1978

State of Utah v. Kenneth M. Forshee, Jr. : Brief of Appellant

Utah Supreme Court

D. Kendall Perkins; Attorney for Appellant;
Gregory L. Bown; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH :

Plaintiff-Respondent, : Case No. 15566

vs. :

KENNETH M. FORSHEE, JR., :

Defendant-Appellant. :

APPELLANT'S BRIEF

Appeal from the judgment of the Third District Court for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge.

D. Kendall Perkins
Attorney for Appellant
Twelve Exchange Place
Salt Lake City, Utah 84111

Gregory L. Bown
Deputy County Attorney
Attorney for Respondent
C-220 Hall of Justice
Salt Lake City, Utah 84111

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH :

Plaintiff-Respondent, : Case No. 15566

vs. :

KENNETH M. FORSHEE, JR., :

Defendant-Appellant. :

APPELLANT'S BRIEF

Appeal from the judgment of the Third District Court for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge.

D. Kendall Perkins
Attorney for Appellant
Twelve Exchange Place
Salt Lake City, Utah 84111

Gregory L. Bown
Deputy County Attorney
Attorney for Respondent
C-220 Hall of Justice
Salt Lake City, Utah 84111

TABLE OF CONTENTS

CASES

CASES CONTINUED

STATUTES CITED

STATEMENT OF KIND OF CASE

This is an appeal from conviction of the Defendant/Appellant of a charge of theft by deception, of an amount of over $2,000.00, a felony of the second degree.

DISPOSITION IN LOWER COURT

Defendant/Appellant was charged, tried and convicted of theft by deception involving a sum greater than $2,000.00, a felony of the second degree. Defendant waived a jury and the case was tried to the Honorable Bryant H. Croft and Defendant was found guilty as charged. Defendant's Motion for New Trial was denied and this appeal was then filed.

RELIEF SOUGHT ON APPEAL

Defendant/Appellant seeks reversal of the lower court's conviction.

STATEMENT OF FACTS

On November 3, 1976, James Dennis Smith and his wife Eileen, purchased a 1973 Chevrolet Monte Carlo automobile from Love Motors, in part owned by the Appellant,

Kenneth M. Forshee, Jr. The car, at the time of sale, allegedly indicated approximately 33,000 miles on the odometer. Subsequently the Smiths alledgedly found a lubrication sticker indicating the vehicle at the date on the sticker had in excess of 71,000 miles. The Smiths brought this to the attention of one J.R. McKnight of the Utah State Motor Vehicle Business Administration and to the attention of the Appellant. Negotiations were had between the Smiths and the Appellant, Forshee. Forshee offered to repurchase the vehicle or replace it with a like model with acceptable mileage which was refused, the Smiths indicating they were pleased with the vehicle and did not want to give it up; Forshee offered also to rebuild the engine in the vehicle, guarantee the transmission for 60,000 miles and overhaul the carburetor, which offer the Smiths accepted. Shortly thereafter Forshee was arrested, jailed and charged with theft by deception under §76-6-405, Utah Code Annotated 1953 as amended 1973, of a sum in excess of $2,000.00, a felony of the second degree. The Defendant was tried, therefore, and upon the State's having rested its case, the Defendant moved to dismiss

for having failed to prove a theft of over $1,000.00, which Motion was denied, trial was completed, Defendant was convicted of theft by deception, a felony of the second degree, his Motion for New Trial was denied and he appealed therefrom.

ARGUMENT

POINT I. WHERE A PERSON ALLEGEDLY ALTERS THE INDICATED MILEAGE ON THE ODOMETER OF A MOTIR VEHICLE HE SHOULD BE CHARGED UNDER THE UTAH STATUTE SPECIFICALLY PROHIBITING SUCH AN ACT.

It is a general rule of statutory construction that where two statutes treat of the same subject matter, the one general and the other specific in its provisions, the specific provision controls. Salt Lake City v. Salt Lake County, 60 Utah 423, 209 P. 207; State ex rel P.S.C. v. Southern Pacific Company, 95 Utah 84, 79 P.2d. 25; State v. Burnham, 87 Utah 445, 49 P.2d. 963; P.I.E. v. State Tax Commission, 7 Utah 2d. 15, 316 P.2d. 549; Bateman v. Board of Examiners, 7 Utah 2d. 221, 322 P.2d. 381; Bureau of Revenue v. Western Electric Company, 89 New Mexico 468,

553 P.2d. 1275 (1976); Holder v. State, 556 P.2d. 1049 (Oklahoma Cr. 1976) and more specifically; absent clear expression of intent to make existing special statutes inapplicable, a special statute is to be given effect. Kuckler v. Whistler, 552, P.2d 18 (Colorado 1976).

It may be argued here, where discussing the theft by deception provision of §76-6-405 vs the odometer provisions of §41-6-176 et sec of the Motor Vehicle Code, that there is no conflict of the two statutes. There should not be a conflict because there is no indication anywhere that the theft by deception statute was ever intended by the legislature to apply to the instant situation. Once the prosecution chose to attempt to so apply said statute then a conflict arises in that at that point, the theft by deception statute is being applied to a situation wherein the dominant act or unlawful act is that of altering the indicated mileage on an odometer with the apparent intent to reduce the true number of miles indicated upon the odometer guage, which is the very act made unlawful by §41-6-177(1) and made a misdemeanor offense by §41-6-178,Utah Code Annotated 1953. Therefore,

if the theft by deception statute is to be applied, it is on its face a general statute dealing with theft by deception, in general with any deceptive act, whereas the odometer statutes deal specifically with deception as to indicated mileage of motor vehicles. It is clear then, that the legislature has actively considered the practice of altering indicated mileage on odometers of motor vehicles and has decreed that to so do is to be a misdemeanor offense. It is not at all clear that the legislature has considered the alteration of indicated mileage on the odometers of a motor vehicle in the context of a theft by deception.

The Supreme Court of Kansas had occasion to consider a similar situtation in its recent case of State v. Kliewer, 504 P.2d 580, 210 Kansas 82 (1973); wherein the defendant had been found to have sold an automobile with an altered odometer and was convicted of unlawful business practices and of altering the mileage on an odometer "with the intent to reduce the number of miles of use thereof indicated on such gauge...." Both were misdemeanor offenses, but one statute was general, dealing with business

practices and the other specific, dealing with altering indicated odometer readings. The court then said, (p 585 P.2d. repts.)

> "under these circumstances where there is a conflict between a statute dealing generally with a subject and another statute dealing specifically with a certain phase of it, the specific statute will be favored over the general statute and controls. (State v. Christensen, 166 Kansas 152, 157, 199 P.2d. 475; Moody v. Edmondson, 176 Kansas 116, 120, 269 P.2d. 462; Ferrellgas Corporation v. Phoenix Insurance Company, 187 Kansas 530, 535, 358 P.2d 786; and Barten v. Turkey Creek W.J.D. No. 32, 200 Kansas 489, 506, 438 P.2d 732"

By adhering to the above principle the clear legislative intent is given full force and effect, in that only in the specific statute is it clear just what the intent of the legislature was with regard to the specific subject matter. Here it is clear that the legislature intended the act of alteration of indicated mileage on a motor vehicle was to be an offense, but one of misdemeanor severity. It was clearly not intended to be a second degree felony, nor did the legislature intend that an ingenous prosecutor should be able to circumvent the Motor Vehicle Code provisions by concocting a theory that would circumvent an already enacted statute dealing with specific subject matter.

POINT II. THE CRIME OF THEFT BY DECEPTION IS NOT ESTABLISHED IN THE ABSENCE OF EVIDENCE SHOWING THAT THE CLAIMED VICTIM HAS SUSTAINED A PECUNIARY OR PROPERTY LOSS BY REASON OF THE TRANSACTION RELIED UPON.

Prior to the enactment of the new Utah Criminal Code the offense parallell to theft by deception was theft of obtaining money or property by false pretenses. The Court's attention is drawn to two such Utah cases; State v. Caspersen et. al., 71 Utah 68, 262 P. 292 (1927) and State v. Morris, 85 Utah 210, 38 P.2d. 1097 (1934). The Court in Caspersen said at page 75 of 71 Utah Reports:

> "that a pretense false in fact and an actual fraud resulting in prejudice (emphasis supplied) are essential elements of the crime in question, and must be proved to establish guilt, are general principles of law which we recognize and approve. The actual fraud and prejudice required, however, is determined according to the situtation of the victim immediately after he parts with his property. If he gets what was pretended and what he bargained for, there is no fraud or prejudice. But if he then stands without the right or thing it was pretended he would then have, he has been defrauded and prejudiced by reason of the false pretense and the offense is complete..."

The Court in the Morris case (supra) cites the above language of Caspersen and goes on to say on page 216 of 86 Utah Reports

> "Thus in the instant case the purchaser (complaining witness) received a part but not all

> that it bargained for. The only reasonable inference, however, which may be drawn from the evidence before us is that the purchasing corporation received, and at the time of the trial had sufficient security to satisfy, the amount owing on the contract, which it purchased. Under such facts may it be said that the defendant is guilty of the crime for which he stands convicted? We are of the opinion that the question must be answered in the negative. Before a recovery may be had in a civil action on the grounds fo fraud, it must be established that the complaining party has sustained some damage on account of the fraud. Were this a civil case in which the purchasing company was seeking to recover a money judgment against the defendant on account of the fraud complained of, no recovery could be had because the evidence fails to show that the purchasing company sustained any injury. The mere fact that a party to a transaction may not have received all he bargained for does not give rise to civil liability. For stronger reasons the crime of obtaining money by false pretenses is not established in the absence of evidence showing or tending to show that the claimed victim has sustained a pecuniary or property loss by reason of the transaction relied upon." (emphasis added)

In the instant case the transcript indicates that the vehicle in question was purchased for Eileen Smith, one of the complainants. (Transcript page 101 lines 1-4) The complainants testified that they liked the vehicle and were satisfied with it except for a minor oil consumption matter. (Transcript

page 73-74; page 98 line 6-8; page 101 line 24-25) The complainants purchased the automobile for $2,830.00. (Transcript page 136 line 10) The record contains unrebutted evidence that the average wholesale value of that particular vehicle was $2,975.00 and that the average retail value of said automobile was at that time approximately $750.00 higher or $3,725.00. (Transcript page 139 lines 8-17)

It is quite clear then that the complainants were not prejudiced at the conclusion of the transaction in question. They obtained a quid-pro-quo, the fair market value of the automobile at wholesale was greater than the price paid by the Smiths. The fair market value at retail was clearly in excess of the price paid by the complainants.

Theft is defined in §76-6-404 Utah Code Annotated, 1953, as "a person commits theft if he obtains or exercises unauthorized control over the property of another with purpose to deprive him thereof." Theft is traditionally viewed as involving a situation in which the complainant loses his property or money and suffers a demonstrable loss measured as the fair market value

of the property of which he was deprived. Here, the Smiths testify that they liked the vehicle obtained, in fact to the extent of being unwilling to sell it back to Forshee or to have it replaced with a like year and model Chevrolet Monte Carlo with fewer miles. (Transcript page 97 line 21; page 98 line 15) Mrs. Eileen Smith wanted that particular automobile! The complainants suffered no pecuniary or property loss as a result of the instant transaction.

The prosecution, at the time of argument of Defendant's (Appellant's) Motion to Dismiss submitted to the Court a Memorandum citing two California cases; People v. Ross 25 California App. 3rd 190, 100 Cal. Rptr. 703 (1972) and People v. Hess, 10 California App. 3rd. 1071, 90 Cal. Rptr. 208 (1970). The Hess case (supra) involved a situation in which the Defendant, Hess, fraudulently obtained a registration certificate on a stolen mixed breed poney, represented to be a blooded Arabian horse by the name of Ingaia worth over $3,000.00 and who then sold the horse receiving $550.00 from the complainant. Hess tried to claim the severety of the crime should have been measured by subtracting the $200.00 actual worth of the horse from the complainant's out of pocket loss. The Court pointed out there

that Hess didn't have title to the pony and couldn't convey anything to the complainant. The Ross case (supra) used as precedent the Hess (supra) case and People v. Brady, 275 California App. 2d. 984, 80 Cal. Rptr. 418. Both Hess and Brady involved sale, pursuant to misrepresentation of terms, of stolen property and appear to be cases where the prosecution could not get the Defendant for the theft of the subject of the sale but could only make out a case on the fraudulent sale, which was, in any event, of property which neither Defendant had title and, therefore, out of pocket loss of complainant was the amount that changed hands. The Ross case (supra) is admittedly parallel to the instant case except that Ross sold 5 automobiles with altered odometers to other used vehicle dealers. The Ross case (supra), however, is not proper precedent for the Utah Courts to use to overrule the Utah cases of Caspersen and Morris (supra): Ross at present is an anomalous result which has not been validated by the California Supreme Court, and is founded in faulty reasoning as will be discussed later.

It should be pointed out to the Court that under our statute, theft is the crime. Theft meaning a pecuniary or property loss of some degree. A theft may be pre-petrated in many ways, deception being only one of the ways; deception is not a crime in and of itself.

POINT III. A CRIMINAL STATUTE THAT DOES NOT CLEARLY INFORM THE AVERAGE PERSON OF NORMAL INTELLIGENCE AS TO JUST WHAT CONDUCT IS TO BE PROSCRIBED WORKS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW AGAINST HIM.

As the Court said in State v. Shondel, 22 Utah 2nd. 343, 453 P.2d. 146 (1969),

> "The well established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it... State v. Musser, 118 Utah 537, 223, P.2d 193; U.S. vs. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516; Lauzetta v. New Jersey, 306 U.S.451, 59 S.Ct. 618, 83 L.Ed. 888, a fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and under-standable as to the penalty imposed for its violation."

The Court's attention in this regard in again drawn to State v. Casperson (supra) where the court said p. 74, 71 Utah Rprts.:

"Such statutes, like all other criminal ones must be construed strictly as against accused person and liberally in their favor and nothing not within their words held to be within their meaning. 2 Bishop Criminal Law (9th Ed.) §415." (emphasis supplied)

Appellant is aware of the provisions of §76-1-106 which provide that the rule of strict construction is not applicable to the new Utah Criminal Code, but would point out that the last sentence thereof refers to §76-1-104 "...to effect the objects of the law and general purposes of §76-1-104." Which in part says in §76-1-104 (2) and (3) "...the provision of the code shall be construed in accordance with these purposes ...(2) define adequately (emphasis supplied) the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal. (3) Prescribe penalties which are proportionate (emphasis supplied) to the seriousness of offenses..."

It is submitted that considering the above language, and the demise of the rule of strict construction not withstanding, that the last clause of the quoted language from Casperson (supra) is still good law and sensibly so, if it may be repeated:

"...and nothing not within their words held to be within their meaning. 2 Bishop Criminal Law (9th Ed.) §415." (emphasis supplied)

It is submitted that where, given the standard set forth in Shondel (supra), and the language emphasized above in Casperson (supra), that the person of ordinary intelligence, desiring to obey the law, could not read the language of §76-6-404, "theft-elements," "a person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." and §76-6-405(1), theft by deception, (1) "a person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof." (both citations Utah Code Annotated as amended, 1953); and therefrom know that he would be committing a felony of the second degree if he sold a motor vehicle with an altered odometer reading knowing thereof and misrepresenting same. It is further submitted that such a result is not within the words of the two statutes cited and could therefore not properly be held to be within their meaning.

Standards of fariness as well as of due process and equal protection of the laws demand that when conduct, which has been freely and frequently engaged in by a certain segment of society, is to be proscribed as criminal, there should be a clear showing of legislative intent to so proscribe such conduct and there should be clear warning and notice that such conduct in the future will be so punished. (It is elementary that there can be no ex-post-facto laws.)

It is submitted that the practice of altering odometers by used car dealers has in the past been such a wide spread practice that the Court could take judicial notice of it.

To allow the present conviction to stand would be to allow a denial of due process and of equal protection of the law against the Appellant.

POINT IV. ASSUMING ARGUENDO, THAT THERE WAS A THEFT, THE AMOUNT INVOLVED DID NOT EXCEED THE $1,000.00 REQUIRED FOR CONVICTION OF A FELONY OF THE SECOND DEGREE.

For a conviction to be affirmed in the instant case, the state was obligated to prove theft of an amount of

over $1,000.00. §76-6-412(a) (i) Utah Code Annotated, 1953, as amended. As has already been cited by Appellant in Caspersen and Morris (supra), before a plaintiff could recover in a civil suit he would be required to show damages and where he could not there would be no recovery. As the Court has said "for stronger reasons" there must be a pecuniary or property loss before there can be a crime of obtaining money by false pretenses or as the current statutes provide, a theft. The State produced testimony uncontroverted by Appellant that the purchase price for the 1973 Chevrolet Monte Carlo in question was $2,830.00. But, there is also uncontroverted testimony that the complainants received a vehicle for their $2,830.00 the fair market value of which, was, at wholesale value $2,975.00 and at retail value worth an additional $750.00 or $3,725.00 (Transcript page 139) the complainants testified they liked the car and did not want Forshee to repurchase it or replace it. So there was not only no proof of theft of over $1.000.00 in satisfaction of the requirement for a second degree felony, there was no proof of a theft of any amount, and the Defendant's Motion to Dismiss (Transcript page 104, page 117),

therefore, should have been granted.

CONCLUSION

For the reasons contained in the foregoing argument, the appellants' conviction for theft by deception, a felony of the second degree, should be reversed and he should be acquitted of the charge. There was no theft, no pecuniary or property loss, the complainants purchased an automobile they liked and would not return or exchange. If they can prove any such loss,they can recover in a civil action (which has been brought by them - tr. p. 67 line 27 - p. 68 line 22). When the complainants brought the matter of the mileage disparity to Forshee, an agreement to appease the Smiths was entered into wherein Forshee would rebuild the engine in the vehicle and guarantee the transmission thereof for 60,000 miles beyond that date. (tr. p. 75 line 11-16, p. 100, line 10-15). They then are complainants in a trial where Forshee is convicted of a second degree felony.

The language of the applicable statutes relating to theft and theft by deception must be tortured to be held to proscribe the sale of a vehicle with an altered odometer whether with intent to deceive or not. If there was no deception, would the prosecution claim such a transaction was a plain out and out theft? The argument for that would be just as sound as for theft by deception, where deception was present.

That would at least be consistent, but the prosecution relies on the California cases earlier cited and would have the Court approve their inconsistency. The California cases say that the crime is the deception, that if a defendant had sold vehicles with altered odometers, and had said, yes, the indicated mileage is correct when it was not, there was then a crime; but if the defendant knew the mileage indicated was incorrect but remained silent about it, there was then no crime. This would be the result in the instant case if this Court affirms Forshee's conviction. If the evidence had shown Forshee to have been silent about the indicated mileage, or if it had shown he had indicated he knew nothing about the indicated mileage, there would have been no intended deception for the buyer to rely on -- no crime -- no conviction.

This is a case of first impression in this Court and to affirm the above thinking would set dangerous precedent. Where a misrepresentative situation exists then, to avoid criminal liability one need merely be silent or profess no knowledge about the misrepresentation.

It is submitted that if the California court's position was consistent, they would have to hold that if the crime is misrepresentation, that it is just as much a crime to sell a buyer a vehicle with incorrect mileage indicated and tell him nothing as to tell him it is correct mileage. For if it is in

the first case a "theft by deception" it is therefore in the second case a "theft" without the deception.

It becomes evident then that the only fair standard to use is that already established by this Court is Morris and Casperson, supra: That the crime is the theft, and that there is no theft without pecuniary or property loss, therefore, in this case the conviction should be reversed.

Respectfully submitted,

D. KENDALL PERKINS
Attorney for Defendant-Appellant
Twelve Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-5835