

2002

# The State of Utah v. Kevin Chukes : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 KEVIN CHUKES, : Case No. 20020376-CA  
 :  
 Defendant/Appellant. :

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**REPLY BRIEF OF APPELLANT**

Appeal from a conviction for Theft by Deception, a second degree felony, in violation of Utah Code Ann. § 76-6-405 (1999), Identity Fraud, a second degree felony, in violation of Utah Code Ann. § 76-6-1102 (Supp. 2002), and Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (1999), in the Third Judicial District Court, State of Utah, the Honorable Ann Boyden, Judge, presiding.

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Utah Court of Appeals

FILED 2003

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... i

SUMMARY OF THE ARGUMENTS ..... 1

ARGUMENT

    I. ORAL ARGUMENTS ARE APPROPRIATE IN THIS CASE ..... 2

    II. THE LACK OF AUTHORITY TO REPRESENT ANOTHER IS  
    INHERENT IN THEFT BY DECEPTION ..... 3

    III. FORGERY MAY BE COMMITTED WITHOUT SIGNING A  
    NAME ..... 8

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

### STATE STATUTES

Utah Code Ann. § 75-5-501 (Supp. 2002) .....	5
Utah Code Ann. § 75-5a-113 (2003) .....	6
Utah Code Ann. § 75-5a-114 (1993) .....	6
Utah Code Ann. § 75-5a-117 (2003) .....	6
Utah Code Ann. § 75-7-402 (2000) .....	6
Utah Code Ann. § 76-1-402 (1999) .....	2
Utah Code Ann. § 76-6-401 (1999) .....	4
Utah Code Ann. § 76-6-405 (1999) .....	4-5
Utah Code Ann. § 76-6-410 (1999) .....	7
Utah Code Ann. § 76-6-501 (1999) .....	8
Utah Code Ann. § 76-6-506.3 (1999) .....	7
Utah Code Ann. § 76-6-513 (1999) .....	7
Utah Code Ann. § 76-6-1102 (Supp. 2002) .....	2, 8

### STATE RULES

Utah R. App. P. 29 (2002) .....	1-3
---------------------------------	-----

STATE CASES

Brown v. Glover, 2000 UT 89, 16 P.3d 540 ..... 3

Cosmas v. Bloomingdales Bros., Inc., 660 A.2d 83 (Penn. 1995) ..... 7

Davis v. Payne & Day, Inc., 348 P.2d 337 (Utah 1960) ..... 5

Foreign Study League v. Holland-America Line, 497 P.2d 244 (Utah 1972) ..... 5

North Dakota v. Perreault, 638 N.W.2d 541 (N.D. 2002) ..... 7

Salt Lake County Comm'n v. Short, 1999 UT 73, 985 P.2d 899 ..... 5

State v. Black on Black Crime, Inc., 736 N.E.2d 962 (Ohio Ct. App. 1999) ..... 7

State v. Forshee, 588 P.2d 181 (Utah 1978) ..... 5

State v. Schultz, 850 P.2d 818 (Kan. 1993) ..... 7

State v. Taylor, 378 P.2d 352 (Utah 1963) ..... 6

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**SUMMARY OF THE ARGUMENTS**

In reply to the State's arguments, Appellant Kevin Chukes makes three assertions. First, Mr. Chukes asserts that the State's request to forego oral arguments is inappropriate under Rule 29 of the Utah Rules of Appellate Procedure. Under that Rule, oral arguments are allowed unless this Court determines that the appeal is frivolous, the issue has already been authoritatively decided, or the briefing is inadequate and argument would not be helpful. Utah R. App. P. 29 (2002). But the State has alleged none of those things here.

Second, the State is incorrect in arguing that someone who authoritatively represents another may commit theft-by-deception. This argument is baseless. If an appropriately authorized person represents another individual, corporation, or government body, the representation is binding. So, no theft or deception is committed. Some common examples of this include agency, power of attorney, and trusteeship. None of these circumstances constitute theft-by-deception.

Third, contrary to the State's argument, forgery is not differentiated from identity



fraud on the basis that forgery requires signing a name. Forgery may be committed in a number of ways that do not involve signing another's name to a document. Utah Code Ann. § 76-1-402 (1999). And, all of these ways, plus signing a name, are covered by the action element of identity fraud, which applies to any use of another's personal information. Utah Code Ann. § 76-6-1102 (Supp. 2002). So, forgery is a lesser-included offense of identity fraud.

## **ARGUMENT**

### **I. ORAL ARGUMENTS ARE APPROPRIATE IN THIS CASE**

Oral arguments should be presented in this case because this case involves questions of law that have not been decided in Utah. Those questions are whether forgery is a lesser-included offense of identity fraud and whether both forgery and identity fraud are lesser-included offenses of theft-by-deception. Aplt. Br. 1-2. Neither question has been authoritatively decided, and the decisions are important because they will affect the way defendants are charged with these types of crimes. So, oral argument is appropriate.

Under Rule 29 of the Utah Rules of Appellate Procedure, oral argument should be allowed in every case unless this Court concludes that:

- (1) The appeal is frivolous; or
- (2) The dispositive issue or set of issues has been recently authoritatively decided; or
- (3) The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral

argument.

Utah R. App. P. 29(a) (2002); Brown v. Glover, 2000 UT 89, ¶17, 16 P.3d 540.

None of these circumstances occur here. This appeal is not frivolous because it is soundly based upon the lesser-included statute. Aplt. Br. 7-10. Also, there is persuasive authority supporting Mr. Chukes' arguments that greater-lesser relationships occur between the forgery and identity fraud statute, and the forgery, identity fraud, and theft-by-deception statutes. Aplt. Br. 11-38. Further, the issues in this case have not been authoritatively decided in Utah. Finally, the briefing is thorough and includes an adequate outline of facts and the issue on appeal. Aplt. Br. 4-6, 7-38; Appellee's Br. 3-5, 6-20. All in all, oral argument is appropriate in this case to help with the organization and meaning of the different elements of the statutes and determine whether there is a greater-lesser relationship among them.

## **II. THE LACK OF AUTHORITY TO REPRESENT ANOTHER IS INHERENT IN THEFT BY DECEPTION**

The State fails in its attempt to differentiate forgery and identity fraud from theft-by-deception. This is because its argument is based on the erroneous assertion that theft-by-deception may be committed by someone who authoritatively acts on behalf of another, whereas forgery and identity fraud is committed only by someone who lacks authority. Appellee's Br. 14-15, 18, 20. However, theft-by-deception, like forgery and identity fraud, requires a lack of authority. This is apparent from the plain language of the

theft-by-deception statute, Utah laws which specifically authorize individuals to act for others in certain circumstances, and persuasive case law from other states.

First of all, the plain language of the theft-by-deception statute shows that theft-by-deception is committed only when a person deceives another in obtaining the property of another. Utah Code Ann. § 76-6-405(1) (1999). And deception, in all of its statutory meanings, contemplates that an actor lacks the authority to make the representations which cause the victim to give up goods or services. “Deception” means that a person:

(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 is false and 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; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or . . .

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

R. 81-82; Utah Code Ann. § 76-6-401(5) (1999).

None of these definitions allow for the conviction of someone who authoritatively uses another’s name or information. For instance, under the first definition, if a properly authorized person represents himself as having the ability to obtain credit or purchase

items on behalf of the other, the representation is not false. Likewise, the representative's failure to correct this impression is not deception under the second definition. Under the third definition, a person representing another may or may not chose to disclose the personal information of the other, but either way it is not deception. Of course, someone with goods or services to sell may wish to have this disclosure, but the representative's failure to disclose does not, alone, amount to theft by deception. This is because the seller may well get what he bargained for. If so, no theft or statutory deception occurs.<sup>1</sup> Finally, under the last definition, if an authorized representative is acting on behalf of another, he intends his promises to be binding, and so it is not deception under the fourth definition.

All of this is easier to see in the context of some of the common forms of representation. One of these is company agency. An employee may be authorized to purchase items for a company, enter contracts for a company, or sell the company's goods.<sup>2</sup> None of this amounts to theft by deception even though the employee is not actually the company or even an officer. Also, it is perfectly legal when a person with power-of-attorney uses the principal's money to purchase items on behalf of the principal.<sup>3</sup> A custodian may enter a contract on behalf of a beneficiary, using the

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<sup>1</sup> Theft does not occur when there is "only falsity as to matters having no pecuniary significance . . . ." Utah Code Ann. § 76-6-405(2) (1999); State v. Forshee, 588 P.2d 181, 183 (Utah 1978).

<sup>2</sup> Salt Lake County Comm'n v. Short, 1999 UT 73, ¶21, 985 P.2d 899; Foreign Study League v. Holland-America Line, 497 P.2d 244, 246 (Utah 1972); Davis v. Payne & Day, Inc., 348 P.2d 337, 339 (Utah 1960).

<sup>3</sup> Utah Code Ann. § 75-5-501(4) (Supp. 2002).

beneficiary's funds as security.<sup>4</sup> And, a trustee may use trust funds to purchase items on behalf of a beneficiary. Utah Code Ann. 75-7-402 (2000). These are only some of the well-recognized forms of representation that do not amount to theft-by-deception.

This shows that the State's argument that theft-by-deception may be committed when a properly-authorized individual acts on behalf of another individual, trust, business or government entity is implausible. A representative does no more than represent; it is the represented which is the responsible party, and so is the represented's information which is important. If this information is given, it is unimportant whether it is the represented or the representative which acted.

Further, it would be unfair to subject properly-authorized individuals to the possibility of a conviction for theft-by-deception because of some transaction with a third party. Often, authorized individuals make purchases or even enter contracts without mentioning the fact that they are representing another individual or entity. And, there is no sound policy which would be forwarded by requiring these representatives to go through a time-consuming and often unnecessary disclosure procedure for every purchase or contract they make.<sup>5</sup>

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<sup>4</sup> See Utah Code Ann. § 75-5a-114(1) (1993) ("A custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers, and authority in that capacity only."); Utah Code Ann. § 75-5a-117 (2003)

<sup>5</sup> Of course, if the representative has inappropriately used funds with which he was entrusted, or otherwise hurt the interests of the represented, the represented usually has a cause of action against the representative. See, e.g. Utah Code Ann. § 75-5a-113 (2003) (care of custodial property); State v. Taylor, 378 P.2d 352, 353 (Utah 1963) (duty of employee to

Persuasive case law from other jurisdictions clarifies this. In other states, the importance of a lack of authorization has been highlighted in cases where a defendant alleges he had authorization to use another's credit cards or write checks on another's account. In fact, the Supreme Court of North Dakota recently clarified that a defendant's contention that he had authority to write checks as a draw on future profits from his company raised a factual question of guilt. North Dakota v. Perreault, 638 N.W.2d 541, 544 (N.D. 2002). Likewise, in Cosmas v. Bloomingdales Bros., Inc., the Pennsylvania Superior Court considered, among other issues, whether the defendant had authorization to use another individual's credit card in making purchases from a department store. Cosmas v. Bloomingdales Bros., Inc., 660 A.2d 83, 88-89 (Penn. 1995). Unauthorized purchases made on behalf of a municipality was the focus of a case decided by the Supreme Court of Kansas. State v. Schultz, 850 P.2d 818, 821 (Kan. 1993). And, in Ohio, a recent case clarified that a statutory lack of authorization for the distribution of charitable funds was at the root of a theft case. State v. Black on Black Crime, Inc., 736 N.E.2d 962, 967 (Ohio Ct. App. 1999).

In sum, the State's argument that a lack of authorization is not part of the theft-by-deception statute fails. Theft-by-deception contemplates that a person representing himself as another did not have permission to do so, and so the crimes of forgery and

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company). Also, other criminal statutes may apply. Utah Code Ann. § 76-6-410 (1999) (theft by person having custody of property pursuant to repair or rental agreement); Utah Code Ann. § 76-6-506.3 (1999) (unlawful acquisition, possession, or transfer of credit card); Utah Code Ann. § 76-6-513 (1999) (unlawful dealing of property by a fiduciary). So, that contingency does not concern us here.

identity fraud cannot be differentiated on this basis.

### **III. FORGERY MAY BE COMMITTED WITHOUT SIGNING A NAME**

The State's argument that forgery is not a lesser-included offense of identity fraud is incorrect. This is because the State bases this argument on the erroneous assertion that, at least in this case, forgery requires the signing of a name. Appellee's Br. 13. However, forgery may be committed in many ways. And, these ways essentially amount to any use of another's personal information, as prohibited by the identity fraud statute. Utah Code Ann. § 76-6-1102 (2)(b) (Supp. 2002). This is apparent from the forgery statute itself.

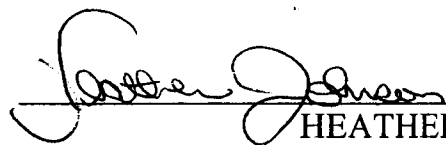
The forgery statute prohibits not only the signing of a name, but also altering another's writing without permission or uttering such a writing. Utah Code Ann. § 76-6-501(1)(a) (1999). Also, making, completing, executing, authenticating, issuing, transferring, publishing, or uttering any writing so that it appears to be that of another is prohibited. Utah Code Ann. § 76-6-501(1)(b) (1999). What is more, the forgery statute emphasizes that "writing" includes "printing, electronic storage or transmission, or any other method of recording valuable information . . . ." Utah Code Ann. § 76-6-501(2) (1999). These definitions are broad and take into account numerous actions, not just signing a name.

So, the State's contention that a name must be signed before forgery is committed is incorrect, and the forgery and identity fraud statutes cannot be differentiated on this basis.

**CONCLUSION**

In light of the above, Mr. Chukes respectfully requests that this court vacate his convictions for forgery and identity fraud. Alternatively, Mr. Chukes requests that this Court vacate his conviction for forgery.

SUBMITTED this 5<sup>th</sup> day of February, 2003.

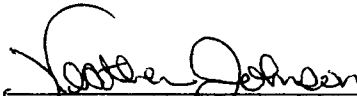
  
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**CERTIFICATE OF DELIVERY**

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 5<sup>th</sup> day of February, 2003.

  
HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_\_ day of February, 2003.

\_\_\_\_\_