

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

People of the State of Michigan,

Plaintiff,

v.

John Francis Davis and
Gerald Magnant,

Defendants.

Case No.: 17-406-FH & 17-407-FH
Hon. Rosemarie E. Aquilina

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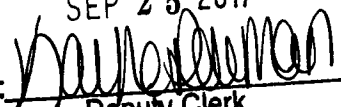
30th Circuit Court

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**DEFENDANTS' JOINT BRIEF IN SUPPORT OF
MOTION TO DISMISS FOR DUE PROCESS VIOLATION**

Background

Defendants Gerald Magnant ("Magnant") and John Davis ("Davis") (collectively "Defendants") are members of the Keweenaw Bay Indian Community (the "Community" or "Tribe"), which is a federally-recognized Indian Tribe, and as such, exercises powers of self-governance.

On December 11, 2015, the Michigan State Police ("MSP") effectuated a traffic stop, purportedly for speeding, on an F-250 Ford pickup truck and trailer driven by the Defendants, who were employees of the Community. Apparently, the MSP had been surveilling that specific truck, registered to the Community, for quite some time. During the course of the traffic stop it is claimed Defendants legally consented to opening the trailer, whereupon tobacco products were found. The truck, trailer, and its contents were seized and Defendants were charged nearly one year later with a felony.

The instant criminal case charges Defendants with failing to obtain a transporter's license in violation of MCL 205.423(3)(f) and MCL 205.428(3). The charge is brought against Community members, who were employed by the Community, and who were during the course of their employment driving a truck hauling the contents of the trailer, both of which were owned by the Community.

Criminal Charges

The criminal Information, a Felony-Violation of the Tobacco Products Tax Act, in pertinent part reads:

did possess, acquire, transport, or offer for sale 3,000 or more cigarettes, in the State of Michigan, without obtaining / possessing a Michigan tobacco license as required by MCL 205.423; contrary to MCL 205.428(3).

The elements of the charge are:

1. Defendants, in their capacity as employees of the Tribe, were acting as a "transporter" as defined in MCL 205.422(y);
2. Defendants, in their capacity as employees of the Tribe, knowingly transported cigarettes which were the property of the Tribe.
3. Defendants, while transporting the cigarettes, knew the Tribe was not licensed by the Department of Treasury as either a wholesaler or unclassified acquirer.

4. Defendants knowingly violated the law by failing to obtain a transporter's license.

Defendants contend Count 1 should be dismissed because the Tobacco Products Tax Act fails to provide "fair notice of the violation" to an employee of what conduct constitutes a crime under the Act in the instant circumstances.

I. THE DEFENDANTS MAY NOT BE HELD CRIMINALLY CULPABLE OF TRANSPORTING TOBACCO PRODUCTS WITHOUT A LICENSE IN THE ABSENCE OF "FAIR NOTICE OF THE VIOLATION"

A. Introduction

In 1993, the Michigan Legislature enacted the Tobacco Tax Act (TPTA). The TPTA specifically authorizes the Michigan Department of Treasury ("Treasury") to adopt rules for the administration of the Act.

(2) The revenue commissioner may promulgate rules to implement this act pursuant to the administrative procedures act of 1960, Act No. 306, of Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. MCL 205.428

MCL 205.433(2).

Treasury has not in the past 24 years adopted any rule, regulation or guideline advising their licensees or licensees' employees as to whether an employee is required to have a transporter license to deliver tobacco products for their employer.

The TPTA provides that a person who transports cigarettes contrary to the act is guilty of a felony punishable by a fine of not more than \$50,000 or imprisonment for not more than five years, or both. See MCL 205.428.

The Act further describes conduct which may lead to a misdemeanor charge.

(5) A person who violates a provision of this Act for which a criminal punishment is not otherwise provided is guilty of a misdemeanor, punishable by a fine of not more than \$1,000 or five times the retail value of the tobacco products

involved, which is greater, or imprisonment, whichever is greater, or imprisonment for not more than 1 year, or both. This subsection does not apply to conduct described in subsection (12). MCL 205.428.

- (11) A person who knowingly possesses, acquires, transports, or offers for sale contrary to this Act 600 or more, but not more than 1,199, cigarettes, tobacco products other than cigarettes with an aggregate wholesale value of \$50 or more but less than \$100 ... is guilty of a misdemeanor punishable by a fine of not more than \$1,000 or imprisonment of not more than 90 days, or both.

Finally, neither the Act nor any Treasury rule, regulation or guideline provide notice as to who or when a transporter license is required.

B. A Criminal Statute Fails to Provide "Fair Notice" If an Individual May Be Required To "Guess At" Or "Meaningfully Differ" In Opinion Regarding What Conduct is Proscribed

The TPTA does not, on its face, provide "fair notice" of the proscribed conduct. As noted in the preliminary exam testimony of Treasury officials, an employee of a licensed wholesaler is not required to obtain a transporter license under the TPTA. Ms. Angela Littlejohn, the manager of the Michigan Department of Treasury Tobacco Tax Unit, testified that the TPTA does not require an employee of a wholesaler to secure a transporter license to deliver tobacco on behalf of his employer.

The Court: So let me just ask you if an employee of a wholesaler was a transporter, does that individual need a license to move the product?

The Witness: No.

(PE Transcript P. 102)

Ms. Littlejohn reiterated on cross examination that the TPTA does not require an employee to secure a transporter license to pick up or deliver tobacco products for and on behalf of his employer.

Q Okay, gotcha. Now, if I'm a wholesaler, right, which I think Mr. Grano was asking, so I'm a wholesaler and I am going to sell my tobacco, I gotta get my tobacco from my warehouse to my customer, correct?

A Correct.

Q Okay. And I have an employee, Mr. Davis is my employee, let's say, and I say, Mr. Davis, this customer bought 56 cases of tobacco products, i.e., cigarettes, can you drive them over to my customer, who is a mile away. He does. Does he need a transporter's license?

A No.

(PE Transcript p. 106)

Moreover, as noted above, the Department of Treasury has not provided any instruction to licensees or the licensees' employees as to the individual employee's responsibilities under the TPTA when making deliveries of tobacco product on behalf of their employer.

The Michigan Supreme Court in *People v Howell*, 396 Mich 16; 238 NW2d 148 (1976), held that a statute may be challenged for vagueness on three grounds:

- (1) It does not provide fair notice of the conduct proscribed
- (2) It confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed or
- (3) Its coverage is overbroad and impinges on First Amendment freedoms.

Howell, supra, at p. 20.

The Supreme Court further warned that a vague law may trap the innocent by failing to provide fair warning. This is what has occurred here. Therefore, the courts must insist that the

law provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly. *Howell, supra, fn 4; see also People v Assy*, 316 Mich App 302, 305; 891 NW2d 280 (2016).

In the present case, the TPTA fails to provide fair notice of the prohibited conduct and confers on the trier of fact unstructured discretion to determine whether an offense has been committed. The Michigan Supreme Court in *People v Hall*, 499 Mich 446, 460-461; 884 NW2d 561 (2016), stated that the Due Process Clause of both the United States and Michigan Constitutions provide that a state may not deprive a person of life, liberty or property without Due Process. Due Process, on the other hand, requires that "a person receive fair notice of not only the conduct that will subject him to punishment but also of the severity of the punishment that a State may impose."

The Michigan Court of Appeals in *People v Mesick*, 285 Mich App 535; 775 NW2d 857 (2009), followed the "fair warning" analysis set forth by the Supreme Court in *People v Dempster*, 396 Mich 700; 242 NW2d 381 (1976), and further held that a criminal statute fails to provide "fair warning" if individuals of reasonable intelligence are required to guess at or "meaningfully differ in opinion" regarding what conduct is proscribed. The court further noted that a person should know from the statute what conduct is criminal without resorting to speculation.

The Constitution requires criminal statutes to give "fair warning" to defendants of what conduct will constitute a crime without resorting to speculation, and they must provide adequate guidance to the trier of fact without requiring a court to "interpret" any ambiguities. *People v Dempster*, 396 Mich 700, 714-715; 242 NW2d 381 (1976). *Lest a person of reasonable intelligence may not be required to guess or meaningfully differ in opinion regarding what conduct is proscribed*, but a "statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or

the commonly accepted meaning of words. *People v Noble*, 238 Mich App 647, 651-652; 608 NW2d 123 (199).

In addition, the Appellate Courts of this State have uniformly held that a criminal statute may be challenged on the basis of vagueness if it is shown that the statute does not provide fair notice of the proscribed conduct:

The party challenging the statute has the burden of proving its invalidity. A defendant may challenge a statute for vagueness on three grounds: (1) the statute does not provide fair notice of the proscribed conduct, (2) the statute is so indefinite as to confer on the trier of fact "unstructured and unlimited discretion" to decide when an offense has been committed, and (3) the statute is overbroad and impinges on protected First Amendment rights. *People v Douglas*, 295 Mich App 129, 135 (2011); *see also People v Rogers*, 249 Mich App 77 (2001).

In the instant case, the Defendants were not provided fair notice that picking up or delivering tobacco products for their employer without obtaining a transporter license would result in a criminal prosecution as set forth above. This fact, coupled with the sworn testimony by a Treasury representative that Treasury does not believe that an employee of a licensed wholesaler is required to obtain a transporter license under the TPTA, compels a conclusion that the State has failed to provide Defendants fair notice with respect to the alleged requirement that they obtain a transporter license or be subject to felony prosecution.

C. Impossibility of Performance: Employees May Not Be Held Criminally Culpable for An Act Of Omission If They Have No Notice Of The Proscribed Conduct.

The TPTA imposes upon a licensee certain responsibilities relative to the possession, transportation, or sale of tobacco products. An employee of a licensee however, is not required nor will the Department of Treasury even entertain issuing certain tobacco licenses to an employee. As mere employees of the Community who might make delivery of tobacco products

on behalf of the Community, Defendants, as individuals, would not qualify for a wholesale tobacco license even if they wanted to obtain one.

The Michigan Supreme Court in *People v Likine*, 492 Mich 367 (2012), recently acknowledged that "impossibility of performance" constitutes a defense under both the English and Michigan common law to a crime of "omission":

Stated differently, a defendant cannot be held criminally liable for failing to perform an act that was impossible for the defendant to perform. When it is genuinely impossible for a defendant to discharge a duty imposed by law, the defendant's failure is excused.

Michigan common law, which has its roots in the English common law, has also recognized impossibility as a defense to a crime of omission.

Likine supra, at p 396-397

In the present case, the Defendants had no legal duty, or responsibility to secure a tobacco transporter license in the performance of their job of delivering packages for and on behalf of the Tribe. As noted in the sworn testimony of Ms. Angela Littlejohn, the manager of the Department of Treasury Tobacco Tax Unit, the TPTA does not require an employee of a wholesaler to secure a transporter license to deliver tobacco on behalf of his licensed employer; nor does it require an employee to secure a transporter license to pick up or deliver tobacco products for and on behalf of his employer. (PE Transcript pp. 102, 106).

The Defendants here were employees of the Community. It is uncontroverted that (a) the Community owned the tobacco that was being transported. (b) the Community owned the truck and trailer that the tobacco was being transported in and (c) the Community was assessed tax on the tobacco that was seized by the State Police on December 11, 2015. If a transporter license was required, then it would be the Community, not its employees (Davis and Magnant), that would need to secure the proper license.

The TPTA clearly does not require an employee of a wholesaler, secondary wholesaler or unclassified acquirer to secure a transporter license to deliver tobacco for his/her licensed employer. In fact, a wholesaler, unclassified acquirer or secondary wholesaler that is licensed by the Department of Treasury to sell tobacco products is not required to have a transporter license for its employees to deliver tobacco products to the employer's customers. Therefore, it is a violation of due process to charge defendants with a knowing violation of MCL 205.423 and MCL 205.428(3) and to place the onus on them to determine whether or not their employer has maintained proper licensure.

D. The Michigan Supreme Court Has Previously Ruled that Where An Appellate Decision Is Required to Clarify "Proscribed Conduct" Such Decision Provides Constructive Notice to Future Defendants But The Application Should Not Be Applied Retroactively

In *People v Dempster*, 396 Mich 700; 242 NW2d 381 (1976), the defendant was convicted of selling unregistered securities in violation of the Uniform Securities Act. One issue raised by the defendant was whether the securities were exempt as "commercial paper" from the registration provisions of the Act, while another issue raised was whether the "commercial paper" exemption within the Act provided fair notice to sustain a criminal conviction.

The Uniform Securities Act contained a provision that exempted from the registration requirement commercial paper which arose from a current transaction and which evidenced an obligation to pay cash within 12 months. The defendant took the position that the notes they sold were commercial paper and thus exempt. The Uniform Securities Act on the other hand did not specifically define the term "commercial paper". Therefore, the defendant argued that the definition of commercial paper as set forth in Article 3 of the Uniform Commercial Code should apply.

At trial, defendant called an expert witness testified that it was his opinion the instruments sold by the Defendant were commercial paper under Article 3 of the Uniform Commercial Code. The Michigan Supreme Court, however, ruled that the application of the Uniform Commercial Code definition of commercial paper was inappropriate in this particular setting. The Court, therefore, focused on the administrative and judicial interpretation of the commercial paper exemption, rather than the Uniform Commercial Code definition of commercial paper. The Court in ruling the defendant's securities were not commercial paper adopted the administrative interpretation rendered by the Securities and Exchange Commission which stated the exemption only applies to prime quality negotiable paper.

After considering the commercial paper exemption issue, the Michigan Supreme Court, then addressed the issue whether the defendant's right to due process was violated. Specifically, the defendant contended that it would be a violation of due process to impose this new interpretation of the "commercial paper exemption" retroactively in order to uphold the defendant's conviction. The defendant argued that if these instruments fit within an acceptable definition of commercial paper, they were free to rely on such definition unless the statutory definition clearly indicated otherwise.

In considering the defendant's due process arguments, the Court quoted the standards set forth by the United States Supreme Court that: (1) No man shall be criminally responsible for conduct which he could not reasonably understand to be proscribed; (2) Criminal statutes must be explicit to inform those who are subject to it what conduct on their part will render them liable to criminal penalties; and (3) Ambiguity concerning the scope of criminal statutes should be resolved in favor of lenity.

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. The underlying principal is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States v Harris*, 347 US 612, 617; 74 SCt 88, 812; 98 LEd 989 (1954).

A criminal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally v General Construction Co*, 269 US 385, 391; 46 SCt 126, 127; 70 LEd 322 (1926). No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. *Lanzetta v New Jersey*, 304 US 451, 453; 59 SCt 618, 619; 83 LEd 888 (1939). Ambiguity concerning the ambit of criminal statute should be resolved in favor of lenity. *Rewis v United States*, 401 US 808, 812; 91 SCt 1056, 1059; 28 LEd 493 (1971). *Dempster, supra*, at pp. 714, 715.

The Michigan Supreme Court finally, noted that an appellate court's interpretation of statutory provisions may add a "clarifying gloss" to otherwise unclear words and, therefore, provide constructive notice to future defendants, but the application should not be applied retroactively.

It is true that interpretations of statutory provisions by a court may add a clarifying gloss to otherwise unclear words, and thereby provide constructive notice to Future defendants, but

'an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an Ex post facto law. . . and . . . the effect is to deprive (the defendant) of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. *Bouie v City of Columbia*, 378 US 347, 353, 355; 84 SCt 1697, 1702, 1703; 12 LEd2d 894 (1964).

* * * *

Thus, while the construction we have placed on the commercial paper exemption is valid for the future, "it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal". *Bouie v City of Columbia*,

supra, 378 US 362; 84 SCt 1707. See also *Douglas v Buder*, 412 US 430; 93 SCt 2199; 37 LEd 52 (1973).

Dempster, supra, at pp. 716-718.

In conclusion, the Michigan Supreme Court held that the "clarifying gloss" that it placed upon the commercial paper exemption is correct when the purpose of the Uniform Securities Act is considered. However, the Court reversed the Defendant's conviction because it was not persuaded that the term "commercial paper" standing by itself was sufficiently definite to allow the conviction to stand.

Finally, the Michigan Court of Appeals in *People v Jones*, 142 Mich App 819; 371 NW2d 459 (1985), noted that the appellate courts have uniformly held if there is doubt whether the act charged by the prosecutor is included within the scope of the prohibited conduct, that doubt should be resolved in favor of the defendant.

In interpreting penal statutes, courts will require clarity and explicitness in the defining of the crimes and the classification of acts which may constitute it. *People v Reese*, 363 Mich 329, 335; 109 NW2d 868 (1961). The reasoning behind this rule is that a penal statute should be so clear that any ordinary person can tell what he may or may not do thereunder. *Id.*

It is a fundamental rule of construction of criminal statutes that they cannot be extended to cases not included within the clear and obvious import of their language. *People v Ellis* 204 Mich 157, 161; 169 NW2d 930 (1918). If there is doubt as to whether the act charged is embraced in the prohibition that doubt is to be resolved in favor of the defendant. *Id.*; *Jones, supra*, at pp. 822-823.


In the present case, there is nothing in the record before the examining magistrate to establish that the Defendants had knowledge that they needed a transporter license to deliver tobacco products for their employer. The Michigan Department of Treasury, although authorized to provide rules and regulations to administer the TPTA, failed to enact any form of guidance. The statute on the other hand is vague at best as to any requirement that an employee must

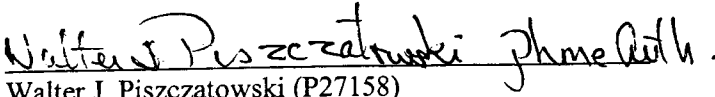
determine that his employer is properly licensed. This vagueness is best demonstrated by the fact that Treasury itself, does not believe that employees of licensees need to obtain a transporter license. Therefore, to charge the Defendants under this statute violates the Defendants' Due Process rights guaranteed by both the Federal and State Constitutions.

CONCLUSION

For the forgoing reasons, it is respectfully requested that this Court dismiss the charges against the Defendants.

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