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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	6-186 85-893
JAMES V. DURLACHER,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for O'Brien County(No. CRF2970), James H. Andreasen, Judge.

Defendant appeals from his conviction for willful failure to file a state tax return in violation of Iowa Code section 422.25(5). **AFFIRMED.**

James V. Durlacher, pro se.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Douglas F. Staskal, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

OXBERGER, C.J.

In this appeal, the defendant challenges his conviction for failure to file a state income tax return in violation of Iowa Code section 422.25(5). The defendant contends: (1) that the trial court erred in denying his motion for judgment of acquittal and motion for judgment notwithstanding the verdict because the evidence was insufficient to support either the submisison of the case to the jury or the jury's verdict; (2) that the question of whether the defendant and his wife qualified as a partnership for tax purposes should not have been determined by the jury, but should have been determined by the court as a matter of law; (3) that a civil burden of proof was improperly employed for the purpose of ascertaining whether a partnership had been established; and (4) that the defendant was denied his constitutional rights when he was charged by information rather than indictment. We affirm.

I. Sufficiency of the Evidence

Our review of the defendant's first contention is governed by well-settled principles. In examining a trial court's denial of motions based upon the alleged insufficiency of the evidence, we view all of the evidence in the light most favorable to the state. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). In addition, we accept all legitimate inferences which may fairly and reasonably be deducted therefrom. Id.; State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). A trial court's refusal to direct a verdict of acquittal will be affirmed upon appeal if there is any substantial evidence tending to support the charge. State v. Schrier, 300 N.W.2d at 306. Similarly, a jury's verdict of guilty is binding unless there is no substantial evidence in the record supporting it, or it is clearly against the weight of the evidence. Id. Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt." Id.; State v. Mitchell, 371 N.W.2d 432 (Iowa Ct. App. 1985).

Transactions between family members instigated for the purpose of reducing tax liability are subject to special scrutiny upon appeal. Commissioner v. Tower, 327 U.S. 280, 291 (1946); Ballou v. United States, 370 F.2d 659, 662 (6th Cir.), cert. denied, 388 U.S. 911 (1966). In Commissioner v. Tower, 327 U.S. at 290, the Supreme Court recognized that a husband and wife may become partners for tax purposes if it is shown that the wife "either invest capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things. . . ." If, however, after the establishment of the so-called "partnership" the income created by the husband's efforts continues to be under his control to the same extent as previously, the income remains taxable to him. Id. at 291-92; Lusthaus v. Commissioner, 327 U.S. 293, 297 (1946).

The record discloses that the defendant operated a chiropractic clinic, taught seminars for other chiropractors, and rented apartments in the hotel building where his residence and clinic were located. In 1979, he and his wife filed a joint Iowa State income tax return; the return did not indicate that they were partners in any of the above enterprises. The defendant and his wife testified that in 1980 they decided to become equal business partners in order to reduce their tax liability. Consequently, they did not file state tax returns in 1980, 1981, or 1982. The defendant was audited by the Iowa Department of Revenue for the 1982 tax year. The auditor determined that the defendant's enterprises should be treated as a sole proprietorship because he found no evidence to the contrary. As such, he calculated the defendant's tax liability for 1982 as $399.02; the auditor testified that if the defendant and his wife were in fact partners, they would have incurred no tax liability.

We have carefully examined the record, and have found ample evidence supporting the jury's conclusion that the defendant and his wife were not partners.

Before the establishment of the alleged partnership, the defendant managed and controlled the business; after the partnership, he continued to control and manage the business exactly as he had before. The defendant's wife testified that she allowed the defendant to make the decisions concerning the hotel building and the income.

Moreover, there is no evidence of the defendant's wife doing anything differently in 1982 than she did in 1979, before the formation of the alleged partnership; in fact, she testified that she was doing the same thing. In 1979 the defendant's wife received $5400 in wages. The bank records reveal that in 1982 she was given only $2500. In addition, she did not share in the gross profits generated by the defendant, which totaled approximately $109,000. Although the defendant's wife testified that she contributed to the partnership by performing various services, the testimony of the defendant's employees contradicts this assertion. In short, we have found nothing in the record supporting the defendant's contention that he and his wife were equal business partners, but a legion of evidence to the contrary. See Commissioner v. Tower, 327 U.S. at 291; Lusthaus v. Commissioner, 327 U.S. at 293; Ballou v. United States, 370 F.2d at 662; compare Masoni v. Commissioner, T.C.M.1968-129(CCH)(partnership existence established); Liebsman v. Commissioner, T.C.M. 1966-88(CCH)(wife failed to prove one-half partnership income did not belong to her where valid partnership had been found). See also RESEARCH INSTITUTE OF AMERICA, 5 FEDERAL TAX COORDINATOR ¶B-2000-B-2022(2d ed. 1986).

The defendant contends that even if no partnership in fact existed, the state did not establish that his nonpayment of taxes was "willful" as provided in Iowa Code section 422.25(5). In State v. Osborn, 368 N.W.2d 68, 70 (Iowa 1985), the supreme court stated that wilfulness is established "by proof of a

voluntary and intentional violation of a known legal duty." We find the evidence adduced in the instant case sufficient to satisfy this definition.

II. Submission of Partnership Question to Jury

The defendant's claim that the trial court erred in submitting to the jury the question of whether a partnership existed is neither tenable nor timely. The defendant requested that the case be tried by a jury; he objected to the submission of the partnership question for the first time on appeal. As such, this claim was not timely raised. Mundy v. Olds, 254 Iowa 1095, 1106, 120 N.W.2d 469, 476 (1963).

III. Burden of Proof

We similarly dispose of the defendant's contention that the trial court erroneously employed a civil burden of proof in determining whether a partnership existed. This contention was not presented to the trial court, but was raised for the first time in this appeal. "Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided on appeal." State Farm Mutual Auto Insurance co. v. Pflibsen, 350 N.W.2d 202, 207 (Iowa 1984). Moreover, the defendant refers to a statement made by the State in its brief filed in connection with this appeal as support for his contention; he has not set forth any action on the part of the trial court indicating an improper delegation of the burden of proof. In fact, the trial court's instructions explicitly state the proper allocation of burdens in a criminal proceeding.

IV. Constitutionality of Charge by Information

Finally, the defendant argues that his constitutional rights were infringed when he was charged by information rather than grand jury indictment. He claims that prosecution by information is violative of his due process rights under the fifth and fourteenth amendments. Iowa Rule of Criminal Procedure 5(1) explicitly states that, "[a]ll indictable offenses may be prosecuted by a

trial information." The courts of this state have repeatedly upheld the constitutionality of this procedure when attacked on fifth amendment grounds. See State v. Williams, 285 N.W.2d 248, 269 (Iowa 1979); State v. Finnegan, 237 N.W.2d 459, 460 (Iowa 1976); State v. Masters, 196 N.W.2d 548, 550 (Iowa 1972); State v. Abodeely, 179 N.W.2d 347, 355 (Iowa 1970), appeal dismissed and cert. denied, 402 U.S. 936 (1971). See also Alexander v. Louisiana, 405 U.S. 625, 633 (1972)(Supreme Court reaffirmed 1884 decision in Hurtado v. California, 110 U.S. 516, 523 (1884), that the fifth amendment guarantee of indictment by grand jury applies only to federal felonies, not state). We find these cases controlling.

The defendant further asserts that the State's decision to prosecute by information rather than indictment involved the use of an arbitrary and capricious classification. We interpret this assertion as an allegation that the state's scheme providing for prosecution by information and indictment is void for vagueness under the due process clause because it fails to set forth guidelines governing which procedure should be employed.

Initially, we do not think that the void for vagueness doctrine is applicable to the defendant's case. In Kolender v. Lawson, 461 U.S. 352, 357 (1982), the Supreme Court stated that, "the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." See also Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). The gravamen of the void for vagueness doctrine is that potential violators must be given fair notice of what acts are unlawful, and sufficient guidelines must be set forth so that law enforcement officials are able to apply the law evenly. See Saadiq v. State, 387 N.W.2d 315, 321 (Iowa 1986). The rule of criminal procedure under attack in the instant case does not offend these principles. Moreover, when rule 5(1)

is read in conjunction with the other provisions enumerated in rule 5, it is clearly surrounded by sufficient safeguards to protect against discriminatory application. See Iowa R. Crim. P. 5. See also State v. Wehde, 258 N.W.2d 347, 350-51 (Iowa 1977).

For these reasons, the decision of the trial court is affirmed.

AFFIRMED.