

1978

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

Utah Supreme Court

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D. Kendall Perkins; Attorney for Appellant;

Gregory L. Bown; Attorney for Respondent;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- : -----  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.  
15566

KENNETH M. FORSHEE, JR., :

Defendant-Appellant. :

----- : -----  
BRIEF OF RESPONDENT  
-----

APPEAL FROM THE JUDGMENT OF THE THIRD  
JUDICIAL DISTRICT COURT, IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE BRYANT H. CROFT, JUDGE  
-----

ROBERT B. HANSEN  
Attorney General

EARL F. DORIUS  
Assistant Attorney General

236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

D. KENDALL PERKINS

Twelve Exchange Place  
Salt Lake City, Utah 84111

Attorney for Appellant

**FILED**

**AUG 31 1978**

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- : -----  
STATE OF UTAH, :  
Plaintiff-Respondent, :  
-vs- : Case No.  
KENNETH M. FORSHEE, JR., : 15566  
Defendant-Appellant. :

----- : -----  
BRIEF OF RESPONDENT  
-----

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for theft by deception, a second degree felony, Utah Code Ann. § 76-6-405(1) (Supp. 1977), in the Third District Court, Salt Lake County, State of Utah, the Honorable Bryant H. Croft, presiding.

DISPOSITION IN THE LOWER COURT

The appellant was tried without a jury on November 2, 1977. Judge Croft found the appellant guilty of theft by deception under Utah Code Ann. § 76-6-405 (Supp. 1977), and sentenced him to an indeterminate term of one to fifteen years in the Utah State Prison. The

execution of the sentence was stayed, and the defendant was placed on two years probation and fined \$1,000.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the conviction below.

#### STATEMENT OF THE FACTS

Mr. and Mrs. James Smith, the complainants, purchased a used car from the appellant, Kenneth Forshee, Jr., on or about November 5, 1976 (T.11). They first looked at the car on November 3, 1976, on the appellant's used car lot (T.7), and on that occasion, the appellant indicated that the car had been recently repainted and that the mileage on the odometer, approximately 33,800 miles, was correct (T.9). The complainants were looking specifically for a 1973 Monte Carlo (T.31), that would be dependable enough to allow Mr. Smith to leave the state to find work (T.9). The Smiths returned to the lot on the next day (T.10), and made a down payment on the car. The defendant again represented the mileage on the car to be accurate (T.10). On November 9, 1976, the Smiths paid the balance due on the car to Mr. Forshee (T.13). The total sales price was \$2,830 plus taxes.

On March 21, 1977, while cleaning out the Monte Carlo, Mr. Smith discovered a lubrication sticker on the

door frame that had been covered up when the car had been repainted (T.13). The lubrication sticker indicated mileage in excess of 80,000 miles (T.14). After making several phone calls to various governmental agencies, Mr. Smith spoke to John McKnight of the Utah Division of Motor Vehicles (T.15). Mr. McKnight examined the car at the State Fairgrounds that same day (T.16).

On March 22, 1977, the appellant called the Smiths at home and asked them to come into his office to discuss the car (T.16). The appellant made several offers to appease the Smiths in an effort to enlist their help in getting the State "off his back" (T.17,18,20).

Evidence was offered to show that the defendant purchased the car from the Salt Lake Auto Auction for \$1850 (T.93), and at that time the car had approximately 73,000 miles on it (T.92).

Mr. Smith testified that although his wife liked the car at the time they discovered the odometer had been tampered with (T.30), that he would not have purchased the vehicle had he known that the 33,800 miles indicated on the odometer was inaccurate (T.20).

ARGUMENT

POINT I

THE UTAH ODOMETER STATUTES, UTAH CODE ANN. §§ 41-6-176, ET SEQ. (SUPP. 1977), AND THE THEFT BY DECEPTION STATUTE, UTAH CODE ANN. § 76-6-405 (SUPP. 1977), ARE NOT DUPLICATIVE, AND THE APPELLANT WAS PROPERLY CONVICTED UNDER SECTION 76-6-405.

On page 3 of his brief, the appellant asserts that "it is a general rule of statutory construction that where two statutes treat the same subject matter, the one general and the other specific in its provisions, the specific provision controls."

While this is undoubtedly the rule in Utah, the appellant has assumed the fact that two statutes, Utah Code Ann. § 76-6-405 (Supp. 1977), and Utah Code Ann. §§ 41-6-176, et seq. (Supp. 1977), are duplicative. This assumption is incorrect.

Section 76-6-405(1), provides that "A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof."

Section 41-6-177, provides:

"It shall be unlawful to do any of the following acts with respect to the operation of an odometer in any motor vehicle:



(1) For any person to disconnect, turn back, or reset the odometer of any motor vehicle with the intent to reduce the true number of miles indicated upon the odometer gauge.

(2) For any person, with intent to defraud, to operate a motor vehicle on any street or highway knowing that the odometer of the vehicle is disconnected or nonfunctional.

(3) For any person to advertise for sale, to sell, to use, or to install on any part of a motor vehicle or on an odometer in a motor vehicle any device which causes the odometer to register any mileage other than the true mileage driven. For the purposes of this act the true mileage driven is the mileage driven by the car as registered by the odometer within the manufacturer's designed tolerance." (Emphasis added.)

In short, the appellant contends that since he could have been charged under Section 41-6-177(1), which is a misdemeanor, he cannot be convicted for the subsequent act of selling the automobile under Section 76-6-405(1), which constitutes a felony.

The statutes on their face clearly are not duplicative. They deal with different subject matter and contain different elements of criminality. The odometer statute proscribes only the disconnecting, turning back, or resetting of an odometer, or the operation of a vehicle knowing the odometer to be inoperative with an intent to defraud. No mention is made of the subsequent sale of the

auto in the statute, and the violation is complete as soon as the tampering has occurred. On the other hand, Section 76-6-405, addresses itself to the situation that arises when a subsequent sale of the vehicle is made. In fact, it goes beyond the odometer statutes and requires additional elements of proof to sustain a conviction. While it is true that the appellant could have been charged with a violation of both offenses contained in two statutes, the statutes are not duplicative. People v. Ross, 25 Cal.App.3d 190, 100 Cal.Rptr. 703 (1972).

In State v. Harlan, 116 N.H. 598, 364 A.2d 1254 (1976), the court addressed the identical issue on the same facts presented in this case. The defendants in Harlan, supra, were found guilty of both theft by deception and tampering with an odometer. The court concluded:

"An examination of the statutes reveals that the elements of each crime differ materially despite the fact that the operative facts on which the State relies in the present indictments may also constitute an offense under R.S.A. 260:91, :92 [the tampering statute].<sup>1</sup> The critical

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1 "260:91 Misrepresentation and Certification of Mileage. Any person who changes, tampers with or defaces, or who attempts to change, tamper with or deface, any gauge, dial, or other mechanical instrument, commonly known as an odometer or an hour meter in a motor vehicle, highway building appliance, (continued on next page)

difference lies in the fact that R.S.A. 637:4<sup>2</sup> [theft by deception] requires a finding that the defendant unlawfully converted the property of another to his own use, an element wholly lacking under R.S.A. 260:91. The statutes are neither inconsistent nor duplications in that regard. Tampering with an odometer with the intent to deceive a prospective purchaser may well be preparatory to the commission of the more serious offense of theft by deception. It does not follow that the State is precluded from charging the greater simply because it might have charged the lesser. . . . The offenses are not the same in law and in fact and thus these indictments do not raise the specter of abuse of prosecutorial discretion." 364 A.2d at 1258.

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- 1 (continued) snowmobile or boat, which, under normal circumstances and without being changed, tampered with or defaced, is designed to show by numbers or words the distance which the motor vehicle, highway building appliance, snowmobile or boat has traveled or the use sustained with the intention of misrepresenting to a prospective or eventual purchaser the number of miles traveled or the use sustained by said motor vehicle, highway building appliance, snowmobile or boat, shall be punished pursuant to the provisions of RSA 260:92. Actual mileage will be certified by the previous owner to the best of his knowledge at the time of sale, trade or other type of transaction resulting in an assignment of title of the vehicle by an entry on the certificate of title or the application for a title if a certificate of title is required, or if no certificate of title is required by a notarized statement by the seller.

"260:92 Penalty. Any person who violates the provisions of RSA 260:91 shall be guilty of a misdemeanor for the first offense, and for a subsequent offense, guilty of a class B felony if a natural person, or guilty of a felony if any other person." New Hampshire Revised Stat. Annotated, 1955, as amended.

- 2 "637:4 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." New Hampshire Revised Statutes Annotated, 1955, as amended.

The New Hampshire court continued, saying that "Since the one statute does not mirror the other, the State is free to proceed under either or both, cognizant of its greater burden under R.S.A. 637:4."

A similar result was reached in State v. Waldenburg, 9 Wash.App. 529, 513 P.2d 577 (1973), in which the court noted the different elements in the larceny statute, under which the defendant was convicted, and the tampering statute.

In his brief, at page 5, appellant asserts that since the legislature has decreed the act of tampering with the odometer to be a misdemeanor in legislation enacted subsequent to Section 76-6-405, it has considered and rejected the idea that a violator of Section 41-6-176, et seq., can be prosecuted under Section 76-6-405. Once again, the appellant overlooks the doctrine that if a statute can be determined from the plain meaning of the words used, the courts may not go further and apply any other means of interpretation. Montana Assn. of Tobacco and Candy Distr. v. State Board of Equalization, 476 P.2d 775 (Mont. 1970). See also, Comment, Prosecutorial Discretion in the Duplicative Statutes Setting, 42 Univ. Colordao Law Review, 455, 1971.

Even if the intent expressed by the legislature in enacting the odometer statutes is considered, it indicates no more than a desire to proscribe that which is unambiguously stated, and does not discuss the act of selling the vehicle after the violation occurs. In People v. Ross, supra, the court addressed an issue very similar to the one in this case, and concluded that the mere enactment of the odometer statute did not manifest the legislature's intent that the odometer statute would preclude prosecutions for theft by false pretenses. 100 Cal.R. at 705. See 76 A.L.R.3d 999.

State v. Kliever, 210 Kan. 820, 504 P.2d 580 (1972), relied on by the appellant (page 5 of appellant's brief) is distinguishable in that the two statutes addressed themselves to virtually the same subject matter.<sup>3</sup>

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3 "21-4403. Deceptive commercial practices. (1) A deceptive commercial practice is the act, use or employment by any person of any deception, fraud, false pretense, false promise, or knowing misrepresentation of a material fact, with the intent that others shall rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby. (2) . . . (c) 'Sale' means any sale, offer for sale, or attempt to sell any merchandise for any consideration. . . (4) A deceptive commercial practice is a class B misdemeanor. [L. 1969, ch. 180, § 21-4403; July 1, 1970.]"

"8-611. Odometers, tachometers and other devices registering mileage; unlawful acts; penalties. (a) It shall be unlawful for any person to sell or convey a

The more general statute, under which Kliever was convicted, dealt with deceptive representations in the sale of merchandise, and the Kansas court found that statute and the odometer statute to be in conflict.

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3 (continued) motor vehicle knowing that the odometer, tachometer or any other device used for registering the mileage or use of such motor vehicle has been disconnected, turned back, reset, replaced or made inoperative with the intent and for the purpose of defrauding a purchaser.

(b) It shall be unlawful for any person to disconnect, turn back, reset or replace the odometer, tachometer or any other device used for registering the mileage or use of motor vehicles with the intent to reduce the number of miles or use thereof indicated on such gauge or device. The provisions of this section shall not apply to any of the following:

(1) The disconnecting of the odometer, tachometer or any other device used for registering the mileage or use of new motor vehicles being tested by the manufacturer prior to the delivery to a dealer.

(2) Replacement of a damaged or broken odometer, tachometer or other device used for registering the mileage or use of a motor vehicle with a new one when such new gauge or device registers '0' miles or use.

(c) The term 'motor vehicle' as used in this section shall mean every vehicle which is self-propelled except aircraft.

(d) The term 'person' as used in this section shall mean an individual, partnership, corporation or association.

(e) Any person violating the provisions of this act shall, upon conviction, be punished by a fine of not to exceed one thousand dollars (\$1,000), or by confinement in the county jail for a period not to exceed six (6) months, or by both such fine and imprisonment. [L. 1969, ch. 50, § 1, July 1.] Kansas Statutes Annotated.

In summary, Utah Code Ann. §§ 41-6-176, et. seq., and § 76-6-405, are not duplicative. Section 76-6-405 requires the State to prove the additional element that the accused obtained control over the property of another with the intent to deprive him thereof. Because they are not duplicative, the appellant's argument that since the odometer statute is more specific, it should apply, is inapplicable since that rule of statutory construction is not to be applied unless the statutes are duplicative or not distinguishable based upon their plain meaning.

#### POINT II

THE COMPLAINANT INCURRED A PECUNIARY LOSS  
IN EXCESS OF \$1,000.

The elements required to be proven by the State in a prosecution for theft by deception have been advanced by this Court on numerous occasions.

"The necessary elements of this offense are (1) a false or fraudulent representation (2) made knowing it to be such (3) with intent to cheat or defraud the person to whom the representation was made; (4) an actual fraud must have been perpetrated in the sense that something of value was obtained and the victim lost something of value, and (5) the representation must have induced

the owner to part with his property in the sense that the owner parted with his property in reliance upon the truth of the representation." State v. Vatsis, 10 Utah 2d 244, 351 P.2d 96 at 97 (1960).

These elements are essentially the same as this Court enumerated in the earlier cases of State v. Howd, 55 Utah 527, 188 Pac. 628 (1920), and State v. Morris, 85 Utah 210, 38 P.2d 1097 (1934).

In addition to the above elements, the Utah court has required that the victim sustain a "pecuniary or property loss by reason of the transaction relied upon." Morris, supra, 38 P.2d at 1100. But to this requirement, the following caveat exists:

" . . . the actual fraud and prejudice . . . is determined according to the situation 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." 38 P.2d at 1099.

See also State v. Fisher, 70 Utah 115, 8 P.2d 589 at 590 (1932).

Mr. Forshee asserts that since the complainant received an automobile that he later came to like for a price less than the fair market value of the car, he has not sustained a pecuniary loss. This argument attempts to prove too much, and ignores entirely the

fact that the buyer would never have purchased the



product had accurate representations been made. In the instant case, the complainant parted with \$2,830 and received in return a car that had more than twice as many miles as the odometer indicated.

State v. Casperson, 71 Utah 68, 262 Pac. 294 (1927), and Morris, supra, are readily distinguishable from the case at bar. In Casperson, supra, the Court based its decision on the "innocent purchaser" theory, and held that where the defendant was allowed to retain title on cars financed by an independent party, that his subsequent representation that he held title was valid, and that the third party received what it intended, i.e., an obligation for payments on an auto whose title was held by the defendant. In Morris, supra, the Court concluded that the finance company received what it bargained for, a right to receive payments based on a sales contract. It stated that, "in all probability it [the complaining corporation] did not and will not sustain any loss."

One issue presented by this appeal is how is the victim's loss to be determined. The respondent has been unable to find any Utah cases that address this specific point. However, two recent California decisions

do discuss these issues. In People v. Hess, 10 Cal.A.3d 1071, 90 Cal.R. 268 (1970), the victim purchased a horse he was led to believe was Ingaia, a full-blooded Arabian mare worth over \$3,000. The victim had agreed to pay \$1,000 for the animal, and at the time of trial he had actually paid \$550. The horse purchased was shown to be worth only about \$150 to \$200. The court stated:

"If the representation was knowingly made, the theft was of \$550 and constituted grand theft. If the representation was innocently made, no crime at all was committed. Under no circumstance were appellants entitled to offset the value of the spurious animal used to accomplish the fraud against the sum obtained from the victims to reduce the crime to petty theft." 90 Cal.R. at 273.

In People v. Ross, supra, the court addressed the same issue, and said: "As to the matter of the degree of the theft, the defendant erroneously argues that the test is ultimate loss rather than the amount of money received by the accused." 100 Cal.R. at 706. The Ross case is similar to the instant case in that the defendant was convicted for turning back odometers and subsequently selling them.

Hess and Ross are valuable precedent for at least two reasons. First of all, the California statute dealing with theft by deception requires the same elements of proof

as Section 76-6-405. See West's Annotated California Codes, Volume 49, § 484, note 393; and People v. Brady, 80 Cal.R. 418 (1969). Secondly, these decisions appear to be the only cases that specifically address the issue presented here.

The appellant argues that a decision by this Court that follows the Ross rationale would necessitate overruling Casperson, supra, and Morris, supra. This is not the case, since neither Casperson nor Morris address the issue presented here. Indeed, the Court's statement in Casperson that it is the situation of the victim immediately after he parts with his property that is determinative, is supportive of the theory advanced in both Ross and Hess.

In his conclusion, the appellant makes a further attempt to point out reasons that this court should reject Hess and Ross. The appellant asserts at page 18 of his brief that the California cases would not have resulted in a conviction if the defendant had remained silent about the altered odometers. There is nothing in either case to support this conclusion. In any event, Section 76-6-401(5), clearly precludes this result in Utah:

"(5) 'Deception' occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true. . . ."

In addition, this Court has held that "fraud by silence, when circumstances require honest disclosure, may constitute grounds for prosecution as well as false statements."

Ballaine v. District Court, 107 Utah 247, 153 P.2d 265 at 268 (1944).

The State submits that the best measure of the theft is the full amount paid by the complainants for the car. This is the amount of money that the defendant "obtained or exercise[d] control over . . . by deception." Section 76-6-405. It is also an amount that reflects the loss of the complainant "immediately after he part[ed] with his property." Morris, supra. Even though the car was of some value, the fact remains that the complainants would never have purchased the car from the defendant had they known the true mileage on the odometer.

POINT III

UTAH CODE ANN. § 76-6-405 (SUPP. 1977) HAS NOT BEEN UNCONSTITUTIONALLY APPLIED IN THIS CASE.

In point three of his brief, pages 12 through 15, the appellant raises the general argument that since odometer spinning has been going on for years, and few if any violators have been prosecuted under the terms of Section 76-6-405(1), that the appellant, while realizing his conduct to be illegal, did not realize that the punishment might be so severe. In advancing his argument, the appellant recognizes Section 76-1-106, but nevertheless calls for a strict interpretation of Section 76-6-405(1). The appellant does not contend that the statute is vague on its face, but that it is vague as applied.

It is without question that a statute must inform people of ordinary intelligence who desire to obey the law what conduct is not condoned. State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976).

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged."

United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594 at 598 (1963).

On the other hand, a criminal statute need not meet impossible standards of specificity, Woofster v. O'Donnell, 542 P.2d 1396 (Nevada 1975); nor does it need to specifically list every act or omission which might fall within its context, State v. Jones, 9 Wash.App. 1, 511 P.2d 74, 76 (1973); United States v. Harriss, 347 U.S. 612, 618, 74 S.Ct. 808 (1954).

The appellant would like us to believe somehow that by selling a used car with a turned back odometer and obtaining \$2,830 of the victim's property, which he would never have received had the victim known the true mileage, that the seriousness of the offense is offset by the fact that he could have sold the car elsewhere or by the fact that the victim got something for his money. The appellant overlooks entirely the fact that the trial court found an intent to defraud and that an actual fraud was committed (R.110), and furthermore, that the appellant would never have obtained the victim's money had he not misrepresented the mileage (R.111). An extension of the appellant's theory would argue that if a thief and the stolen property are both recaptured, that no crime has been committed since the owner has suffered no loss.

It is safe to assume that the appellant was aware that his conduct was illegal. He should not be

permitted to attack the constitutionality of his conviction, merely because he underestimated the severity of the potential punishment. As was discussed previously in Point I of this brief, there is no reason to believe that the legislature in enacting the odometer statute desired to make it the only means of charging violators. Indeed, it deals only with the act of spinning the odometer, and not the subsequent sale.

The appellant's conduct fits specifically into the realm of that proscribed by Utah Code Ann. § 76-6-405(1) (Supp. 1977), and the mere fact that he failed to consider the full implications of his conduct does not make this statute, as applied, constitutionally vague.

#### CONCLUSION

This is a case of first impression in Utah. However, other jurisdictions that have considered this approach to the odometer spinning problem have addressed the issues presented by this appeal and sustained the convictions. The odometer statutes, Sections 41-6-176, et seq., and the theft by deception statute, Section 76-6-405, are not duplicative. A conviction under Section 76-6-405 requires the State to meet additional burdens of proof, i.e., a sale of the car and a pecuniary

loss to the victim. Since the statutes are not duplicative, the rule of statutory interpretation advanced by the appellant is inapplicable.

The victim in this case suffered a real pecuniary loss. Although he received a car that he later came to like, he did not receive what was pretended or bargained for. As a result, the appellant gained control over the victim's money solely on the basis of the deception he exercised on him. The victim would never have purchased the car had he known its true mileage.

Section 76-6-405 has not been applied in an unconstitutional manner. The appellant knew that odometer spinning was illegal. His error was that he underestimated the potential severity of the crime. The statute need only inform people of ordinary intelligence, who desire to obey the law, what conduct is not condoned. The appellant's conduct does not indicate a desire to obey the law.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

EARL F. DORIUS  
Assistant Attorney General

Attorneys for Respondent