IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	
SAYEL GHABAYEN,	)	Case No. 1209001881
	)	
Defendant,	)	
	)	
and	)	
	)	
MARCO S. HASSAN,	)	Case No. 1209001862
	)	
Defendant.	)	

Submitted: May 8, 2013
Decided: September 3, 2013

Upon Defendants' Motion to Dismiss and for Judgment of Acquittal
DENIED

Barzilai K. Axelrod, Esquire, Deputy Attorney General, Wilmington, Delaware, A*ttorney for State of Delaware.*

Eugene J. Maurer, Esquire, Wilmington, Delaware, *Attorney for Defendant Sayel Ghabayen*.

Robert M. Goff, Jr., Esquire, Wilmington, Delaware, *Attorney for Defendant Marco S. Hassan*.

DAVIS, J.

INTRODUCTION

Defendants Sayel Ghabayen and Marco S. Hassan were arrested on September 2, 2012 during a routine traffic stop by Officer Neal Strauss of the Delaware River and Bay Authority ("DRBA"). The State subsequently indicted Mr. Ghabayen and Mr. Hassan on

charges of Attempt to Evade or Defeat Tax under 30 *Del. C.* § 571 (Count I); Conspiracy Second Degree, under 11 *Del. C.* § 512, as to Attempt to Evade or Defeat Tax charge (Count II); Possession of Untaxed Tobacco Products under 30 *Del. C.* § 5342(a) (Count III); and Conspiracy Third Degree, under 11 *Del. C.* § 511, as to Possession of Untaxed Tobacco Products (Count IV). The State also charged Mr. Hassan with Driving a Vehicle While License is Suspended or Revoked under 21 *Del. C.* § 2756(a).

On April 15, 2013, Mr. Ghabayen moved to dismiss (the "Motion to Dismiss") the charges pending against him. The Court docketed the Motion to Dismiss on April 16, 2013. Subsequently, Mr. Hassan joined in the Motion to Dismiss. Prior to trial, the State entered *nolle prosequis* on Counts I and II. The Court held a non-jury trial on Counts III, IV and V on April 16, 2013. At the end of the State's case, Mr. Hassan and Mr. Ghabayen also moved for a judgment of acquittal (the "Motion for Judgment").[1]

As the Motion to Dismiss was filed the day before trial, docketed the day of trial and raised issues relating to application of the Commerce Clause of the United States Constitution, the Court allowed the State an opportunity to file a written response to the Motions. The Court also allowed Mr. Hassan and Mr. Ghabayen to file replies to any papers filed by the State. The State filed its State's Response to Defendants' Motion to Dismiss (the "Response") on April 30, 2013. Mr. Hassan filed Defendant Hassan's Reply to State's Response to Defendants' Pre-trial Motion to Dismiss and Defendant Hassan's Renewed Motion for Judgment of Acquittal on May 7, 2013. Mr. Ghabayen filed a letter in response on May 8, 2013.

[1] The Motion to Dismiss and the Motion for Judgment will be collectively referred to as the Motions.

After a review of the record, the applicable authorities, and the legal arguments and factual presentation in the papers and at trial, the Court **DENIES** the Motion to Dismiss and the Motion for Judgment.

BACKGROUND

Through the Motions, Mr. Hassan and Mr. Ghabayen challenge the State's indictment of them under 30 *Del. C.* § 5342(a) ("Section 5342(a)"). The Motions make many arguments but basically assert that, under the circumstances of their arrest on September 2, 2102, application of Section 5342(a) would be an impermissible use of the State's taxation power. The State counters by contending that Section 5342(a) is a possession statute that works in conjunction with other provisions to aid in the enforcement of Delaware's tobacco product tax, and that the evidence is clear that Mr. Hassan and Mr. Ghabayen possessed contraband tobacco products in violation of the statute.

The Court held a hearing on the Motions and a trial on April 16, 2013. The State called only one witness, Officer Strauss of DRBA. Mr. Hassan and Mr. Ghabayen did not call any witnesses but did cross-examine Officer Strauss. The facts contained in this Opinion come from the testimony provided by Officer Strauss and the exhibits admitted into evidence at trial. As an initial determination, the Court finds Officer Strauss to be a credible witness.

On September 2, 2012, Officer Strauss was positioned northbound on Interstate 295 when he observed a gray 2002 Jeep Cherokee. Officer Strauss was in his patrol car, which patrol car was equipped with an in-car video recording system or MVR.[2] The Jeep Cherokee had Virginia license plates. Officer Strauss observed the Jeep Cherokee make

[2] State Exhibit 2.

a lane change across a solid line at the base of a ramp on I-295. Officer Strauss pulled the Jeep Cherokee over for this traffic offense.

Upon approaching the Jeep Cherokee, Officer Strauss observed two large square objects covered with black plastic on the backseat. Officer Strauss also observed several supermarket plastic bags on the floor containing cartons of cigarettes. Officer Strauss testified that he noticed the smell of tobacco when he was interviewing Mr. Hassan and Mr. Ghabayen during the traffic stop.

Mr. Hassan and Mr. Ghabayen were the two occupants in the Jeep Cherokee. Mr. Hassan was the driver and Mr. Ghabayen was the front seat passenger. Officer Strauss asked Mr. Hassan to produce his license, registration and proof of insurance. Mr. Hassan produced an expired New York State learners permit[3] and a military identification card. During the stop, Mr. Hassan stated that, other than the expired learner's permit, he did not have a driver's license from any other state. According to evidence produced at trial, Mr. Hassan's New York driving record indicates that Mr. Hassan's New York license is currently listed as revoked.[4] Mr. Hassan produced valid registration and proof of insurance.[5] The registration and proof of insurance indicated that Mr. Hassan is the owner of the Jeep Cherokee. Mr. Hassan told Officer Strauss that he was coming from Virginia with his destination being New York.

The Jeep Cherokee contained 276 cartons of tobacco cigarettes (the "Cartons"). The Cartons were all over the vehicle. Officer Strauss testified, and exhibits demonstrated, that the Cartons were placed in such a manner and covered such that the

[3] State Exhibit 10.
[4] State Exhibit 1.
[5] State Exhibit 11.

Cartons did not create a visible profile above the windows such that these cartons could be observed by other drivers.[6]

The Cartons did not have Delaware tax stamps on them. Instead, the Cartons were only affixed with Virginia tax stamps. Mr. Hassan and Mr. Ghabayen did not have any invoice or delivery tickets or purchase orders in their possession. Mr. Ghabayen did have $4,503.00 USD in his possession.

While Officer Strauss did not find any invoices, delivery tickets or purchase orders relating to the Cartons, Officer Strauss found additional documents in the vehicle. Officer Strauss found a handwritten list containing cigarette carton orders[7] and several receipts from different stores in Virginia that detailed purchases of the Cartons on September 2, 2012.[8] The receipts indicate that five Cartons were the maximum number purchased at any given location. Officer Strauss testified that vendors will cap their sales to five cartons of tobacco cigarettes to avoid aiding potential interstate traffickers.

Officer Strauss also testified that, in Delaware, tobacco products will only have one tax stamp affixed which stamp corresponds to the destination use or sale state. Officer Strauss then testified that no tobacco carton or package would have stamps from two states. Officer Strauss stated that Delaware allows a personal use exemption for possession of ten packs or less of cigarettes (a carton contains twelve packs of cigarettes) upon which: (i) no Delaware tobacco product tax has been paid, or (ii) no Delaware tax stamp has been affixed.

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[6] State Exhibit 3-6.
[7] State Exhibit 8.
[8] State Exhibit 12.

APPLICABLE STANDARD

Although not expressly stated, the Motion to Dismiss seeks relief under Rule 12 (b) of the Superior Court Rules of Criminal Procedure ("Criminal Rule __"). Criminal Rule 12(b)(1) states that a defendant may move to dismiss a criminal matter prior to trial by raising any defense, objection or request to the institution of the prosecution which is capable of determination without the trial of the general issue.[9] Mr. Hassan and Mr. Ghabayen moved to dismiss their criminal cases prior to the April 16, 2013 trial. The Court heard arguments but reserved decision because of the timing of the Motion to Dismiss, and the fact that the trial was to be a non-jury trial and all parties and witnesses were already present.

The Motion for Judgment is based, in part, on Criminal Rule 12 and also on Criminal Rule 29(a). Criminal Rule 29(a), in relevant part, provides

> … The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.[10]

For purposes of a motion under Criminal Rule 29(a), the Court views the evidence submitted at trial in a light most favorable to the State.[11] Unlike Criminal Rule 12, a motion under Criminal Rule 29(a) is made after the presentation of the evidence.[12] Mr. Hassan moved for a judgment of acquittal at the end of the presentation of the State's case at trial on April 16, 2013. The Court denied that motion, in part, holding that

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[9] Del. Super. R. Crim. P. 12(b)(1).
[10] Del. Super. R. Crim. P. 29(a).
[11] *See, e.g., Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982).
[12] *State v. Crawford*, 297 A.2d 55 (Del. Super. 1972).

Section 5342(a) did provide for criminal prosecution because 30 *Del. C.* § 5343 provides a penalty for violations of Section 5342(a). The Motion for Judgment renews in part the motion for judgment of acquittal.

ANALYSIS

Parties Contentions

The Motions contend that the Court should dismiss or enter judgment in favor of Mr. Hassan and Mr. Ghabayen. The main argument in the Motions is that the State's use of Section 5342(a) in this prosecution violates the Commerce Clause contained at Article 1, Section 8 of the United States Constitution. The Motions contend that Section 5342(a) is, in essence, a taxation statute and, when applied to the events involving Mr. Hassan and Mr. Ghabayen, impermissibly discriminates against interstate commerce. Secondarily, the Motions contend the State failed to demonstrate that the Cartons were subject to a Delaware tobacco product tax.

The State contends that Section 5342(a) is not a tax statute but, rather, a possession statute. The State asserts Section 5342(a) is designed to criminalize possession of contraband – ten or more packs of tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed.

Legal Analysis

Section 5342(a) provides:

> Except as authorized by this chapter, no person, not being an affixing agent or not holding an unexpired exemption certificate, shall have in such person's possession within this State 10 or more packs or packages (or an equivalent amount unpackaged) of tobacco products upon which the

> Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed in the amount required.[13]

The State enacted Section 5342(a) in 1953 and made a minor change to this section in 2010.[14]

Not all persons who possess ten or more packs of tobacco products upon which the Delaware stamp is not affixed or the Delaware tobacco product tax has not been paid are subject to Section 5342(a). Section 5328 of Title 30, Chapter 53 of the Delaware Code ("Section 5328") provides:

> Every person who shall possess or transport 10 or more packs or packages (or an equivalent amount unpackaged) of unstamped tobacco products upon the public highways, roads or streets of this State for the purpose of delivery, sale or disposition shall be required to have in such person's possession invoices or delivery tickets and purchase orders for such tobacco products which shall show the true name and complete and exact address of the consignor or seller, the true name and complete and exact address of the person transporting the tobacco products, the quantity and brand of the tobacco products transported and the true name and complete and exact address of the person who has been licensed to assume the payment of the Delaware tax or the tax, if any, of the state or foreign country at the point of ultimate destination; provided, that any common carrier which has issued a bill of lading for shipment of tobacco products and is without notice to itself or to any of its agents or employees that the tobacco products are not stamped as required by this chapter shall be deemed to have complied with this chapter. *The absence of such proper invoices or delivery tickets and purchase orders shall be prima facie evidence that such person is in violation of this chapter and subject to the penalties of this chapter.*[15]

Section 5328, as stated, allows the transport of unstamped packs of tobacco products if the person moving the product has certain documentation (possession invoices or delivery tickets and purchase orders, etc.). Section 5328 also provides that the absence of the appropriate documentation constitutes prima facie evidence that a person is in

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[13] 30 *Del. C.* §5342(a).
[14] The change made was to add the introductory clause "[e]xcept as authorized by this chapter" to the first sentence of Section 5342(a).
[15] 30 *Del. C.* §5328 (emphasis added).

violation of Delaware tobacco product tax chapter. Therefore, Section 5342 is part of a police regulatory scheme that allows for enforcement against those possessing contraband tobacco products, and Section 5328 creates, in part, a "safe harbor" for those legally transporting tobacco products in interstate commerce.

The Motions and the Response do not refer the Court to any controlling Delaware precedent with respect to the applications of Sections 5342 and 5328 in a criminal prosecution. Instead, both parties rely on decisions from other jurisdictions and analogous statutes.

The Court has found one Delaware case that references Section 5342(a) -- *Redden v. State*.[16] The Supreme Court's brief discussion of Section 5342(a) in *Redden* seems to support the State's position that this section is a possession statute. None of the parties refer to or discuss this case but it appears helpful here. *Redden* involves a situation where a defendant, Justin Redden, was convicted before this Court of possession with intent to sell dangerous drugs. Mr. Redden appealed. In overturning Mr. Redden's conviction, the Supreme Court held that the fact that three plastic envelopes containing about 12 ounces of marijuana, 29 small sealed manila packets containing marijuana and 84 empty packets were found in defendant's possession was insufficient evidence, under the particular criminal statute, of possession with intent to sell. In so holding, the Supreme Court noted that nothing in the particular criminal statute provided a statutory standard or guideline from which an inference or presumption of intent to sell may arise. The Supreme Court contrasted the relevant drug possession statute in *Redden* with the statutes relating to

[16] 281 A.2d 490 (Del. 1971).

unlawful intent to sell contraband cigarettes, 30 *Del. C.* § 5342(a), and unlawful intent to sell alcoholic liquor, 4 *Del. C.* § 722(5).[17]

From this passage in *Redden*, it appears to this Court that Section 5342(a) relates to illegal possession of contraband – possession of unstamped or untaxed cigarettes with the unlawful intent to sell such cigarettes. While not a "simple" possession statute, Section 5342(a) clearly criminalizes possession of cigarettes in certain circumstances regarding taxed tobacco products.

The parties have ably provided this Court with a vast number of cases relating to the criminal prosecution of possession of untaxed or, for lack of a better term, other state tax stamped cigarette packages. All of these cases are helpful, but the Court believes the Maryland Court of Appeals, in *State v. Sedacca*[18] and *Chen v. State,*[19] has articulated the most well-reason approach to the issue presented to this Court. The Maryland Court of Appeals cases are more recent and factually similar to the cases involving Mr. Hassan and Mr. Ghabayen than the other ones relied upon by the parties. The Court recognizes that Maryland's tobacco product tax laws are in some ways different than those in Delaware but not in such a manner as to make the reasoning, analysis and holdings of the Maryland Court of Appeals invalid here.

In *Sedacca*, the Maryland Court of Appeals held police regulation statutes, like Delaware's Section 5342(a) and Section 5328, contained in the tobacco product tax laws are necessary for safeguarding a state's vital interest in preventing the diversion of cigarettes into illicit channels of trade where the state would be unable to collect its tax. Moreover, these regulations are reasonable, are ones with which honest and law abiding

[17] *Id.* at 491 n. 2.
[18] 249 A.2d 456 (Md. 1969).
[19] 803 A.2d 518 (Md. 2002).

citizens can readily comply and are no impediment to the free flow of trade and commerce between the several States.[20] The Maryland Court of Appeals therefore concluded that use of these statutes would not be a violation of the Commerce Clause.

The Maryland Court of Appeal in *Chen* affirmed a conviction of a defendant with facts eerily similar to those present in these criminal actions – 7,190 packs of cigarettes bearing Virginia tax stamps, that the defendant was travelling from Virginia to a state other than Maryland when stopped in Maryland, and at no time were the cigarettes intended for use, distribution or sale into or within the state of Maryland.[21] Relying on *Sedacca*, the Maryland Court of Appeals once again held that the prohibitions concerning the possession and transportation of unstamped or untaxed cigarettes did not violate the United States Constitution's Commerce Clause, and were otherwise clear and accessible by persons of common intelligence.[22]

Like the Court of Appeals, this Court holds that Sections 5342(a) and 5328 applied in the criminal actions against Mr. Hassan and Mr. Ghabayen do not violate the Commerce Clause of the United States Constitution. These statutes are narrowly tailored and applied in a way which honest and law abiding citizens can readily comply. Moreover, these statutes are reasonable under the circumstances and do not place an undue burden on interstate commerce.

The Court has also reviewed and finds unpersuasive the argument that Section 5342(a) does not criminalize the conduct of Mr. Hassan and Mr. Ghabayen. Section

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[20] 249 A.2d at 217.
[21] 803 A.2d at 518-522.
[22] *Id.* at 527. Other State courts have come to similar conclusions under facts similar to the one here and involving statutes almost identical to those contained in the Delaware Code. *See, e.g., O'Leary v. Allphin*, 357 N.E.2d 491, 495 (Ill. 1976); *People v. Locricchio*, 69 N.W.2d 723 (Mich. 1955); *State v. Gilman*, 273 A.2d 617 (N.J. Super. 1971).

5342(a) does not provide for a particular sanction or penalty but 30 *Del. C.* §5343 ("Section 5343") does. Section 5343 provides:

> Whoever violates any provision of this chapter for which a specific penalty is not otherwise provided, and whoever violates any regulation promulgated pursuant to this chapter, shall be fined not less than $100 nor more than $1,000, or imprisoned not more than 90 days, or both.

Section 5343 clearly criminalizes a violation of Section 5342(a). Section 5342(a) does not have a specific penalty but is contained in Chapter 30 (the "this chapter" referred to in Section 5343). As such, Section 5343 applies when a person is found guilty of violating Section 5342(a).

Moreover, the Court rejects the argument in the Motion for Judgment that the State failed to produce evidence on whether the Cartons were tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed in the amount required. Officer Strauss testified that the Cartons bore only Virginia stamps and that if a tax is paid in Delaware then a Delaware tax stamp would be affixed. The other evidence presented at trial showed that Mr. Hassan and Mr. Ghabayen purchased the Cartons on September 2, 2012 in Virginia and otherwise did not stop in Delaware until pulled over by Officer Strauss. Absent any other evidence on the issue, the Court makes the proper inference that the State demonstrated that the Cartons did not bear Delaware tax stamps and the Delaware tax was not otherwise paid, in the amount required, with respect to the Cartons.

Mr. Hassan and Mr. Ghabayen drove from New York to Virginia and purchased the Cartons. The Cartons bear only Virginia stamps. Mr. Hassan and Mr. Ghabayen were stopped in Delaware and were in possession of the Cartons. The Cartons contain more than ten packages of tobacco products that do not bear the Delaware tobacco

product stamps (in any amount) and for which no Delaware tobacco product tax has been paid. Finally, neither Mr. Hassan nor Mr. Ghabayen possess the types of invoices or delivery tickets and purchase orders necessary under Section 5328. Accordingly, the Court finds Mr. Hassan and Mr. Ghabayen violated the Section 5342(a).

CONCLUSION

For the reasons stated in this opinion, the Court **DENIES** the Motions.

The Prothonotary shall set these criminal matters for a hearing to address any additional outstanding matters and at which the Court can render its verdict on Counts III, IV and V.

IT IS SO ORDERED.

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Eric M. Davis
Judge