



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARCO HASSAN,)
)
Defendant-Below,)
Appellant)
)
v.) No. 529, 2013
)
STATE OF DELAWARE)
)
Plaintiff-Below,)
Appellee.)

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE
COUNTY

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NATURE AND STAGE OF THE PROCEEDINGS

Marco Hassan (“Hassan”) and Sayel Ghabayen (“Ghabayen”), co-defendants in this matter, were arrested on September 2, 2012. The State indicted both men on charges of attempting to evade or defeat tax under 30 Del. C. § 571; conspiracy second degree; possession of untaxed tobacco products under 30 Del. C. § 3542(a); and conspiracy third degree. A-6.¹

On April 15, 2013, Ghabayen filed a motion to dismiss which Hassan joined. A-9. Prior to trial, the State *nolle prossed* the charges for attempting to evade or defeat tax and conspiracy second degree. [D.I. 24]. A non-jury trial was held on April 16, 2013. At the conclusion of the State’s case, Hassan moved for a judgment of acquittal. A-76. Due to the breadth of the issues raised at the hearing on the motion to dismiss, the Court allowed the parties to submit supplemental briefing. Thereafter, on September 3, 2013, the trial court issued a written order denying the motion to dismiss and judgment of acquittal. A-145.

On September 27, 2013, Hassan was convicted of unlawfully possessing untaxed cigarettes and conspiracy in the third degree. Hassan filed a timely notice of appeal on October 3, 2013 and this is his Opening Brief in support of his appeal.

¹ The State also charged Hassan with driving while license suspended or revoked. The Court found Hassan not guilty of that charge.

SUMMARY OF THE ARGUMENT

1. The Superior Court erred as a matter of law when it denied Hassan's motion for judgment of acquittal. The function of 30 Del. C. § 5342(a) is to criminalize the possession of cigarettes for which Delaware tax is owed. Here, there was no tax due, and, as such, no "required" "amount" of tax stamps, for the cigarettes. Thus, under the facts of this case, no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the necessary elements to convict.

2. The Superior Court erred in denying Hassan's motion to dismiss because the tax scheme under 30 Del. C. § 5342 is unconstitutional. The Delaware Tobacco Tax scheme impermissibly exacts an unconstitutional tax on cigarettes that 1) has no nexus with the State of Delaware, 2) is unfairly apportioned, 3) discriminates against interstate commerce and 3) is wholly unrelated to services provided by the State. Finally, because the Maryland and Delaware statutory schemes significantly differ in the way personal transportation of cigarettes is exempted, it was impermissible for the Superior court to adopt the *Sedacca* analysis without a more critical review of the Delaware tax scheme. Thus, reversal is required.

STATEMENT OF FACTS

On September 2, 2012, Officer Strauss from the Delaware River and Bay Authority stopped a Jeep Cherokee, occupied by Hassan and Ghabayen, for a traffic offense while crossing from Route 9 onto Interstate 295. A-39. Hassan and Ghabayen, both residents of New York were travelling from Virginia through Delaware en route back to their home State. A-61-62. When the vehicle came to rest, it was found to contain hundreds of cigarettes, all bearing Virginia's tax stamp. A-53-54. None of the cartons bore Delaware's tax stamp. Hassan and Ghabayen produced receipts related to their purchases in Virginia. A-50-51. It is undisputed that Hassan and Ghabayen lawfully purchased the cigarettes in Virginia and had no plans to do anything in Delaware except drive right through the state.

As a result of the stop, police arrested Hassan and Ghabayen for Possession of Untaxed Tobacco Products and other related offenses.

I. **THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED HASSAN’S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE 30 DEL.C. § 5342(A) DOES NOT CRIMINALIZE HASSAN’S CONDUCT UNDER THE FACTS OF THIS CASE.**

Question Presented

Whether pursuant to 30 Del. C. § 5342, the General Assembly intended to criminalize the possession of cigarettes that are not taxable in Delaware and do not bear Delaware’s tax stamp? The issue was preserved by a motion for judgment of acquittal. (A-55).

Standard and Scope of Review

The review of a trial court’s ruling on a motion for judgment of acquittal is *de novo*.² Generally review by this Court of questions of construction of statutory law and conflicting interpretations is *de novo*.³

Merits of Argument

Before there can be any criminal liability for the possession of untaxed cigarettes, there must be a Delaware tax liability on those cigarettes. Delaware tax stamps on cigarettes are placed on cigarettes for a purpose,

² *Priest v. State*, 879 A.2d 575, 577 (Del. 2005).

³ *Watson v. Burgan*, 610 A.2d 1364, 1367 (Del. 1992).

and, that is to evidence that Delaware tax has been paid on cigarettes only where tax is due. *See* 30 Del. C. § 5315(a). A Delaware excise tax is imposed for “the sale and use of cigarettes” in Delaware. 11 Del. C. § 5305(a).

30 Del. C. § 5342(a) provides, in relevant part:

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.***⁴

The plain language of 30 Del. C. § 5342(a) does not impose strict liability for possession of unstamped cigarette packs. *See* 1 Del. C. Section 303 (“Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language”). Rather, the language of § 5342(a) requires that the prosecution prove either that Delaware tax was due and not paid, or that the cigarette packages do not

⁴ 30 Del. C. § 5342(a)(emphasis added).

bear Delaware tax stamps “*in the amount required*”. Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Evans v. State*, 516 A.2d 477, 478 (Del. 1986).

Section 5342(a) of Title 30 of the Delaware code does not criminalize Hassan’s conduct on this record. The function of § 5342(a) is to criminalize the possession of cigarettes for which Delaware tax is owed. Criminalizing possession of cigarettes “to which Delaware tobacco product tax stamps are not affixed *in the amount required*” means that some “amount” is required. The required amount of tax is explicitly supplied by clear statutory language: the stamps are required “in an amount not less than the tax thereon.” *See* 30 Del. C. § 5315(b).

Just as there was no amount of tax due on the cigarettes being transported from Virginia to New York, so too there was no “amount” of tax stamps “required” to be rightfully affixed to them. Therefore, according to the plain language of § 5342(a), the criminality of the possession of unstamped cigarettes in Delaware is wholly dependent upon those cigarettes being taxable in this State. *See State v. 483 Cases, More or Less of Assorted Brands of Cigarettes*, 96 A.2d 568, 570-572 (N.H. 1953)(holding that a statute permitting the forfeiture of cigarettes “found at any place in this state

without stamps affixed thereto as required herein” did not apply to cigarettes on which no tax was due because they were not intended for sale in that state). Here, the State made no claim that the codefendants’ cigarettes were for sale or use in Delaware. Hence, *ipso facto* the State cannot make any claim that any Delaware tax stamps in any “amount” were “required” to be affixed upon them.

Hassan and Ghabayen possessed packs of cigarettes that did not bear Delaware’s tax stamp. In the court below, the State conceded that the cigarettes possessed by Hassan were not taxable by Delaware. Thus, there was no tax due, and, as such, no “required” “amount” of tax stamps, for the cigarettes. Moreover, the record reflects that the codefendants were neither selling nor using the cigarettes seized. If they had been, those cigarettes would have been taxable under Delaware law and the felony tax evasion charges in the original indictment would not have been *nolle prossed* as lacking in prosecutive merit.

Under the facts of this case, no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the necessary elements to convict. Moreover, the State failed to prove that the General Assembly intended to criminalize the possession of cigarettes that

do not bear Delaware's tax stamp even though those cigarettes are not taxable in Delaware. Therefore, Hassan's convictions must be reversed.

II. EVEN SHOULD THIS COURT FIND THAT THE CIGARETTES WERE TAXABLE, REVERSAL IS STILL REQUIRED BECAUSE THE TAX SCHEME UNDER 30 DEL.C. § 5342 IS UNCONSTITUTIONAL.

Question Presented

Whether the taxation scheme provided under 30 Del. C. §5342 is unconstitutional when it discriminates against interstate commerce and is an affront to the constitutional protections of the commerce clause? The issue was preserved by a motion to dismiss. A-9.

Standard and Scope of Review

Issues alleging constitutional error and misapplication of law are reviewed *de novo*. *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

Argument

Counts III and IV of the indictment should have been dismissed because they are an impermissible use of the State’s taxation power. The federal government, and not State governments, has the power “[t]o regulate commerce with foreign nations and among the several states...”⁵ (hereinafter “commerce clause”). Such powers include the regulation and taxation of goods, both commercial and personal, which are transported throughout and

⁵ U.S. Const., art I, § 8

among the states.⁶ The negative implication of the federal government's power to regulate commerce, known as the "dormant commerce clause," prohibits states from impermissibly interfering with interstate commerce.⁷

The Cigarettes Were Continuously In Transit And Immune From Local Taxation

In *Minnesota v. Blasius*, the Supreme Court held that:

"[t]he states may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the state to impose a nondiscriminatory property tax... If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement."⁸

The Delaware Superior Court summarized the test for determining whether property is subject to local taxation in *State v. Crane Hook Oil Storage Co.*, 2 Terry 194 (Del.Super. Ct. 1941). In that case, the court held that "[t]he

⁶ *Minnesota v. Blasius*, 290 U.S. 1, 8-9 (1933) (discussing the parameters of state taxation and the regulation of interstate commerce).

⁷ *Lehman Bros. Bank, FSB v. State Bank Comm'r*, 937 A.2d 95, 107 (Del. 2007).

⁸ 290 U.S. 1, 9 (1933).

crucial question to be settled in determining whether personal property moving in interstate commerce is subject to local taxation is that of its continuity of transit." *Id.* (citing *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929)).

The case at issue presents an even more compelling scenario against an imposition of local tax than in either *Blasius* or *Crane Hook Oil Storage*. Unlike the defendants in both of those cases, Hassan had no business purpose in Delaware. At no time did he ever have any intent on stopping in Delaware or in reselling any of his cigarettes in the Delaware area. Whereas in *Blasius* and in *Crane Hook Storage*, both of the defendants purposefully delivered their respective goods to the State at issue, Hassan did not even pause out of his own volition in Delaware. Were it not for the law enforcement officers' direction to stop his vehicle, Hassan would not have had any reason to pause within the State. As the Court in *Blasius* reiterated, "mere pauses" for the purposes of safety or redirection do not constitute a break in transit. The traffic stop was a "mere pause" for the purpose of complying with local law enforcement. Hassan did not purposefully deliver goods to Delaware and he did not stop in Delaware other than for a "pause" that was insufficient to effect his immunity from local taxation. The cigarettes in Hassan's vehicle were thus not subject to the State's tax as they

were not part of the State's mass of property. Therefore, the State's prosecution for possession of untaxed goods is an untenable application of the State's taxation power and substantially interferes with the interstate transportation of goods.

30 Del. C. §5342 Fails To Satisfy All Four *Complete Auto Transit* Factors

In *Complete Auto Transit v. Brady*, The United States Supreme Court modified the dormant commerce clause analysis.⁹ The Court determined that goods traveling in interstate commerce were subject to taxation if such tax “(i) is applied to an activity with a substantial nexus with the taxing state, (ii) is fairly apportioned, (iii) does not discriminate against interstate commerce, and (iv) is fairly related to the services provided by the State.”¹⁰ The *Complete Auto Transit v. Brady* test was codified in a multitude of Delaware cases¹¹ and remains the appropriate analysis for determining whether goods are subject to local Delaware taxation.

⁹ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (holding recognized by the Delaware Supreme Court in *Director of Revenue v. Dial Corp.*, 2008 WL 5146861 (Del. Dec. 8, 2008)).

¹⁰ *Id.*

¹¹ See, e.g., *Lehman Bros. Bank, FSB v. State Bank Comm’r*, 937 A.2d 95, 111-12 (Del. 2007) (using the *Complete Auto Transit* test to determine whether a bank franchise statute was constitutional); *Ford Motor Co. v. Dir. of Revenue*, 963 A.2d 115, 119 (Del. 2008) (applying the *Complete Auto Transit* factors to determine whether the Wholesaler’s Tax was constitutional).

In the instant case, Hassan had no nexus to Delaware other than driving on I-295 on the way to his home state, New York. Were it not for the officer's traffic investigation, Hassan would have no connection whatsoever with Delaware. The State does not contest that the cigarettes were lawfully purchased in Virginia and that the goods did not originate in Delaware. Further, Hassan resides in New York, he has a place of business in New York, and his vehicle was registered in New York. All of these factors indicate that his final destination was never Delaware, but instead, New York. Consequently, the defendant has no nexus with the State of Delaware.

The tobacco tax under 30 Del. C. §5342, as applied, is not fairly apportioned. A tax must be relative to "that portion of the revenues from interstate activity which reasonably reflects the in-state component of the activity being taxed." *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89, 97 (Del. 1998). Here, the cigarettes have no relation to any in-state activity, except the momentary use of the interstate highway and police officers. The tax fails the internal consistency test because the exact tax statute applied to every state in the nation would result in duplicitous taxing events, causing the goods to be taxed over and over during transit. Unlike the defendants in *Ford* and *Saudi Refining*, Hassan had no contractual relationships involving Delaware and had no business purpose in this state.

Because he never delivered the cigarettes to Delaware (but rather was attempting to deliver them to New York) and because he had no personal or commercial purpose for being in Delaware, this tax is grossly disproportionate to the nonexistent economic activity involved within the State.

The tax scheme at issue also fails prong three of the *Complete Auto Transit* factors because it discriminates against interstate commerce. This particular case presents exactly the situation for which the dormant commerce clause theory is meant to protect; Hassan was subject to Virginia taxation when he purchased the cigarettes and he would have been subject to taxation when he reached his final destination, New York. Thus, in addition to subjecting Hassan's property to taxes in both the originating and final destination states, he faced taxation in Delaware for merely passing through the state while in transit. As opposed to the tax in *Saudi Refining, Inc.*, which strictly limited taxation to goods "physically delivered for the purpose of resale," this tax provides no such limitation and is an imposition on interstate commerce.

Finally, because the tax at issue is only minimally related to services provided by Delaware, it fails the fourth factor of the *Complete Auto Transit* test. 30 Del. C. § § 5342, 5305 are essentially a sales tax on cigarettes. The

tax applies "only once to the same pack of cigarettes" and is assessed "upon the sale or use of cigarettes within" the state. 30 Del. C. § 5305. Consequently, the tax has no relation to the provision of special state services. Arguably, the State provided transportation services to the defendant when he drove through the state, but his contacts with Delaware were so minimal as to be negligible. Unlike in *Saudi Refining, Inc.*, where the defendants used extensive environmental and safety resources including a ship captain, potential environmental spill safety precautions, staff, and over 82 hours of services, here, Hassan drove up I-295 for less than an hour. His use of state resources is negligible and is appropriately accounted for by way of toll roads and other driving fees. Therefore, the tax fails to relate to the provision of state services.

The Superior Court's Reliance On *State v. Redden*¹² & *State v. Sedacca*¹³ Is Misplaced And Its Analysis Is Inherently Flawed

In its Order denying the codefendant's motion to dismiss, the Superior Court found that 30 Del. C. §5342 was merely a "possession" statute and therefore, no constitutional analysis need be applied. A-154. In support of

¹² 281 A.2d 490, n.2 (Del. 1971).

¹³ 229 A.2d 456, 463 (Md. 1969).

its position, the Superior Court cited to a lone footnote from *State v. Redden*. A-153. In *Redden*, this Court overturned a conviction for possession of drugs with the intent to sell because the State failed to prove and the statute failed to articulate the requisite standards for determining intent.¹⁴ In footnote two, this Court suggested that the General Assembly should amend the statute to include such standards.¹⁵ The decision does not, however, analyze or comment on the substance of 30 Del. C. §5342 other than to point out that the statute contains articulable standards for proving intent.¹⁶ Thus, *Redden* is inapposite when determining whether the Superior Court should have more substantially addressed the constitutionality of the tobacco statute prior to finding Hassan guilty of possessing untaxed cigarettes.

30 Del. C. §5342 only criminalizes the possession of untaxed tobacco products that are subject to the *Delaware* tax. Thus, an inquiry into whether the tobacco products are subject to Delaware tax is essential to proving the possession crime. Thus, the court was required to conduct a more searching commerce clause inquiry and should not have ignored the issue, or rely on a sweeping analysis that the statute was “narrowly tailored” and “applied in a

¹⁴ *Redden*, 281 A.2d at 490.

¹⁵ *Id.* at n.2.

¹⁶ *Id.*

way [*sic*] which honest and law abiding citizens can readily comply” without actually balancing the *Complete Auto Transit* factors to make the determination. The failure to do so was error requiring that the Superior Court’s holding be reversed.

By adopting the analysis in *State v. Sedacca*, the Superior Court erroneously relied on *Carter v. Commonwealth of Virginia*,¹⁷ which applied to a liquor regulation, to hold that the State’s police power provided an independent basis for taxing cigarettes in interstate commerce. In *State v. Sedacca*, the Maryland Court of Appeals determined that the state had a “vital interest in preventing the diversion of cigarettes into illicit channels of trade in Maryland where the State would be unable to collect *its* tax.”¹⁸ The decision assumed, with little analysis, that the State was entitled to collect tax on the cigarettes in question because a liquor regulation with a more egregious regulatory scheme was permitted in *Carter*. In *Carter*, the United States Supreme Court distinguished liquor from other goods in commerce.¹⁹ The *Carter* decision, while clearly binding on the issue of liquor, fails to

¹⁷ 321 U.S. 131 (1944).

¹⁸ *Sedacca*, 249 A.2d at 463. (emphasis added).

¹⁹ Justice Black stated that “[t]he Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce.” *Id.* at 138.

adequately address the reasonableness of tobacco taxation schemes. Thus, the Superior court erred in relying on it without also undertaking a *Complete Auto Transit* analysis.

Moreover, the *Sedacca* decision failed to consider due process considerations. The *Complete Auto Transit* factors require a nexus to the taxing state.²⁰ As previously indicated, the nexus analysis stems from both commerce clause and due process jurisprudence.²¹ The *Sedacca* court did not consider due process in making the determination that the tobacco legislation at issue was permissible. Instead of relying on the flawed *Sedacca* analysis, the Superior Court should have conducted its own analysis to determine whether the Delaware statute runs afoul of all of the *Complete Auto Transit* Factors, including the due process prong of the nexus requirement.

Finally, reversal is required because the Superior Court's reliance on *Sedacca* fails to recognize that the Delaware and Maryland taxation schemes are categorically different. Despite many similarities between the Maryland

²⁰ *Wisconsin v. J.C. Penney*, 311 U.S. 435, 444-45 (1940) (stating that one of the constitutional requirements of a tax is “whether property was taken without due process of law,” or, restated, “whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state”).

²¹ *Id.*

and Delaware Tobacco tax schemes, one difference prevents the Delaware scheme from passing Constitutional muster. The Maryland statutes allow for an exception of up to five cartons of cigarettes or a retail value of up to one hundred dollars for personal consumers.²² In Delaware, personal consumers are criminally liable for having even one carton of cigarettes.²³ Consequently, if a Delaware resident bought a carton of cigarettes at a location across the state border and then traveled back into the State without a Delaware tax stamp, the resident would be guilty of a misdemeanor. Such a low threshold subjects individuals to an undue burden when traveling between and amongst states and is patently unreasonable. Thus, Delaware's limited exception to the taxation scheme is insufficient to justify the significant burden on interstate commerce.

²² Md. Code § 12-104

²³ The statute permits less than ten cigarette *packs* to be possessed without a tax stamp. 30 Del.C. §5342. Compare with Md. Code § 12-104, which permits consumers to have 5 *cartons* of cigarettes without being subject to tax.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that each of Marco Hassan's convictions and sentences must be reversed.

\s\ Santino Ceccotti

Santino Ceccotti, Esquire

DATE: December 27, 2013