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Court of Appeals
Division III
State of Washington

No. 32960-7
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

GENE ANGELO CAMARATA,

Defendant/Appellant

Respondent's Brief on Supplemental Issue

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III. ARGUMENT

1. Review of a criminal conviction for sufficiency of evidence, a Due Process concern, should be undertaken as to the actual elements of the crime, as set forth in *Musacchio v. United States*, 136 S. Ct. 709 (2016), not upon a “to convict” instruction which adds an additional element to the burden of the State.

Many Washington cases in which the sufficiency of evidence is at issue cite to *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 61 L.Ed. 560 (1979). In that seminal case, the United States Supreme Court held that the due process guaranteed by the U.S. Constitution's fourteenth amendment required that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson* at 315-316. The standard that *Jackson* follows is whether any rational trier of fact, taking the facts in the light most favorable to the state, could have found guilt beyond a reasonable doubt. *Jackson* at 324. Since that time, the law and standards of *Jackson* have been followed in sufficiency reviews. See, for

example *State v. Green*, 94 Wn.2d 216 (1980), which officially adopted the *Jackson* analysis for Washington State.

This review guarantees that the Government's case was strong enough to reach the jury; that is what a Due Process analysis requires. In *Musacchio v. United States*, 136 S. Ct. 709 (2016), the United States Supreme court undertook the question of how to review a case for sufficiency in the situation where a jury instruction added an element to the crime incorrectly. The Supreme Court held that Due Process concerns do not require the sufficiency review on the erroneously added element of a jury instruction, but only on the actual elements of the crime with which the defendant was charged. The court said,

“All 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....The Government's failure to object to the heightened jury instruction thus does not affect the court's review for sufficiency of the evidence.”
Musacchio at 715.

The United States Supreme Court having the final say on matters of United States Constitutional Due Process rights, this analysis should be followed and stand as precedent for every lower court's due process analysis of sufficiency of the evidence, including this one. The U.S. Supreme Court specifically granted this review in order to resolve

questions that had divided the lower courts, one of which was the same question as presented in our case. The federal courts had split in their treatment of extraneous issues in erroneous jury instructions, purportedly, as in our case under review, under the doctrine of “the law of the case.” In the end, the Court held:

“We hold 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.

Thus, as far as federal Due Process concerns go, the State is now entitled to have the Appellate Courts review the case for sufficiency of evidence based upon the actual elements of the crime, not the “To Convict” jury instruction elements which added an extraneous element not actually present in the legislature's definition of the offense.

2. The “law of the case” in Washington State was predicated upon federal Due Process concerns, and should therefore track with federal law of the case analysis.

This Court has requested the parties to address whether or not the decision in *Musacchio*, above, which was adopted in *State v. Tyler*, 195 Wn. App. 385 (2016), should be adopted also by Division III, or whether the line of cases surrounding *State v. Hickman*, 136 Wn.2d 97 (1998) actually stem from a state common law doctrine of law of the case which is different from the federal common law doctrine of law of the case.

This Court should find that *Hickman* and its progeny form a common law doctrine of law of the case which is not essentially separate from the federal common law doctrine. In *Tyler*, Division I of the Court of Appeals goes through an analysis of sufficiency of evidence reviews, and our Supreme Court’s amendment of its standard of review following the Supreme Court opinion in *Jackson*, cited above. In the two *State v. Green* cases, one at 91 Wn.2d 431 (1979) and the second , cited above, at 94 Wn.2d 216 (1980), the Washington Court did reconsider its prior

standard of review after *Jackson* came out, and changed its analysis to reflect the federal *Jackson* standard. Our Courts having essentially always used federal Due Process analysis in sufficiency cases, the Federal Due Process analysis in *Musacchio*, which is right on point, should control.

Indeed, the Due Process clause of the Washington State Constitution, Article I, Section 3, is worded exactly the same as the Due Process in the Fifth Amendment of the United States Constitution. Specifically, Art. I § 3 states, “No person shall be deprived of life, liberty, or property, without due process of law.” This is the same as the Fifth Amendment to the United States constitution, which says in relevant part, “...nor be deprived of life, liberty, or property, without due process of law.”

Analysis of State Constitutional provisions and comparison with their federal counterparts has yielded varying results depending upon the Constitutional section being analyzed. For example, the State of Washington has not extended greater protection to defendants through Art. 1, § 9, of our Constitution than the United States Constitution Fifth Amendment provision against self-incrimination. The analysis and State Common law interpreting the State constitution in that case follows the

federal common law. (See *State v. Russell*, 125 Wn.2d 24 (1994) and *State v. Piatnitsky*, 180 Wn.2d 407 (2014)). A totally different result is reached regarding Washington Constitution Article I, §7, and its Fourth Amendment Federal counterpart. The State provision has been held repeatedly to be more protective of individual rights than the United States Constitution's Fourth amendment, (see *State v. Boland*, 115 Wn.2d 571 (1990) and *State v. Young*, 135 Wn.2d 498 (1998) among others).

In this case, regarding §3 of the State Constitution, and the Due Process language of the Fifth Amendment to the U.S. constitution, the language is exactly the same as the federal language, and analysis by our Courts follows and should continue to follow the Federal analysis. In multiple cases, Washington courts have held, “this language is nearly identical to the federal provision, and no legislative history indicates that the state provision should be interpreted differently. *State v. Wittenbarger*, 124 Wn.2d 467 (1994). The same result was reached in *State v. Ortiz*, 119 Wn.2d 294 (1992).

Numerous previous cases have either conducted the analysis under *State v. Gunwall*, 106 Wn.2d 54 (1986), and have concluded that the provision should be interpreted the same as the federal due process clause,

such as *In re Pers. Restraint of Dyer*, 143 Wn.2d 384 (2001), *In re Pers. Restraint of Matteson*, 142 Wn.2d 298 (2000), and *State v. Mamussier*, 129 Wn.2d 652 (1996), or the Courts have declined to make an independent state analysis of the Due Process clause under *Gunwall* (see, for example, *Andersen v. King County*, 158 Wn.2d 1 (2006) which was subsequently overruled by the Federal court analysis in *Obergefell v. Hodges*, 135 S.Ct 2584 (2015)).

State v. Hickman, 135 Wn.2d 97 (1998) itself discusses the so-called “Law of the Case” doctrine, pointing out that it has a long history. This is not disputed. The doctrine has a history both federally and in Washington State. However, the question is not whether the state common law doctrine of the “law of the case” exists, but whether it should be considered in derogation to the U.S. Supreme Court’s statement of law in *Musacchio*, which directs the reviewing court to ignore the extraneous elements of a “to convict” instruction in a sufficiency review. In reviewing those cases cited by *Hickman*, they largely do not involve a court reviewing an erroneous jury instruction for sufficiency of the evidence (though sufficiency was discussed, for example, in *State v. Salas*, 127 Wn. 2d 173 (1995) and *State v. Lee*, 128 Wn.2d 151 (1995) it was not

in the context of forcing the State to prove additional elements in a to convict instruction). In fact, in applying the “law of the case” doctrine to sufficiency of the evidence concerns as to extraneous elements, the court in *Hickman* resorts to discussion of federal cases and U.S. Fifth Amendment analysis (see *Hickman* at 103).

It is undisputed that *Hickman* and *State v. Dent*, 123 Wn.2d 467 (1994) both agree that venue is not an element of a crime that must be proved. Therefore, under *Musacchio*, the most recent U.S. Fifth amendment analysis, and one directly on point, venue, as an extraneous element, need not be considered by the court reviewing elements for sufficiency of evidence. This is the extraneous element at issue.

The Court in *Tyler* makes a compelling case that in fact the appellate review of a criminal conviction for sufficiency of the evidence is always performed using a federal constitutional standard. *Tyler* at 394. Thus, *Tyler* does not do away with the “law of the case” doctrine; it simply holds that the operation of that doctrine is irrelevant to how the reviewing court rules on the Due Process analysis of sufficiency of the evidence. It states:

“Indeed, the reasoning and result in Hickman are directly at odds

with the Fourteenth amendment's evidentiary sufficiency standard, as articulated in Musacchio. 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." *Tyler* at 397-398.

Division III should join Division I in following the Supreme Court of the United States analysis that "Law of the Case" does not and should not limit a reviewing court's power to revisit matters decided in the trial court in harmony with constitutional dictates.

In *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91 (1992), the Court makes the observation that the term "law of the case" means different things in different circumstances.

"In one sense, it refers to, the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand." The term also refers to the rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." Finally, the term is employed to express the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case, or which were necessarily implicit in such prior determination." *Lutheran Day Care* at 113.

Clearly, the U.S. Supreme Court felt that the second mentioned meaning of the term should not control a criminal sufficiency of evidence review. Although that same meaning existed in the Tenth and Fifth circuits, as mentioned in *Musacchio*, the Supreme Court disapproved of its use in a

criminal sufficiency of evidence Due Process review. Since our State law follows federal law on Due Process concerns and sufficiency reviews, it should follow *Musacchio*.

3. Even if this court decides to follow *State v. Hickman*, 136 Wn.2d 97 (1998), this court should determine that there was substantial evidence that some part of the act committed by defendant occurred in Kittitas County.

If this Court decides that there is an independent State common law doctrine of “law of the case” that *Musacchio* does not affect, or if this Court decides it need not address the issue, this court should still find that the relevant sufficiency of the evidence analysis is met by the evidence in the case. RCW 9A.04.030 provides state criminal jurisdiction over a crime committed in the state whether in whole or in part. It also includes a person who commits an act without the state which affects persons or property within the state, which if committed within the state would be a crime.

In the present case, Mr. Camarata knowingly entered false information for his voter registration and his candidacy registration with

the Kittitas County Auditor. The witnesses from the State and from the County auditor's office testified that regardless of where a person was when they pressed the keyboard buttons to send a voter registration or a candidate's registration, that the document and file are routed through Olympia to Kittitas County, so that the document is received in this County electronically. (RP Day 1, 52, 55, 169, 171, 180) The act of registering to vote involves more than sitting at a computer and typing. It involves actual sending of the document to Kittitas County. A person who types a false registration to vote, but who disconnects the computer and never sends it, is similar to a person filling out a paper registration and then discarding it. The crime is not to fill it out incorrectly. The crime is to submit it, and that takes place in Kittitas County, in part, in Olympia, in part, and in part wherever the defendant is physically located. The physical act of pressing the "enter" computer button sets all of the acts of the defendant in motion, since defendant knows when he presses it that he is transmitting the information ultimately to Kittitas County, to be reviewed in Kittitas County. The jury instruction indicates that " in Kittitas County, Washington, the defendant knowingly provided false information on an application for voter registration," (CP 62) and the

defendant can be found guilty of this element if the information is typed in Kittitas County and handed over, is mailed to Kittitas County, or is electronically sent to Kittitas County. It is still "provided" *in* Kittitas County in all those situations. Sufficient evidence, looked at in the light most favorable to the State would certainly support the jury's conclusion that Mr. Camarata's voter registration was provided to and received in Kittitas County, and Mr. Camarata knew it would be. The same is true for the declaration of candidacy. In the case of the Declaration of Candidacy, the testimony was that the Kittitas County Auditor's office has to check the validity of information provided by the Declaration of Candidacy. (RP I, 55) The Kittitas County Auditor must specifically accept the candidacy and approve it to be on the ballot. (RP I, 56, 191) As argued already in Respondent's brief, there was evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Mr. Camarata knowingly provided false information on an application for voter registration and for candidacy. Relevant to this specific supplemental brief, there was also sufficient information from which a rational trier of fact could conclude that the Defendant was knowingly providing false information on the applications *in* Kittitas County, since he knew full well that the

information was to be registered *in* Kittitas County. A rational trier of fact could easily conclude that “in Kittitas County” modifies the location of the registration, as opposed to where the applicant sits to push the button. The crime does not make sense otherwise, considering the attempt of the State of Washington to provide easy registration on the internet.

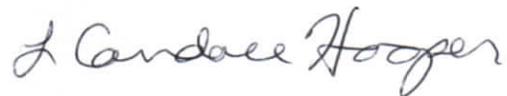
VI. CONCLUSION

Since Federal Due Process analysis controls the State of Washington's sufficiency of evidence analysis, and since *Musacchio v. United States* expressly tells the reviewing court to ignore extraneous elements that are not elements of the crime in making that determination, and since there is no intervening state common law doctrine about jury instructions which is separate and apart from the Federal Due Process sufficiency analysis, *Musacchio* should be followed in this case, and the extraneous elements ignored.

Siince there was sufficient evidence that the defendant was providing false information for an application for voter registration in

Kittitas county and for a declaration of candidacy in Kittitas county, the conviction should be upheld even if the extra element is applied to the State's burden of proof.

Respectfully submitted,

A handwritten signature in cursive script that reads "L. Candace Hooper".

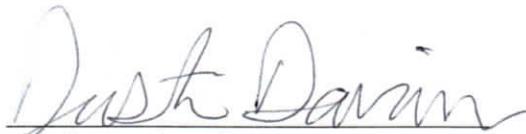
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PROOF OF SERVICE

I, Dustin Davison, do hereby certify under penalty of perjury that on October 10th, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the cover page for the Respondent's Brief on Supplemental Issue:

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