

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |   |                              |
|--------------------|---|------------------------------|
| SAYEL GHABAYEN,    | § |                              |
|                    | § |                              |
| Defendant-Below,   | § |                              |
| Appellant,         | § | No. 526, 2013                |
|                    | § |                              |
| v.                 | § | Court Below: Superior Court  |
|                    | § | of the State of Delaware, in |
| STATE OF DELAWARE, | § | and for New Castle County    |
|                    | § | Case No. 1209001881          |
| Plaintiff-Below,   | § |                              |
| Appellee.          | § |                              |

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|--------------------|---|----------------------------------|
| MARCO HASSAN,      | § |                                  |
|                    | § |                                  |
| Defendant-Below,   | § |                                  |
| Appellant,         | § | No. 529, 2013                    |
|                    | § |                                  |
| v.                 | § | Court Below: Superior Court      |
|                    | § | of the State of Delaware, in and |
| STATE OF DELAWARE, | § | for New Castle County            |
|                    | § | Case No. 1209001862              |
| Plaintiff-Below,   | § |                                  |
| Appellee.          | § |                                  |

Submitted: June 4, 2014  
Decided: June 9, 2014

Before **STRINE**, Chief Justice, **HOLLAND**, **BERGER**, **RIDGELY**, Justices, and **LASTER**, Vice Chancellor\* constituting the Court en Banc.

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\* Sitting by designation pursuant to Del. Const. art. IV § 12.

## ORDER

This 9th day of June 2014, after hearing oral argument and upon consideration of the record in this case, it appears to the Court that:

- (1) While driving through Delaware on their way from Virginia to New York, the defendants, Sayel Ghabayen and Marco Hassan, were stopped for a routine traffic violation and were discovered to be in possession of 276 cartons of cigarettes.<sup>1</sup> Because the cigarettes had been purchased in Virginia and did not have Delaware tax stamps affixed as required by Delaware law, Ghabayen and Hassan were indicted and convicted of violating 30 *Del. C.* § 5342(a), which states that:

Except as authorized by this chapter, no person, not being an affixing agent or not holding an unexpired exemption certificate, shall have in such person's possession within this State 10 or more packs or packages (or an equivalent amount unpackaged) of tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed in the amount required.

- (2) In an attempt to avoid conviction, Ghabayen and Hassan argued to the Superior Court that § 5342(a), as applied to them, constituted an impermissible use of the State's taxation power.<sup>2</sup> Ghabayen and Hassan claimed that § 5342(a) discriminates against interstate commerce in violation of the Dormant Commerce Clause of the United States Constitution,<sup>3</sup> and looked to the factors set forth in

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<sup>1</sup> A carton contains 10 packs of cigarettes and each pack contains 20 cigarettes, so Ghabayan and Hassan were in possession of 55,200 individual cigarettes.

<sup>2</sup> Appendix to Ghabayan's Opening Br. at A103; Appendix to Hassan's Opening Br. at A10.

<sup>3</sup> Appendix to Ghabayan's Opening Br. at A107-112; Appendix to Hassan's Opening Br. at A14-19.

*Complete Auto Transit, Inc. v. Brady*<sup>4</sup> to argue that the cigarettes seized were not subject to taxation by the State of Delaware.<sup>5</sup> After a hearing, the Superior Court issued a thoughtful opinion and found no merit to that argument.<sup>6</sup>

- (3) On appeal, Ghabayen and Hassan renew their arguments below that: (i) § 5342(a) is unconstitutional because it fails the *Complete Auto Transit* analysis and constitutes an undue burden on interstate commerce, and (ii) the cigarettes seized were not subject to taxation by Delaware. In their briefs, Ghabayen and Hassan also claimed that the personal use exemption included in § 5342(a) is so low that it “is patently unreasonable” and creates an undue burden for residents traveling between states.<sup>7</sup> Then, at oral argument, Ghabayen and Hassan also suggested that they should have framed their argument as a violation of their constitutional right to Due Process, because Ghabayen and Hassan did not have sufficient minimum contacts with the State of Delaware for it to legitimately exercise jurisdiction over them. We find no merit to these arguments, and affirm the Superior Court’s judgments of conviction.
- (4) In particular, we note that Ghabayen and Hassan’s argument about the size of the personal use exemption and their claim that it is a violation of Due Process for the State of Delaware to apply § 5342(a) to individuals who are merely traveling through Delaware lack merit. These arguments were not fairly presented below

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<sup>4</sup> 430 U.S. 274, 289 (1977). Delaware has adopted the *Complete Auto Transit* analysis. See, e.g., *Lehman Bros. Bank, FSB v. State Bank Comm’r*, 937 A.2d 95, 111-12 (Del. 2007).

<sup>5</sup> Appendix to Ghabayan’s Opening Br. at A142; Appendix to Hassan’s Opening Br. at A135.

<sup>6</sup> *State v. Ghabayen & Hassan*, 2013 WL 4848172 (Del. Super. Sept. 3, 2013).

<sup>7</sup> Ghabayan’s Opening Br. at 30; Hassan’s Opening Br. at 19.

and the latter was raised for the first time at oral argument on appeal. As a result, they have not been fairly presented and must be rejected.<sup>8</sup> Furthermore, it is within Delaware’s power as a sovereign to enact statutes that criminalize the possession of contraband of various kinds, and many of those statutes hinge to some extent on the amount a defendant possesses. When a defendant is charged with such illegal possession while physically present within a state, that state has a solid and traditional constitutional basis to exercise that jurisdiction and enforce its laws.<sup>9</sup> Therefore, not only were these arguments not fairly presented to the Superior Court and thus improper to present on appeal, they are meritless.

- (5) We also find no merit to the primary argument raised below, which was that the application of § 5342(a) to Ghabayen and Hassan was an impermissible use of the State’s taxation power and that their conviction under that statute cannot stand.

On appeal, all parties conceded that the Congress has expressly authorized states to create statutes like § 5342(a).<sup>10</sup> Thus, there is no basis for a challenge based on

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<sup>8</sup> See Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review . . . .”); Supr. Ct. R. 14(b)(vi)(A)(3) (“The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.”).

<sup>9</sup> See, e.g., *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604 (1990) (upholding physical presence in a state as the basis for personal jurisdiction over a defendant, even when an out-of-state individual only enters the forum state for a brief time); see also 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1067.3 (3d ed. 2014) (discussing exceptions to the minimum contacts requirement and the holding in *Burnham*).

<sup>10</sup> 18 U.S.C. § 2345(a) (“Nothing in this chapter shall be construed to affect the concurrent jurisdiction of a State or local government to enact and enforce its own cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized in violation of such laws, and to provide for penalties for the violation of such laws.”).

the Dormant Commerce Clause.<sup>11</sup> Because this congressional authorization renders any Commerce Clause challenge meritless, we affirm solely on that basis and do not consider whether the Superior Court’s thorough analysis would provide another additional basis for rejecting that challenge.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are hereby AFFIRMED.

BY THE COURT:

/s/ Leo E. Strine, Jr.  
Chief Justice

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<sup>11</sup> See, e.g., *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (“When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”); *White v. Massachusetts Council of Const. Emp’rs, Inc.*, 460 U.S. 204, 213 (1983) (“Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.”); *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652-53 (1981) (“If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.”).