

1963

State of Utah v. Edgar Glen Cude : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

EDGAR GLEN CUDE,
Defendant and Appellant.

FILED
JUL 19 1963

Supreme Court, Utah
Case No. 9619
UNIVERSITY OF UTAH

OCT 23 1963

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PETITION FOR REHEARING

On Rehearing

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} Case
No. 9619

PETITION FOR REHEARING

STATEMENT OF POSITION ON REHEARING

The respondent, State of Utah, submits that the decision of the court heretofore filed on July 2, 1963, reversing the appellant's conviction of larceny, should be re-examined and that the original opinion should be withdrawn and the conviction affirmed.

ARGUMENT

POINT

THE COURT'S OPINION ASSUMES THAT,
IF THE DEFENDANT TOOK HIS VEHICLE
UNDER A GOOD FAITH BELIEF THAT HE
HAD A RIGHT TO THE POSSESSION OF HIS

VEHICLE, SUCH GOOD FAITH BELIEF
COULD DESTROY THE REQUIRED MENS
REA THAT IS AN ELEMENT OF THE CRIME
CHARGED, WHICH ASSUMPTION IS ERROR.

Appellant, Edgar Glen Cude, was convicted of grand larceny. The facts as indicated in the opinion of the court are that the appellant took his automobile from a garage repairman who had performed repairs upon the vehicle. In *State v. Parker*, 104 Utah 23, 137 P. 2d 626, this court realized that an individual could be convicted of grand larceny by destroying the lienholder's possessory right to the property upon which he has performed repairs. In the court's decision rendered in the instant matter, the court states:

“It is fundamental that an essential element of larceny is the intent to steal the property of another. Consequently, if there is any reasonable basis in the evidence upon which the jury could believe that the accused thought he had a right to take possession of his automobile, or if the evidence in that regard is such that it might raise a reasonable doubt that he had the intent to steal, then that issue should be presented to the jury. The principle is correctly stated in 52 C.J.S., p. 999, that if the property was taken under any ‘* * *’ circumstances from which the jury might infer that the taking was under a claim of right, the accused is entitled to an appropriate charge distinguishing larceny from a mere trespass.’”

It is apparently the position of the court that, if the appellant took possession of his vehicle in good faith, thinking that he had a right to do so, he could not have

the requisite *mens rea*. It is admitted as a general principle of law that, where a specific *mens rea* is required, if the defendant's mistaken state of mind is of such a nature as to obviate the *mens rea*, the required criminal intent is lacking and the accused cannot be convicted. However, the court's initial premise in the instant case is unsound, for it assumes that the required *mens rea* is the intent to deprive the possessor of his compensation and that it was necessary to show an intent to "steal" his automobile. This premise is unsound, since the *mens rea* is not the intent to steal or to deprive the lienholder of compensation, but to deprive the lienholder of his "possessory right." Perkins, *Criminal Law* (1958) page 224. A lienholder has a possessory right to retain the automobile until paid for his work, but has the primary possessory right to hold the property and, if necessary, to satisfy the debt against him from that property. Therefore, the required *mens rea*, in an offense like that with which the appellant was charged, is not the intent to steal but the intent to deprive the lienholder of the possessory right to the property. The appellant's good faith would only be a defense if it demonstrated that he did not intend to deprive the lienholder of the possession of the vehicle. Not one shred of evidence was before the court either at the trial or upon appeal which would show that the appellant had any other intent than to take the vehicle from the possession of the lienholder and sell it.

The evidence overwhelmingly shows without a single contradiction that the appellant intended to sell the ve-

hicle (R. 66 to 1). Appellant at no time testified that he intended to return the vehicle or to grant the lienholder his possessory right. Consequently, the state of mind that the appellant had at the time he took the vehicle was clearly that of an intent to deprive the lienholder of his possessory right, and, although he may have taken the vehicle under the belief that he had a right to do so, such a state of mind where the vehicle was taken with the intent of permanently removing it from the lienholder's possession would not be such a state of mind as would exculpate the appellant from the crime charged. As a consequence, there was no evidence before the trial court which would have warranted the court in instructing the jury.

The nature of the circumstances under which a claim of good faith is made must be examined to determine whether or not the claim of good faith would blot out the criminal intent required. Appellant's position and thus the court's position would be correct only if the intent would be the general intent to steal as distinct from the specific intent to deprive of a possessory lienholder's right. The lienholder has a right, not only to payment for his work, but a right to satisfy that debt out of the property possessed. Consequently, any act that would deprive the lienholder of his right to satisfy his debt out of the property would not be such an intent as could be exculpatory of the required *mens rea*.

The Supreme Court of Canada in *Regina v. Shymkovich*, 1954 S. Ct., 606, had before it a case where the

District Court of the Province of British Columbia had entered an acquittal, and the Court of Appeals of British Columbia affirmed on the grounds that the respondent, who took logs under the believe that they were abandoned, could exculpate himself because of a good faith belief. The lower courts had ruled this would be exculpatory of the required intent for the crime. The court ruled:

“The taking into possession and the conversion of the logs obviously was intended to deprive the owner temporarily at least of its property and this comes within the express language of the definition of theft given by the *Criminal Code*.”

It is noteworthy that, in the opinion of Justice Estey to the degree that it relates to the instant facts, he stated:

“* * * The conduct of the respondent, in the submission of the Crown, in going into and trespassing upon the booming ground with the intent and purpose of collecting floating logs therein, though not inside a boom, was itself, in the circumstances, such evidence of dishonest or wrongful intent that the mere assertion on his part that he thought he had a right to collect floating logs would not establish an honest intent.”

The Supreme Court of Canada reversed the acquittal and directed that a conviction be entered.

Certainly, therefore, where the instant opinion of the court is predicated on an erroneous premise as to the requisite *mens rea*, the court should withdraw its opinion and grant rehearing. Further, where the factual status of the record is such that there is not a scintilla of evidence

exculpatory of the required *men rea* actually involved in the crime, the court should grant a rehearing.

As the court's opinion now stands a mistake of law has been made, not only by the accused but by the court.

CONCLUSION

The opinion of the court makes a serious and glaring mistake of law in that it assumes that the mental element of the instant offense is other than the intent to deprive the lienholder of the right to satisfy his indebtedness from the possession of property, and assumes that it is the intent to deprive the lienholder of payment. Since it is obviously clear that the appellant did intend to deprive the lienholder of possession of his property permanently, the court should affirm the conviction.

Respectfully submitted,

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