

No. CA-08-014
Pascua Yaqui Court of Appeals

PASCUA YAQUI TRIBE
COURT OF APPEALS

NOV 28 2011

Pascua Yaqui Tribe, Plaintiff/Appellee,

ISSUED
CLERK OF COURT

vs.

Arthur Baltazar, Defendant/Appellant.

ORDER

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR-08-009, the Honorable Melvin Stooft, presiding.

Allen Osburn, Esq., Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Arthur Baltazar, Tucson, AZ for the Defendant/Appellant.

Appellant Arturo Baltazar filed a Notice to Appeal in this case on June 18, 2008 and filed an Opening Statement on October 30th, 2008.

Appellee has not filed its Response Brief.

Accordingly, the court will decide this case based on the record and the filings before the court, pursuant to 3 PYTC § 2-3-140 (C) (1).

Factual and Procedural History

On June 2, 2008, Appellant Arthur Baltazar, was convicted of fraud (counts 1 and 3), in violation of 4 PYTC § 1-370, and forgery (counts 2 and 4), in violation of 4 PYTC § 1-360. Appellant's former wife and cousin modified his time sheets, which benefitted Appellant by \$183.53. Appellant was found guilty on all counts and sentenced on all counts as follows: pay \$100 court costs, \$183.53 restitution to the Tribe by money order within 30 days and perform 20 hours of community service within 60 days.

The Tribal Court's exhibits provide testimony from an auditor's expert opinion that state that Appellant knew about the variances between his reported hours and the extra hours in his paycheck. The auditor explains that there were discrepancies between the hours in Appellant's punch detail, the hours approved by his supervisor, and the hours punched in by his relatives. The auditor's report indicates that there were 6 out of 11 unauthorized entries giving Appellant more credit for hours than actually worked. The auditor found up to 15 hours per pay period that were over reported. Appellant denied knowing the changes were made by his former wife and cousin, but Appellant signed for every paycheck in agreement that that the hours paid for were correct.

Appellant seeks dismissal of the forgery and fraud charges on appeal based on double jeopardy. Appellant had a prior case, CR-07-161, in Tribal Court where he was charged with several counts of forgery and fraud. He was acquitted on all counts. After the acquittal for case CR-07-161, Appellant was charged for new and different fraud and forgery charges. The fraud and forgery charges in this appeal are based on more recent and separate transactions and dates than those in CR-07-161.

The Tribal Court denied Appellant's request for dismissal based on double jeopardy grounds, reasoning that the allegations and proof required in the instant case are different from the allegations and proof presented in the prior case in which he was acquitted.

Discussion

The issues before this Court are: (1) whether the trial court erred in denying Appellant's motion to dismiss based upon double jeopardy, and (2) whether the Tribe failed to meet the burden of proof required for Appellant's forgery and fraud convictions.

Double Jeopardy

Denial of Appellant's motion to dismiss based on double jeopardy is reviewed de novo. See United States v. James, 109 F.3d 597, 599 (9th Cir. 1997).

Discussion

Both the Pascua Yaqui Constitution and the United States Constitution provide that no person shall twice be put in jeopardy for the same offense. See Pascua Yaqui Const. art. I, Sec. 1(c); U.S. Const. amend. V. Although Appellant cites Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 18, 182, 76 L. Ed. 306, 309 (1932), Blockburger involved multiple punishments imposed in a single prosecution, providing that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.” Blockburger, 284 U.S. at 304. The double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense. U.S. v. Brooklier, 637 F.2d 620 (9th Cir. 1980). The case at bar implicates the protection against a second prosecution for the same offenses after acquittal. However, Appellant has acknowledged that his second prosecution was for *different* offenses that were not tried during the first trial. Therefore Blockburger does not apply.

Appellant cites Green in his appellate brief, but Green is distinguishable from this case. In Green, the defendant was charged with committing arson by maliciously setting fire to a house, thereby causing the death of a woman. Green was tried by a jury. The jury instructions allowed the jury to find Green guilty of first degree murder or second degree murder. The jury found Green guilty of second degree murder but remained silent on the charge of first degree murder. Green appealed the conviction which the Court of Appeals reversed due to lack of evidence. The case was remanded for a new trial. On remand, Green was tried for first degree murder under the original indictment. He raised a double jeopardy defense but was overruled and he was found guilty of first degree murder. Eventually the Supreme Court heard the case and held that the jury’s silence as to the first degree murder charge in the first trial was an “implicit acquittal” of the first degree charge. Thus, the Supreme Court concluded that the second trial for first-degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution.

In this case, Appellant's second trial was not for the identical charges of which he was acquitted, which was the case in Green. Appellant was tried for separate charged that included conduct occurring during different pay periods that were not tried during his first trial.

Collateral Estoppel

Appellant also believes that prosecution is not permissible because of the doctrine of collateral estoppel. The Ninth Circuit has held that "if the Government's case depends on facts found in defendant's favor by an acquittal, collateral estoppel precludes the government from attempting to reprove those facts and, hence from retrying the defendant." See James, 109 F.3d at 600. Constitutional collateral estoppel exists where a fact necessarily determined in the defendant's favor by his earlier acquittal makes his conviction on the challenged second trial impossible unless the fact could be relitigated and be determined adversely to the defendant. Id. At 601. The three step inquiry the Ninth Circuit follows in determining whether collateral esoppel bars the bringing of a subsequent suit is as follows:

First, the issues in the two actions are identified so that the court may determine whether they are sufficiently similar and material to justify invoking the doctrine. Second, the court examines the first record to determine whether the issue was fully litigated. Finally, the court ascertains whether the issue was necessarily decided after examining the record." Id. (citing United States v. Schwartz, 785 F.Ed 673 (9th Cir.), cert. denied, 479 U.S. 890, 93 L. Ed. 2d 264, 107 S. Ct. 290 (1986)).

In Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), the issue before the Court was whether the State violated Appellant's guarantee to be free from double jeopardy when it prosecuted the Appellant a second time for an armed robbery but involved a different victim. The Court held that since the single issue in dispute before the jury was Ashe's identity as one of the robbers, the federal rule of collateral estoppel, which is embodied in the Fifth Amendment's guaranty against double jeopardy, made the second trial impermissible.

In Ashe, six men were robbed by three or four masked men during a poker game. Four men, including Ashe, were charged with seven separate offenses—the armed

robbery of each of the six poker players and the theft of a car. The jury found Ashe not guilty based on insufficient evidence that he was one of the robbers.

Six weeks later, the defendant was brought to trial again and prosecuted for the robbery of a different participant in the poker game. The defendant filed a motion to dismiss based on the previous acquittal but the motion was overruled. The prosecution used the same evidence and witnesses; and some witnesses who had previously had trouble identifying the defendant now had stronger testimonies. The jury found the defendant guilty in the second trial.

The Supreme Court found that once the first jury had determined upon conflicting testimony that there was reasonable doubt as to whether the defendant was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight, anticipating the new jury would find the evidence more convincing. Although the second trial related to another victim of the same robbery, the Court reasoned that the name of the victim, in the circumstances of this case, had no bearing on the issue of whether the defendant was one of the robbers. In addition, the U.S. Supreme Court noted that the State's brief conceded that following the defendant's acquittal, "it treated the first trial as no more than a dry run for the second prosecution." Ashe, 397 U.S. at 447. The prosecutor "redefined his presentation in light of the turn of events at the first trial." Id. The Court concluded that this is what the constitutional guarantee prohibits.

In order to have a valid collateral estoppel claim, the State would have to charge the same defendant multiple times with the same crime and use the same evidence and witnesses in all of the trials. In this case, both of Appellant's trials resulted from conduct that occurred at his place of employment and involved punch details, but the similarities end there. The Appellant was acquitted of similar charges in the first trial but according to the record, the second trial was based on wholly different charges that occurred after the charges for which he was originally acquitted. Appellant and his prior attorney acknowledged that the charges in the current prosecution derived from activities that occurred after the conduct for which he was previously charged and acquitted. Appellant was not twice put in jeopardy nor is there a valid collateral estoppel claim.

Insufficient evidence

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Discussion

The Pascua Yaqui Tribal Code defines fraud as, “Any Indian who shall by willful misrepresentations or deceit, or by false interpreting, or by the use of false weights and measures obtain money or other things of value shall be deemed guilty of an offense.” See 4 PYTC § 370. According to the partial transcript of Appellant’s trial, he testified that he had no knowledge that the time was being altered. However, insofar as the element of “willful misrepresentation” is concerned, the facts indicate Appellant knew that his punch details were being altered and should have been aware of the alterations because he received extra money in his paychecks during the October and November pay periods in question.

The criminal complaint filed against Appellant indicated that the conduct for which he was charged in the current case was between October 15, 2006 and November 11, 2006 (two pay periods). The punch details from October 15 through November 11, 2006, indicate that several punch details were altered or moved back. See Tribe’s Exhibit #2. The record also contains a summary of the unauthorized charges, which was documented by the Pascua Yaqui Tribe internal audit department. The document, which includes the time periods from October 19, 2006 until November 9, 2006, specifies the number of hours that were unauthorized during that time and includes an amount totaling \$183.53 from which Appellant benefitted. See Tribe’s Exhibit #3.

In addition, documents requesting that each employee verify, correct and return his/her punch details were submitted for the employees’ review. See Exhibits 4(a), 4(b), 4(c), 5(a), 5(b), and 5(c). The altered times were included in the documents and Appellant signed 5 of the 6 sheets containing the altered punch details. Thus, Defendant knew about the altered times.

Forgery is defined as follows: "Any Indian who shall, with intent to defraud, falsely sign, execute or alter any written instrument, shall be deemed guilty of forgery." As stated previously, the record contains several exhibits containing Appellant's punch details that had been altered and contained Appellant's signature.

The Tribe has proven beyond a reasonable doubt that Appellant committed fraud and forgery.

CONVICTION AND SENTENCE AFFIRMED.

So Ordered,


Chief Justice
Court of Appeals

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