

IN THE COURT OF APPEALS OF IOWA

No. 2-127 / 11-0469
Filed March 28, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LORRAINE ANN MESSER,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Randy S. DeGeest, District Associate Judge.

Defendant appeals claiming the evidence did not support her conviction of fraudulent practice in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Rose Anne Mefford, County Attorney, and Misty White, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Lorraine Messer appeals from her conviction of fraudulent practice in the third degree, in violation of Iowa Code sections 453A.36(1), 453A.37, and 714.11(1) (2009), claiming the evidence only supported a conviction for fourth degree fraudulent practice, in violation of Iowa Code section 714.12. Because we find the district court properly interpreted the statutes at issue, we affirm the conviction.

I. BACKGROUND AND PROCEEDINGS. Oskaloosa police received a tip from the Iowa Department of Revenue that Lorraine Messer was selling untaxed cigarettes from her home. The police conducted a controlled buy with an undercover officer, purchasing two packs of cigarettes from Messer for three dollars per pack. The cigarettes did not bear an Iowa tax stamp as required by Iowa Code chapter 453A. With this information, the police obtained a search warrant and discovered 218 packs of untaxed cigarettes in Messer's home. Messer admitted to the police she obtained the cigarettes from an Indian reservation. She would purchase as much as twenty cartons at a time for \$27.00 per carton. She would then resell the cigarettes to family and friends.

The State charged Messer with one count of fraudulent practice in the third degree and one count of possession of a controlled substance.¹ On December 23, 2010, Messer entered a written guilty plea to the fraudulent practice charge, but did not plea to the degree of the offense. The case proceeded to a bench trial on January 26, 2011, in order to determine the value

¹ The possession charge was later dismissed following a bench trial on count I, and is not a part of this appeal.

on which to base the degree of the offense. The district court found Messer guilty of fraudulent practice in the third degree holding it was the value of the cigarettes and not the amount of unpaid tax that determines the degree of the offense. The district court sentenced Messer to thirty days in jail and a \$625 fine, all of which was suspended. She was placed on probation for one year, and ordered to pay restitution, court-appointed attorney fees, court costs, and the applicable surcharges. Messer appeals claiming the district court erred in using the value of the cigarettes, and not the amount of the unpaid tax, in determining the degree of the crime committed.

II. SCOPE OF REVIEW. As this appeal presents a question of statutory construction, our review is for correction of errors at law. Iowa R. App. P. 6.907; *State v. McSorley*, 549 N.W.2d 807, 809 (Iowa 1996).

III. ANALYSIS. The statute Messer was convicted of violating provides:

Except as otherwise provided in this division, it is unlawful for any person to have in the person's possession for sale, distribution, or use, or for any other purpose, in excess of forty cigarettes, or to sell, distribute, use, or present as a gift or prize cigarettes upon which a tax is required to be paid by this division, without having affixed to each individual package of cigarettes, the proper stamp evidencing the payment of the tax and the absence of the stamp on the individual package of cigarettes is notice to all persons that the tax has not been paid and is prima facie evidence of the nonpayment of the tax.

Iowa Code § 453A.36(1). Later the chapter provides that violation of this section constitutes a fraudulent practice. See Iowa Code § 453A.37. However, the chapter does not establish the degree of fraudulent practice involved or provide the penalty. Thus, one must turn to the fraudulent practice chapter to determine

the degree of the charge or penalty to impose. Iowa Code section 714.11(1) provides a person is guilty of a fraudulent practice in the third degree when “the amount of money or value of property or service involved exceeds five hundred dollars but does not exceed one thousand dollars.” Fraudulent practice in the fourth degree is the proper charge when “the amount of money or value of property or services involved exceeds two hundred dollars but does not exceed five hundred dollars.” Iowa Code § 714.12.

Messer argues the proper value to use when determining the degree of the offense in this case is the value of the tax due on the cigarettes confiscated. As each cigarette is taxed at a rate of \$.068,² the total tax due on 218 packs of cigarettes is \$296.48.³ Because the amount of money or value of property or services involved exceeded \$200, but did not exceed \$500, Messer contends fraudulent practice in the fourth degree is the proper charge. See Iowa Code § 714.12.

In contrast the State asserts the proper value to consider was not the tax due, but the value of the cigarettes themselves in determining the degree of fraudulent practice to charge. As Messer was selling each pack for \$3 and she had 218 packs, the proper amount to determine the degree of the offense to charge is \$654.00. The State asserts, therefore, the proper charge was fraudulent practice in the third degree as the value of the property exceeded \$500, but did not exceed \$1000. See Iowa Code § 714.11(1).

² See Iowa Code section 453A.6(1).

³ There were 218 packs of cigarettes containing 20 cigarettes each multiplied by \$.068 per cigarette equals \$296.48.

While there is no current Iowa appellate case law interpreting section 453A.36, the Iowa Supreme Court has previously held the word “involved” in the fraudulent practice sections is ambiguous, and advised us to construe the language in light of the acts that are prohibited. *McSorley*, 549 N.W.2d at 809. In this case we find the prohibited act in Iowa Code section 453A.36(1) is possessing cigarettes that do not have the proper tax stamp affixed to them. Messer contends the prohibited act is the failure to pay the tax, but that is not how the legislature drafted this section. When the legislature wants to make the failure to pay a tax a fraudulent practice, they clearly know how to draft a statute accordingly. See Iowa Code § 422.25 (5) (providing a person who willfully fails to pay the tax required is guilty of a fraudulent practice). In this case, the legislature chose to draft section 453A.36 to make the possession of untaxed cigarettes the crime, not the failure to pay the tax. Because the prohibited act is the possession of the untaxed cigarettes, we find it is the untaxed cigarette’s value, not the amount of the unpaid tax, that is the property “involved” under the fraudulent practice code sections.

We therefore affirm the district court’s decision entering judgment against Messer for fraudulent practice in the third degree as the value of the untaxed cigarettes is greater than \$500, but less than \$1000.

AFFIRMED.