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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2015-002073

THE STATE,

Appellant,

vs.

ROXANNE HUGHES,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court judge abuse his discretion and commit a reversible legal error by dismissing three indictments for felony tax evasion prior to trial when the prosecutor properly exercised his prosecutorial discretion in deciding what charges to bring against Respondent, the grand jury issued facially-valid indictments for tax evasion in Respondent's case, and Respondent's act of affirmatively filing a false tax withholding certificate coupled with her acts of failing to file tax returns and failing to pay her taxes collectively established Respondent willfully attempted to evade or defeat a tax in violation of S.C. Code Ann. § 12-54-44(B)(1)?

STATEMENT OF THE CASE

In February of 2014, the Colleton County Grand Jury indicted Respondent Roxanne Hughes for three counts of evasion of a tax or property assessment or payment in violation of S.C. Code Ann. § 12-54-44(B)(1). Prior to trial, Respondent filed a motion entitled "Defendant's Motion and Memorandum in Support of Motion to Proceed Under More Specific Offense Statute." On September 28, 2015, a hearing was conducted on Respondent's motion in the Colleton County Court of General Sessions before the Honorable Larry B. Hyman, Jr., circuit court judge. At the conclusion of the hearing, the circuit court judge granted Respondent's motion and dismissed each of the felony tax evasion indictments that had been issued by the grand jury. The State then timely filed a notice of appeal.

STATEMENT OF FACTS

Following an investigation into Respondent Roxanne Hughes's actions over the course of several years, the South Carolina Attorney General elected to charge Respondent with multiple counts of felony tax evasion, and the Colleton County Grand Jury responded by issuing three indictments for evasion of a tax or property assessment or payment. (Indictments). In each of the indictments issued by the grand jury, Respondent's offense was identified as a violation of S.C. Code Ann. § 12-54-44(B)(1), and the indictments all alleged Respondent "willfully attempt[ed] to evade and defeat a tax or property assessment imposed by the South Carolina Department of Revenue or the payment of that tax or assessment[.]" (Indictments). Likewise, each of the indictments alleged Respondent committed the offense of felony tax evasion by filing a false withholding allowance certificate with her employer that stated she was exempt from the withholding of taxes, by failing to file an income tax return for the applicable year, and by failing to pay her state tax liability for the applicable year. (Indictments).

Prior to trial, defense counsel for Respondent filed a motion challenging the State's indictments. (Def. Motion, pp. 1-4). In that motion, defense counsel noted the willful failure to pay a tax or file a return and the willful provision of false information to an employer in regard to tax withholdings are prohibited acts in South Carolina and can constitute misdemeanor offenses pursuant to S.C. Code Ann. §§ 12-54-44(B)(3) and (B)(5). (Def. Motion, pp. 1-2). With that in mind, defense counsel asserted a more specific statutory provision will typically control over a more general statutory provision according to statutory construction principles while contending S.C. Code Ann. §§ 12-54-44(B)(3) and (B)(5) appeared to be in conflict with S.C. Code Ann. § 12-54-44(B)(1), which was the statute Respondent was alleged to have violated. (Def. Motion, pp. 2-3).

Based on that purported statutory conflict, defense counsel argued the more specific statutory provisions identifying misdemeanor tax offenses in South Carolina "should control" in Respondent's case. (Def. Motion, pp. 3-4).

In response, the prosecutor for the State filed a return to Respondent's motion. (State's Response, pp. 1-4). In the State's return, the prosecutor noted arguments precisely like the argument raised by Respondent had been raised in numerous federal cases, which were decided following an analysis of a federal felony tax evasion statute that was virtually identical to South Carolina's felony tax evasion statute. (State's Response, pp. 2-3). In those cases, the prosecutor noted the federal courts had determined the commission of acts just like Respondent's could constitute lesser tax offenses while **also** constituting the offense of felony tax evasion. (State's Response, pp. 2-3). Furthermore, the prosecutor asserted the State exercised its constitutionally-derived prosecutorial discretion in deciding what charges to bring against Respondent and had properly obtained indictments in Respondent's case. (State's Response, pp. 3-4). For those reasons, the prosecutor asserted Respondent's motion seeking for the State to be compelled to charge her solely with misdemeanor tax offenses should be denied as such relief would constitute a fundamental violation of the separation of powers doctrine. (State's Response, pp. 3-4).

Thereafter, the circuit court judge conducted a pre-trial hearing on Respondent's motion. (Tr. p. 3). During the hearing, defense counsel acknowledged it was uncontested Respondent filed a false W-4 with her employer resulting in no withholdings being taken out of her paychecks while also failing to file tax returns as required, which he noted were actions specifically classified as misdemeanors that were outlawed by S.C. Code Ann. §§ 12-54-44(B)(3) and (B)(5). (Tr. pp. 3-5). Because Respondent's actions

were specifically prohibited by those statutory provisions, defense counsel reiterated his argument Respondent could not be charged for a violation of S.C. Code Ann. § 12-54-44(B)(1), which prohibited the offense of tax evasion and classified it as a felony, due to the fact it was allegedly a more general statutory provision. (Tr. pp. 3-4). Defense counsel then expressed his desire to the circuit court judge "to proceed under the two misdemeanor accounts." (Tr. p. 4).

In response, the prosecutor again asserted Respondent's actions, when viewed separately, could constitute two misdemeanor tax offenses but, when taken together, also constituted the felony offense of tax evasion. (Tr. p. 5). The prosecutor further argued the question of whether the evidence regarding Respondent's combined actions and intent constituted the offense of felony tax evasion should be a factual question left for the jury to consider and resolve. (Tr. p. 6).

After considering the arguments of counsel, the circuit court judge inquired of defense counsel what relief he was requesting. (Tr. p. 10). Defense counsel responded: "Your Honor, in the form of relief, we would ask you to dismiss the indictment with leave for the State of South Carolina to pursue misdemeanor charges." (Tr. p. 10). The circuit court judge then granted Respondent's motion in full. (Tr. p. 10; p. 13). Thereafter, the prosecutor quickly appealed the circuit court judge's ruling. (Notice of Appeal).

ARGUMENT

Did the circuit court judge abuse his discretion and commit a reversible legal error by dismissing three indictments for felony tax evasion prior to trial when the prosecutor properly exercised his prosecutorial discretion in deciding what charges to bring against Respondent, the grand jury issued facially-valid indictments for tax evasion in Respondent's case, and Respondent's act of affirmatively filing a false tax withholding certificate coupled with her acts of failing to file tax returns and failing to pay her taxes collectively established Respondent willfully attempted to evade or defeat a tax in violation of S.C. Code Ann. § 12-54-44(B)(1)?

Prior to trial, the circuit court judge abused his discretion and committed reversible error by dismissing three indictments for felony tax evasion in response to defense counsel's contention Respondent should have instead been indicted for misdemeanor tax offenses. Critically, that ruling was legally erroneous because Respondent's actions were sufficient to prove the offense of felony tax evasion, the indictments issued in Respondent's case were facially valid and sufficient to bring the case to trial, and the prosecutor had the exclusive prosecutorial discretion to determine what charges to bring against Respondent pursuant to the separation of powers doctrine. For those reasons, the circuit court judge did not have the power to dismiss the indictments under the circumstances, and his decision to do so was controlled by a legal error. Accordingly, the circuit court judge's ruling dismissing the indictments should be reversed, the indictments should be reinstated, and Respondent's case should be remanded for trial.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In appeals of pretrial rulings, [the appellate court] is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by

error of law.' " Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). Importantly, a trial judge's ruling on a matter "will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial judge's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ANALYSIS

Pursuant to S.C Code Ann. § 12-54-44(B)(1), "[a] person who willfully attempts in any manner to evade or defeat a tax or property assessment imposed by a title administered by the department or the payment of that tax or property assessment, in addition to other penalties provided by law, is guilty of a felony[.]" Notably, South Carolina's felony tax evasion statute is substantially similar to the statutory provision defining the federal offense of felony tax evasion. See 26 U.S.C. § 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony[.]"). In order to prove the offense defined by either of those statutory provisions, the prosecutor must establish the following elements: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of a tax. See Sansone v. United States, 380 U.S. 343, 351 (1965) (explaining the elements of felony tax evasion are willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of a tax).

Significantly, based on the plain language of the state and federal felony tax evasion statutes, the affirmative act necessary to prove the offense of felony tax evasion

can be committed **in any manner** so long as that act was committed to willfully evade a tax. 26 U.S.C. § 7201; S.C. Code Ann. § 12-54-44(B)(1); see also State v. Morgan, 352 S.C. 359, 366-367, 574 S.E.2d 203, 206-207 (Ct. App. 2002) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is **no need to employ rules of statutory interpretation** and the court has no right to look for or impose another meaning." (emphasis added)); State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language."). As a result, affirmative acts that could constitute misdemeanor tax offenses can **also** constitute proof of the offense of felony tax evasion if committed with the intent to evade a tax. See Sansone, 380 U.S. at 352-353 (finding Sansone's commission of acts constituting misdemeanor tax violations could also constitute the offense of felony tax evasion in light of the fact the misdemeanors involved willful affirmative acts sufficient to establish an attempt to evade a tax); see also Spies v. United States, 317 U.S. 492, 497 (1943) ("A felony may, and frequently does, include lesser offenses **in combination** either **with each other** or with other elements." (emphasis added)).

One such prohibited misdemeanor tax offense is the act of willfully failing to file a return, which is prohibited by substantially similar state and federal statutes. See S.C. Code Ann. § 12-54-44(B)(3) ("A person required under any provision of law administered by the department and who willfully fails to pay any estimated tax or tax, or who is required by any provision of law or by any regulation and **who willfully fails to make a return**, keep records, or supply information, at the times required by law or regulation, in addition to other penalties provided by law, is guilty of a misdemeanor[.]" (emphasis added)); see also 26 U.S.C. § 7203 ("Any person required under this title to

pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor[.]"). Another of the prohibited misdemeanor tax offenses is the act of filing a false W-4, which is also prohibited by substantially similar state and federal statutes. See S.C. Code Ann. § 12-54-44(B)(5) ("A person required to supply information to his employer under [the statutory section addressing income tax withholding] **who willfully supplies false or fraudulent information** or who willfully fails to supply information **which would require an increase in the tax to be withheld** under [the statutory section addressing income tax withholding] is guilty of a misdemeanor[.]" (emphasis added)); see also 26 U.S.C. § 7205 ("Any individual required to supply information to his employer under [the federal statutory section addressing income tax withholding] who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under [the federal statutory section addressing income tax withholding] shall, in addition to any other penalty provided by law, upon conviction thereof be fined not more than $1,000, or imprisoned not more than 1 year, or both.").

Importantly, the filing of a false W-4 naturally constitutes an affirmative act on the part of an offender as it involves a direct action as opposed to a mere omission. See United States v. King, 126 F.3d 987, 989-990 (7th Cir. 1997) ("An affirmative act is some conduct, undertaken at least in part because of a tax evasion motive, 'the likely effect of which would be to mislead or to conceal.' Filing a false Form W-4 satisfies the

affirmative act requirement." (citations omitted)); United States v. Connor, 898 F.2d 942, 945 (3rd Cir. 1990) ("[H]is purposeful failure to file an accurate W-4 form could be viewed by the jury as an affirmative willful act to support the violation of [the felony tax evasion statute.]"); see also Spies, 317 U.S. at 499 ("Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."). Accordingly, by committing the affirmative act of willfully filing a false W-4 coupled with the act of failing to file a tax return with the intent to evade or defeat a tax, an offender can properly be found guilty of all the required elements of the offense of felony tax evasion if a tax deficiency exists a result of the offender's actions. See United States v. Gross, 626 F.3d 289, 297-298 (6th Cir. 2010) ("The filing of false W-4 forms falls comfortably within the broad parameters established in Spies. . . . [W]hen a W-4 form bearing false information is on file, it is possible that the IRS might rely upon that information while investigating a taxpayer's failure to file a return, in which case the W-4 form would facilitate the taxpayer's attempts to evade payment of tax. Similarly, filing false W-4 forms allowed Gross to ensure that the IRS would not receive, through the withholding process, any of the taxes which it was owed. Indeed, if Gross had not claimed that he was exempt from withholding, [his employer] would have withheld taxes from his paycheck, which would have thwarted Gross's attempts to evade paying his taxes by not filing a return. In other words, even if no taxes were due when Gross completed the fraudulent W-4 forms, the W-4 forms still played an integral part in his attempt to evade his taxes. . . . In sum, Gross committed an affirmative act of tax evasion when he submitted false W-4 forms to [his employer]. . . . Therefore, we affirm Gross's convictions under § 7201 for attempting to

evade or defeat the payment of tax." (citations and footnote omitted)); see also United States v. Szilagyi, 878 F.2d 373, __ (6th Cir. 1989) (holding the district court judge correctly instructed the jury in regard to the offense of felony tax evasion by giving the following charge: "If you find that the defendant deliberately filed a false and fraudulent W-4 form, and failed to file an income tax return, and failed to pay taxes, you may find that he committed an affirmative act of tax evasion.").

In the case sub judice, Respondent, as alleged in the indictments, filed a false withholding certificate with her employer that fraudulently claimed she was exempt from the withholding of taxes while also failing to file tax returns as required for several years and failing to pay the income tax she lawfully owed to the State.[1] (Indictments). As further alleged in the indictment, those collective actions resulted in over $10,000 in unpaid taxes being owed to the State. (Indictments). Significantly, while each of Respondent's actions – when viewed in isolation – could have constituted various misdemeanor tax offenses, her actions – when taken together – collectively demonstrated a willful and affirmative attempt to evade or defeat her state income tax obligations. See United States v. Copeland, 786 F.2d 768, 770 (7th Cir. 1985) ("The acts comprising [Copeland]'s evasion convictions are themselves proscribed as misdemeanors. . . . [Copeland] contends that the felony evasion charge requires proof of a willful act beyond the misdemeanor charges. He broadly construes Spies v. United States . . . to stand for the proposition that there must be a willful commission of an act separate from and in addition to the willful omissions included in the Code's list of misdemeanor offenses. . . . The underlying misdemeanor offenses in Spies were insufficient not because they were

[1] Notably, during the pre-trial hearing, defense counsel conceded to the circuit court judge the facts in Respondent's case were not being contested. (Tr. p. 5).

misdemeanors, but rather because they were acts of omission whereas the felony of willful attempt to evade or defeat tax required 'some willful commission in addition to the willful omissions that make up the list of misdemeanors.' . . . The act of filing a false and fraudulent tax withholding certificate, although a misdemeanor offense, constitutes valid and sufficient evidence of willful commission." (citations and footnote omitted)); see also United States v. Williams, 928 F.2d 145, 148-149 (5th Cir. 1991) (finding evidence establishing Williams filed a false W-4 and failed to file returns was sufficient to prove the necessary elements of the offense of felony tax evasion). As a result, the evidence in regard to Respondent's actions constituted proof of the offense of felony tax evasion.

In light of that fact, the South Carolina Attorney General properly exercised his constitutionally-derived prosecutorial discretion and prepared indictments charging Respondent with felony tax evasion after determining Respondent's actions violated the mandates of S.C. Code Ann. § 12-54-44(B)(1). See S.C. Const. art. I, § 8 ("[T]he legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."); see also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, **and what charge to file or bring before a grand jury**, generally rests entirely in [the prosecutor's] discretion." (emphasis added)). Significantly, those indictments contained the necessary elements of the offense of felony tax evasion and sufficiently apprised Respondent of what allegations she was facing. See State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) (explaining an

indictment is sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction"); State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999) ("[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet."); see also S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). Under those circumstances, the indictments issued by the grand jury were facially valid and sufficient, and the circuit court judge had no authority to dismiss those indictments prior to trial. See United States v. Hogan, 861 F.2d 312, 314-315 (1st Cir. 1988) (finding an indictment alleging Hogan committed felony tax evasion by willfully attempting to defeat or evade a tax through the act of filing a false withholding allowance certificate that claimed he was exempt from withholding was valid, sufficient, and not defective); see also State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) ("[A] trial court generally has **no power** to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court." (emphasis added)); State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's

evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

Despite the fact the indictments were facially valid and sufficient, the circuit court judge in Respondent's case agreed with defense counsel's argument, granted Respondent's motion, and dismissed each of the felony tax evasion indictments issued by the grand jury. Critically, that ruling constituted reversible error for a variety of different reasons. Initially, the circuit court judge's ruling was legally erroneous because Respondent's actions as alleged **were**, in fact, sufficient to constitute the offense of felony tax evasion in light of the fact her affirmative act of filing a false W-4 coupled with her acts of failing to file tax returns and failing to pay her taxes established she willfully attempted to evade or defeat a tax.[2] See Sansone, 380 U.S. at 352-353 (holding

[2] In challenging the indictments, defense counsel argued to the circuit court judge the rules of statutory construction precluded the prosecutor from charging Respondent with anything other than misdemeanor tax offenses due to fact her actions allegedly were covered by more specific statutory provisions classifying her criminal acts as misdemeanors. (Def. Motion, pp. 1-3; Tr. pp. 3-5). While defense correctly asserted specific statutory provisions typically control over more general statutory provisions when those provisions are in conflict, that statutory construction principle was not applicable because the statutory provisions at issue in Respondent's case were **in no way** in conflict with each. See Pressley v. Tupperware Long Term Disability Plan, 553 F.3d 334, 339 (4th Cir. 2009) (recognizing the " 'basic principle of statutory construction that **when two statutes are in conflict**, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision' " (emphasis added and citation omitted)); see also Florence County v. Moore, 344 S.C. 596, 601, 545 S.E.2d 507, 509 (2001) ("Our goal in construing statutes is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd."). Critically, that is true because a single act of an offender can support charges for multiple offenses, including misdemeanor offenses **and** felony offenses. See State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (1996) ("A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses."); State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989) ("Under South Carolina law, distinct criminal offenses may arise from a single act."); Elders, 386 S.C. at 482, 688 S.E.2d at 861 ("[A] defendant may be convicted of two separate crimes arising from the same conduct[.]"). In light of that fundamental legal principle coupled with the fact the legislature directly specified in S.C. Code Ann. § 12-54-44(B)(1) the penalties authorized under that provision were to be imposed "in addition to other penalties provided by law," the prosecutor was **not** precluded from charging Respondent for felony tax evasion based on her criminal acts simply because those acts could have also supported charges for misdemeanor tax offenses. See State v. Pace, 337 S.C. 407, 416, 523 S.E.2d 466, 470 (Ct. App. 1999) (holding the trial judge properly denied Pace's motion to dismiss a forgery indictment and instructing Pace's argument she could not be charged for both forgery and insurance fraud based on the same conduct was entirely without merit); see also State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) (explaining the legislature's intent should be ascertained primarily from the plain language of the statute and the court must apply clear and unambiguous terms of a statute according to their literal

evidence of misdemeanor tax violations can be sufficient to prove the offense of felony tax evasion); see also United States v. Waldeck, 909 F.2d 555, 560 (1st Cir. 1990) ("Courts have uniformly held that the filing of false W-4s constitute evidence of a willful attempt to evade taxes in violation of 26 U.S.C. § 7201."). Additionally, the circuit court judge's ruling was erroneous because he had **no** authority whatsoever to dismiss the facially-valid indictments issued by the grand jury in light of the fact a pre-trial challenge to an indictment cannot be used to challenge the sufficiency of the State's evidence. See Needs, 333 S.C. at 146, 508 S.E.2d at 863 (explaining a trial judge ordinarily has no power to dismiss a properly drawn indictment prior to trial absent some statutory authority permitting the trial judge to do so); State v. Sweat, 221 S.C. 270, 272, 70 S.E.2d 234, 235 (1952) (holding a motion to quash the indictment raised on the ground the victims identified in the indictment did not actually own the property stolen was properly denied because the indictment was facially valid and because the motion – if treated as a motion for a directed verdict since it went to the sufficiency of the evidence – was out of order and premature); see also United States v. Guerrier, 669 F.3d 1, 3-4 (1st Cir. 2011) ("[C]ourts routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment's allegations[.] . . . [I]n the ordinary course of events, a technically sufficient indictment handed down by a duly empaneled grand jury 'is enough to call for trial of the charge on the merits.' " (citations omitted)); United States v. Redcorn, 528 F.3d 727, 733 (10th Cir. 2008) ("[A] challenge to the indictment is not a vehicle for testing the government's evidence."); Gibson v. United States, 244 F.2d 32, 34 (4th Cir. 1957) (holding a pre-trial challenge to an indictment can

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meaning); see generally United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997) ("If one person shoots and kills another, a prosecutor may charge anything between careless handling of a weapon and capital murder."). Thus, the circuit court judge's decision to dismiss the indictments in response to Respondent's argument was clearly erroneous.

only be made in respect to the validity of the indictment itself and not in respect to whether the facts of the case support the allegations in the indictment, which is an issue to be raised during trial). Finally, the circuit court judge's ruling was legally erroneous because his ruling dismissing the properly-obtained felony tax evasion indictments infringed upon the prosecutor's constitutionally-derived discretion to determine what charges to bring in clear violation of the separation of powers doctrine. See State v. Burdette, 335 S.C. 34, 40, 515 S.E.2d 525, 528-529 (1999) ("Choosing which crime to charge a defendant with is the essence of prosecutorial discretion[.]"); State v. Thrift, 312 S.C. 282, 291, 440 S.E.2d 341, 346 (1994) (instructing the executive branch is vested with the power to decide when and **how** to prosecute criminal cases); State ex rel. Rawlinson v. Ansel, 76 S.C. 395, __, 57 S.E. 185, 189 (1907) ("[I]n the exercise of a discretionary official act, an executive officer cannot be restrained, coerced, or controlled by the judicial department."); see also United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992) ("A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them.").

For the foregoing reasons, the circuit court judge abused his discretion and committed a clear error of law by dismissing the properly-drawn indictments issued in Respondent's case. See Sheldon, 344 S.C. at 342, 543 S.E.2d at 585-586 (instructing a trial judge's ruling should only be reversed if it is legally erroneous or constitutes an abuse of discretion); see also State ex rel. Davis v. State Bd. of Canvassers, 86 S.C. 451, __, 68 S.E. 676, 678 (1910) (explaining an appellate court "will correct errors of law" committed by a lower court). As a result, the circuit court judge's ruling should be reversed, the indictments should be reinstated, and Respondent's case should be remanded for trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the circuit court judge should be reversed, the indictments should be reinstated, and the case should be remanded for trial.

Respectfully submitted,

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February 8, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2015-002073

THE STATE,

Appellant,

vs.

ROXANNE HUGHES,

Respondent.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Initial Brief of Appellant and Designation of Matter on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John R. Alphin and Bakari T. Sellers, Esquires
Strom Law Firm, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204

I further certify that all parties required by Rule to be served have been served.
This 8th day of February, 2016.

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ALAN WILSON
ATTORNEY GENERAL

February 8, 2016

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RE: State v. Roxanne Hughes – Appellate Case No. 2015-002073

Dear Mr. Alphin and Mr. Sellers:

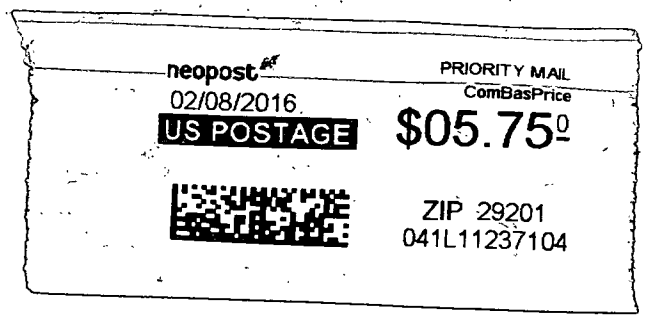
I am enclosing two (2) copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Services



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