

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
STATE VS.
Curnez Ellerbee
AKA:
Race: BLACK Sex: M Age: 45
DOB: SS#
Address:
City, State, Zip:
DL#: SID#

INDICTMENT/CASE#: 2018GS4005541
A/W#: DP18588
Date of Offense: 4/15/2010
S.C. Code §: 12-54-0044(B)(1)
CDR Code #: 2759 2757

SENTENCE SHEET RECEIVED

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or MAY PLEADS
TO: Tax / Failure to pay taxes, file a return and keep records TAX EVASION

in violation of § 12-54-0044(B)(3) of the S.C. Code of Laws, bearing CDR Code #
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Solicitor SC Bar# 14710 Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 3 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for 5

months and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.
CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the SCDOC.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic
Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:
RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP payment of restit
Total: \$ 3000 plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:
*Fine: \$

Table with 3 columns: Code, Description, Amount. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso (Public Def/Probation) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, 3% to County (if paid in installments) \$

TOTAL
Clerk of Court/ Deputy Clerk
Court Reporter: Melinda Jeanette McBride
SCCA/217 (04/2018)

Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:
Appointed PD or appointed other counsel,
Proviso requires \$500 be paid to Clerk
during probation and shall be collected before
any other fees.
Presiding Judge
Judge Code: 2161
Sentence Date: 2-12-19

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

The State of South Carolina

vs.

Curnez Ellerbee,

Defendants.

) IN THE COURT OF GENERAL
) SESSIONS OF THE FIFTH JUDICIAL
) CIRCUIT

) Indictment No.: 2018-GS-40-05541

) **ORDER DENYING DEFENDANT'S**
) **MOTION FOR NEW TRIAL**

2019 MAY 22 PM 2:24
RICHLAND COUNTY
FILED
CLERK OF COURT
S.S., & EC.

This matter came before The Honorable DeAndrea Gist Benjamin on February 11, 2019. Present at the hearing were Allen Myrick and Nicole Wooten for the state and Jonathan Comish, Catherine Mubarak and Alice Phillips for the defense.

For the reasons set forth below, Defendant's motion for new trial is **DENIED**.

FACTUAL BACKGROUND

Curnez Ellerbee was charged with five counts of Tax Evasion and five counts of failure to file Tax Returns. On February 11, 2019, Special Assistant Attorney General Allen Myrick called the case of Curnez Ellerbee to trial for the state. Mr. Myrick elected to proceed at trial on all ten indictments.

In the defense's opening statement, Counsel for the defendant told the jury that Mr. Ellerbee was guilty of failing to file tax returns. Defense counsel asked the jury to find Mr. Ellerbee guilty of the five misdemeanor failure to file charges. Defense expressed to the jury that Mr. Ellerbee did not intend to commit tax evasion and asked the jury to find him not guilty on those charges. The defense later explained it was their trial strategy to build credibility and trust with the jury by conceding guilt to the five misdemeanor failure to file charges.

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The state admitted evidence of Mr. Ellerbee's failure to file taxes through S.C. Department of Revenue investigators, including evidence that S.C. Department of Revenue had no record of Mr. Ellerbee filing returns for the years for which he was indicted.

During the course of the trial, Mr. Myrick called several witnesses for the state including Verizon Human Resources employee, Stacy Young, S.C. Department of Revenue investigators Andy Blackwell and Marshall Smith, and Mr. Ellerbee's tax preparer, Ms. Kadenia Williams-Jarvis. At the conclusion of the state's case and after the defense indicated it would not put up a case, Mr. Myrick announced his intention to dismiss the five misdemeanor failure to file charges. Mr. Myrick expressed that he was principally concerned with attaining a guilty verdict on the tax evasion charges and that he was dismissing the misdemeanor failure to file charges as an exercise of his prosecutorial authority. The defense argued the timing of Mr. Myrick's decision implicated Mr. Ellerbee's constitutional rights to due process and a fair trial.

Mr. Myrick presented a motion to dismiss before the court, the five misdemeanor failure to file charges were dismissed. The state rested and the defense decided not to present a case. The jury acquitted Mr. Ellerbee on four of the five felony tax evasion charges and found Mr. Ellerbee guilty of one. The defense requested a new trial on the single felony tax evasion charge.

LEGAL ANALYSIS

I. The Defense argued the state improperly dismissed the five misdemeanor failure to file charges after presenting their case to the jury at trial, thereby depriving Mr. Ellerbee of his constitutional right to fair trial and due process.

In South Carolina, the solicitor is charged with the responsibility of prosecuting criminal charges, including procurement of the proper indictment from the grand jury. S.C. Const. art. V, § 24; S.C. Code Ann. §§ 1-7-320 (1986), 14-9-210 (1977). "In our system, so 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 his discretion.” United States v. Goodwin, 457 U.S. 368 (1982). “A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution.” State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (There was no vindictiveness where prosecutor filed additional charges which more specifically detailed the criminal behavior after the defendant complained the original indictment lacked specificity). Mr. Myrick had prosecutorial authority to indict Mr. Ellerbee as he deemed appropriate and present evidence to the jury that proved Mr. Ellerbee’s guilt. Mr. Myrick had full discretion to indict Mr. Ellerbee on the five misdemeanor failure to file charges as well as the five felony tax evasion charges based upon on the fact that Mr. Ellerbee willingly and knowingly did not file his taxes during the five years in which he was indicted. There is no case law that makes the state responsible for the defense’s trial strategy and the arguments the defense chooses to make before the jury. Mr. Myrick was well within the rim of his prosecutorial discretion in making a motion to dismiss charges that he deemed were unwarranted at or near the conclusion of trial.

II. The defense argues canons of statutory construction dictate that the state should have charged Mr. Ellerbee with two complimentary misdemeanors for each tax year, rather than a felony.

The defense argued Mr. Ellerbee was prejudiced by the State’s decision to charge him with a felony rather than the appropriate misdemeanors. “The Difference between the misdemeanor offense of willful failure to pay taxes when due and felony offense of willful attempt to evade or defeat taxes is that the felony offense involves some commission in addition to willful omission.” 26 U.S.C.A. (I.R.C.1954) §§ 7201, 7203. Evidence presented by the state demonstrated there was some commission in addition to willful omission, evident by the allegations of the state that Mr. Ellerbee submitted a false W-4 withholding document.

This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.

United States v. Batchelder, 442 U.S. 114 (1979). More importantly, there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements." Id. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. Id. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. Id. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced. Id. Mr. Ellerbee admitted he failed to file his taxes during the five year period for which he was indicted. Due to his failure to pay his taxes, the submittal of a false W4 withholding document, and the close resemblance of the misdemeanor charge of failure to file and the felony charge of tax evasion, Mr. Myrick had the discretion to prosecute under either statute. Based on the evidence admitted during trial the state was well within their prosecutorial discretion to determine which charge(s) were more appropriate to pursue. No discrimination was shown by Mr. Myrick exercising his discretion. Mr. Myrick considered both the financial aspect of securing the \$13,000 the state sought in restitution, as well as, deterring future tax evasion cases in determining which of the two charges to pursue. Although, it was the defense's strategy to admit guilt to the misdemeanor charges, no evidence presented during trial indicated Mr. Ellerbee's constitutional rights were violated.

III. The Defense argues the state violated Mr. Ellerbee's constitutional rights to Equal protection and Due process by extending plea offers to similarly situated defendants in a manner that discriminated based upon inability to pay.

Mr. Ellerbee was one of several dozen Verizon Wireless employees across the state that the SC Dept. of Revenue investigated and arrested for felony tax evasion and misdemeanor failure to file tax

returns from 2008 to 2012. It was uncontested that Mr. Ellerbee and his fellow Verizon employees were similarly situated, worked for the same employer, many of whom had no criminal record and faced the same charge(s). There was no factual dispute regarding the terms of the plea offers Mr. Myrick extended to Mr. Ellerbee or any of the other defendants deriving from SC Dept. of Revenue's investigation. The fact that identically situated individuals received the same plea offers is evidence that there were no violation of equal protection or due process rights. Prior to the case going to trial, the state alleged on several occasions that Mr. Ellerbee owed approximately \$13,000 in restitution. The defense contended that Mr. Ellerbee could not afford to pay the alleged restitution in his case. Mr. Ellerbee elected to go to trial rather than accepting either of the pleas offers available to him.

V. The defense argues Mr. Myrick's tiered plea offers discriminated against similarly situated defendants based on ability to pay, thereby violating both the equal protection and due clauses of the 14th amendment of the U.S. Constitution.

The defense quoted Griffin v. Illinois as the framework for their constitutional argument, where the Court declared, "There can be no equal justice where the kind of trial a man gets depends on the money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956). "In criminal trials, a state can no more discriminate on account of poverty than on account of religion, race, or color." Id. "Both equal protection and due process emphasize the central aim of the judicial system that all people charged with a crime must stand on an equality before the bar of justice." Id.

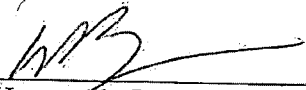
The defense alleged Mr. Ellerbee did not have the right to a plea offer, but he did have the right to be treated equally to the similarity situated individuals who had the resources to pay restitution in advance. The type of trial Mr. Ellerbee received did not depend on his financial resources. Mr. Ellerbee was afforded the same rights as all other similarly situated individuals employed by Verizon wireless, who made the same or similar salary and faced the same charge(s). The defense contended Mr. Ellerbee did not have the funds to pay the restitution the state alleged he owed and thus the defense decided to take the case to trial.

The trial record reflects no indication that Mr. Ellerbee was discriminated against in any way. In fact, Mr. Ellerbee was given a fair trial amongst his peers to decide his guilt. Despite the fact that Mr. Ellerbee made close to \$50,000, during the years in which he was indicted, is still employed by Verizon and making the same salary or more, well beyond the federal poverty guidelines, Mr. Ellerbee was provided adequate representation from Richland County's Public Defender's office. Where he received assistance from not one, but three capable public defenders who worked collectively to try his case. At the conclusion of trial, the jury found Mr. Ellerbee guilty of only one of the five felony tax evasion charges he faced.

CONCLUSION

Based upon the foregoing arguments, case law and statutes cited herein, this court finds the state did not violate Mr. Ellerbee's statutory and constitutional rights. Therefore, defense's motion for new trial is denied.

IT IS SO ORDERED the Defendant's motion for new trial is denied.



The Honorable DeAndrea Gist Benjamin
Presiding Judge

May 22, 2019
Columbia, South Carolina