STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

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 Cir. Ct. No. 17-406-FH

DEFENDANT/APPELLANT JOHN DAVIS' REPLY TO THE PEOPLE'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT GRANTED

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Dated: November 25, 2020

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ARGUMENT

A. MCL § 205.428(3) Requires Proof that Davis Knew that He was Transporting Cigarettes in a Manner "Contrary To" the TPTA, *i.e.*, that He had Knowledge that He was Required to Obtain a Transporter License (But Did Not Do So).

In its Supplemental Brief, Appellee argues for the first time that "contrary to this act is not describing an element of an offense" proscribed in MCL § 205.428(3) ("Subsection (3)"), but is merely a means for incorporating by reference the regulatory requirements of the statute and Department of Treasury ("Treasury") Rules and Regulations. (Appellee's Supp. Brief at 16) But in a previous filing in this Court, Appellee stated that Subsection (3) comprised the following elements: "(1) Defendant knowingly transported cigarettes; (2) Defendant did not have a license or permit issued by the Department of Treasury to transport tobacco; (3) Defendant transported 3,000 or more cigarettes." (People's Answer in Opposition to Defendant's Application at 23.) Since the lack of a license or permit is precisely the failure that renders Davis' conduct "contrary to this act," there can be no dispute – and until now there has been no dispute – that possession or transport of cigarettes "contrary to this act" is, indeed, an element of the offense. Rather, the issue is whether Subsection (3) requires knowledge that one transporting cigarettes was doing so "contrary to this act."

As Appellants have demonstrated, the *mens rea* presumption applies to "'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (quoting *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)); *accord Rambin v. Allstate Ins. Co*, 495 Mich. 316, 328 (2014) (emphasis added). Appellee offers no persuasive reason for abandoning the *mens rea* presumption for the element "contrary to this act." Appellee contends that "contrary to this act" was placed in this felony penal statute "not to delineate a specific evil to be prohibited," but simply to incorporate by reference a regulatory

regime that would permit a person to be imprisoned for up to five years without any knowledge that he or she engaged in wrongful conduct. Appellee's contention ignores the core *mens rea* principles underlying the criminal law and is without legal support.

Appellee's other attempts to justify departure from the *mens rea* presumption are equally unpersuasive. Appellee makes the conclusory argument that the knowledge requirement applies only to the "prohibited act" of possession or transport of cigarettes, not to the "attendant circumstance" of doing so without a required license. In advancing this purported distinction between a "prohibited act" and an "attendant circumstance," Appellee ignores the fact that the criminal act prohibited by Subsection (3) is, indeed, the possession or transport of cigarettes *contrary to this act*, i.e., without a license - not the otherwise innocent conduct of possession or transport of cigarettes.

Appellee also contends that *People v. Nasir*, 255 Mich. App. 38 (2003), supports its argument that the knowledge requirement should not apply to "contrary to this act." But *Nasir*, in fact, supports *Appellants* on this point, not Appellee. As Appellants explained in more detail in their Applications for Leave to Appeal, *Nasir* addressed the factors set forth in *People v. Quinn*, 440 Mich. 178 (1992), to determine whether the Legislature intended to enact a strict liability offense in MCL § 205.428(6) ("Subsection (6)") and concluded that it did not. The *Nasir* Court then addressed what intent the statute *did* require and determined that it was not enough that the defendant merely knew he possessed a tax stamp; rather, the *Nasir* Court concluded, the defendant had to know that the stamp was counterfeit. Significantly, the knowledge requirement in *Nasir* goes to the nature of the stamp possessed, requiring a culpable state of mind. Nasir's conviction was overturned because although there was proof that he knew he was in possession of something that turned out to be a counterfeit stamp, the *mens rea* principle also required proof that he

possessed or used the stamp "*with knowledge that the stamp . . . was not an authentic tax stamp . . .*" 225 Mich. App. at 46 (emphasis added). The same reasoning applies here. The *mens rea* requirement goes beyond mere possession or transport of cigarettes, requiring proof of knowledge of the nature of the possession or transport that made that conduct illegal, i.e., that it was done without a required license ("contrary to this act"). Appellants reiterate that they are not, contrary to Appellee's insistence, advocating for proof of a defendant's "specific intent to violate the TPTA." Rather, they are simply advocating for a knowledge requirement that differentiates innocent conduct (possession or transport of cigarettes) from criminal conduct (possession or transport of cigarettes contrary to the TPTA).

According to Appellee it is significant that the clause "contrary to this act" in Subsection (3) is "placed in the same grammatical context" as the clause "without authorization from the Department" in Subsection (6), and because the Court of Appeals in *Nasir* noted its belief that the legislature did not intend that Subsection (6) contain a specific intent element "that a defendant need act with knowledge that the defendant does so without authorization from the Michigan Department of Treasury," Subsection (3) should not require the defendant to have knowledge that he was acting "contrary to this act." As previously noted, the issue in this case is not whether Subsection (3) requires proof of specific "intent to violate the TPTA," nor was that the basis upon which Nasir's conviction was overturned. In *Nasir* as here, this knowledge or fault requirement is necessary to ensure that the statute does not impermissibly criminalize otherwise innocent conduct.

Appellee's various arguments that *Rehaif* is inapposite are also unpersuasive. Appellee makes the curious argument that the federal statute at issue in *Rehaif* included the term

"knowingly," unlike Subsection (3)[1]. But all of the parties here agree and there is no dispute that the word "knowingly" should be read into Subsection (3). What is at issue, as in *Rehaif*, is to what elements does "knowingly" apply. Appellee further contends that *Rehaif* is inapposite because the U.S. Supreme Court limited its holding regarding application of the knowledge requirements to non-jurisdictional elements. The jurisdictional element of "in or affecting commerce" in the statute in *Rehaif* – which ensured that the federal government had the constitutional authority to criminalize defendant's conduct – did not "describe the evil [the Legislature] seeks to prevent." Here, that is exactly what makes "contrary to this act" a non-jurisdictional element. It is the very element separating innocent from criminal conduct -- the element that converts the innocent conduct of possessing or transporting cigarettes into a criminal act. Finally, *Rehaif* provides the "quality" of analysis that this Court suggested is necessary when looking to federal law for guidance, especially given that this Court has consistently followed the same foundational *mens rea* principles that were applied and formed the basis for the holding in *Rehaif*. *Rambin, 495 Mich.* at 327-328 (collecting cases); s*ee Garg v. Macomb Cty. Community Mental Health Services*, 472 Mich. 263, 283 (2005).

Appellee then goes on to incorrectly intimate that Davis is proffering an ignorance of the law defense, an issue that the U.S. Supreme Court addressed head on in *Rehaif*. There, the federal government argued that, under the maxim that ignorance of the law is not a defense to a criminal charge, it was not required to prove Rehaif's knowledge that he was unlawfully present in the United States. The Court, however, following criminal law scholars, noted that the rule applies only where a defendant is claiming he was unaware of the criminal statute prohibiting his conduct;

[1] Subsequent to *Nasir* MCL 205.428 was amended to add a misdemeanor offense in subsection (11) that expressly contains "knowingly" thereby providing a "grammatical context" for application in subsection (3) as well.

it does not apply where, as here, the defendant is ignorant or mistaken about a "collateral" rule of law (such as the complex ones surrounding tobacco licensure) where such mistake or ignorance negates a material element of the offense. Thus, the Court in *Rehaif* held that although "the defendant's status as an alien 'illegally or unlawfully in the United States' refers to a legal matter . . . [a] defendant who does not know he is . . . 'illegally or unlawfully in the United States' does not have the guilty state of mind that the statute's language and purpose requires." *Rehaif* 1395 S.Ct. at 2198.

Finally, it bears noting that Appellee has failed to address *Rambin*, a case specifically referenced in this Court's order for supplemental briefing. Appellee also ignores the holding and analysis in *Liparota* v. *United States*, 471 U.S. 419 (1985), a case involving a statute very similar to Subsection (3).

B. Nonsupervisory Employees like Davis Do Not Fall Within the Definition of "Transporter" under the TPTA so as to be Required Individually to Obtain a Transporter License to Deliver Tobacco Products on Behalf of Their Employer.

Appellee contends that non-supervisory, low-level employees such as Davis and Magnant fall within the definition of "transporter," just as the defendant in *People v. Shami*, 501 Mich. 243 (2018), fell within the definition of "manufacturer." This contention overlooks the key factual distinction that Shami "managed the day-to-day operations" of the retail store owned by Sam Molasses, LLC. It was in that capacity that Shami created a new "special blend" of hookah tobacco that was then sold at the store. The nature of Shami's role at the retailer was not at issue before this Court in *Shami*.

There are also significant differences between the terms "manufacturer" and "transporter" that would call for a different conclusion even if *Shami* involved a low-level employee (which it did not). Under the TPTA, "manufacturer" means "a person who manufactures or produces a

tobacco product." MCL §205.422(m)(i). The term manufacturer thus defines what a person does – manufactures or produces. A "transporter," however, is a different species. The term transporter is not simply defined by what a person does; i.e., transports, but is further defined as "a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source outside this state or from any person not duly licensed under this act."

A "transporter" in the TPTA thus signifies a person engaged in a continuity of action, i.e., importing or transporting as opposed to simply one who imports or transports either on a single occasion or perhaps on multiple occasions. As used in the TPTA, it suggests a person engaged in an ongoing activity of one who is in the business of importing or transporting. The remainder of the definition supports this interpretation. It specifically excludes one type of business, common carriers, a "transporter does not include an interstate common 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 definition, when read together with the other TPTA provisions informing on it, as outlined in Appellants' Supplemental Briefs, coupled with the application process established by Treasury for licensure, leads to the conclusion that a "transporter," under the TPTA, is a business involved in the transportation of tobacco products or an individual operating such a business on his or her own account. It does not apply to non-supervisory employees such as Davis and Magnant.

C. The TPTA Does Not Give Fair Notice that Employees like Davis Would Fall Within the Definition of "Transporter" and Could Face Felony Charges for Failure to Obtain a Transporter License When Delivering Tobacco Products on Behalf of their Employer.

Appellee maintains that the TPTA fairly notifies low-level employees that unlicensed transportation of cigarettes subjects them to criminal prosecution, an argument it says that is not

clouded by the testimony of Treasury officials[2] or Form 336 because they cannot "alter the meaning or application of the relevant statutes." (Appellee's Supp. Brief at 30-31.) Several pages earlier however, Appellee argues the felony prohibition included the phrase "contrary to this act" for the specific purpose of "incorporating a regulatory scheme" and "any rules the Department of Treasury enacts." (Appellee's Supp. Brief at 16). But when the regulatory scheme, consistent with the overall statute, is aimed only at businesses involved in the transportation of tobacco products, Appellee departs from the notion that the scheme must be given its due weight or that the public may rely on Form 336 and regulations promulgated by Treasury.

The State argues *Nasir* and *Shami* help in providing notice to Michigan citizens, however, this is hardly true. The knowledge requirement addressed by Appellee (i.e., that one simply have knowledge that one is possessing or transporting cigarettes) does not require any mental culpability whatsoever and thus does nothing to remedy the fair notice defects. Indeed, in *Nasir,* the defendant had to have knowledge that the stamp was, in fact, counterfeit. In contrast, the TPTA, related regulations, and Form 336, fail to provide fair notice to non-supervisory employees rather than individuals in the business of transporting.

Finally, Appellee touts "prosecutorial discretion" and "institutional vetting" (apparently referring to the appellate process, but inexplicably excluding this Court's upcoming review) as sufficient guarantees that the TPTA will not ensnare innocent defendants. (Appellee's Supp. Brief at 20-21.) The claim is made one sentence after Appellee asserts to this Court, without a whit of

[2] Appellee contends that Ms. Littlejohn's testimony supports its argument, but conveniently disregards Mr. Miller's testimony. Mr. Miller, who is the chief Administrator of Special Taxes charged with administering the TPTA, testified that Form 336 could be relied upon by the public and that based on the form an employee would not require a transporter's license. It is also telling that Form 336 was recently revised, since Appellants were charged with crimes, to line up more closely with Appellee's legal arguments.

support, that Davis and Magnant, were not just paid drivers, but "*sophisticated defendants* who knew precisely what they were doing"[3] and two sentences after attempting to use Magnant's purported admission against his co-defendant, Davis, in blatant disregard of the well-established Right of Confrontation principles articulated in *Bruton v. United States*, 391 U.S. 123 (1968).

CONCLUSION

For the foregoing reasons, as well as all the reasons set forth in his prior filings, Davis respectfully requests that this Honorable Court reverse the Court of Appeals' Decision affirming the trial court's denial of Defendants' Joint Motion to Quash the Information and Joint Motion to Dismiss for Due Process Violation and dismiss this case.

Respectfully submitted,

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Dated: November 25, 2020

[3] Davis does not address other factual misstatements made by Appellee since most did not implicate how this Court should rule on the three questions it presented to the parties.