

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 22nd JUDICIAL CIRCUIT
MCHENRY COUNTY

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiffs,

v.

MICHAEL M. PENKAVA,
Defendant.

Case No. 20CM1338

Katherine M. Keefe
Clerk of the Circuit Court
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McHenry County, Illinois
22nd Judicial Circuit

PEOPLE’S MOTION IN LIMINE #1

NOW COME the People of the State of Illinois, by and through PATRICK D. KENNEALLY, State’s Attorney for McHenry County, and his duly appointed assistant, ASHUR Y. YOUASH, and respectfully request that this Court enter an order granting People’s Motion *in limine* #1.

In support of said motion, the People state as follows:

Background

On July 27, 2006, Defendant, in his capacity as an elder of the Kingdom Hall Crystal Lake – Spanish Congregation was made aware of a child sexual abuse occurrence. Defendant, a mandated reporter as defined in 325 ILCS 5/4 as a member of the clergy, did not report this matter to the Agency or authorities. Rather, the defendant engaged in several discussions with others regarding what he had been told. Defendant initially suggested that he engaged in one such conversation with an attorney in New York (subsequently identified to the People as Mr. Greg Allen). Clarifying in its Amended Motion *in limine* #1, the Defendant now asserts that he spoke to a paralegal, who then spoke to Mr. Allen, and then in-turn relayed information from which the Defendant depended and acted upon. Subsequently, the Defendant did not

report the criminal sexual abuse to the authorities as required in his capacity as a mandated reporter.

For failing to report to the proper agency and authorities, pursuant to 325 ILCS 5/4(a)(9), Defendant was charged with a violation of Failure to Report, a Class A Misdemeanor.

MOTION IN LIMINE #1

In its Motion *in limine* #1, the People respectfully asks that this Court preclude the defendant from raising the affirmative defense of ignorance or mistake of law at trial as it is inapplicable. Defendant should be barred from raising this affirmative defense as reliance on legal advice is not a proper basis from which this defense may be asserted and, is therefore, irrelevant.

As Defendant previously outlined in its own Motion *in limine* #1, mistake of law is codified in statute 720 ILCS 5/4-8, which reads:

Sec. 4-8. Ignorance or mistake.

(a) A person's ignorance or mistake as to a matter of either fact or law, except as provided in Section 4-3(c) above, is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense.

(b) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

- (1) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or
- (2) he acts in reliance upon a statute which later is determined to be invalid; or
- (3) he acts in reliance upon an order or opinion of an Illinois Appellate or Supreme Court, or a United States appellate court later overruled or reversed; or
- (4) he acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by a public officer or agency legally authorized to interpret such statute.

(c) Although a person's ignorance or mistake of fact or law, or reasonable belief, described in this Section 4-8 is a defense to the offense charged, he may be convicted of an included offense of which he would be guilty if the fact or law were as he believed it to be.

(d) A defense based upon this Section 4-8 is an affirmative defense.
720 ILCS Section 5/4-8

I. Defendant did knowingly and willfully fail to immediately report the child sex abuse of which he was made aware on July 27, 2006.

To satisfy the *mens rea* act of knowingly, a defendant need only have knowingly committed the act constituting the offense, not knowingly committed the act constituting the offense knowing the act was illegal. *People v. Wendt*, 183 Ill. App. 3d 389 (2nd Dist. 1989). In *Wendt*, the defendant was charged with “willfully failing to file an income tax return” on income earned. *Id.* at 392. In support of his defense, the defendant presented evidence “tending to show that, in reliance upon certain court opinions he read, articles interpreting the law and the United States Constitution he read, and speeches at certain seminars he attended, he had in good faith come to believe that he was not subject to the Illinois (and United States) income tax. *Id.* at 393. As such, the defendant argued he ...” subjectively believed he was not subject to the tax, and so long as such belief was held in good faith, he was not willful and therefore not guilty” by the terms of 725 ILCS 4/8. *Id.* at 394.

The court, in categorically rejecting this reasoning, stated that the defendant’s “argument displays a profound misunderstanding of both the mental state of willfulness and the mistake-of-law defense under Illinois law.” *Id.* at 772. Citing the Illinois criminal code, the court began by observing that the term knowingly and willfully are synonymous. *Id.* at 395. As such, the court found that “to prove the mental element of the offense at bar, it was only necessary to prove that defendant was consciously aware that a failure to file his income tax return was practically certain to be caused by his conduct.” *Id.*

The court cited 725 ILCS 4/3(c), providing that “[k]nowledge that certain conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute

defining an offense, is not an element of the offense unless the statute clearly defines it as such.” With this in mind, the court found further that the charging statute at issue “does not clearly define the offense of willful failure to file a return as including as an element ‘[knowledge]’ that certain conduct constitutes an offense, or knowledge of the existence, meaning or application of [the statute], so such knowledge is not an element of the offense of willful failure to file a return. *Id.* at 396. The court concluded:

“All of defendant’s contentions regarding the deficiencies of the evidence of willfulness really come down to one claim: that defendant believed he was complying with the law. Such a mistake is not a defense under 4—8(a) of the Criminal Code for two separate reasons. First, such a belief falls squarely within the provision of section 4---3(c) and so is not a defense under section 4—8(a). [sic]. Second, such a belief does not negative the existence of the mental state of the offense at bar, i.e., conscious awareness by defendant that a failure to file his return was practically certain to be caused by his conduct.” *Id.*

Analogously, the Defendant here argues that since he relied on legal advice given to him by a paralegal in New York, he did not knowingly/willfully commit the offense as he was unaware that his act was illegal. Subsection (m) of the Abused and Neglected Child Reporting Act (the Act) provides, : “Any person who knowingly and willfully violates any provision of this Section other than a second or subsequent violation of transmitting a false report as described in the preceding paragraph, is guilty of a Class A misdemeanor for a first violation...” 325 ILCS 5/4(m). 325 ILCS 5/4 reads in pertinent part:

- (a) The following persons are required to immediately report to the Department when they have reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child:
 - (9) Any member of the clergy.

325 ILCS 5/4

At trial, therefore, the State must prove that the Defendant had “reasonable cause to believe that C.H., who was known to him in his professional or official capacity, was an abused or neglected child and knowingly and willfully¹ failed to immediately report to the Department.

As there is no real dispute with respect to the Defendant’s belief in his professional capacity that C.H. was abused, the only issue is whether he knowingly and willfully failed to immediately report to the Department. In other words and in keeping with *Wendt*, the State need only prove that by not reporting the abuse the Defendant was consciously aware that his failure to report was practically certain to be caused by his conduct, not that he was subjectively aware that failing to report was a crime.

People v. Abdul-Mutakabbir, cited by the Defendant, is distinguishable and of little guidance. 295 Ill. App. 3d 558 (1st Dist. 1998). In *Abdul-Mutakabbir*, the Defendant’s law license was suspended by the Illinois Supreme Court in 1993. *Id.* at 560. The Defendant filed a timely pleading with the supreme court requesting a petition for rehearing and stay on the mandate. *Id.* That same day, the supreme court responded with a letter to the defendant informing him that his petition would be treated as a “motion to reconsider and to recall its mandate.” *Id.* The supreme court, approximately 30 days later, entered an order denying the defendant’s motion and upholding the suspension. *Id.* The defendant continued to practice law over the next two years and was subsequently charged with eight misdemeanor counts of false personation of a judicial official. *Id.* at 561. Specifically, the defendant was alleged to have “falsely represented himself to be an attorney authorized to practice law.” *Id.* The trial court denied the defendant’s request to have the *mens rea* element of “knowledge” inserted into the

¹ Knowingly and willfully are synonymous, setting forth the identical mental state. 720 ILCS 5/4-5; *see also Smith v. Smith*, 2016 IL App (1st) 141091-U (1st Dist 2016) (stating that “[a]lthough specifically applying to the intent requirement in criminal cases, Illinois law prescribes that ‘conduct preformed knowingly is performed willfully unless the statute clearly requires another meaning’”).

instructions, finding the offense to be one of strict liability. *Id.* The defendant sought to argue that because the supreme court had not ruled on his motion for a “rehearing,” but rather their interpretation of his motion as one to “reconsider,” the order was stayed pursuant to Illinois Supreme Court Rule 368 (providing, “the timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court”). The defendant was convicted and appealed.

The court reversed in small part, finding first that false personation of a judicial officer was not a strict liability offense and required the *mens rea* element of “knowledge” to be proved with respect to each element. *Id.* at 562. The court observed that, in view of the “specific” language requiring that representation be “false” required the “knowledge” instruction. *Id.* at 564. The court reasoned, “in cases where a person is charged with falsely representing himself to be an attorney authorized to practice law, there will rarely be a question as to whether the presentation was false, but there may well be a question as to whether the person knew that the representation was false. *Id.* Second, the court found that one of the counts, the underlying act occurring prior to the supreme court’s final order dismissing the defendant’s motion for rehearing and stay, should be vacated, and remanded for a new trial. *Id.* at 566. The court resolved that, had the jury been properly instructed, it could have concluded that the defendant had no “knowledge” that his personation of judicial officer was “false” in that the defendant “knew that he was not authorized to practice law.”

Abdul-Matakabiir does not stand for the proposition that a defendant must be aware that their criminal acts are in fact illegal. *Abdul-Matakabbir* involved a specific statutory element that could be negated by a person’s mistake of fact or law. The defendant’s being mistaken as to his capacity to practice law negates the element that he knew his representation

of himself as a lawyer was false. In other words, the knowledge of falsity made being subjectively aware of his legal status as authorized to practice law or not was explicitly an element of the offense. The appellate court in *Abdul-Matakabiir* would not have been sympathetic to the defendant's argument that he was unaware that the unauthorized practice of law was illegal.

Unlike the defendant in *Abdul-Matakabiir*, in this case, there is no language necessitating that the Defendant be subjectively aware that failing to report was illegal. As such, *Wendt* is controlling and the State need only prove that by not reporting the abuse the Defendant was consciously aware that his failure to report was practically certain to be caused by his conduct.

II. Defendant's claim that he relied on legal advice is not a basis for the affirmative defense of ignorance or mistake under 720 ILCS 5/4-8(b).

The Defendant should be barred from raising the affirmative defense of ignorance or mistake as bad legal advice is not a basis for such a defense. The Defendant contends he relied on a paralegal, who then spoke to who he believed to be an attorney, in New York. It was the paralegal who then advised him of what actions to take, which included, but were not limited to, **not reporting the information to the proper authorities or the Agency.**

Subsection (b)(4) of 720 ILCS 5/4-8 lists the only individuals the Defendant must have relied on in order to raise the defense of ignorance or mistake when it states, "an official interpretation of the statute, regulation, or order defining the offense, made *by a public officer or agency legally authorized to interpret such statute.*" (emphasis added by People) 720 ILCS 5/4-8.

Here, the Defendant did not rely on advice from a public officer or agency legally authorized to interpret such statute. He relied on advice given to him from a paralegal in New

York. Even if this person's interpretations, translations, or recitations were precise and rise to the level of what the attorney would have said himself, it is well established that reliance on bad legal advice- even from a lawyer directly - is not an affirmative defense. Neither the paralegal nor the attorney is a public officer nor does either work for an agency that is authorized to interpret the statute at bar. Reliance on anyone else precludes the raising of ignorance or mistake affirmative defense pursuant to 720 ILCS 5/4-8(b)(4).

The People ask the Court to consider from the 10,000-foot level how the Defendant suggests this Court interpret the affirmative defense of ignorance or mistake of law. Any defendant may claim that they did not know their conduct was a crime because a paralegal or lawyer in another state told them it was not. (It should also be noted a search in the Illinois Bar shows that in 2006, Mr. Allen was not, and has never since been, licensed to practice law in Illinois.) Imagine the absurdities this interpretation would lead to were this court were to interpret the affirmative defense in such a manner.

No other section exists allowing the Defendant to raise the affirmative defense of ignorance or mistake under 720 ILCS 5/4-8. Since reliance on the "legal advice" given to him by a paralegal in New York cannot be raised as an affirmative defense this court should preclude the defendant from raising it at trial as it is irrelevant.

Conclusion

WHEREFORE, for the reasons stated above, the People pray that this Honorable Court grant People's Motion *in Limine* #1 and for such other remedies as the Court deems just.

Respectfully submitted,



Ashur Y. Youash
Assistant State's Attorney

Patrick D. Kenneally
State's Attorney for McHenry County
2200 North Seminary Avenue
Woodstock, IL 60098
(815) 334-4159