

RENDERED: OCTOBER 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001099-MR

MARK RANDOLPH

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CR-00888

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY, SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Mark Randolph brings this appeal from a May 11, 2009, judgment of the Kenton Circuit Court sentencing him to three-years' imprisonment upon a jury verdict finding him guilty of theft by unlawful taking over \$300. We affirm.

The facts underlying appellant's conviction arose from the unlawful taking of a used Cadillac from a car dealership known as Justice Auto Sales

located in Kenton County, Kentucky. The dealership was owned by Roger Justice, who testified to purchasing the Cadillac for resale. Justice also testified that he had employed appellant at the dealership but ended such relationship the day after purchasing the Cadillac. Justice discovered the Cadillac missing and contacted the authorities. Appellant was eventually apprehended in Bedford, Indiana, with the Cadillac. At the time of his arrest, appellant was accompanied by Larry Teague, who was also placed under arrest.

Appellant was indicted by the Kenton County Grand Jury upon the offenses of theft by unlawful taking over \$300 and of burglary in the third degree. A jury ultimately convicted appellant upon the offense of theft by unlawful taking over \$300 in connection with the Cadillac but acquitted appellant upon the offense of burglary in the third degree. The trial court sentenced appellant to three-years' imprisonment. This appeal follows.

Appellant initially contends that the trial court erred by denying his motion for a directed verdict of acquittal upon theft of unlawful taking over \$300. We disagree.

Theft by unlawful taking is codified in Kentucky Revised Statutes (KRS) 514.030 and provides:

- (1) Except as otherwise provided in [KRS 217.181](#) or [218A.1418](#), a person is guilty of theft by unlawful taking or disposition when he unlawfully:
 - (a) Takes or exercises control over movable property of another with intent to deprive him thereof[.]

The term “property of another” as used in KRS 514.030(1)(a) is defined as follows:

(7) “Property of another” includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security arrangement.

KRS 514.010(7).

A defendant is entitled to a directed verdict of acquittal if upon the evidence as a whole it would be clearly unreasonable for the jury to have found guilt. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991). Specifically, appellant argues entitlement to a directed verdict because the Commonwealth failed to prove that he stole the Cadillac or that Justice Auto Sales owned the Cadillac as required by KRS 514.030(1)(a).

The evidence at trial reflected that appellant was apprehended in Bedford, Indiana, with the Cadillac. Justice testified that he purchased the Cadillac for his car dealership and that the Cadillac was taken from the dealership without his permission or knowledge. While the evidence did demonstrate that the title to the Cadillac had not been transferred from the previous owner to Justice, the evidence was sufficient to demonstrate that the Cadillac constituted “property of

another” within the definition of KRS 514.010(7). Justice’s testimony alone demonstrated that the Cadillac was property that Justice Auto Sales held an interest in and that appellant had no privilege to infringe upon such interest. Thus, we conclude that appellant was not entitled to a directed verdict of acquittal upon the offense of unlawful taking over \$300.

Appellant also argues that the trial court erred by requiring him to pay court costs of \$130 as he was indigent. It is well-established that the trial court may not impose court costs against an indigent defendant. KRS 31.110; *Edmonson v. Com.*, 725 S.W.2d 595 (Ky. 1987). While it is true that appellant was found to be indigent before trial, that he was appointed a public defender during trial, and that he was granted leave to appeal *in forma pauperis*, the trial court, nevertheless, found that appellant owned real property in Kenton County and placed a judgment lien upon the property for payment of the court costs. Consequently, we cannot say that the circuit court abused its discretion by imposing court costs of \$130. *See Edmonson*, 725 S.W.2d 595.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Alyette Durham II
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky