

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

09-CR-51-A

v.

CARLO J. NAPPI
a/k/a CARL NAPPI,

Defendant.

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

THE UNITED STATES OF AMERICA, by and through its attorneys, William J. Hochul, Jr., United States Attorney for the Western District of New York, and Charles B. Wydysh, Assistant United States Attorney and Jeffrey A. Cohen, Special Assistant, United States Attorney, ATF Associate Chief Counsel, of Counsel, hereby files its response to Defendant's Motion to Dismiss Counts 1, 2, 3, 4, 5 and 6 of the Indictment, on the grounds that the State tax statute upon which the counts are based failed to provide sufficient notice that the conduct in question was prohibited by law and thus violated the due process clause of the Fifth Amendment of the United States Constitution.

I. INTRODUCTION

On February 19, 2009, an Indictment was returned in the Western District of New York charging the defendant with 13 counts

of violations of Federal Law relating to the trafficking of contraband cigarettes. Count 1 charged the defendant with conspiracy to possess and transport contraband cigarettes in violation of Title 18 U.S.C. §2342(a) and 371. That is, it is alleged that between October of 2002 and April of 2004, the defendant, with others, agreed to ship, transport, possess, sell and distribute contraband cigarettes. Count 1 described the object of the conspiracy was to:

"generate money through the smuggling of contraband cigarettes by avoiding and evading the collection of payment of State of Michigan cigarette excise taxes."

Moreover, overt acts paragraphs 25 through 30 detail defendant's transporting, possessing and distributing of contraband cigarettes on specific occasions between August 11, 2003 and March 31, 2004, to the State of Michigan, bearing no evidence of payment of the State of Michigan cigarette tax.

Counts 2 through 6 charge the defendant with substantive trafficking of contraband cigarette charges on specified time periods between January 12, 2004 and March 30, 2004. Counts 2 through 6 charge the defendant with shipping, transporting, receiving, possessing, selling and distributing contraband cigarettes,

"which bore no evidence of the payment of applicable state cigarette taxes in the State of Michigan ..."

The Indictment also charges the defendant in Counts 7 through 11, with wire fraud, in violation of Title 18 U.S.C. §1343(a). Counts 12 and 13 charged the defendant with engaging in monetary transactions and property derived from specified unlawful activity in violation of Title 18 U.S.C. §1957 and 2. Lastly, Counts 14 and 15 contain forfeiture allegations pursuant to Title 18 U.S.C. §981(a)(1)(C) and Title 28 U.S.C. §2461(c). Count 15 contains a forfeiture allegation pursuant to Title 18 U.S.C. §982, 981(A)(1)(C), Title 18 U.S.C. §2461(c) and Title 21 U.S.C. §853.

On January 14, 2011, the defendant filed a motion to dismiss counts 1 and 6 of the Indictment. This is the government's response.

II. SUMMARY OF ARGUMENT

The Defendant contends that Counts 1 through 6 of the Indictment which charges the unlawful possession and distribution of contraband cigarettes should be dismissed because it would be a violation of the due process clause to prosecute him for the Federal Contraband Cigarette Trafficking Act (CCTA) violations because of confusion regarding the New York State Tobacco Tax Law

and its relation to Native American cigarette distributors. The government contends that this argument fails on several grounds.

II. SUMMARY OF ARGUMENT

The Indictment charges Mr. Nappi with conspiracy to traffic and distribute unstamped (untaxed) cigarettes (which originated in the Western District of New York) in Michigan. Even if there is a deficiency in New York State cigarette tax law which renders the law invalid to transactions involving New York State Native American cigarette distributors, this deficiency would not grant anyone the right to distribute untaxed cigarettes in violation of the CCTA and Michigan law in Michigan.

Additionally, the cigarettes in question were obtained by Mr. Nappi, a non-Native American, and ultimately distributed to non-Native Americans. The Supreme Court has repeatedly and unanimously held that the distribution of cigarettes on or originating on Native American land intended for consumption by Non-Native Americans is subject to full State taxation.

Moreover, the CCTA is a general intent statute involving a pervasively regulated commodity which plainly and explicitly places anyone on notice that the possession of a threshold amount of

unstamped cigarettes, in a State which requires tax stamps on cigarettes, is a violation of Federal law. Thus the knowledge of, or analysis of, specific State tax laws are irrelevant to establishing criminal intent to violate the CCTA and cannot be the basis for an alleged violation of the Due Process Clause. Finally, at the time of the offenses, New York State law clearly held it was illegal for anyone other than a licensed taxing agent to possess unstamped cigarettes. Accordingly, it was clear that defendant's conduct was illegal and charging the defendant with violations of the CCTA does not violate the Due Process Clause.

III. ARGUMENT

A. REGULATORY BACKGROUND

The status of the New York State tobacco tax laws during the time period covered by the Indictment, from October 2002 to April 2004 and their relationship to possible violations of the CCTA was explained by Chief Judge Arcara in United States v. 1,920,000 Cigarettes, 2003 WL 217 30528 (W.D.N.Y. 2003) as follows:

Under the CCTA, the term contraband cigarettes means 'a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a [tax] stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes.' See 18 U.S.C. § 2341(2). The CCTA makes it "unlawful for

any person knowingly to ship, transport,] receive, possess, sell, distribute, or purchase contraband cigarettes."See 18 U.S.C. § 2342. Under the New York Tax Law, with limited exceptions not applicable here, all cigarettes possessed by anyone within the State other than a licensed New York State stamping agent or wholesaler, must have a New York tax stamp. See N.Y. Tax Law § 471 et seq. The New York Tax Law further prohibits any person other than a duly licensed agent from possessing or transporting for the purpose of sale, any unstamped cigarette packages. See N.Y. Tax Law § 1814. Moreover, under the New York Public Health Law, it is unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to any person in New York State who is not a licensed cigarette tax agent or wholesaler. See N.Y. Pub. Health Law §1399-11. In this case, the government alleges that the defendant cigarettes constitute a quantity in excess of 60,000, were located within the State of New York, did not have New York State tax stamps on them, and were not shipped through or in the possession of a licensed New York State stamping agent. Such facts, if proven at trial, would establish a prima facie case that the defendant cigarettes constitute contraband cigarettes under the CCTA ...

United States v. 1,920,000 Cigarettes 2003 WL 21730528 *3 (W.D.N.Y. 2003).

1. The Cigarettes Constitute Contraband Cigarettes Under the Contraband Cigarette Trafficking Act

The cigarettes involved in this case are contraband cigarettes as defined under the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 et seq. Section 2342 makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell,

distribute, or purchase contraband cigarettes." Contraband cigarettes were defined at the time of the offenses as:

A quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes

18 U.S.C. § 2341(2).¹ Exceptions are made for cigarettes in the possession of certain enumerated persons none of which are applicable to this case.

As explained in United States v. 1,920,000 Cigarettes, at the time of the indictment, New York State law required, subject to narrow specific exceptions—none of which are claimed by the defendant— that all cigarettes possessed by anyone other than a licensed New York Stamping Agent, must have a tax stamp. See N.Y. CLS Tax § 471 et seq. The cigarettes involved in this case were in excess of 60,000, were possessed in New York State without applicable tax stamps, and were not in the possession of a licensed stamping agent or any of the persons to whom an exception applies under the CCTA or state law. We note that CCTA prosecutions may be

¹ Section 2341(2) was amended in March 2006 and the number of cigarettes required to trigger the provisions of the CCTA was reduced to 10,000. See U.S. v. Morrison, 706 F. Supp. 2d 304, 308 (E.D.N.Y. 2010).

held in any state which requires a tax stamp wherein the requisite amount of untaxed cigarettes is found regardless of the fact that the cigarettes are ultimately destined for another State. United States v. Boggs, 775 F.2d 582, 585 (4th Cir. 1985). As such, the cigarettes were contraband cigarettes.

The doctrine of void for vagueness means that criminal responsibility should not attach when one could not reasonably understand that his contemplated conduct is prescribed. United States v. Harris, 347 U.S. 612, 617 (1954). In determining the sufficiency of notice a statute must, of necessity, be examined in the light of the conduct with which a defendant is charged. Robinson v. United States, 324 U.S. 282, 285-86 (1945). The CCTA addresses violations involving cigarettes, a highly taxed and pervasively regulated commodity, which can be easily utilized in criminal schemes. Accordingly, in order to convict a defendant of violating the CCTA all the Government needs to do is establish that he possessed the threshold amount of cigarettes in a State which required a tax stamp. Thus, the Sixth Circuit Court of Appeals in United States v. Elshenawy, 801 F.2d 856 (6th Cir. 1986) held that the CCTA is a general intent statute and the violation "does not depend upon the actor's state of mind or degree of knowledge. Rather the definition of 'contraband cigarettes' depends only on the absence of indicia of state tax payment and

location in a state requiring such indicia.” Id. at 858. Accord United States v. Baker, 63 F.3d 1478, 1493 (9th Cir. 1995) (conviction for CCTA does not require proof that defendant knew he was violating the law). The Elshenawy Court based this conclusion on a series of Supreme Court decisions which held that specific intent to violate the statute was not necessary when the statute involved other highly regulated commodities such as firearms, drugs or corrosive liquids. The Sixth Circuit concluded that the legislative history of the CCTA demonstrated

“the clear intent of Congress to enact legislation to deal with cigarette ‘bootlegging’ activities of organized crime, activities in which the knowledge of cigarette taxing requirements may be presumed... In regard to very large quantities of cigarettes the probability of regulation is so great that anyone who is possession of them or dealing in them must be presumed to be aware of regulation...”

Elshenawy 801 F.2d at 859 (citing United States v. International Materials & Chemicals Corp., 402 U.S. 558, 565 (1971)).

Thus, accordingly, the Government in Elshenawy was only required to show that Elshenawy knew the physical nature of what he possessed, a ‘quantity in excess of 60,000 cigarettes which (bore) no evidence of the payment of applicable state cigarette tax’ Id. at 858-859.

Additionally, at the time of this case all cigarettes distributed in Michigan were required to possess Michigan tax stamps. See MICH. COMP. LAWS § 205.426(a) (Sec 6a) (2002). The cigarettes involved in this case did not contain Michigan Tax stamps. These unstamped cigarettes were also possessed and distributed in Michigan. Therefore, the cigarettes were contraband cigarettes. The CCTA plainly and succinctly placed persons of ordinary intelligence on notice in certain, explicit terms that the possession and distribution of 60,000 unstamped cigarettes in State which requires tax stamps by non-excepted parties is illegal. Since an intent to violate the CCTA is not an element of the CCTA a due process challenge to the statute cannot be premised based on criminal intent. Moreover, the CCTA is certainly not vague. Accordingly, a prosecution under this statute is permissible under the Due Process Clause.

2. The Distribution of Unstamped Cigarettes On Indian Reservations To Unlicensed Non-Native Americans Is Subject To State Tax

The defendant, a non-Native American, whose criminal scheme involved the distribution of untaxed cigarettes to non- Native Americans by shipping the cigarettes through Native American land, attempts to justify his actions by injecting legal issues pertaining to Native American distribution of cigarettes as a defense for his criminal conduct. See Defendant's Memorandum of

Law at 7-9, 12. However, the Supreme Court has repeatedly rejected the notion that cigarettes may be distributed on or through Native American lands to Non-Native Americans free of State tobacco taxes.

In Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), the United States Supreme Court held that the State of Washington properly seized unstamped cigarettes destined for Native American reservations. Although the court noted that Native Americans could sell cigarettes on the reservation to other reservation Native Americans free from State excise taxes for personal consumption, the court emphatically supported the State of Washington's right to tax all cigarette sales to non-Native Americans. Accord Oklahoma Tax Commission v. Citizen Bank Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 512 (1991) (holding that Oklahoma can tax tribal sales to non-Native Americans); See also, Moe v. Salish and Kootanai Tribe, 425 U.S. 463, 475-83 (1986) (holding that Montana could require Indian smoke shop owners to collect and enforce the tax on sales of cigarettes to non-Indians by adding tax to sales price).

In Confederated Tribes, Indian smoke shops were profiting by obtaining cigarettes without payment of Washington State taxes and, like the defendant, were profiting by making sales to non-Indians at a price substantially lower than legitimate retailers. See Id.

at 144-145. The Tribes in Confederated Tribes argued that the State of Washington could not tax its cigarette sales to non-tribal members. The Court emphatically rejected that argument:

It is painfully apparent that the value marketed by the smoke shops to persons coming from the outside is not generated by activities in which the tribes have a significant interest. [internal citations omitted]. What the smoke shops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create sale exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted the tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. **We do not believe that principals of federal Indian law, whether stated in terms of pre-exemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.**

Id. at 155 (emphasis added).

The Supreme Court in Confederated Tribes addressed the issue implicitly raised by the Defendant, that Native American land creates a tobacco tax free trade zone, See Defendant's Memorandum of Law at 9-10, and held that Washington State *could even tax Indian residents* on the Colville reservation who were not members of the Colville tribe.

[T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for the purposes of the Indian Reorganization of 1934 . . . does not demonstrate a congressional intent to exempt

such Indians from State taxation. Nor would the imposition of Washington's tax on these purchasers contravene the principal of tribal self-government, for the simple reason that non-members are not constituents of the governing Tribe. For most practical purposes these Indians stand on the same footing as non-Indians resident on the reservation.

Id. at 161.

In Department of Taxation and Finance of New York, et al. v. Milhelm Attea & Bros., Inc., etc., et al., 512 U.S. 61 (1994) the Supreme Court held that Federal law did not preempt New York State regulations imposing quotas on the distribution of tax-free cigarettes for tribal retailers which was designed to prevent Native American retailers from distributing unstamped, not tax-paid cigarettes to non-Native Americans. In Attea, the court upheld New York State law limiting sales of unstamped and untaxed cigarettes by Indian traders to statutorily qualified parties. The court stated that:

New York's decision to staunch the illicit flow of tax-free cigarettes early in the distribution scheme is "reasonably necessary" method of "preventing fraudulent transactions," one that "polices against wholesale evasion of [New York's] own valid taxes without unnecessarily intruding on core tribal interest."

. . .

New York's requirements that wholesalers sell untaxed cigarettes only to persons who can produce valid exemption certificates and that wholesalers maintain detailed records on tax-exempt transactions likewise do not unduly interfere with Indian trading.

Id. at 75, 76, quoting Colville, 447 U.S. at 160, 162.

Accordingly, at the time of the Indictment it was crystal clear from long established Supreme Court precedent that structuring cigarette sales through an Indian reservation did not eliminate tax liability regarding sales to non-Native Americans.

Moreover, we note that Chief Judge Arcara held that the CCTA is a statute of general applicability which even applies to Native Americans who distribute cigarettes in violation of State law. See U.S. v. 1,920,000 Cigarettes, 2003 WL 21730528*3. The court noted that the Second Circuit has adopted the Ninth Circuit's jurisprudence on the applicability of Federal law to Native Americans. See, Grey Poplars, Inc., v. United States, 282 F.3d 1175 (9th Cir. 2002); United States v. Gord, 77 F.3d 1192 (9th Cir. 1996); United States v. Baker, 63 F.3d 1478 (9th Cir. 1995) *cert. denied*, 516 U.S. 1097 (1996) (Cases holding that Native American can be charged for violations of the CCTA). See also, Reich v Mashantucket Sand and Gravel, 95 F.3d 174, 182 (2d Cir. 1996) ("We adopt the Ninth Circuit's method of analysis . . . as the appropriate test to determine whether a statute silent as to Indians applies to tribes.")

The Ninth Circuit CCTA case law establishes that conducting and structuring untaxed cigarette sales through Native American Reservations in violation of State law constitutes a violation of the CCTA. In United States v. Baker, 63 F.3d 1478 (9th Cir. 1995) *cert. denied*, 516 U.S. 1097 (1996), defendants were included in a 2,836 count indictment which charged 23 alleged co-conspirators with forming a racketeering enterprise with the purpose of smuggling contraband cigarettes from Montana to Washington for illegal distribution on Native American reservations without payment of cigarette taxes and subsequently laundering the proceeds of the contraband cigarette sales.

Defendant Baker was an enrolled member of the Shoalwater Indian tribe who ran a smoke shop, which distributed contraband cigarettes on the Puyallup Indian reservation near Tacoma, Washington. He raised several defenses to his illegal conduct, which the Ninth Circuit rejected. Initially, the *Baker* court noted that the CCTA is a statute of general applicability, which applies to Indians. See Id. at 1484-86. The court noted that in Washington, just as in New York State, state law and regulations governed the distribution of unstamped cigarettes. Baker, like the defendant in this case, failed to comply with state requirements regarding receipt and possession of unstamped cigarettes. See Id. at 1487. As such, even though in certain instances Native

Americans in Washington were lawfully allowed to possess unstamped cigarettes, Baker violated the CCTA because he possessed unstamped cigarettes and failed to abide by Washington regulatory requirements. The Baker court stated:

Baker contends that because Indians are permitted to possess unstamped cigarettes and to distribute them to other Indians, Washington law is violated only upon sale of the unstamped cigarettes to non-tribal members . . . In making these arguments, the defendants misapplied Washington law. **Under Washington law, mere possession of unstamped cigarettes, even by an Indian is prohibited if the cigarettes are not pre-approved for tax exemption.** Unapproved cigarettes are contraband . . .

Id. at 1487 (emphasis added).

In United States v. Gord, 77 F.3d 1192 (9th Cir. 1996), defendant Gord was indicted for distributing unstamped contraband cigarettes on the Thunderbird Trading Post near Tacoma, Washington, and laundering millions of dollars from the proceeds of the scheme in violation of 18 U.S.C. § 1956(a)(1)(A)(I).

Gord argued that not every violation of State tax law or State tax regulation could serve as the basis for a violation of the CCTA. Gord argued that Washington cigarette taxes were not due on his cigarettes since he intended to sell the cigarettes only to Native Americans. However, the Ninth Circuit upheld the Government's indictment of Gord on CCTA violations because Gord had failed to comply with Washington State regulations and had failed

to obtain pre-approval for the cigarettes. Accordingly, the Ninth Circuit upheld the CCTA indictment because Gord received unstamped cigarettes in violation of Washington's cigarette regulatory scheme.

Similarly, in Grey Poplars, Inc., v. One Million Three Hundred Seventy-One Thousand One Hundred Cigarettes, 282 F.3d 1175 (9th Cir. 2002), the Ninth Circuit upheld ATF's seizure for civil forfeiture of cigarettes on the Yakama Indian reservation in Washington which lacked Washington State tax stamps. Grey Poplars attempted to raise one of claimants' arguments that since (allegedly) the State of Washington did not enforce its cigarette tax laws by seizures within Indian country, the Federal Government could not do so as well. The court rejected this contention noting that the Federal Government has the power to seize these cigarettes under the CCTA, a Federal statute of general applicability, which applies equally to Native Americans even on the reservation. Moreover, the court held:

[T]ribal sellers are not entitled to be free from the state's system of allocating tax-free status to tribes . . . [internal citations omitted]. Thus, because Washington law requires that cigarettes destined for sale to Indians be pre-approved . . . any cigarettes without pre-approval are considered contraband under federal law if the quantity requirements are met. [Internal citation omitted]. The cigarettes here were without stamps and without pre-approval. **The cigarettes were, therefore, contraband and subject to seizure and forfeiture** under 18 U.S.C. § 2341(2).

Id. at 1178 (emphasis added).

Applying the aforementioned New York State statutes and the previously discussed case law to this case, it is indisputable that, under Colville and its progeny, New York State had the power to tax all sales of cigarettes by defendants in New York State since these were commercial cigarette sales that were not intended for personal consumption by New York State reservation Native Americans. Similarly, Michigan had the power to tax all of the sales of these unstamped cigarettes. Additionally, under Baker, Gord and Grey Poplars, the possession of unstamped cigarettes, by a Native or non-Native American, in violation of State cigarette laws or regulations, results in violations of the Contraband Cigarette Trafficking Act. The defendant in this case possessed more than 60,000 unstamped cigarettes and was not a licensed stamping agent or wholesaler in violation of New York State Tax § 471. He also transported and possessed the cigarettes and offered the cigarettes for sale while he was not an agent of a licensed entity in violation of New York State Tax Law § 1814. Finally, he also distributed unstamped cigarettes in violation of Michigan law. Accordingly, the defendant violated the CCTA.

3. New York Non-Enforcement Policy Does Not Repeal the Applicable New York Cigarette Tax Statutes

The defendant argues that New York's policy of not enforcing cigarette tax laws on Native American reservations renders New York cigarette tax laws and regulations inapplicable for purposes of serving as predicates under the CCTA. See Defendant's Memorandum of Law at 9. This argument has been rejected by Federal Courts.

The defendants in the case of United States v. Kaid, 241 Fed Appx. 747, 2007 WL 2705574 (2d Cir. 9/12/2007) offered the same argument that the defendant in this case is raising; that is, that New York State's non-enforcement policy effectively de-taxed sales of cigarettes to non-native Americans on reservation land thereby negating the element of 'contraband' necessary for a conviction for trafficking in contraband cigarettes" The Second Circuit rejected this argument:

This argument is meritless. While it appears that New York does not enforce its taxes on small quantities of cigarettes purchased on reservations for personal use by non-Native Americans, nothing in the record supports the conclusion that the state does not demand that taxes be paid when, as in this case, massive quantities of cigarettes were purchased on reservations by non-Native Americans for resale. Appellants' claim that they believed these cigarettes to have been "effectively 'de-taxed'" is further belied by their active efforts, including the use of police scanners, to evade official detection.

Id. 241 Fed. Appx. At 750, 2007 WL 2705574 *1. (Emphasis added).

Similarly, the Eastern District of New York rejected this argument in City of New York v. Attea, 2009 WL 701005 *8 (E.D.N.Y. 3/11/2009) noting that the "determination that a tax duly enacted by the legislature is 'applicable' notwithstanding the executive branch's policy not to enforce it rested on the well established principal that the legislature, not the executive, is the branch of Government charged with making laws. Id. (citing Barrett v. Indiana, 229 U.S. 26, 30, 33 (1913)). ("It is the province of the legislature to make the laws and of the courts to enforce them").

Indeed, it is a bedrock principle of American jurisprudence that the failure to enforce a law does not render that law invalid or inapplicable. See e.g., Ridley Township v. Pronseti, 244 A.2d 719, 721 (Pa. 1968) ("We [hold] that the 'validity of [an] ordinance does not usually depend on a completely successful enforcement of its provisions, nor can one who violates it be discharged, merely because it is shown that there are other violators who have not been convicted.'") quoting Valicenti's Appeal, 148 A. 308, 311 (Pa. 1929); G.J. Stocks v. L.L. Lee, 198 So. 211, 212 (Fla. 1940) ("[T]he failure of the authorities to enforce the ordinance against others constitutes no defense in favor of one who is prosecuted under such ordinance."); Cunningham

v. City of Niagara Falls, 242 App. Div. 39, 42, 272 N.Y.S. 720, 722 N.Y. A.D. 4th Dept., ("Non-enforcement of the ordinance, however, does not work its repeal, nor affect its validity."); Lee v. Seitz, 13 Tenn. App. 260, 264 (Tenn. Ct. App. 1930) ("We do not controvert the rule that mere non-enforcement of an ordinance or law does not destroy the obligation to observe it Of course a law or ordinance does not lose its validity by non-enforcement")

4. The Morrison Decision Does Not Justify The Defendant's Actions In This Case

The defendant contends that the decision of the Eastern District of New York in United States v. Morrison, 706 F. Supp. 2d 304 (E.D.N.Y. 2010) supports his argument that the defendant had not been sufficiently warned that his conduct was proscribed. This is not the case. Initially, the Morrison Court, in a prior ruling, held that the sale of the threshold amount of unstamped cigarettes with the exception of a sale to a Native American for personal consumption violates New York State law § 471 and therefore violates the CCTA. U.S. v. Morrison, 656 F.Supp.2d 338, 341 (E.D.N.Y. 2009) ("In sum, a sale of unstamped cigarettes (with the exception of on-reservation sales to a Native American for his or her own consumption and other exceptions not presently relevant) is violative of New York Tax Law §461(1) and, to the extent such a sale exceeds 60,000 cigarettes, it violated §2342(a)"). The

Eastern District of New York in a *subsequent* decision, United States v. Morrison, 706 F. Supp. 2d at 304, vacated its earlier ruling based on the Second Circuit's March 4, 2010 decision in City of New York v. Golden Feather Smoke Shop, Inc., 597 F.3d 115 (2d Cir. 2010).

However, there are significant distinctions between the Morrison case and the present case. The defendant in Morrison operated and sold unstamped cigarettes from the Peace Pipe, Native American smoke shop on the Poospatuck Indian Reservation in Mastic, New York. See United States v. Morrison, 656 F. Supp. 2d at 340. This smoke shop was on the land of Unkechaug Indian Nation. The Unkechaug Indian Nation had existed in New York State for hundreds of years. This tribe maintains a sovereign to sovereign relationship with New York State and its members sell cigarettes on the Poospatuck reservation to members of the Unkechaug Nation for personal consumption which are not subject to New York State taxation and to the general public alike. City of New York v. Golden Feather, 597 F.3d at 117. By contrast, Carl Nappi is a New York state resident who is not a Native American. Moreover, the sales in this case were from Carl Nappi to non-Native Americans from Michigan. As such, the fact pattern in this case differs significantly from the Morrison case as the defendant in the Morrison case could lawfully distribute untaxed cigarettes

to Tribal members for personal consumption under the Supreme Court's Colville and Attea decisions.

The defendant in this case and in the 2010 Morrison decision both relied the Second Circuit's Golden Feather decision as the basis for alleged claims of violations of substantive due process. However, the issues in Golden Feather involved application of the 2005 amendments to the New York State tax law, particularly section 471 (e), which was scheduled to go into effect in 2006 which specifically amended New York State tobacco taxation law pertaining to Native American tobacco vendors on Native American reservations. Section 471 (e) never went into effect because the State of New York failed to issue regulations. The Golden Feather Court noted that the New York State Fourth Department Appellate Division had determined in Cayuga Nation of New York v. Guild, 884 N. Y.S. 2d 510 (2009) that section 471 (e) was intended to "overhaul the statutory scheme" and was the "exclusive method" for taxing Native American sales on a reservation and since section 471 (e) was not effect there was no statutory mechanism for taxing Native American reservation vendors cigarette sales. See Golden Feather, 597 F. 3d at 123-124.

Thus, Golden Feather deals with the status of New York State tax law pertaining to Native American cigarette vendor sales which took place *after* 2006 and *after* the enactment of section 471 (e) which altered Section 471. This section did not exist at the time the violations cited in the indictment occurred. At the time of the violations there was no confusion regarding the scope of section 471. Therefore there was no failure of notice in section 471 from 2002-2004. Additionally, Golden Feather and Cayuga Nation as well as Morrison specifically addressed sales by Native American smoke shops which may lawfully sell untaxed cigarettes to tribal members for personal consumption. Accordingly, Golden Feather deals solely with post-2006 issues involving the effect on Native Americans cigarette vendors of section 471 (e) which was passed *after* the crimes involved in this case took place. These cases do not address structured sales by non- Native Americans from 2002-2004. Therefore, Golden Feather and the latest Morrison decision provide no legal basis for a due process challenge by a non-Native American who sold cigarettes ultimately to other non-Native Americans in Michigan years before the New York State legislature passed section 471 (e).

Additionally, assuming arguendo, that violations of the CCTA could not be premised on violations of New York State law § 471, this Court held in United States v. 1,920,000 Cigarettes, supra, that "the New York State tax law further prohibits any person other than a duly licensed agent from possessing or transporting for the sale any unstamped cigarette packages." See Id. at p 3 (Citing N.Y Tax Law § 1814). Since there is no ambiguity in section 1814 nor is there any case law indicating that this statute cannot be the basis for a CCTA violation, the New York portion of the CCTA violations can be sustained solely on violations of this statute. Moreover, the defendant was also in violation of N.Y. Pub. Health Law § 1399-11 as he was unlawfully selling unstamped cigarettes to someone who was not a licensed tax agent or wholesaler. See United States v. 1,920,000 Cigarettes at *3. Accordingly, there is no due process violation involve in charging Mr. Nappi, with his violations of the CCTA in New York or Michigan from 2002-2004.

CONCLUSION

The CCTA is a plainly worded statute that clearly provided the defendant with sufficient notice that the distribution of more than 60,000 unstamped cigarettes in New York and Michigan, States

which require tax stamps, violated Federal law. The CCTA is a general intent statute which involves transactions in cigarettes, a highly taxed and pervasively regulated product. Thus, Mr. Nappi's purported failure to understand New York State tax is immaterial to a prosecution under the CCTA. However, at the time of the offenses in 2002-2004, the Supreme Court and Federal Courts of Appeal had unanimously held that States could tax sales on Native American reservations to non-tribal members. As such, from 2002-2004 any person of reasonable intelligence would not believe that Non-Native Americans could distribute tax free cigarettes to other Non-Native Americans in multiple States by structuring the transactions through Native American land and that by doing so one could lawfully defraud States of tens of thousands of dollars of cigarette tax money. Accordingly, a prosecution for these acts does not violate the Due Process Clause. The recent jurisprudence analyzing the interplay between section 471 (e), which was scheduled to go into effect in 2006 and section 471 and the application of these statutes to Native American cigarette distributors is irrelevant to this case. Additionally, since the defendant was also in violation of section 1814 of the New York

State tax law, the CCTA violations may be sustained solely on these violations. Therefore, the Motion to Dismiss should be denied.

DATED: Buffalo, New York, February 11, 2011.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

09-CR-51-A

CARLO J. NAPPI
a/k/a CARL NAPPI,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, I electronically filed the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT** with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

Steve Zissou, Esq.

S/ JOANNE BEALE