

1987

State of Utah v. Charles R. Cox : Petition for Rehearing

Utah Court of Appeals

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Elaine M. Coates; Grand County Attorney; Attorney for Respondent.

Paul W. Mortensen; Attorney for Appellant.

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BRIEF

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870237-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, :
 :
 Plaintiff-Respondent, : NO. 870237-CA
 :
 vs. : Category No. 2
 :
 CHARLES R. COX, :
 :
 Defendant-Appellant. :

PETITION FOR REHEARING

ON APPEAL FROM THE TWELFTH CIRCUIT COURT OF
GRAND COUNTY, STATE OF UTAH
HONORABLE BRUCE K. HALLIDAY
CIRCUIT JUDGE

PAUL W. MORTENSEN
131 East 100 South
P. O. Box 339
Moab, Utah 84532-0339
Telephone: (801) 259-8173

Attorney for Appellant

ELAINE M. COATES
Grand County Attorney
36 South 100 West
Moab, Utah 84532
Telephone: (801) 259-6901

Attorney for Respondent

MAR 28 1988

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	Case No. 870237-CA
	:	
vs.	:	Category No. 2
	:	
CHARLES R. COX,	:	
	:	
Defendant-Appellant.	:	
	:	

PETITION FOR REHEARING

The above Defendant-Appellant, pursuant to Rule 35 of the Rules of the Utah Court of Appeals hereby respectfully petitions the above court for a rehearing.

1. Points overlooked or misapprehended. On page 4 of its opinion regarding the issue of presumption of consent the Court dismissed the Defendant's contention, in part, because of his failure to submit a written proposed instruction. This point was raised by the court rather than by the State in its brief to the court. The court overlooked or misapprehended the following facts:

a. Prior to trial the trial court had prepared a proposed instruction No. 14 which had not included the charge that "The consent of the owner or legal custodian of a vehicle to its control by the defendant is not in any case presumed or implied

because of the owner's consent on a previous occasion to the control of the vehicle by the same or a different person". This instruction is set forth on page xi of the Addendum to the Appellant's brief.

b. Defendant prepared his written requests for instructions in response to this instruction previously prepared by the court.

c. The State submitted its proposed instruction which included the statutory language above referred to. (Addendum to Appellant's brief, pages xvi to xviii). The court, immediately prior to summation, changed its mind and agreed to give the State's proposed instruction and did so. (Addendum, page xix). The Defendant for the first time became aware that the Court would give the State's proposed instruction and not having opportunity to prepare a written instruction had no choice but to make an oral request.

2. Such argument as the Petitioner desires. The Defendant at trial just prior to summation for the first time became aware that the court would give the State's proposed instruction and, without opportunity to present a written instruction, accordingly orally requested the court for the additional cautionary instruction that although the jury could not presume Bessire's express or implied consent, it was nevertheless free to find implied consent in light of the surrounding circumstances. The

Defendant, therefore, was not fairly allowed the opportunity to meet the court's decision to change the instruction it originally proposed to give by submitting a proposed written instruction to correct its inadequacies.

This court agrees that the proposed oral instruction would have been properly given. The trial court, realizing it had changed its instruction, did not state that it was denying the Defendant's requested instruction because it hadn't been made in writing. The State did not at trial or in its brief contest the request on the basis that it was orally made. This court's sui sponte raising the point is rigidly done without duly recognizing the position the Defendant was placed in at trial when the trial court changed its instruction.

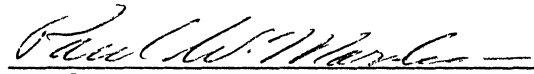
The jury was left with the impression that Bessire's consent was lacking as a matter of law if not expressly given and the Defendant was thereby prejudiced. The instruction regarding criminal intent aggravated rather than enhanced the jury's wrongful perception of the law since it reinforced the notion that the simple taking of a car without express permission may be presumed to be criminal conduct without regard to circumstances evidencing implied consent. The instruction said that criminal intent could be inferred from circumstantial evidence; it did not say that a victim's consent could be found from circumstantial

evidence.

The Defendant should be given a new trial.

3. Certification that petition for rehearing is made in good faith and not for delay. Defendant, by his counsel, hereby certifies that this petition is made in good faith and not for purposes of delaying this matter.

Respectfully submitted this 25 day of March, 1988.



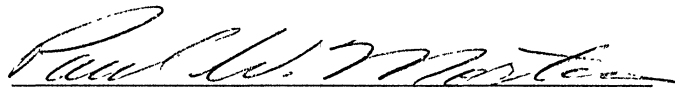
Paul W. Mortensen
Attorney for Defendant-Appellant

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CERTIFICATE OF MAILING

Served the foregoing Petition for Rehearing this 25
day of March, 1988, by mailing four copies thereof, postage
prepaid, to the following:

ELAINE M. COATES
Grand County Attorney
36 S. 100 W.
Moab, Utah 84532


PAUL W. MORTENSEN