



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALLEXEA BLACKWELL)
)
 Defendant-Below)
 Appellant)
)
 v.) No. 182, 2023
)
)
 STATE OF DELAWARE)
)
 Plaintiff-Below)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On October 26, 2021, a grand jury indicted Allexea Blackwell (“Blackwell”) on two counts of State Tax Fraud, two counts of Tampering with Public Records First Degree, one count of Theft (f), one count of Attempted Theft (m), and two counts of Offering a False Instrument for Filing. A1 at DI 1¹; A7-11. Prior to trial, Blackwell moved to dismiss counts 3 and 4, Tampering with Public Records, on the grounds that her tax returns, which she filed with the Delaware Division of Revenue (“DOR”), should not be considered public records. A18-20. The Superior Court denied Blackwell’s motion. A22. Blackwell also moved *in limine* to preclude the State from presenting letters sent and documents received by the DOR auditor for Blackwell’s 2018 tax return because the auditor was not available to testify at trial. A22-23. The trial judge denied her motion, but permitted Blackwell to cross-examine other witnesses from the DOR and object to documents coming into evidence. A28-29.

After a two-day trial a jury convicted Blackwell of all charges. A6 at DI 49. The Superior Court sentenced Blackwell to an aggregate six years at Level V suspended for one year of Level II concurrent probation. A264-266. Counts 7 and 8, Offering a False Instrument for Filing, were merged into Count 1, State Tax Fraud,

¹ “DI” refers to docket items on the Superior Court criminal docket in *State v. Blackwell*, Super. Ct. ID No. 2108001151.

for sentencing. Blackwell timely appealed and filed her Opening Brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's claim is DENIED. The trial court did not err in denying Blackwell's Motion to Dismiss the Tampering with Public Records First Degree charges. Personal tax returns filed with DOR are public records for the purpose of 11 *Del. C.* § 876.

II. Appellant's claim is DENIED. The trial court did not err in denying Blackwell's Motion in Limine and allowing admission of documents from DOR official files. The documents were admitted under an established hearsay exception and were non-testimonial. Neither the Rules of Evidence nor Blackwell's constitutional rights were violated.

STATEMENT OF FACTS

Blackwell submitted her tax year 2019 personal income tax return at the beginning of February, 2020. A95. DOR auditor Vanessa Borges (“Borges”) reviewed the return after Blackwell claimed \$64,862 in adjusted gross income and \$41,011 in itemized deductions. A72. This triggered a review in DOR’s system because the itemized deductions exceeded fifty percent of her income. A76. On March 3, 2020, Borges sent a letter to Blackwell at her P.O. box asking for more information about the itemized deductions. A76. Borges received a letter by e-mail from AllexeaBlackwell@yahoo.com responding to her request listing different check numbers and totaling \$40,000 donated. A77, 79, 87. A phone number on that e-mail contained the last four digits 3547. A87. The letter was allegedly signed by Brittney Santiago. A79. Brittney Santiago testified at trial that she knew Blackwell because Blackwell’s daughter was one of her best friends. A125. Santiago denied authoring the letter and denied that the signature on the letter was hers. A126.

Borges also received, via e-mail, purported M&T bank statements with Blackwell’s name on them. A79-80. The purported bank statements contained anomalies in the check numbers, the dates of the checks, and the amounts of the checks that led Borges to believe that they may be fictitious. A80-84. Borges corresponded multiple times with Blackwell via the AllexeaBlackwell@yahoo.com

e-mail address. A87-89. Borges referred the matter to DOR assistant director, Warren Woods and DOR Special Investigator David Smith (“Smith”). A84, 91.

Smith testified that he has worked as an investigator at DOR for 35 years. A128. He investigates tax-related wrongdoing. A128. Smith’s standard procedure when receiving a referral is to go back at least one year in the taxpayer’s history in DOR’s official records to look for good or bad patterns for the taxpayer. A129-130. Smith reviews past returns for “similarities or disparities.” A130. As part of his investigative process, Smith reviews tax returns for the year in question and prior years, taxpayer-submitted records, as well as W-2s and 1099s that might be applicable. A130-131. He may also subpoena additional records. *Id.* Smith followed those procedures in Blackwell’s case. A131. He sent a subpoena to M&T bank for Blackwell’s certified bank records for tax year 2019 and compared them to statements that Blackwell provided via e-mail. A136-142. The certified statements bore Blackwell’s name and P.O. box number but were substantially different than what Blackwell provided via e-mail. A136-42.

Smith also reviewed Blackwell’s tax year 2018 return. A143. When every taxpayer’s return is filed, it goes into the official system for DOR. A143. DOR records contain all prior years’ returns that have been filed. A143. DOR records showed that DOR auditor, Patricia Thomas, sent Blackwell a letter on February 15, 2019 related to the 2018 return requesting supporting documents for itemized

deductions. A160-161. Blackwell responded the following day and provided checks purportedly supporting the itemized deductions. A162-163.

Smith knew Blackwell's 2018 return was electronically filed because of the identifying number series on the return. A146. The 2018 return contained the same P.O. box number for Blackwell as the 2019 return. A74, 146. Smith noticed that the itemized deductions in the 2018 return were very similar to those in the 2019 return. A147. As Smith did with the 2019 return, he sent a subpoena to the bank for copies of checks that Blackwell supplied to DOR's 2018 tax return auditor. A148.

At trial, Blackwell objected when the State attempted to admit the letter the 2018 DOR auditor sent to Blackwell requesting additional information and a letter and checks received from Blackwell. A151. The Court told the parties that it would allow them into evidence, but that the State would need to provide additional evidentiary foundation. A154-155. Smith testified about his knowledge and experience with DOR auditors and their audit procedures, and entry of information received into DOR official records. A156-159. The Court allowed admission of the DOR 2018 records. A159.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BLACKWELL'S MOTION TO DISMISS COUNTS III AND IV OF THE INDICTMENT ALLEGING VIOLATIONS OF 11 *DEL. C.* § 876.

Question Presented

Whether the Superior Court abused its discretion when it denied Blackwell's motion to dismiss Counts III and IV, holding tax returns filed with the Division of Revenue and held in their official files are "public records" for the purpose of 11 *Del. C.* §876.

Standard and Scope of Review

This Court reviews the denial of a motion to dismiss counts of an indictment for an abuse of discretion.²

Merits of Argument

On the morning of trial prior to jury selection, Blackwell moved to dismiss the two counts of the indictment alleging violations of 11 *Del. C.* § 876, Tampering with Public Records First Degree. A18. Blackwell contended tax returns are not public records because the "statute applies to internal records, so in this case, it's the

² *Pierce v. State*, 911 A.2d 793, 796 (Del. 2006) (citing *State v. Harris*, 616 A.2d 288, 291 (Del. 1992)).

records of the Delaware Division of Revenue, and I don't believe that an individual's tax returns fall within that." A19. Blackwell also argued that a tax return is not filed for the purpose of DOR's records. A20.

The State argued that section 876 is broad and covers a wide array of activities - making a false entry in or falsely altering any record or other written instrument filed, deposited in, or otherwise constituting a record of a public office or public servant. A21.

After hearing argument from counsel, the trial judge concluded:

I agree with [the State] in reading the language of the statute that makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office does fall - this charge does fall within the language of that statute.³

The trial court did not abuse its discretion when it denied Blackwell's Motion to Dismiss.

Blackwell is incorrect that section 876 was intended to address only internal records of DOR and not records obtained by DOR from outside sources for its official files. The statute includes not only internally created records, but, "any record or other written instrument *filed with, deposited in* or otherwise constituting

³ A22.

a record of a public office or servant.”⁴ This shows an intention by the drafters to include more than internally created agency records.

The Delaware Criminal Code with Commentary (1973) for § 873 (the misdemeanor companion charge to § 876) directly addresses this:

The Code Provision

Section 873 makes tampering with public records a class A misdemeanor when any person knowingly removes, mutilates, destroys, steals, makes a false entry in, or falsely alters any record or other written instrument which is a public record. No intention to defraud need be proved. Any falsification of public records is serious enough to require a criminal penalty because of the great public importance in having official records free from error or destruction. *The crime may be committed by anyone; liability is not limited to acts of public servants.*⁵ (emphasis added)

Moreover, it would be unreasonable for the law to value accuracy only for internal DOR documents and not for all documents that become official DOR records.

The cases Blackwell cites in her opening brief conflate “public records” deposited with a public agency or division with government records subject to public disclosure.

⁴ 11 *Del. C.* § 876 (emphasis added). See *State v. Odom*, 993 So.2d 663, 668 (La. 2008) (finding in prosecution for filing false public records, tax records do not need to be “public,” but must be filed or deposited “in any public office or with any public officer”).

⁵ The *Commentary* to section 876 states that the principal aspects of §873 and § 876 are the same.

In *Ochsner v. N. C. Dep't of Revenue*⁶, the North Carolina Court of Appeals held that the plaintiff could request his own tax records, but that a person's tax records are not considered public records subject to disclosure under North Carolina General Statute § 132-1.1, which prohibits disclosure of tax information.⁷

In *Goodale v. Bray*, a wife claimed interest in real property.⁸ She was required to show “objectively observable acts which would put a reasonably diligent vendor...on notice that someone in addition to the named vendee has an interest in the property.”⁹ The wife claimed that she shared income from the property with her husband as documented in her income tax return, but the court found that it was not objectively observable because individual tax returns are not public records.¹⁰ The income tax returns did not provide notice because they were not available to the vendor.¹¹

Similarly, *Wiggins v. McDevitt*¹² addressed the confidentiality of tax returns and whether they were available for public inspection, not whether they constituted “public records” for a purpose like 11 *Del. C.* § 876.

⁶ 835 S.E.2d 491, 498 (N.C. Ct. App. 2019) (*review denied*, 373 N.C. 595 (N.C. 2020)).

⁷ See N.C. Gen. Stat. § 132-1.1(b).

⁸ 546 N.W.2d 212 (Iowa 1996).

⁹ *Id.* at 214.

¹⁰ *Id.* at 215.

¹¹ *Id.*

¹² 473 A.2d 420 (Me. 1984).

Blackwell suggests that the spirit of 11 *Del. C.* § 876 is focused on internally created records of the agency, but does so without support. It would be illogical to suggest that there is a great public interest in maintaining accurate records in public agencies, but also allow incorrect or falsified records to be filed in the records of those public agencies without recourse.¹³

Blackwell's suggestion that a tax return is not filed for the purpose of DOR's records is equally without support. DOR keeps the tax records of Delaware's citizens. The circumstances in Blackwell's own case shows that DOR maintains and uses the records filed with and deposited in DOR for not only determining tax liability or refund, but for administrative review of prior tax years compared to the current tax year. The trial court did not abuse its discretion by finding that income tax returns are public records for the purpose of 11 *Del. C.* § 876.

¹³ See *State v. Moore*, 1984 WL 553539, at *2 (Del. Super. Ct. Jun.18, 1984).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR IN DENYING BLACKWELL’S MOTION IN LIMINE AND ADMITTING DOCUMENTS RELATED TO HER 2018 TAX RETURN

Question Presented

Whether the Superior Court abused its discretion in admitting documents in DOR’s official files into evidence.

Standard and Scope of Review

The standard of review for decisions on the admissibility of evidence is abuse of discretion.¹⁴ To the extent that Blackwell is presenting a constitutional claim, this Court’s review is *de novo*.¹⁵

Merits of Argument

The Superior Court did not abuse its discretion or otherwise err because the DOR documents related to Blackwell’s 2018 tax are admissible under a firmly rooted hearsay exception and are non-testimonial under *Crawford v. Washington*.¹⁶

Prior to jury selection, Blackwell moved *in limine* to preclude admission of documents sent and received by a DOR auditor related to her 2018 tax return because the auditor was not going to be called as a witness. A22. Blackwell objected based

¹⁴ *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999).

¹⁵ *Taylor v. State*, 260 A.3d 602, 612 (Del. 2021).

¹⁶ 541 U.S. 36 (2004).

on lack of authentication because she asserted that DOR could not say when or how the documents were received or who sent the documents. A23. Blackwell also argued a violation of the Confrontation Clause because there was not a witness available to discuss how the documents were received or whether there was additional correspondence. A23. The State advised the Court that David Smith, a DOR chief investigator who reviewed the 2018 and 2019 DOR files would testify. A28. The trial judge initially denied Blackwell's Motion *in Limine* based on the proposed DOR witnesses and the public records and business records hearsay exceptions. A28.

Special Investigator David Smith testified during the State's case-in-chief. According to Smith, every state taxpayers' return is placed in DOR's internal system. A143. He has access to all prior years' tax returns. A143. With respect to Blackwell's 2018 return, Smith testified that he was able to tell that the return was filed electronically. A146. When the State marked a series of checks related to the 2018 return for identification,¹⁷ Blackwell objected based on authentication and confrontation. A151-152. The court required the State to present an additional evidentiary foundation. A154-155. Smith testified about his first-hand knowledge of the process that auditors undertake when seeing irregularities. It is standard operating procedure for auditors to send letters to taxpayers requesting additional

¹⁷ State's L for identification, later admitted as State's Exhibit 11.

information and that the letter format is a standard one. A157. Taxpayers will typically respond to a letter if it requests documents. A157. When an auditor receives documents, they place the documents in the official record of DOR and it becomes attached to that tax year. A158. This happens even when it is not a criminal investigation and is an administrative audit. A158. The letters sent by the auditor and the documents received are reviewed and scanned into the official file for the particular taxpayer for the relevant tax year. A159. When an investigation is referred to Smith, he can review DOR's official file. A159. Smith reviewed the documents in State's L for identification as part of DOR's official file. A159.

Blackwell claims that the letter the DOR auditor sent to her and the documents received by the auditor from Blackwell are hearsay and that no hearsay exception exists to allow their admission. She is incorrect.

Business Records Exception- DRE 803(6)

Delaware Rule of Evidence (DRE) 803(6), often referred to as the business records exception, contains a hearsay exception for records of a regularly conducted activity. DRE 803(6) requires the proponent to show, in relevant part:

- (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the memorandum, report, record or data compilation was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.¹⁸

Smith testified that it was standard procedure for DOR auditors to send letters to taxpayers seeking additional information and that the letters were sent in a standard format. A157. The letters are scanned into the DOR official file. A159. Similarly, when documents are received by a DOR auditor they are scanned into the DOR official file for that particular taxpayer for that particular year. Smith, as a 35-year special investigator with DOR, is a qualified witness who has first-hand knowledge of the standard practices and record-keeping of DOR auditors. Smith's testimony satisfied DRE 803(6)(A-D). Blackwell failed to show that the source of the information or method of preparation indicate a lack of trustworthiness. The evidence supports that Blackwell sent the 2018 documents to DOR. Evidence adduced at trial showed that the 2018 letter sent to Blackwell triggered a written response and the written response contained corroborative details about her identity such as her phone number and P.O. box number. A162. The 2018 letter and documents were sufficiently corroborative to indicate that they were, in fact, sent by

¹⁸ D.R.E. 803(6).

Blackwell. The State met the evidentiary benchmarks required for admission under DRE 803(6).

Opposing Party's Statement- DRE 801(d)(2)(A)

The details in the 2018 letter from Blackwell and accompanying documents were sufficiently corroborative to show that they were not hearsay at all. They are admissible as an opposing party's statement under DRE 801(d)(2)(A), which states in relevant part:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity.¹⁹

DOR received the letter and checks one day after it sent a letter to Blackwell. A162. The letter contained Blackwell's name, P.O. box number and telephone number. This is sufficient indication that Blackwell sent the letter and the letter and its contents were Blackwell's non-hearsay admissions.

Public Records Exception- DRE 803(8)

The Superior Court also allowed the admission of the letter and documents under the public records hearsay exception, DRE 803(8). A28. That rule reads in pertinent part:

Public Records. Records, reports, statements or data compilations, in any form, of a public office or agency setting forth its regularly

¹⁹ D.R.E. 801(d)(2)(A).

conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. But the following are not within this exception to the hearsay rule:

- (A) Investigative reports by police and other law-enforcement personnel;
- (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;
- (C) factual findings offered by the government in criminal cases;
- (D) factual findings resulting from special investigation of a particular complaint, case or incident;
- (E) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.²⁰

Smith is employed by DOR, a public agency, and testified that the audit letters and responses are records kept in the course of regularly conducted activity of DOR. A157-159. The records in question were not investigative reports by law enforcement personnel or investigative reports prepared for DOR for a case where it is a party. They are not the factual findings offered by the government in a criminal case nor are they the factual findings of a special investigation. There are no indicia of a lack of trustworthiness. The documents are not factual findings at all. Rather, the auditor's letter is an administrative tool used to obtain additional information used for determining tax liability. Blackwell's letter and documents are the response to that. The letter and checks qualify for the public records exception to the hearsay rule.

²⁰ D.R.E. 803(8).

Confrontation Clause

Blackwell argues that the admission of the auditor's letter and responsive documents without the auditor's testimony violated the Confrontation Clause and *Crawford v. Washington*²¹. Blackwell is incorrect.

Under *Crawford*, the core question for determining whether admission of a statement violates the Confrontation Clause is whether the statement is testimonial.²² The United States Supreme Court developed the "primary purpose" test to determine whether a statement qualifies as testimonial.²³ In *Michigan v. Bryant*, the United States Supreme Court held that when the primary purpose of a statement is not to create a record for trial, then it does not violate the Confrontation Clause.²⁴ When a statement is created as "an out of court substitute for trial testimony", then it falls under the auspices of the Confrontation Clause.²⁵ When that is not the primary purpose, the admissibility is controlled by the rules of evidence.²⁶

The auditor's letter and Blackwell's response were not created with the primary purpose of being used in litigation and are not testimonial. Blackwell filed a tax return seeking a refund. The auditor's letter was intended to obtain additional

²¹ 541 U.S. 36 (2004).

²² *Id.* at 51.

²³ *Michigan v. Bryant*, 562 U.S. 344, 359 (2011).

²⁴ *Id.* at 358.

²⁵ *Id.* at 392.

²⁶ *Bryant*, 562 U.S. at 359.

information to determine tax liability. This is an administrative function. Blackwell's response was intended to supplement her tax return and buttress her request for a refund. Litigation was not a consideration. This was a citizen and public agency communicating about an administrative public function. To put a fine point on this, the United States Supreme Court has held that, "(b) usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."²⁷

The admission of DOR records did not violate the Confrontation Clause because they were not testimonial. The DOR records are admissible as records of regularly conducted activity and as public records. Blackwell's own submissions to DOR are non-hearsay admissions of a party opponent. The Superior Court did not err by admitting the records under established hearsay exceptions. The documents were not testimonial.

²⁷ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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Dated: November 27, 2023

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AND TYPE-VOLUME LIMITATION**

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/s/ David Hume, IV

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DATE: November 27, 2023