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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN FRANCIS DAVIS,

Defendant-Appellant.
_____/

Supreme Court No. 159373

Court of Appeals No. 341621

Ingham County Circuit Court
No. 17-406 FH

THE PEOPLE'S ANSWER IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

The Defendant/Appellant's statement of jurisdiction is complete and correct under MCR 7.305(C)(2); MCR 7.303(B)(1), MCL 600.309. Defendant appeals the denial of his appeal of his motion to quash bind-over and motion to dismiss for a Due Process violation. The Court of Appeals affirmed the circuit court's decision in an unpublished opinion on February 5, 2019.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Defendant was discovered transporting 672,000 cigarettes without a license under the Tobacco Products Tax Act. The district court bound defendant over for trial on a felony charge of transporting tobacco products without a license following the Court of Appeals' recent unpublished decision in *People v Shouman*. Defendant filed a motion to quash, which was denied by the circuit court, and the Court of Appeals affirmed. Did the Court of Appeals err in affirming the denial of defendant's motion?

   Appellant's answer: Yes

   Appellee's answer: No

   Court of Appeals answer: No

   Trial court's answer: No.

2. The Tobacco Products Tax Act applies to everyone in the State of Michigan. Defendant transported 672,000 cigarettes through the State of Michigan, was not licensed, and was not an interstate carrier. Does the Tobacco Products Tax Act apply to him and provide proper notice of its requirements?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Appeals Answer: Yes.

   Trial court's answer: Yes.

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STATUTES INVOLVED

MCL 205.423:

> [A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

MCL 205.428(3):

> A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes … is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

MCL 205.422(o):

> "Person" means an individual, partnership, fiduciary, association, Limited Liability Company, corporation, or other legal entity.

MCL 205.422(y):

> "Transporter" means a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act. Transporter does not include an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce, or a licensee maintaining a warehouse or place of business outside of this state if the warehouse or place of business is licensed under this act.

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INTRODUCTION

At the onset, it is helpful to understand the basic structure of the Tobacco Products Tax Act (TPTA) (MCL 205.421 *et seq*). The TPTA heavily regulates tobacco products, as well as people involved in the purchase, sale, importation, transportation, export, and distribution of tobacco products in, or into, Michigan. These regulations generally affect people and entities licensed to import and transport untaxed tobacco, as well as the movement and sale of taxed tobacco products for sale to retailers and ultimately end consumers. The Court of Appeals has described the TPTA as "a pervasive group of tobacco regulations" and has held that at its core, "the TPTA is a revenue statute designed to assure that tobacco taxes levied in support of Michigan schools are not evaded." *People v Beydoun,* 283 Mich App 314 (2009).

Wholesalers and Unclassified Acquirers are the only two licensees that may import untaxed tobacco products into the State and pre-collect and remit the tobacco tax to the Department on those tobacco products. Wholesalers may sell to retailers, vending machine operators, and transportation companies in addition to other wholesalers, while Unclassified Acquirers may sell to these same purchasers in addition to end users directly and to secondary wholesalers. Secondary wholesalers can only sell to other secondary wholesalers and to retailers. See MCL 205.422(s). MCL 205.423 requires manufacturers, wholesalers, secondary wholesalers, unclassified acquirers, vending machine operators, transporters and transportation companies, to obtain a license from the Michigan Department of Treasury. See MCL 205.423. The TPTA generally requires those transporting

tobacco products into and throughout the State of Michigan to obtain a license as well as have that license to transport and a permit for the load on their person while transporting tobacco products in Michigan. MCL 205.423; MCL 205.426(7) & (8). *People v Shouman* (2016 WL 5853301) (unpublished) (Attached B). Transporters may in principle form a link between tobacco product wholesalers and retailers in Michigan, which would ensure that retailers obtain tobacco products that comply with the TPTA.

Defendant claims to be a member of the Keweenaw Bay Indian Community (KBIC), a federally-recognized Indian tribe, and exempt from State tax law. Even if defendant is a KBIC member, he is not exempt from complying with the TPTA's licensing requirements for his activities outside his tribe's reservation and trust lands as a matter of black letter law. See *Mescalero Apache Tribe v Jones*, 411 US 145, 148–49 (1973). "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id*.

Additionally, Treasury maintains a system to refund the tobacco tax on the stamped, tax-paid tobacco products that federally-recognized Indian tribes without a tax agreement sell to their resident tribal members inside its reservation and trust lands in Michigan. See *Keweenaw Bay Indian Cmty. v Rising*, 477 F3d 881, 884 (CA6 2007). But the refund system does not eliminate any requirements under the TPTA for tribes or tribal members outside of Indian country. See *id*.

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Therefore, KBIC or its employees need a license under the TPTA to transport or import tobacco products into and through the State of Michigan. The failure to obtain the proper TPTA license leaves defendants open to civil and criminal enforcement action by the State. Michigan may prosecute violations of state law outside of Indian country. *Michigan v Bay Mills Indian Cmty*, 134 S Ct 2024, 2035 (2014). The TPTA generally exempts interstate carriers from obtaining a license under the TPTA. See MCL 205.422(y). The defendant in this case, however, was not acting as an interstate carrier and cannot rely on that exemption in this case.

Michigan State Police stopped defendant Davis for speeding while driving a KBIC pick-up truck and enclosed utility/snowmobile trailer loaded with over 600,000 cigarettes headed from Baraga to Marquette on U.S. 41 on December 11, 2015. Neither defendant Davis nor the co-defendant, Gerald Magnant, KBIC, nor any entity involved was licensed by the State of Michigan to move, transport or acquire untaxed tobacco products in the State of Michigan. The lower courts have properly applied the TPTA law. Defendant Davis would not be harmed by allowing this matter to proceed to trial. If convicted, an appeal of right would be available to him.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The preliminary examination was held on March 16, 2017 in the 54-A District Court, Judge Alderson, presiding. The People first called Michigan State Police Trooper Chris Lajimodiere. Trooper Lajimodiere testified that he is assigned the 8th District in the Upper Peninsula, does traffic enforcement, and that on December 11, 2015, he stopped a truck on US 41 in Marquette County. (PE 12–14.) KBIC's casino in Marquette was 40 miles away and the tribe's reservation was 60 miles away in Baraga County. (PE 15). The stop occurred in the State of Michigan, outside of any Indian reservation or trust lands.

When the vehicle stopped, the trooper made contact with the driver and noticed a passenger. (PE 15.) The driver was John Davis. (PE 16.) The passenger was Gerald Magnant. (PE 16.) The truck had KBIC plates and no U.S. Department of Transportation markings. (PE 16, 17.) Davis indicated he was headed to a gas station in Marquette and advised he was hauling supplies. (PE 17.) Lajimodiere asked to see the contents of the trailer. Davis voluntarily got out of the vehicle, unlocked the trailer and said "there you go boss," once he opened it. (PE 18.) Inside the trailer, Tpr. Lajimodiere saw several large brown boxes or shipping containers similar to People's exhibit 2. (PE 19). He stated to Davis, "You knew that stuff was back there," to which Mr. Davis replied, "I'm just a worker." The video of the stop was then entered into evidence as People's exhibit 1. (PE 24.) The truck contained Seneca cigarettes, cigarettes not taxed in Michigan. No one provided Tpr. Lajimodiere a Michigan tobacco license, tobacco permit, or invoice for the tobacco. (PE 26, 27).

Trooper Kevin Ryan had arranged for the traffic stop of the truck and assisted in the seizure of the contraband cigarettes. Tpr. Ryan explained earlier in the day on December 11, 2015 he was driving back toward Marquette on U.S. 41 through Baraga County and the KBIC reservation. (U.S. 41 goes through one side of KBIC's L'Anse Indian Reservation and is the main way from Houghton to Marquette.) (PE 53.) He passed the Pines Convenience Store, a KBIC business. (The Pines is located on U.S. 41.) (PE 53.) He noticed a couple of pick-up trucks with trailers parked at the back of the store. He had previously seen those trucks during surveillance. The trucks left the Pines and traveled to the KBIC pole barn, across the street from the Baraga KBIC Casino. Two men entered one truck and they left back to U.S. 41 towards Marquette in one vehicle. (PE 54, 55.) He called for a patrol vehicle. Trooper Lajimodiere called him. He advised Tpr. Lajimodiere that, if there was a legal way to stop the vehicle, to do so.

When Trooper Ryan arrived at the traffic stop, the trailer was already open and he saw Seneca cigarettes in the trailer. (PE 57.) The defendants were not handcuffed. (PE 57.) Ryan took pictures of the scene and then opened a package of cigarettes to check for a Michigan tax stamp. (PE 57.) The cigarettes contained a KBIC stamp, but *no* Michigan tax stamp. The larger shipping containers contained no Michigan markings nor labeling. (PE 58.) There were 56 cases of Seneca cigarettes with 12,000 cigarettes per case. (PE 59.) No tobacco license was presented to Ryan. (PE 59.) One of the 56 shipping containers seized was placed into evidence as People's exhibit 2. (PE 60.)

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Tpr. Ryan assisted in transporting defendant Magnant. Magnant admitted that he helped load the trailer with the cigarettes. He also admitted that he transported cigarettes for KBIC before to Marquette. (PE 62, 63.)

The People entered certified records from the Department of Treasury for the defendants, KBIC, the Pines, and the casinos that indicated no person nor entity maintained a Michigan tobacco tax license. The People introduced the testimony of Angela Littlejohn, Manager of the Treasury Tobacco Tax Unit. She testified that a person or business could receive a tobacco licensee, and if there was no other licensee involved (wholesaler or unclassified acquirer), a person would need a transporters license to import tobacco and move tobacco in the state of Michigan. (PE 101.)

STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion to dismiss for abuse of discretion. *People v Shami,* 501 Mich 243, 251 (2018). The Court reviews "*de novo* questions of statutory interpretation." *Id.*

A higher court reviews a district court's decision to bind a defendant over for trial for an abuse of discretion. *Shami,* 501 Mich at 251. It reviews *de novo* a circuit court's ruling on a motion to quash a bind-over. *Id.* The Court reviews a claim of "instructional error involving a question of law de novo." *People v Dupree*, 486 Mich 693, 702 (2010).

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ARGUMENT

I. The TPTA provides proper notice to defendant and thus the Court of Appeals did not err in affirming the circuit court decision to deny defendant's motion to dismiss.

The issues that defendant raises on the issue of notice on appeal were properly resolved by the Court of Appeals, as they are governed by established principles of due process and clear guidance by statute and the Court of Appeals. The same is true in response to defendant's claim about his job status. It is clear that he was required to have a license. This Court need not grant leave here.

A. The application of well-settled due process law supports the decision below rejecting defendant's due process argument.

The Legislature passed the Tobacco Products Tax Act (TPTA) in 1993. The language of the TPTA is clear to persons of ordinary intelligence. The pertinent parts for the analysis in this case are:

MCL 205.423:

> [A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

MCL 205.428(3):

> A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes … is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

MCL 205.422(o):

> "Person" means an individual, partnership, fiduciary, association, Limited Liability Company, corporation, or other legal entity.

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MCL 205.422(y):

> "Transporter" means a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act. Transporter does not include an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce, or a licensee maintaining a warehouse or place of business outside of this state if the warehouse or place of business is licensed under this act.

This Court recently reviewed a due process claim against the TPTA but ultimately passed on the argument even after extra briefing by the parties on the issue. *People v Shami,* 501 Mich 243 (2018) (see footnote 34). The Court of Appeals also recently held, however, that the TPTA gave the defendant sufficient notice. See *People v Assy*, 316 Mich App 302 (2016). The *Assy* panel held that the Legislature defined the terms in the TPTA with sufficient precision "to place persons of ordinary intelligence on notice…." *Id.* at 311. The panel also held that "the statutory scheme is sufficiently definite to preclude arbitrary or discriminatory enforcement." *Id.* at 312, citing *People v Hayes*, 421 Mich 271 (1984).

The Legislature's decision to include the definition of which actors needed a license, a description of what a transporter does, and the articulation of penalty puts people of average intelligence on notice of what a transporter is and what is required. Moreover, the words the Legislature used are common words all Michiganders would understand. The TPTA language relates to an expansive process involving many different activities. Any person who was unsure of the meaning of these words could do what courts do and pick up a dictionary and find a long list of conduct included within their meaning.

Not only is the meaning of transporter clear, but a complete reading of the TPTA demonstrates the necessity of prohibiting defendant's conduct. Accurate collection of the tobacco tax on cigarettes and other tobacco products is dependent upon fulfillment of stamping, labeling, record-keeping, and reporting requirements set forth in the TPTA. Those who transport tobacco products that are sold in Michigan must obtain a license and must file tax returns with Treasury documenting the movement of the tobacco products to other licensees or retail stores.

Further, the TPTA regulatory scheme requires tobacco products must be packaged and labelled. Invoices documenting these acquisitions and sales must contain numerous elements. All of these requirements exist so that Michigan's Treasury can track tobacco product sales from manufacturers, through distributors and transporters, and ultimately to retailers. This tracking system, if followed, allows Treasury to verify unclassified acquirers and wholesalers are remitting the appropriate tobacco tax. If "low-level employees" are allowed to import out-of-state tobacco products and transport them without a license and sell those products at retail without complying with the reporting and record-keeping requirements, as Defendant did, the TPTA would be rendered meaningless. It would be impossible for Treasury to determine where the tobacco products came from and whether the tobacco tax was paid. A person with average intelligence would understand that importing tobacco and transporting it for resale without a license and without complying with all the reporting duties that come with obtaining such a license

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would severely limit the effectiveness of the TPTA. An ordinary intelligent person would realize a violation of the TPTA by transporting over 3,000 cigarettes without license would subject them to a five-year felony.

As it relates specifically to transporters, the TPTA, requires that anyone acting as a Transporter upon the public highways, roads, or streets of this State, obtain a license, have complete records for the tobacco being transported on his person, and obtain a permit. For each load of tobacco transported the transporter shall obtain a permit from Treasury indicating what is being transported, and to whom. See MCL 205.426(7) and (8). If the tobacco is being imported from out-of-state the transporter should stop at the first MSP post for inspection.

Likewise, the TPTA defines Transporter with sufficient notice to place the defendant on notice that his actions may subject him to criminal liability. Further, the statutory scheme precludes arbitrary and discriminatory enforcement of the TPTA.

B. The TPTA criminal liability is not dependent on job status.

Moreover, on his claim that he acted as an employee of the tribe, defendant is still criminally liable. Defendant argues that the tribe, or business entity, is the legal entity that needs to obtain the transporter license, and that as an employee-driver he does not have to comply with the Michigan law. This is wrong.

First, no individual, nor any legal entity, maintained a tobacco license here. Accordingly, defendant was not transporting under a business's transporter license or his own transporter's license, putting each defendant in violation of MCL 205.423(1).

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Second, the Court of Appeals held that the "the statutory language of MCL 205.423(1) and MCL 205.428(3) make clear that an individual possessing 3,000 or more cigarettes for transport, without having a license to do so, is guilty of a felony." *People v Davis* (2019 WL 453891) (Attached A). Further, the majority opinion in *Davis* addresses the dissent's misplaced reliance on *People v Assy,* 316 Mich App 302 (2016), that the TPTA is not intended to apply to low level employees.

> The dissent does raise an interesting point based on this Court's decision in *People v Assy*, 316 Mich App 302; 891 NW2d 280 (2016). Ultimately, we conclude that the *Assy* decision is distinguishable from this one. The statute here defines the term "transporter" to include "a person . . . transporting in this state, a tobacco product." MCL 205.422(y). The statute further defines the term "person" to include both individuals and legal entities, MCL 205.422(o), and provides that a "person" can be a "transporter," MCL 205.422(y). Therefore, under a plain reading of the statutory language, an individual driver can be subject to prosecution under the TPTA as a "transporter."
>
> The dissent, however, points to this Court's decision in *Assy* and concludes that the Legislature did not intend to include within the definition of "transporter" any low-level employees, such as those who drive the vehicles transporting cigarettes. In *Assy*, this Court concluded that the term "retailer" did not include "a cashier or stocker," but only included "a person who directs or manages the business." The *Assy* Court reached this conclusion based on the statute's requirement that a "retailer" means a person who "operates a place of business" and read the term "operates" to include an element of direction and control, i.e., "someone who has control over the business's day-to-day operations." *Assy*, 316 Mich App at 310-311. In contrast, the Legislature defined the term "transporter" to include "a person . . . transporting in this state, a tobacco product." The verb "transport" is defined to mean "To carry or convey (a thing) from one place to another." *Black's Law Dictionary* (10th ed.). Contrary to the ordinary meaning of the term "retailer," the ordinary meaning of the term "transport" or "transporter" only requires the physical action of carrying or conveying a thing, in this case, cigarettes. Therefore, this case is distinguishable from *Assy*, in that the ordinary meaning of the term "transporter" reasonably includes the individuals who drive truckloads of cigarettes. [*Davis,* slip op, p 6.]

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Third, a similar argument was raised in *People v Shouman,* and the Court of Appeals agreed with the State's position that criminal liability is not dependent on job status. See *People v Shouman*, (2016 WL 5853301) (unpublished) (attached B). The *Shouman* Court found that the statute applied:

> Regardless of whether defendant was employed by LZ, defendant was required by MCL 205.426(7) and (8) to have in his possession a transporter license and a permit for the load in his possession. Defendant's contention that he lacked a means of determining the licensure status of his purported employer is thus incorrect in light of his statutory responsibility to have the required license and permit in his possession when transporting the tobacco product. [*Shouman*, slip op, p 7.]

Though defendant alleges that he is a KBIC member, he and the tribe are not exempt from complying with the TPTA's licensing requirements for their activities outside the tribe's reservation and trust lands. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. *Mescalero Apache Tribe v Jones*, 411 US 145, 148–149 (1973). Therefore, KBIC – or its employees – need a license under the TPTA to transport or import tobacco products into and through the State of Michigan. The failure to obtain the proper TPTA license leaves defendants open to civil and criminal enforcement action by the State. The State of Michigan may prosecute violations of state law outside of Indian country. See *Michigan v Bay Mills Indian Cmty*, 134 S Ct 2024, 2035 (2014).

Moreover, in *People v Assy*, 316 Mich App 302 (2016), the defendant claimed the store owner, not the defendant manager, should be held criminally liable. The

Court of Appeals rejected that argument. It found the TPTA defined "retailer" sufficiently to put those who operate a store on notice. The court noted, "[t]he Legislature defined the term 'person' to include both individuals and legal entities. MCL 205.422(o)." MCL 205.428(3) makes it a crime for a person to possess, transport, or acquirer 3,000 or more cigarettes in violation of the act. An individual can be held criminal liable for violating the TPTA, not just a legal entity.

By following the TPTA's requirements, an employee would be able to know that he was transporting cigarettes without a Michigan tobacco license. No one maintained a license in this case. Criminal liability on the person or persons possessing and transporting the tobacco is appropriate. MCL 205.428(3).

Next, to adopt the dissent's position would create an exception that would swallow the rule. Anyone intending to not pay Michigan's high tobacco taxes would simply have low-level employees acquire, transport or sell the tobacco illegally. Following the dissent's logic, there would be nothing the State could do under our current statutory scheme to stop smuggling from occurring if it was done by low-level employees. This result is unsupported in law. It is clear that the intent of the TPTA was to apply to all the people in Michigan. The criminal penalties all start with "a person who possesses … contrary to the act…" MCL 205.428. Legality is not dependent on job status. Additionally, in prosecuting all sorts of smuggling cases, it is normal and proper to start at the lowest level employees and work one's way up.

Defendant was only charged with one low level felony – a G grid offense. As a G grid felony, he is very unlikely to receive any incarceration if he was convicted

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as charged. Higher level smugglers usually are charged with the more serious crime of Conducting a Criminal Enterprise. See MCL 750.159g(a), which allows, as the first predicate crime listed, felony violations of the Tobacco Products Tax Act to be the predicate offense for the 20 year Conducting a Criminal Enterprise.

Last, defendant's claim he would not be a position to know he needed a license for the activity at issue because he was a mere employee. Ignorance of the law does not excuse violation of the same. *People v Longwell*, 120 Mich 311, 317 (1899). Furthermore, the Court of Appeals majority here also relied on the *Shouman* panel's analysis in determining intent. "Even though *Shouman*, as an unpublished case, is not binding on this court, the *Shouman* panel's thorough analysis of this issue and sound reasoning is persuasive. MCR 7.215(C)(1). Thus, the circuit court's determination that the district court applied an appropriate intent standard to MCL 205.428(3) was not an error of law." *Davis,* slip op,p 5 (Attached A).

In *People v Shouman*, the court found that the prosecution was only required to prove that the defendant knew what he possessed, not that he specifically violated the TPTA:

> There is no support in *Nasir* or other case law for defendant's contention below that the prosecutor had to prove that defendant knew he was required to have a license and that he specifically intended to violate the TPTA. Rather, as discussed above, the *mens rea* element required by *Nasir* is that the defendant had knowledge that the stamp was counterfeit. *Nasir*, 255 Mich App at 45–46. That is, the defendant was required to have knowledge of what it was that he possessed. [*Id.* at 5.]

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Likewise, in this matter, defendant did not have to know he needed a tobacco license from Treasury for a violation to occur. He need only have known that he transported cigarettes—in this case, over 672,000 cigarettes.

II. The Court of Appeals did not in affirming the circuit court decision to deny defendant's motion to quash by applying established TPTA law regarding the elements of this offense.

This Court should deny leave as the Court of Appeals properly ruled regarding the necessary proofs of *mens rea*—knowledge that he was transporting cigarettes – but not that the prosecution was required to prove that he was violating the law. The Court of Appeals has previously ruled on this same issue, in an unpublished decision, *People v Shouman*. Moreover, the decision to bind-over was supported by the evidence.

A. The proper elements for this offense were established in *People v Shouman* and the district and circuit court properly applied them.

The Court of Appeals also properly ruled in the matter consistent with its published decision in *People v Nasir,* 255 Mich App 38 (2003).

MCL 205.428(3) provides the general basis for the charge:

> A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes … is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

There are no standard jury instructions for a violation of MCL 205.428(3); MCL 205.423. The following elements integrate the provisions cited above to form a

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basis for a criminal charge. These elements were recently upheld in *People v Shouman* (2016 WL 5853301) (unpublished) (Attached B):

1. Defendant knowingly transported cigarettes.
2. Defendant did not have a license/or permit to transport tobacco issued by the Michigan Department of Treasury
3. The Defendant transported 3,000 or more cigarettes.

While *Shouman* is an unpublished case, and thus is not binding authority, it was persuasive to the trial court and the Court of Appeals here. The exact arguments the defendant raises here were raised in that matter. Thus, these same arguments were dismissed by both the *Shouman* and *Davis* courts. Furthermore, like in *Shouman*, the People in this case are seeking a general intent element by proposing "*knowingly* transport cigarettes" as the first element for the instructions.

Here, also like in *Shouman*, it should be noted that the *Nasir* case is inapplicable. Nasir was charged under MCL 205.428(6), which requires a mandatory prison term. The *Nasir* court was concerned about sending someone to prison for 1 to 10 years with no *mens rea*. In this matter, charges under MCL 205.428(3) do not require any incarceration and are on the G grid of the sentencing guidelines. Defendants relies on *People v Nasir* to support his additional *mens rea* element, but his reliance is misplaced. *Nasir* does not support this requested element and does not control the outcome here.

As an initial point, *Nasir*, which is the only published case on any TPTA criminal violation elements, addressed a different statutory subsection. It dealt specifically with a violation of MCL 205.428(6), which criminalizes possessing a

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counterfeit tax stamp, and not MCL 205.428(3), which is at issue here. And *Nasir* did not impose a requirement that the defendant know he is violating the statute, as defendant requests; it simply required that the defendant know that what he possessed was counterfeit.

The *Nasir* court held that the elements of that TPTA offense are as follows:

> (1) defendant possessed or used,
>
> (2) a counterfeit stamp, or a writing, or device intended to replicate a stamp,
>
> (3) that the defendant possessed or used the counterfeit tax stamp, or writing or device intended to replicate a stamp, *with knowledge that the stamp, writing or device was not an authentic stamp*, and
>
> (4) that the defendant acted without authorization of the Michigan Department of Treasury. [*Nasir*, 255 Mich App at 46 (emphasis added).]

The knowledge the *Nasir* court required is knowledge of what one possesses and transports, not the legal ramifications of such possession or transportation. *Nasir*'s holding is thus consistent with and supports the People's proposed elements here.

Indeed, the Court of Appeals acknowledged in *Nasir* that the TPTA criminal provisions do not include a fault element and appear to be strict-liability on their face, and it rejected a nearly identical version of defendant's argument—i.e., that the defendant must know he is violating the statute. *Nasir*, 255 Mich App at 41. The *Nasir* court specifically concluded that the Legislature did not intend a specific intent element *nor "that a defendant need act with knowledge that the defendant does so without the authorization of the Michigan Department of Treasury*." *Id.* at 46 (emphasis added).

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The offense at issue in *Nasir* is also distinguishable from defendant's offense. Subsection (6) at issue in *Nasir*, governing possession of a counterfeit tax stamp, is more likely to target "a broad range of apparently innocent conduct." *Nasir*, 255 Mich App at 44. Subsection (6) deals with counterfeit stamps, the purpose of which is to deceive, which makes it likely that an innocent person may not know he or she is in possession of a counterfeit stamp. As an example of its concern, the *Nasir* court reasoned that "a strict reading of the statute would render criminal the possession by a retail customer of a pack of cigarettes bearing a counterfeit tax stamp." *Id*.

Moreover, unlike the counterfeit-stamp offense at issue in *Nasir*, MCL 205.428(3) does not require imprisonment "for not less than 1 year," nor does it carry the possibility of a 10-year term of imprisonment, instead maxing out at 5 years. To hold that MCL 205.428(3) requires the state of mind element that Davis requests would contradict the words of the statute, would unduly expand *Nasir*, and would in effect give every tobacco smuggler one "get out of jail free" card. The State could seldom show beyond a reasonable doubt a person's knowledge of the law before that person got caught the first time.

Therefore, the People placed a knowledge requirement in the possession element, consistent with *Nasir* and many other criminal laws.[1] See *Nasir,* 255 Mich App at 45–46. For instance, the standard jury instruction for Unlawful Possession

[1] The People note that the default *mens rea* statute, MCL 8.9, does not apply to this matter, as this offense occurred prior to January 2016.

of Control Substance with Intent to Deliver, M Crim JI 12.3, places the knowledge requirement in the first element of knowingly possessing a controlled substance. It is notable that the defendant does not need to know whether he can possess that substance legally. The same applies for the instruction for Possession of Firearm at Time or Commission or Attempted Commission of a Felony, M Crim JI 11.34, which places the knowledge requirement in the element of knowingly possessed a firearm. It too does not require the defendant to know that it was illegal for him to possess a firearm. Lastly, the standard instruction for Possession of Fraudulent, or Altered Financial Transaction Device, M. Crim JI 30.4, also places the knowledge requirement in the possession of the device. There is no element that defendant knew it was illegal to possess such a device. This list is not meant to be exhaustive, but to show that in many other areas of criminal law one needs to know what he possesses, but not the legality of it. Indeed, the general principle in criminal law is that ignorance of the law is no defense. *People v Munn*, 198 Mich App 726 (1993), citing *People v Turmen*, 417 Mich 638 (1983); 4 Blackstone, Commentaries p. 27.

Furthermore, the Court of Appeals properly determined that the circuit court did not abuse its discretion in denying defendant's motion to quash. Defendant alleges the district court and circuit court erred by not giving effect to "contrary to the act" in the charging statute. He is wrong. The "contrary to the act" is the failure to have the license. Davis knowingly possessed tobacco "contrary to the act" (i.e. without a transporter's license) and transported over 3000 cigarettes. The Information states:

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COUNT 1: TOBACCO PRODUCTS TAX ACT VIOLATIONS-FELONY

> 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).

As the Court can see in the charging language, the People charged the "contrary to the act" as "without obtaining/possessing a Michigan tobacco license as required by MCL 205.423." The People specifically listed which provision of the TPTA the defendant's possession and transportation violated.

Defendant's focus on "contrary to the act" is really an attempt to add a specific intent element into the act. *Nasir, Shouman,* and the Court of Appeals panel here correctly rejected the argument that there is a specific intent in the TPTA felony provisions. The district court followed the opinions in both *Nasir* and *Shouman* giving greater weight to *Shouman* as Shouman was charged for the identical act (transporting without a license) under the same statute MCL 205.428(3).

Therefore, even though *Shouman* was unpublished, it was the only case on the subject, and was unanimously decided by the Court of Appeals just months before. The district court and circuit court's reliance on *Shouman* was reasonable and appropriate and not an abuse of discretion. Neither lower court made an error of law.

B. The People met their burden of probable cause to each and every element of the charge.

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As it relates to John Davis' bind-over, the People presented evidence to establish probable cause as to each element. For the first element, a totality of the circumstances approach should be used.

First, he stated he was transporting "supplies." He opened the trailer for the Trooper and stated, "[t]here you go boss," as if to say: "you got me." The Trooper then says to him, "you knew that was in there." Davis replies, "I have a job to do," i.e. he has to transport the cigarettes for his employer.

Second, he only had cigarettes in the trailer, 56 containers of 12,000 cigarettes. Each container was in plain view when the trailer was opened. In other words, he was driving 672,000 cigarettes 82 miles between Baraga to Marquette. It is unreasonable to assume he did not know what he was hauling. This is especially true following Davis' argument that he was just doing his low-level job. It is unbelievable that an employee charged with delivering 672,000 cigarettes (and only cigarettes) did not know what he was transporting. This was not one or two packs of cigarettes, it was a truck load.

In controlled substances cases, intent to deliver may be proved by circumstantial evidence, such as, the large amount of controlled substance possessed. See *People v Wolfe*, 440 Mich 508 (1992). In possession of stolen items cases, the courts have allowed knowledge to be inferred based on such things as sole possession, or a tampered ignition. See *People v Tantenella*, 212 Mich 614 (1920), overruled on other grounds by *Echelon Homes LLC, v Carter Lumber Co*, 472 Mich 192 (2005); *People v Biondo*, 89 Mich App 96 (1979); *People v MacCullough,* 281

Mich 15 (1937). In this matter, the lower courts were proper to circumstantially infer defendant's knowledge of the cigarettes by his words, actions, and the number of cigarettes involved.

The defendant did not have tobacco license and the number of cigarettes was well over the 3,000 threshold for a felony. Bind-over was proper.

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CONCLUSION AND RELIEF REQUESTED

Accordingly, the People ask this Court to deny defendant's application for leave to appeal and allow this matter to proceed to trial.

Respectfully submitted,

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Dated: May 21, 2019

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Attachment A

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2016 WL 5853301
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Ali Riad SHOUMAN, Defendant–Appellant.

Docket No. 330383.
|
Oct. 4, 2016.

Wayne Circuit Court; LC No. 15–005989–FH.

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

Opinion

PER CURIAM.

*1 Defendant appeals by interlocutory leave granted[1] an order adopting the prosecutor's proposed jury instruction regarding the elements of the felony offense of possessing, acquiring, transporting, or offering for sale tobacco products other than cigarettes with an aggregate wholesale price of $250 or more without having a license, MCL 205.428(3). We affirm.

MCL 205.423(1), which is a provision of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq.*, provides:

> Beginning May 1, 1994, a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so. A license granted under this act is not assignable.

Defendant is charged with violating MCL 205.428(3), which states:

> A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes, tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more, 3,000 or more counterfeit cigarettes, 3,000 or more counterfeit cigarette papers, 3,000 or more gray market cigarettes, or 3,000 or more gray market cigarette papers is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

It is alleged that defendant possessed, acquired, offered for sale, or transported tobacco products other than cigarettes with an aggregate wholesale price of $250 or more without a license.

Defendant argues that the trial court erred in concluding that MCL 205.428(3) is a strict liability offense without a *mens rea* or fault requirement that must be included in the jury instruction. The premise of defendant's argument is faulty because the trial court's instruction *does* require proof of some knowledge on the part of defendant. In particular, the instruction requires proof that defendant *knowingly* possessed, acquired, offered for sale, or transported tobacco products other than cigarettes. As explained below, we conclude that proof of any additional knowledge or intent is not required.

Questions of law pertaining to jury instructions are reviewed de novo. *People v. Gillis,* 474 Mich. 105, 113; 712 NW2d 419 (2006). A trial court's determination whether a jury instruction applies to the facts of a case is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v. Armstrong,* 305

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Mich.App 230, 239; 851 NW2d 856 (2014). "Determining the elements of a crime is also a question of law that we review de novo ." *People v. Pace,* 311 Mich.App 1, 4; 874 NW2d 164 (2015). In *People v. Phillips,* 469 Mich. 390, 395; 666 NW2d 657 (2003), our Supreme Court set forth the following principles of statutory interpretation:

> When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. To do so, we begin by examining the language of the statute. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and the statute is enforced as written. Stated differently, a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [Quotation marks and citations omitted.]

***2** There is no case law stating the elements of the offense specified in MCL 205.428(3). The parties discuss at length this Court's opinion in *People v. Nasir,* 255 Mich.App 38; 662 NW2d 29 (2003). In *Nasir,* this Court addressed the elements of MCL 205.428(6), another criminal offense contained in the TPTA, which provides:

> A person who manufactures, possesses, or uses a stamp or manufactures, possesses, or uses a counterfeit stamp or writing or device intended to replicate a stamp without authorization of the department, a licensee who purchases or obtains a stamp from any person other than the department, or who falsifies a manufacturer's label on cigarettes, counterfeit cigarettes, gray market cigarette papers, or counterfeit cigarette papers is guilty of a felony and shall be punished by imprisonment for not less than 1 year or more than 10 years and may be punished by a fine of not more than $50,000 .00.

The defendant in *Nasir* was convicted of possessing or using counterfeit tax stamps in violation of MCL 205.428(6). *Nasir,* 255 Mich.App at 39. The trial court concluded that the statute created a strict liability offense and instructed the jury that the prosecutor had to prove that the defendant possessed or used a counterfeit stamp without the Department of Treasury's authorization. *Id.* at 40. On appeal, this Court noted that MCL 205.428(6) does not contain a fault element. *Id.* at 41. This Court considered several factors in ascertaining whether the Legislature nonetheless intended to require some fault as a predicate to finding guilt. *Id.* at 41–45. MCL 205.428(6) did not codify a common-law crime but was "at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded." *Id.* at 42. Nor did the statute create a public welfare offense which may impose criminal penalties irrespective of intent; instead, MCL 205.428(6) is a revenue provision that was "not designed to place the burden of protecting the public welfare on an 'otherwise innocent' person who is in a position to prevent an injury to the public welfare with no more care than society might reasonably expect." *Id.* at 42–43 (quotation marks, ellipsis, and citations omitted). Further, the punishment provided was severe given that the violation of MCL 205.428(6) is a felony punishable by imprisonment for up to 10 years, with a mandatory prison term of at least one year, and a fine of up to $50,000; such punishment is not typical of public welfare offenses. *Id.* at 43–44. The damage to one's reputation arising from such punishment suggested that some level of fault is required. *Id.* at 44. Failure to include a *mens rea* element could criminalize a broad range of apparently innocent conduct, such as by rendering criminal a retail consumer's possession of a pack of cigarettes bearing a counterfeit tax stamp. *Id.* The possible loss of potential tax revenue was not the type of immediate harm to the public welfare that is common to strict liability offenses. *Id.* at

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45. Prosecutors would not face an oppressive burden from the inclusion of a fault element because the difficulty in proving an actor's state of mind is addressed by the rule that minimal circumstantial evidence will suffice to prove state of mind. *Id.*

> ***3** Accordingly, we hold that knowledge is an element of the offense of which defendant stands convicted. Therefore, in order to establish that a defendant is guilty of possessing or using counterfeit tax stamps, the prosecution must prove that (1) the defendant possessed or used (2) a counterfeit stamp, or a writing or device intended to replicate a stamp, (3) that the defendant possessed or used the counterfeit tax stamp, or a writing or device intended to replicate a stamp, with knowledge that the stamp, writing, or device was not an authentic tax stamp, and (4) that the defendant acted without authorization of the Michigan Department of Treasury. We do not believe that the Legislature intended that the offense contain a specific intent element, nor do we believe that a defendant need act with knowledge that the defendant does so without the authorization of the Michigan Department of Treasury. We also conclude that any potential due process problem is remedied by the inclusion of the above fault element in the prima facie case. [*Id.* at 45–46.]

The *Nasir* Court therefore reversed the defendant's conviction because the jury was not instructed on the element of *mens rea* required for the offense. *Id.* at 46–47.

It is unnecessary in this case to determine whether the offense set forth in MCL 205.428(3) constitutes a true strict liability crime, i.e., a crime that requires no mental element but only the prohibited act. See *People v. Quinn,* 440 Mich. 178, 188; 487 NW2d 194 (1992). The prosecutor has agreed to require proof of knowledge concerning defendant's possession of the tobacco products, and the trial court has adopted that knowledge requirement in its instructions. "[W]here a statute requires a criminal mind for some but not all of its elements, it is not one of strict liability." *Id.* at 187. In *Quinn,* our Supreme Court considered whether transportation or possession of a loaded firearm other than a pistol in or upon a vehicle, MCL 750.227c, required proof of the defendant's knowledge that the firearm was loaded. *Quinn,* 440 Mich. at 180. The Supreme Court noted:

> The prosecutor does not contest that the statute requires proof of knowledge of the presence of the firearm in the vehicle. We assume arguendo that proof of knowledge of the presence of the firearm is an element of the offense in question, recognizing that the question has not been decided by this Court or the Court of Appeals. [*Id.* at 180 n 1.]

Our Supreme Court further explained that "[i]n light of the prosecutor's concession, we do not deal with the more controversial issues involved in true strict liability crimes, i.e., statutes requiring no mens rea at all." *Id.* at 184 n 8. Likewise, here, because the prosecutor has agreed to an instruction requiring the jury to find that defendant *knowingly* possessed the tobacco products in order to convict him, this Court need not address whether the offense in MCL 205.428(3) constitutes a true strict liability crime for which no proof of *mens rea* is required. [2]

***4** There is, nonetheless, useful analysis in *Quinn* and other cases concerning both strict liability crimes and the requirement of proving a defendant's intent or knowledge. The Court noted in *Quinn* that true strict liability crimes are proper under some circumstances and that "[t]he Legislature may impose certain penalties regardless of the actor's criminal intent and regardless of what the actor actually knew or did not know." *Id.* at 188. The *Quinn* Court noted that "the prosecution need not prove as an element of the offense of carrying a concealed weapon, MCL 750.227, that the defendant knew his permit was expired[.]" *Id.* at 189, citing *People v. Combs,*

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160 Mich.App 666, 673; 408 NW2d 420 (1987). In some situations, requiring proof of knowledge would frustrate a statute's regulatory purpose. *Quinn,* 440 Mich. at 189. "[I]t is clear under both federal and state authority that the Legislature, as part of its police powers, may define an act to make it criminal without defining the actor's knowledge as an element of the offense." *Id.* at 189–190. In *Quinn,* the Supreme Court concluded that knowledge of the firearm being loaded is not an element of MCL 750.227c. *Id.* at 197.

> Section 227c promotes justice and effects the objects of the law by imposing on those who transport firearms in their vehicles the duty to ensure that those firearms are unloaded.... The person who transports a firearm must inspect it before transporting it. [*Id.* at 197–198 (quotation marks, ellipsis, and citation omitted).]

In *People v. Motor City Hosp. & Surgical Supply, Inc.,* 227 Mich.App 209, 210; 575 NW2d 95 (1997), this Court held that MCL 400.604, a provision of the Medicaid False Claims Act (MFCA), and MCL 752.1004, a provision of the Health Care False Claims Act (HCFCA), both of which criminalize the receipt of a referral fee, did not include a "knowledge or corrupt intent" element. The plain language of the statutory offenses did not include such an element. *Id.* at 212. Because the offenses did not codify a common law crime, this Court evaluated whether the Legislature intended scienter as an element of the offense and concluded that the Legislature did not intend to include a corrupt intent element. *Id.* This Court noted that other sections of the MFCA and the HCFCA included a knowledge element, thus evincing a legislative intent not to include a corrupt intent element in the offenses at issue. *Id.* at 213–214. "When construing a statute, this Court may not assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then on the basis of that assumption, apply what is not there." *Id.* at 213 (quotation marks and citation omitted).

> The absence of a corrupt intent element in the instant offenses also furthers the underlying purposes of the MFCA and HCFCA by criminalizing conduct that fosters false claims. By their plain terms, MCL 400.604 and MCL 752.1004 criminalize the receipt of referral fees. The blanket prohibitions make those who engage in the business of providing goods and services responsible for ensuring that no referral fees are paid because they are in the best position to do so. Accordingly, the Legislature did not intend a corrupt intent element in these offenses. [*Id.* at 214.]

***5** This Court further explained that the offenses at issue were ones of general rather than specific intent, i.e., "[t]he requisite intent is the intent to do the prohibited physical act, i.e.[,] to receive a referral fee." *Id.* at 215.

See also *People v. Roby,* 52 Mich. 577, 579; 18 NW 365 (1884) ("Many statutes which are in the nature of police regulations ... impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible ."); *Pace,* 311 Mich.App at 6–7 (strict liability offenses are disfavored, but the Legislature has authority to enact such offenses, and whether it intended to do so is a matter of statutory interpretation); *People v. Ramsdell,* 230 Mich.App 386, 392–399; 585 NW2d 1 (1998) (concluding that the crime of prisoner in possession of contraband, MCL 800.281(4), was a strict liability crime because the Legislature did not include a knowledge or intent element in the statute, and particularly given that another statute proscribing the possession of controlled substances included language setting forth a knowledge or intent requirement).

In the present case, defendant has failed to establish that an intent or knowledge element in addition to that set forth in the trial court's instruction is required. Again, the trial court's instruction *already* requires that defendant *knowingly* possessed, acquired, offered for sale,

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or transported tobacco products other than cigarettes. In the trial court, defendant offered a proposed instruction that would have required proof that defendant knew he was required to have a license in order to transport tobacco products and that he specifically intended to violate the TPTA. On appeal, defendant appears to have abandoned the request to include those elements in the jury instruction. And those elements are not included in his proposed instruction in his appellate brief, which defendant acknowledges differs from his proposed instruction below. Defendant has failed to adequately present an appellate argument in support of his proposed instructions filed below; consequently, he has abandoned any claim that he is entitled to the elements set forth in those proposed instructions. See *People v. Kelly,* 231 Mich.App 627, 640641; 588 NW2d 480 (1998).

Moreover, there is no support in *Nasir* or other case law for defendant's contention below that the prosecutor had to prove that defendant knew he was required to have a license and that he specifically intended to violate the TPTA. Rather, as discussed above, the *mens rea* element required by *Nasir* is that the defendant had knowledge that the stamp was counterfeit. *Nasir,* 255 Mich.App at 45–46. That is, the defendant was required to have knowledge of what it was that he possessed, which is consistent with the general intent element requiring that one have the requisite intent to do the prohibited physical act. See *Motor City Hosp.,* 227 Mich.App at 215. Indeed, this Court in *Nasir* explicitly rejected the proposition that the offense in MCL 205.428(6) contained a specific intent element and concluded that the prosecutor did not have to prove that the defendant knew that he lacked the authorization of the Michigan Department of Treasury. *Nasir,* 255 Mich.App at 46. Accordingly, defendant's suggestion below that *Nasir* should be read to require proof in this case that defendant knew he was required to have a license to transport tobacco products and that he specifically intended to violate the TPTA is utterly without any support from the holding in *Nasir,* in addition to lacking any basis in the language of MCL 205.428(3). The trial court's instruction in this case, by requiring proof that defendant *knowingly* possessed tobacco products other than cigarettes, effectuates the notion of general intent discussed earlier and is consistent with the general intent element deemed necessary for the offense at issue in *Nasir.* Defendant has cited no authority requiring a specific intent element in this case and, again, appears to have abandoned on appeal his argument below that such an element is required.

***6** And as discussed later, a transporter of tobacco such as defendant is required by MCL 205.426(7) and (8) to have *in his possession* a transporter license and a permit for the load. Given defendant's statutory responsibility to have the license and permit *in his possession,* he was in a position to know whether he had the requisite license and permit, thereby undercutting defendant's claim that the prosecutor must prove his knowledge regarding the licensure requirement. Cf. *Quinn,* 440 Mich. at 197–198 (knowledge of a firearm being loaded is not an element of MCL 750.227c; the statute imposes on a person who transports a firearm the duty to ensure that the firearm is unloaded and to inspect the firearm before transporting it); *Motor City Hosp.,* 227 Mich.App at 214 (the prohibitions on the receipt of referral fees in the MFCA and HCFCA "make those who engage in the business of providing goods and services responsible for ensuring that no referral fees are paid because they are in the best position to do so. Accordingly, the Legislature did not intend a corrupt intent element in these offenses.").

On appeal, defendant presents a confusing argument concerning a presumption contained in MCL 205.426(6). But that presumption is wholly inapplicable to the issues here. MCL 205.426(6) provides in relevant part:

> If a tobacco product other than cigarettes is found in a place of business or otherwise in the possession of a wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transporter, or retailer without proper markings on the shipping case, box, or container of the tobacco product or if an individual package of cigarettes is found without a stamp affixed as provided under this act or if a tobacco product is found without proper substantiation by invoices or other records as required by this section, the presumption shall be

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> that the tobacco product is kept in violation of this act.

Defendant says that he was arguably a transporter of tobacco products other than cigarettes and concedes that LZ Distribution, LLC (LZ), the entity that defendant claims was his employer,[3] apparently did not obtain a transporter license.[4] Defendant suggests, therefore, that his failure to have proper records or invoices created a rebuttable presumption that the tobacco products were kept in violation of the TPTA. Defendant says that the trial court's instruction is inappropriate because it eliminates his ability to rebut the presumption in MCL 205.426(6).

Defendant fundamentally misunderstands the language of MCL 205.426(6). The statute provides that if a tobacco product lacks proper markings or proper substantiation by invoices or other records, then it is presumed that the tobacco product is kept in violation of the TPTA. Defendant apparently assumes that his lack of licensure equates to a lack of proper substantiation by invoices or other records. Defendant fails to explain how he concludes that the failure to have a license comprises a lack of proper substantiation by records. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kelly,* 231 Mich.App at 640–641. MCL 205.426(1) refers to "records" as including "a written statement containing the name and address of both the seller and the purchaser, the date of delivery, the quantity, the trade name or brand, and the price paid for each tobacco product purchased ." Records also include "a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product...." MCL 205.426(1). There is no indication in the statute that a license itself constitutes a record for the purpose of the presumption in MCL 205.426(6). The statutory reference to substantiation of the purchase or acquisition of each tobacco product indicates that the license itself is not the type of record contemplated in this statutory provision. Even if the presumption applied to the failure to have a license, the presumption does not pertain to the defendant's state of mind. Instead, the presumption that arises is that the tobacco product is being kept in violation of the TPTA. Defendant's confusing argument that the presumption in MCL 205.426(6) is relevant to establishing the proper *mens rea* element for a violation of MCL 205.428(3) is meritless.

*7 Defendant further contends that the trial court's instruction is inappropriate because the requirement of having a transporter license applies to a business rather than a driver or employee of the business. According to defendant, a driver or employee is not in a position to know whether a transporter license is needed. Defendant's argument assumes that he is a mere driver or employee of LZ. The prosecution indicates it will present evidence at trial disputing defendant's claim that he was employed by LZ, and will show that, in fact, defendant had his own business and had recently lost his tobacco license before this particular incident. The case is currently in an interlocutory posture, and this Court need not address or resolve whether defendant was employed by LZ.[5] Regardless of whether defendant was employed by LZ, defendant was required by MCL 205.426(7) and (8) to have in his possession a transporter license and a permit for the load in his possession. Defendant's contention that he lacked a means of determining the licensure status of his purported employer is thus incorrect in light of his statutory responsibility to have the required license and permit in his possession when transporting the tobacco product.

Moreover, MCL 205.423(1) provides that "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so." " 'Transporter' means a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act." MCL 205.422(y). " 'Person' means an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity." MCL 205.422(o). Because a "transporter" includes a "person" who transports a tobacco product from a source outside the state and because a "person" includes an individual, defendant's suggestion that he could not qualify as a "transporter" is inconsistent with the statutory definitions.[6] Further, as discussed, MCL 205.426(7) requires a "transporter" to have the license "in his or her actual possession" while transporting or possessing the tobacco product, and MCL

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205.426(8) likewise requires a "transporter" to have the permit for a specific load "in his or her possession [ ]" while possessing the tobacco product. These statutory provisions thereby further confirm that an individual may be a "transporter" under the TPTA.

In support of his contention that the transporter license requirement applies only to businesses and not individuals, defendant relies on language in the Department of Treasury's license application form that describes a transporter as "[a] business that imports or transports into this state, or transports in this state, cigarettes or other tobacco products obtained from a source located outside this state, or obtained from a person that is not a Michigan tobacco tax licensee." This document is not in the lower court record. A party may not expand the record on appeal. *People v. Nix,* 301 Mich.App 195, 203; 836 NW2d 224 (2013), citing *People v.. Powell,* 235 Mich.App 557, 561 n 4; 599 NW2d 499 (1999). Defendant fails to acknowledge that the license application form is not in the lower court record or to address whether it constitutes a type of document of which this Court may take judicial notice. See MRE 202(a) (permitting a court to take judicial notice of regulations of governmental agencies). It is not this Court's role to undertake on its own a party's argument. *Kelly,* 231 Mich.App at 640–641. In any event, a state agency's interpretation of a statute, although entitled to respectful consideration, is not binding on courts and cannot conflict with the legislative intent expressed in a statute's plain language. *In re Complaint of Rovas Against SBC Mich,* 482 Mich. 90, 103; 754 NW2d 259 (2008). As discussed, the plain language of the TPTA supports the conclusion that an individual may be a "transporter." A governmental agency's statement on a form cannot supersede the statutory text.

***8** We affirm.

All Citations

Not Reported in N.W.2d, 2016 WL 5853301

Footnotes

1 See *People v. Shouman,* unpublished order of the Court of Appeals entered April 7, 2016 (Docket No. 330383).

2 We note, however, that applying the factors discussed in *Nasir* might be more likely to lead to the conclusion that MCL 205.428(3) is a true strict liability crime than in the case of MCL 205.428(6). In particular, the punishment provided for by MCL 205.428(3) is less severe than for MCL 205.428(6). Although MCL 205 .428(3) authorizes imprisonment for up to five years, it does not, unlike MCL 205.428(6), *mandate* imprisonment for at least one year or authorize imprisonment for up to 10 years. Moreover, whereas *Nasir* concluded that the failure to include a *mens rea* requirement in MCL 205.428(6) could criminalize a broad range of apparently innocent conduct such as by rendering criminal a retail consumer's possession of a pack of cigarettes bearing a counterfeit tax stamp, *Nasir,* 255 Mich.App at 44, it is more difficult to envision a likely scenario in which a person would innocently transport tobacco products with a wholesale aggregate price of $250 or more without the required license or permit, particularly in light of the transporter's statutory responsibility to have the requisite license and permit in his or her possession while transporting the tobacco products. See MCL 205.426(7) and (8). In any event, because the prosecutor in this case has agreed to instruct the jury that defendant must have *knowingly* possessed or transported the tobacco products, this Court need not address whether MCL 205.428(3) is a true strict liability crime. See *Quinn,* 440 Mich. at 180 n 1, 184 n 8. Also, we note that the recently enacted default *mens rea* statute, MCL 8.9, does not apply here because the offense was committed before January 1, 2016. See MCL 8.9(1) ("Except as otherwise provided in this section, a person is not guilty of a criminal offense committed *on or after January 1, 2016* unless both of the following apply ....") (emphasis added); 2015 PA 250. In sum, it does not appear that the application of MCL 8.9(1) would require a different outcome.

3 The prosecutor disputes defendant's claim that he was employed by LZ, noting that defendant had his own tobacco business and that his license was revoked before the incident in this case.

4 The prosecutor disputes defendant's claim that he was employed by LZ, noting that defendant had his own tobacco business and that his license was revoked before the incident in this case.

5 The prosecutor argues that LZ lacked a transporter license and that defendant was therefore not transporting under either an independent transporter license of his own or a transporter license of his purported employer, LZ, in violation of MCL 205.423(1). The prosecutor explains that although LZ had a license as an unclassified acquirer of tobacco products other than cigarettes, LZ did *not* have a transporter license or a permit to transport the tobacco from Ohio to Michigan. See

MCL 205.423(2) (stating, in relevant part, that "[i]f a person acts in more than 1 capacity at any 1 place of business, a license shall be procured *for each capacity.*") (emphasis added).

6 Defendant at one point of his appellate brief concedes that he "arguably was a transporter of other tobacco products." And defendant also acknowledges that a driver could be charged and convicted of violating the TPTA. These concessions are inconsistent with defendant's suggestion that only a business could qualify as a transporter.

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Attachment B

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2019 WL 453891
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
John Francis DAVIS, Defendant-Appellant.
People of the State of Michigan, Plaintiff-Appellee,
v.
Gerald Magnant, Defendant-Appellant.

No. 341621, No. 341627
|
February 5, 2019

Ingham Circuit Court, LC Nos. 17-000406-FH, 17-000407-FH

Before: Swartzle, P.J., and Sawyer and Ronayne Krause, JJ.

Opinion

Per Curiam.

*1 Defendants appeal two orders, one denying their joint motion to quash the information and one denying their joint motion to dismiss the case for a due process violation. Defendants had been bound over on charges of transporting over 3,000 cigarettes without a license to transport them, contrary to the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq.*, and more particularly MCL 205.428(3). In denying defendants' motions to dismiss, the circuit court concluded that under *People v. Shouman*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2016 (Docket No. 330383), the statute provided adequate notice that individuals can be transporters in violation of the statute. In denying the motion to quash, the circuit court concluded that there was evidence of at least constructive possession and evidence of knowledge that the truck defendants were driving had illegal cigarettes. Defendants filed an interlocutory appeal, we granted leave, and the cases were consolidated for administrative efficiency. [1] We now affirm.

I. BACKGROUND

Defendants were nonsupervisory employees of the Keweenaw Bay Indian Community (KBIC). On December 11, 2015, defendant John Francis Davis was driving a KBIC truck pulling a trailer and defendant Gerald Magnant was a passenger. A Michigan State Police officer pulled the truck over for speeding. During the stop—which did not occur on KBIC property—56 cases of "Seneca" cigarettes were found in the trailer. The cigarettes bore a KBIC stamp but no Michigan Department of Treasury tax stamp. The parties stipulated that there was no record of any tobacco license or transport license for the KBIC, its affiliates, or defendants. Defendant Magnant allegedly admitted that he had helped load the trailer, but there was no indication that either defendant was actually aware that a license was needed to transport the tobacco products under state law.

II. ANALYSIS

A. Motion to Quash

On appeal, defendants first argue that the circuit court erred by denying their motion to quash the information, asserting that the statute required not only that they have knowledge that they were transporting cigarettes but also knowledge that it was illegal to transport the tobacco products without a license. They asserted that such knowledge was lacking, and defendant Davis also asserted that, in any event, there was no evidence establishing probable cause to believe that he knew he was transporting cigarettes.

"This Court reviews a trial court's decision on a motion to quash the information for an abuse of discretion." *People v. Miller*, 288 Mich. App. 207, 209, 795 N.W.2d 156 (2010). The trial court abuses its discretion where its decision falls "outside the range of principled outcomes." *People v. Shami*, 501 Mich. 243, 251, 912 N.W.2d 526 (2018). We review de novo questions of law. *People v. McKerchie*, 311 Mich. App. 465, 471, 875 N.W.2d 749 (2015).

*2 In all felony cases, the district court has a duty "to determine whether a crime has been committed and if there is probable cause to believe that the defendant

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committed it." *People v. Laws*, 218 Mich. App. 447, 451-452, 554 N.W.2d 586 (1996) (cleaned up). "To bind a criminal defendant over for trial in the circuit court, the district court must find probable cause to believe that the defendant committed a felony." *Shami*, 501 Mich. at 250, 912 N.W.2d 526. Probable cause "requires sufficient evidence of each element of the crime charged, or from which the elements may be inferred, to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt." *Id.* at 250-251, 912 N.W.2d 526 (cleaned up).

Intent to Violate MCL 205.428(3). Defendants first argue that, because there was no evidence presented that defendants knew they were required to have a license to transport tobacco products, the district court could not have found probable cause to bind them over on a charge under MCL 205.428(3). We disagree.

The district court found that there was probable cause to believe that defendants violated MCL 205.428(3) of the TPTA, which provides in pertinent part that a "person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes, tobacco products other than cigarettes with an aggregate wholesale price of $ 250.00 or more, 3,000 or more counterfeit cigarettes ... is guilty of a felony." The purpose of the TPTA is to "regulate and license manufacturers of tobacco products, as well as provide penalties for violations of the act." *Shami*, 501 Mich. at 251-252, 912 N.W.2d 526. The Act provides that a "person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so." MCL 205.423(1). Thus, a person possessing a tobacco product as a transporter must be licensed under the Act, and if that person transports a certain value or quantity of tobacco product without a license, then the person is guilty of a felony. *Id.*; see also *Shami*, 501 Mich. at 247, 251-252, 912 N.W.2d 526 (addressing who is a "manufacturer" under the TPTA).

Relying on *Shouman*, the circuit court found that the prosecutor was required to prove "[t]hat defendants knowingly transported cigarettes, that defendants did not have a Michigan Department of Treasury license or permit to transport tobacco, and that defendants transported 3,000 or more cigarettes." Defendants argue that, in addition to having knowledge that they were transporting cigarettes, the statute requires that they "must have knowingly possessed or transported cigarettes 'contrary to this act' or with knowledge that they were required to obtain a transporter license but did not do so."

"Criminal intent can be one of two types: the intent to do the illegal act alone (general criminal intent) or an act done with some intent beyond the doing of the act itself (specific criminal intent)." *People v. Janes*, 302 Mich. App. 34, 41, 836 N.W.2d 883 (2013) (cleaned up). Here, MCL 205.428(3) does not specify an intent requirement. Still, "the omission of any mention of criminal intent must not be construed as eliminating the element from the crime," and, therefore, we must "infer the presence of the element unless a statute contains an express or implied indication that the legislative body wanted to dispense with it." *Id.* at 43, 836 N.W.2d 883 (cleaned up). [2]

***3** Defendants argue that *People v. Nasir*, 255 Mich. App. 38, 662 N.W.2d 29 (2003), supports their proposition that the intent requirement should have been that "defendants knowingly possessed or transported cigarettes '*contrary to this act*,' i.e., with knowledge that they were required to obtain a transporter license but did not do so" (emphasis added). In *Nasir*, this Court analyzed a different subsection of the TPTA, MCL 205.428(6), which does not contain an explicit fault element, to determine whether the statute provided for strict liability, that is, no requirement to prove intent. *Id.* at 40-41, 662 N.W.2d 29. MCL 205.428(6) provides in pertinent part:

> A person who manufactures, possesses, or uses a stamp or manufactures, possesses, or uses a counterfeit stamp or writing or device intended to replicate a stamp without authorization of the department, a licensee who purchases or obtains a stamp from any person other than the department, or who falsifies a manufacturer's label on cigarettes, counterfeit cigarettes, gray market

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> cigarette papers, or counterfeit cigarette papers is guilty of a felony.

The *Nasir* Court weighed several factors to determine "whether the Legislature ... intended to require some fault as a predicate to finding guilt." *Nasir*, 255 Mich. App. at 41, 662 N.W.2d 29. The *Nasir* Court held that "knowledge is an element of the offense of which defendant stands convicted." *Id.* at 45, 662 N.W.2d 29. Specifically, the *Nasir* Court concluded that, to convict under MCL 205.428(6), the prosecutor had to demonstrate that "the defendant possessed or used the counterfeit tax stamp, or a writing or device intended to replicate a stamp, with knowledge that the stamp, writing, or device was not an authentic tax stamp." *Id.* at 45-46, 662 N.W.2d 29.

Defendants argue that, following *Nasir*, the intent element that should have been read into the language of MCL 205.428(3) is a knowing possession of 3,000 or more cigarettes, knowing that the possession was "contrary to" the TPTA. In other words, defendants argue that the statute requires that they have knowledge that a license was required to transport the cigarettes legally. Again, the statute states, "A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes ... is guilty of a felony." MCL 205.428(3). Thus, the question is whether the intent of "knowingly," which is not expressly in the act, applies to just the "possession of cigarettes," or to both "the possession of cigarettes" and "contrary to the act."

Notably, in interpreting MCL 205.428(6), the *Nasir* Court concluded, "We do not believe that the Legislature intended that the offense contain a specific intent element, nor do we believe that a defendant need act with knowledge that the defendant does so without the authorization of the Michigan Department of Treasury." *Nasir*, 255 Mich. App. at 46, 662 N.W.2d 29. Thus, it would be consistent with *Nasir* to interpret MCL 205.428(3) as a general-intent crime requiring only the intent to do the illegal act of transporting the cigarettes without a license, rather than a specific-intent crime requiring the intent to violate the TPTA. Note that *Nasir* requires an intent to do the illegal act alone of possessing or using a counterfeit tax stamp that defendant knew was not authentic, and has as a separate element "that the defendant acted without authorization of the Michigan Department of Treasury." *Id.* This is similar to the circuit court here requiring the prosecutor to demonstrate that defendants knew that they transported cigarettes, and separately that they "did not have a Michigan Department of Treasury license or permit to transport tobacco." Thus, it appears that the phrase, "contrary to the act," included in MCL 205.428(3), describes the unlicensed status of the tobacco transporter, possessor, or manufacturer, rather than the knowledge of the defendants.

***4** This reading is consistent with the conclusion reached by another panel of this Court in *Shouman*. The *Shouman* Court considered the argument that defendants have made here, and concluded:

> Indeed, this Court in *Nasir* explicitly rejected the proposition that the offense in MCL 205.428(6) contained a specific intent element and concluded that the prosecutor did not have to prove that the defendant knew that he lacked the authorization of the Michigan Department of Treasury. *Nasir*, 255 Mich. App. at 46, 662 N.W.2d 29. Accordingly, defendant's suggestion below that *Nasir* should be read to require proof in this case that defendant knew he was required to have a license to transport tobacco products and that he specifically intended to violate the TPTA is utterly without any support from the holding in *Nasir*, in addition to lacking any basis in the language of MCL 205.428(3). [*Shouman*, unpub. op. at 6.]

Even though *Shouman*, as an unpublished case, is not binding on this Court, the *Shouman* panel's thorough analysis of this issue and sound reasoning is persuasive. MCR 7.215(C)(1). Thus, the circuit court's determination that the district court applied an appropriate intent standard to MCL 205.428(3) was not an error of law.

Knowing Transport of Tobacco Products. Defendant Davis argues that the district court erred by finding probable cause to believe that he knew that he was transporting

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cigarettes. The district court found such probable cause because, "taken as a whole, his work assignment, the amount of cigarettes, statements and demeanor viewed on the video indicated [defendant Davis's] knowledge of the cigarettes being transported in the trailer."

At the preliminary examination, Detective Kevin Ryan testified that he witnessed the truck that defendant Davis was driving arrive at a storage area and drive away. Trooper Chris Lajimodiere, who ultimately stopped the truck for speeding, said that defendant Davis told him that he and his passenger, defendant Magnant, were driving to a store in the area and were hauling supplies. According to Trooper Lajimodiere, either defendant Davis or defendant Magnant also told him that they were hauling "chips." At Trooper Lajimodiere's request, defendant Davis unlocked and opened the trailer, exposing numerous cardboard boxes of "Seneca" cigarettes. Trooper Lajimodiere reported that defendant Davis said, "There you go, boss," that he said to defendant Davis, "You knew that stuff was back there," and that defendant Davis replied that he was just a worker and did not pack the trailer. The police seized 56 cases of Seneca cigarettes, each containing 12,000 cigarettes. According to Detective Ryan, while he and another officer were transporting defendant Magnant, defendant Magnant told them that he was involved in loading the cigarettes into the truck and had transported cigarettes for a long time for the KBIC. A videorecording of the traffic stop was entered into evidence.

Defendant Davis argues accurately that, at this stage in the proceedings, the prosecutor has not offered any *direct* evidence that he knew that he was transporting cigarettes. Nonetheless, there was sufficient circumstantial evidence that defendant Davis knew that there were cigarettes in the trailer to bind him over on this charge. Defendant Magnant's statements that he loaded the cigarettes and that his work involved transporting cigarettes for the KBIC were evidence that the truck was being used as a cigarette delivery vehicle at the time it was stopped, and was circumstantial evidence that defendant Davis, as the driver of the truck, was complicit in delivering what his codefendant knew were cigarettes.

***5** The district court also cited the amount of cigarettes found in the trailer. The sheer volume made it less likely that defendant Davis not know what was in the truck. Additionally, defendant Davis admitted to Trooper Lajimodiere that he was working, and it would be reasonable to infer that defendant Davis was as aware of his work assignment as was defendant Magnant. The district court also cited the statements defendant Davis made to police and his demeanor on the videorecording as evidence that defendant Davis knew that there were cigarettes in the trailer. Thus, there was sufficient circumstantial evidence that defendant Davis knew of the cigarettes to present the question to the jury.

The circuit court did not err by denying defendants' motion to quash the bindover.

B. Motion to Dismiss

Defendants next argue that the circuit court erred by denying their motion to dismiss based on their claim that MCR 205.428(3) is unconstitutionally vague. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v. Adams*, 232 Mich. App. 128, 132, 591 N.W.2d 44 (1998). We review de novo constitutional issues of law. *People v. Hall*, 499 Mich. 446, 452, 884 N.W.2d 561 (2016).

"The 'void for vagueness' doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law." *People v. Roberts*, 292 Mich. App. 492, 497, 808 N.W.2d 290 (2011). A statute may be overly vague where "it does not provide fair notice of the conduct proscribed," or is "so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed." *Id.* (cleaned up). "A statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *People v. Noble*, 238 Mich. App. 647, 652, 608 N.W.2d 123 (1999).

Defendants were charged with transporting cigarettes without a license to transport tobacco. As previously stated, MCL 205.428(3) provides in pertinent part that a "person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes, tobacco products other than cigarettes with an aggregate wholesale price of $ 250.00 or more, 3,000 or more counterfeit cigarettes ... is guilty of a felony." MCL 205.423(1) provides, in relevant part, that "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine

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operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so." "Person" is defined by MCL 205.422(o) to include "an individual ... corporation, or other legal entity." Thus, the statutory language of MCL 205.423(1) and MCL 205.428(3) makes clear that an individual possessing 3,000 or more cigarettes for transport, without having a license to do so, is guilty of a felony.

Defendants' vagueness argument focuses not on the language of the relevant statutes, but rather on the interpretation of that language by two Department of Treasury employees. Defendants note that Angela Littlejohn, the manager of the Tobacco Tax Unit, testified that, to transport tobacco products in Michigan, an individual would have to work for a wholesaler or unclassified acquirer with a transporter's license, be a licensed transporter, or be an interstate commerce carrier. Doug Miller, the administrator of special taxes, clarified that, if a Michigan licensed tobacco wholesaler had an employee transport tobacco to another place in Michigan, the employee would not need an individual tobacco transporter license. Essentially defendants argue that, under these employees' interpretations, the statute does not put them on notice of a potential violation because that violation hinges on whether their employer has obtained the license. We disagree.

***6** First, departmental interpretations of statutes, although entitled to respectful consideration, are not binding on this Court. *D'Agostini Land Company LLC v. Dep't of Treasury*, 322 Mich. App. 545, 558, 912 N.W.2d 593 (2018). As already discussed, the plain language of the statute indicates that an individual violates the TPTA by possessing for transport large quantities of tobacco without a license. Second, even if the department's interpretations are credited, the statute makes clear that *someone*—either the individual or the individual's employer—must have a license authorizing the possession for transport of a large quantity of tobacco. Thus, the statute is sufficiently clear to put defendants on notice that, if they did not personally hold individual licenses to possess the tobacco for transport, they should have inquired as to whether their employer—the KBIC—held such a license before accepting the load for transport. The statute is not unconstitutionally vague.

The dissent does raise an interesting point based on this Court's decision in *People v. Assy*, 316 Mich. App. 302, 891 N.W.2d 280 (2016). Ultimately, we conclude that the *Assy* decision is distinguishable from this one. The statute here defines the term "transporter" to include "a person ... transporting in this state, a tobacco product." MCL 205.422(y). The statute further defines the term "person" to include both individuals and legal entities, MCL 205.422(o), and provides that a "person" can be a "transporter," MCL 205.422(y). Therefore, under a plain reading of the statutory language, an individual driver can be subject to prosecution under the TPTA as a "transporter."

The dissent, however, points to this Court's decision in *Assy* and concludes that the Legislature did not intend to include within the definition of "transporter" any low-level employees, such as those who drive the vehicles transporting cigarettes. In *Assy*, this Court concluded that the term "retailer" did not include "a cashier or stocker," but only included "a person who directs or manages the business." The *Assy* Court reached this conclusion based on the statute's requirement that a "retailer" means a person who "operates a place of business" and read the term "operates" to include an element of direction and control, i.e., "someone who has control over the business's day-to-day operations." *Assy*, 316 Mich. App. at 310-311, 891 N.W.2d 280. In contrast, the Legislature defined the term "transporter" to include "a person ... transporting in this state, a tobacco product." The verb "transport" is defined to mean "To carry or convey (a thing) from one place to another." *Black's Law Dictionary* (10th ed.). Contrary to the ordinary meaning of the term "retailer," the ordinary meaning of the term "transport" or "transporter" only requires the physical action of carrying or conveying a thing, in this case, cigarettes. Therefore, this case is distinguishable from *Assy*, in that the ordinary meaning of the term "transporter" reasonably includes the individuals who drive truckloads of cigarettes.

Affirmed.

Ronayne Krause, J. (dissenting)

I respectfully dissent. The majority's recitation of the facts is accurate. However, I conclude that, for several reasons, the district court abused its discretion by binding defendants over for trial. I would therefore reverse the circuit court's orders.

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I. STANDARD OF REVIEW

This Court effectively reviews de novo a circuit court's decision on a motion to quash a bindover. *People v. Harlan*, 258 Mich. App. 137, 144-145, 669 N.W.2d 872 (2003); *People v. Hudson*, 241 Mich. App. 268, 276, 615 N.W.2d 784 (2000). We therefore review the district court's ultimate decision whether to bind over a defendant for an abuse of discretion, but we review any underlying questions of law de novo. *People v. Flick*, 487 Mich. 1, 9, 790 N.W.2d 295 (2010). "Whether conduct falls within the scope of a penal statute is a question of statutory interpretation" and therefore reviewed de novo. *Id.* at 8-9, 790 N.W.2d 295. Review of a bindover decision entails consideration of the entire record. *People v. Norwood*, 303 Mich. App. 466, 468, 843 N.W.2d 775 (2013).

*7 An abuse of discretion occurs where the lower court's decision falls "outside the range of principled outcomes." *People v. Shami*, 501 Mich. 243, 251, 912 N.W.2d 526 (2018). This standard recognizes that there may "be no single correct outcome." *People v. Babcock*, 469 Mich. 247, 269, 666 N.W.2d 231 (2003). However, an abuse of discretion necessarily occurs if a trial court's decision is based on an error of law. *Ronnisch Constr. Group, Inc. v. Lofts on the Nine, LLC*, 499 Mich. 544, 552, 886 N.W.2d 113 (2016). An abuse of discretion also necessarily occurs if the trial court fails or refuses to exercise its discretion. *People v. Merritt*, 396 Mich. 67, 80, 238 N.W.2d 31 (1976).

The fundamental goal of statutory interpretation is to give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written. *Veenstra v. Washtenaw Country Club*, 466 Mich. 155, 159-160, 645 N.W.2d 643 (2002). We may not inquire into the wisdom or fairness of a statute or statutory scheme. *Smith v. Cliffs on the Bay Condo Ass'n*, 463 Mich. 420, 430, 617 N.W.2d 536 (2000), abrogated on other grounds in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006). We may also not depart from the literal language of a statute merely because the result would be absurd. *People v. McIntire*, 461 Mich. 147, 155-159, 599 N.W.2d 102 (1999) (internal quotation omitted). However, where construction of a statute is necessary, any construction should avoid an absurd or unjust result to the extent possible.[1] See *Rafferty v. Markovitz*, 461 Mich. 265, 270, 602 N.W.2d 367 (1999). A statute may be found ambiguous on its face if it is susceptible to multiple interpretations, and a superficially clear statute may become ambiguous when considered in context of other statutes. *People v. Denio*, 454 Mich. 691, 699, 564 N.W.2d 13 (1997).

II. STANDARD FOR BINDOVER

"To bind a criminal defendant over for trial in the circuit court, the district court must find probable cause to believe that the defendant committed a felony, which requires sufficient evidence of each element of the crime charged, or from which the elements may be inferred, to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt." *Shami*, 501 Mich. at 250-251, 912 N.W.2d 526 (footnote citations and internal quotations omitted). The examining magistrate may evaluate the credibility of any witnesses. *People v. Moore*, 180 Mich. App. 301, 309, 446 N.W.2d 834 (1989). However, the prosecutor need not prove guilt beyond a reasonable doubt; rather, any conflicts or doubts must be resolved by the trier of fact. *People v. Yost*, 468 Mich. 122, 126, 659 N.W.2d 604 (2003).

Defendants were charged with violating two provisions of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq.* Specifically, the alleged crime is a violation of MCL 205.428(3), which provides:

> A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes, tobacco products other than cigarettes with an aggregate wholesale price of $ 250.00 or more, 3,000 or more counterfeit cigarettes, 3,000 or more counterfeit cigarette papers, 3,000 or more gray market cigarettes, or 3,000 or more gray market cigarette papers is guilty of a felony, punishable by a fine of not more than $ 50,000.00 or imprisonment for not more than 5 years, or both.

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*8 Defendants allegedly transported cigarettes "contrary to this act" because they lacked licenses mandated by MCL 205.423(1), which provides:

> Beginning May 1, 1994, a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so. A license granted under this act is not assignable.

It is not disputed that the trailer attached to the vehicle contained more than the requisite number of cigarettes, and neither defendants nor their employer, the Keweenaw Bay Indian Community (KBIC), possessed a license. [2] The prosecution agreed to require a *mens rea*, but defendants challenge the scope of the *mens rea* required and whether the above provisions apply to them at all.

III. PURPOSE OF THE TPTA

The necessary starting point is the purpose of the TPTA. The TPTA's preamble provides, in relevant part, that its purpose is:

> to provide for a tax upon the sale and distribution of tobacco products; to regulate and license ... transportation companies, transporters, and retailers of tobacco products; to prescribe the powers and duties of the revenue division and the department of treasury in regard to tobacco products; to provide for the administration, collection, and disposition of the tax; ... to prescribe penalties and provide remedies for the violation of this act[.] [1993 PA 327.]

"Although a preamble is not to be considered authority for construing an act, it is useful for interpreting its purpose and scope." *Malcolm v. City of East Detroit*, 437 Mich. 132, 143, 468 N.W.2d 479 (1991) (citation omitted); see also *Shami*, 501 Mich. at 251-252, 912 N.W.2d 526. The preamble is consistent with MCL 205.427a, which provides, in relevant part, that "[i]t is the intent of this act to impose the tax levied under this act upon the consumer of the tobacco products by requiring the consumer to pay the tax at the specified rate." MCL 205.427a. Thus, the TPTA "is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded." *Value, Inc. v. Dep't of Treasury*, 320 Mich. App. 571, 577, 907 N.W.2d 872 (2017) (internal quotations omitted).

The above discussion is critical, because to the extent there is ambiguity in any particular provision within the TPTA, that ambiguity must be resolved in favor of furthering the purposes of the act. This Court has previously discussed such a situation in the context of a "retailer." This Court observed that a "retailer" was defined as including "a person," and therefore could apply to discrete individuals. *People v. Assy*, 316 Mich. App. 302, 310-311, 891 N.W.2d 280 (2016). However, when read in context, this Court concluded that the definition of a "retailer" was not intended to apply to low-level employees, but rather individuals with some degree of meaningful control over an operation. *Id.* This Court's conclusion is also consistent with the underlying purpose of the TPTA.

*9 In the instant case, the word "transporter" is also defined as including "a person ... transporting in this state, a tobacco product ... " MCL 205.422(y). As was the case in *Assy*, a discrete individual could, under appropriate circumstances, be prosecuted under the TPTA. However, as was also the case in *Assy*, when read in in context, the Legislature clearly intended to constrain "transporters" to a more limited class of individuals.

Notably, *Assy* first considered how the relevant terms would be used "in ordinary speech." *Assy*, 316 Mich. App. at 310, 891 N.W.2d 280. Possession specifically "*as a ... transporter*," MCL 205.423(1) (emphasis added), in ordinary speech, suggests that transportation is a more

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primary function than merely serving as an employee. Additionally, an applicant for a license is required to have "a minimum net worth of $ 25,000.00," MCL 205.423(6)(a), further suggesting that low-level employees are not expected to be licensed. Finally, the Legislature has mandated that "[e]xcept for transportation companies, each place of business shall be separately licensed," and that licenses "shall be prominently displayed on the premises covered by the license." MCL 205.423(2). A "place of business" is "a place where a tobacco product is sold or where a tobacco product is brought or kept for the purpose of sale or consumption, including a vessel, airplane, train, or vending machine." MCL 205.422(p). These provisions strongly imply that licensure is, much like the situation in *Assy*, linked to some degree of meaningful control. [3]

When read in context, MCL 205.428(3) and MCL 205.423(1) indicate that low-level employees are not required to be licensed and are not truly engaging in "transportation" within the meaning of the TPTA. Alternatively, the statutes are ambiguous regarding the class of persons who can be transporters. Construing the statutes as exempting low-level employees would be most consistent with the intent and spirit of the TPTA. Prosecuting ministerial agents like defendants would not further the goal of ensuring tax revenue is properly collected from the ultimate consumers of tobacco products. As a practical matter, [4] the only entity truly acting *as a transporter* is defendants' employer and the registered owner of the vehicle and trailer: KBIC. The purpose of the TPTA would have been served by pursuing charges against KBIC. [5] Pursuing KBIC's low-level employees [6] not only fails to serve the purposes of the TPTA, but amounts to an overreach that makes a mockery of both the Legislature's intent and fundamental justice.

IV. ELEMENTS OF THE CHARGED OFFENSE

A. GENERAL INTENT

***10** Presuming the TPTA permits charging a mere low-level employee under MCL 205.428(3), the next issue is the extent and nature of any *mens rea* requirement. The parties agree that a *mens rea* is required, but dispute the scope of that requirement.

There are few circumstances under which the courts may depart from the literal language of a penal statute. One of those circumstances is inferring that the Legislature intended to include a *mens rea* element without expressly drafting one. See *People v. Quinn*, 440 Mich. 178, 185-195, 487 N.W.2d 194 (1992). The TPTA does not codify a common law crime, so we may consider various factors to determine whether the Legislature intended to include a *mens rea* element, including:

> (1) the statute's legislative history or its title, (2) guidance to interpretation provided by other statutes, (3) the severity of the punishment provided, (4) the severity of potential harm to the public, (5) the opportunity to ascertain the true facts, and (6) the difficulty encountered by prosecuting officials in proving a mental state. [*Id.* at 190, 487 N.W.2d 194 n. 14 (citing LaFave & Scott, Criminal Law (2d ed), § 3.8, pp. 244-245).]

Stipulations of law are not binding on the courts. *In re Finlay Estate*, 430 Mich. 590, 595-596, 424 N.W.2d 272 (1988). Consequently, the parties' agreement that a *mens rea* element exists does not obviate the need for us to make that determination in the first instance. [7]

By default, the courts will presume that a penal statute imposes a general intent requirement unless it is clear that the Legislature intended to omit such a requirement. *People v. Janes*, 302 Mich. App. 34, 45-46, 836 N.W.2d 883 (2013). Public welfare laws are a notable exception. *Quinn*, 440 Mich. at 187, 487 N.W.2d 194; *Janes*, 302 Mich. App. at 46-47, 836 N.W.2d 883. However, as discussed, MCL 205.428(3) is a revenue provision, not a public welfare provision. Indeed, the entirety of the TPTA is intended to counteract a specific form of tax evasion. See *People v. Nasir*, 255 Mich. App. 38, 42-43, 662 N.W.2d 29 (2003) (discussing MCL 205.428(6)). As with the statute at issue in *Nasir*, the immediate harm from a violation of MCL 205.428(3) "is not the type of immediate harm to the public

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welfare that is common to many strict-liability offenses." *Id.* at 45, 662 N.W.2d 29.

The United States Supreme Court has observed that many statutes lacking a *mens rea* requirement carry relatively light penalties, and a harsh penalty suggests that a *mens rea* is required. *Staples v. US*, 511 U.S. 600, 616-619, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). A felony cannot ever be considered a light penalty, irrespective of the length of the ensuing sentence or amount of the ensuing fine. In contrast to a misdemeanor, a felony on one's record will be a potentially catastrophic blight for the rest of one's life, strongly suggesting a *mens rea* element. See *People v. Olson*, 181 Mich. App. 348, 350-353, 448 N.W.2d 845 (1989); see also *People v. Pace*, 311 Mich. App. 1, 12, 874 N.W.2d 164 (2015).

***11** Proving state of mind is always a challenge, but I do not believe doing so would be exceptional here. See *Nasir*, 255 Mich. App. at 45, 662 N.W.2d 29. The prosecution asserts that it is unlikely for ordinary persons to drive around with more than 3,000 cigarettes or $ 250.00 worth of tobacco. See *Id.* at 44-45, 662 N.W.2d 29. I presume the reasonableness of that assertion. Nevertheless, the severity of the penalty, the nature of the crime, and the purpose of the TPTA overwhelmingly show that the Legislature did not intend to dispense with the traditional *mens rea* requirement for felonies. [8]

B. SPECIFIC INTENT

Defendants argue that MCL 205.428(3) carries a specific intent element in addition to a general *mens rea* element. Defendants base their argument on the phrase "contrary to this act" in MCL 205.428(3). Defendants contend that this phrase requires knowledge that the transportation occurred in violation of the TPTA. In other words, defendants argue the statute requires (a) knowledge that they were transporting cigarettes, *and* (b) knowledge that they were doing so without a required license. In contrast, the prosecution argues the statute requires (a) knowledge *only* that they were transporting cigarettes, and (b) factually doing so without a required license. The prosecution's construction is therefore partially strict liability. As the majority accurately summarizes, "the question is whether the intent of 'knowingly,' which is not expressly in the act, applies to just the 'possession of cigarettes' or to both 'the possession of cigarettes' and 'contrary to the act.' "

The distinction between general intent and specific intent is simple in theory, albeit difficult to apply in practice: general intent requires only the intent to do the physical act itself, whereas specific intent requires an additional mental state beyond what is necessary to commit the physical act. *People v. Langworthy*, 416 Mich. 630, 638-639, 639 n. 9, 331 N.W.2d 171 (1982). The common law *mens rea* presumption is only of general intent, based on the general rule that ignorance or a mistake of law is not a defense to a crime. See *Cheek v. US*, 498 U.S. 192, 199-200, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). Nonetheless, especially concerning voluminous and convoluted statutory schemes such as tax laws, statutes might be construed as requiring a defendant to have voluntarily and intentionally violated a known legal duty. *Id.*

As discussed, the TPTA is a revenue statute, not a public welfare law. As also discussed, prosecuting low-level employees who have no meaningful control of the transportation operations is contrary to the fundamental purposes of the TPTA. However, *if* low-level employees can be subjected to felony prosecutions for merely doing their jobs, the above general intent discussion applies with equal force to *all* elements of the crime. In other words, such a prosecution could only be fundamentally fair if defendants actually knew that what they were doing was unlawful. Therefore, defendants must have known both that they were transporting cigarettes, and at least generally that they were doing so in violation of the TPTA. [9]

V. KNOWLEDGE BY DEFENDANT DAVIS

***12** Irrespective of the above, I would find that the district court erred in binding defendant Davis over on the facts.

A knowledge requirement in a statute does not include constructive knowledge, unless the Legislature included a statutory phrase like "should have known." *Echelon Homes, LLC v. Carter Lumber Co.*, 472 Mich. 192, 197-198, 694 N.W.2d 544 (2005). Actual knowledge may always be proven by circumstantial evidence. *Id.* at 198-200, 694 N.W.2d 544. Nevertheless, state of mind

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"may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation." *People v. Plummer*, 229 Mich. App. 293, 301, 581 N.W.2d 753 (1998); see also *People v. Bailey*, 451 Mich. 657, 673-675, 681-682, 549 N.W.2d 325 (1996); and *Skinner v. Square D Co.*, 445 Mich. 153, 163-167, 516 N.W.2d 475 (1994). It is well established that mere suspicion does not establish probable cause to bind over a defendant. See *People v. Fairey*, —— Mich. App. ——, ——; —— N.W.2d —— (2018) (Docket No. 333805, slip op. at pp. 3-4).

Here, there is simply *no* evidence that Davis had any knowledge of the contents of the trailer. The prosecution's assertion that Davis must have known because there were a lot of cigarettes is an impermissible imputation of constructive knowledge. The prosecution also infers that Davis's mention of "chips" must have been a reference to cigarettes, and Davis's invitation to the police to look in the trailer was a concession that he had been caught fair and square. These inferences about what Davis may have meant are pure guesswork. No evidence in the record permits any reasonable inference of knowledge by Davis. Therefore, even under the prosecution's construction of the TPTA, the trial court abused its discretion by binding Davis over for trial.

VI. DUE PROCESS

Defendants finally argue that the statute is unconstitutionally vague. In light of the above discussion, I do not believe I need to reach this issue. However, the majority's reasoning suggests that defendants should somehow be aware that *they* might be committing a crime simply because their *employer* might lack a license. Neither Michigan nor any other jurisdiction recognizes a doctrine of "respondeat inferior" as far as I can determine, and I would not adopt such a complete inversion of well-established agency law here.

VII. CONCLUSION

The district court erred as a matter of law by binding defendants over. The TPTA requires defendants prosecuted under MCL 205.428(3) to have knowledge of each element of the offense. The prosecution overreached and violated the spirit and intent, if not the letter, of the TPTA by seeking to prosecute low-level employees for what is really a wrong committed by their employer. In any event, the district court abused its discretion by finding that Davis knew even that there were cigarettes in the trailer. For any and all of these reasons, I would reverse.

All Citations

Not Reported in N.W. Rptr., 2019 WL 453891

Footnotes

1 *People v. John Francis Davis*, unpublished order of the Court of Appeals, entered July 18, 2018 (Docket No. 341621); *People v. Gerald Magnant*, unpublished order of the Court of Appeals, entered July 18, 2018 (Docket No. 341627).

2 We note that the default *mens rea* statute enacted by our Legislature, MCL 8.9, does not apply here because the offense was committed before January 1, 2016. MCL 8.9(1). With that said, we agree with the panel's observation in *Shouman* that "it does not appear that the application of MCL 8.9(1) would require a different outcome." *Shouman*, unpub. op. at 4 n. 2.

1 It is not entirely clear whether there is a level of absurdity at which the "absurd result rule" may still apply in Michigan. See *Detroit Int'l Bridge Co. v. Commodities Export Co.*, 279 Mich. App. 662, 674-675, 760 N.W.2d 565 (2008). Fortunately, we need not resolve that issue here.

2 There is apparently an ongoing dispute between Michigan, KBIC, and the federal government whether KBIC can be required to obtain a license under the TPTA. That issue is not before us, and I do not believe it would be relevant to this appeal in any event.

3 The majority accurately notes that the definition of "retailer" at issue in *Assy* does not perfectly parallel the definition of "transporter" here. I believe the majority's analysis overlooks the context and clear intent of the TPTA. " '[T]he meaning of statutory language, plain or not, depends on context.' " *People v. Vasquez*, 465 Mich. 83, 89, 631 N.W.2d 711 (2001), quoting *King v. St Vincent's Hosp*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) (MARKMAN, J.). Furthermore, even if this was a "close call," MCL 205.428(3) imposes a criminal penalty, and "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056,

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28 L.Ed.2d 493 (1971); see also *People v. Bergevin*, 406 Mich. 307, 311-312, 279 N.W.2d 528 (1979). "If there is doubt with regard to whether the act charged is embraced in [a statutory] prohibition, that doubt is to be resolved in favor of the defendant." *People v. Sartor*, 235 Mich. App. 614, 623, 599 N.W.2d 532 (1999).

4 Courts look to the substance of matters rather than superficialities. *Hurtford v. Holmes*, 3 Mich. 460, 463 (1855); *Wilcox v. Moore*, 354 Mich. 499, 504, 93 N.W.2d 288 (1958); *Norris v. Lincoln Park Police Officers*, 292 Mich. App. 574, 582, 808 N.W.2d 578 (2011). Furthermore, the prosecutor admitted at oral argument that, as is readily apparent, defendants were mere "mules."

5 This would remain the case even if it is ultimately determined that Michigan cannot subject KBIC to the TPTA.

6 Several jurisdictions have observed that no doctrine of "respondeat inferior" exists. See, e.g., *Coleman v. Houston Independent School Dist.*, 113 F.3d 528, 534-535 (CA 5, 1997); *Davis v. Hoffman*, 972 F.Supp. 308, 314 (ED Penn, 1997); *Speer v. Taira Lynn Marine, Ltd, Inc.*, 116 F.Supp.2d 826, 830 (SD Tex, 2000); *Grubb v. Smith*, 523 S.W.3d 409, 426 (Ky, 2017); *Thede v. Kapsas*, 386 Ill App. 3d 396, 401, 897 N.E.2d 345, 325 Ill.Dec. 97 (2008). Cases from other jurisdictions are merely persuasive. *People v. Stone*, 269 Mich. App. 240, 245, 712 N.W.2d 165 (2005). However, I have found no Michigan authority suggesting that an agent may be held strictly liable for the misconduct of a principal, and I would not create that authority now.

7 The parties and the trial courts placed considerable importance on *People v. Shouman*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2016 (Docket No. 330383), which touched on whether MCL 205.428(3) includes a *mens rea* element. *Shouman* is unpublished and therefore not binding, although it may be considered persuasive. MCR 7.215(C)(1); *Cox v. Hartman*, 322 Mich. App. 292, 307, 911 N.W.2d 219 (2017). Furthermore, to the extent *Shouman* commented on a *mens rea* requirement, it did so after emphasizing that it did not actually need to reach the issue. Consequently, the pertinent discussion in *Shouman* is both non-binding and dicta. If either trial court believed itself bound by *Shouman*, it committed an abuse of discretion per se. *Merritt*, 396 Mich. at 80, 238 N.W.2d 31; *Ronnisch*, 499 Mich. at 552, 886 N.W.2d 113. As will be discussed, I also believe *Shouman* was wrong.

8 The prosecution is therefore incorrect to the extent it asserts that MCL 205.428(3) is really a strict liability offense, to which it has agreed to append a *mens rea* requirement as a matter of grace rather than entitlement. Likewise, to the extent *Shouman* suggests that MCL 205.428(3) should be considered a strict liability offense, *Shouman* was wrong.

9 Defendants concede that they need not have known that they were committing a crime, or the specific details of how they were in violation of the TPTA. Rather, they contend that they need only have a general awareness that some provision of the TPTA was being contravened. This concession reasonably balances fundamental fairness, the purposes of the TPTA, and the need for realistic law enforcement. However, it is not necessary to reach that question in this appeal.

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