 Wn. App. at 533 (recognizing that judicial narrowing of an essential element implicates Fourteenth Amendment due process); State v. Nieblas-Duarte, 55 Wn. App. 376, 378-79, 777 P.2d 583 (1989) (information must contain all elements of the offense, including those established by case law).

The fact that the law of the case doctrine is grounded in common law does not affect the outcome. The State has still failed to meet its constitutionally required burden, and double jeopardy principles prohibit giving the State another bite at the apple under those circumstances. E.g., State v. Hescok, 98 Wn. App. 600, 611, 989 P.2d 1251 (1999) (citing Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 308, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984)).

The guarantee of the Fourteenth Amendment is to ensure that the jury's verdict is not contrary to the constitutionally mandated burden of

proof as applied to the applicable state law. Jackson, 443 U.S at 324 n. 16, (“[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.”). In Washington, the applicable state law includes the law of the case doctrine, requiring proof of any additional elements included in the jury instructions. Hickman, 135 Wn.2d at 101-02. Camarata requests this Court decline to follow Tyler and apply the law of the case doctrine as it has existed in Washington since the earliest days of statehood.

B. CONCLUSION

Musacchio does not alter Washington’s law of the case doctrine or its application to this case.

DATED this 10th day of October, 2016.

Respectfully submitted,

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