

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001216-MR

MICHAEL LEPPER

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JAMES R. SCHRAND, II, JUDGE  
ACTION NO. 10-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING IN PART,  
VACATING IN PART,  
AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,<sup>1</sup>  
SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Michael Lepper brings this appeal from a June 2,  
2010, Order of the Boone Circuit Court ordering forfeiture of Lepper's automobile

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

pursuant to Kentucky Revised Statutes (KRS) 514.130. We reverse in part, vacate in part, and remand.

Lepper was indicted by the Boone County Grand Jury upon the offenses of unlawful transaction with a minor (first degree), two counts of burglary (second degree), two counts of theft by unlawful taking over \$500, criminal mischief (first degree), and ten counts of theft by unlawful taking under \$500. Pursuant to a plea agreement, the Commonwealth agreed to dismiss the count of unlawful transaction with a minor, and Lepper agreed to enter a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) upon the remaining counts in the indictment. Also, the Commonwealth recommended a total term of five-years' imprisonment. Following his guilty plea, Lepper was sentenced in accordance with the plea agreement.

The plea agreement additionally provided that the circuit court would decide whether forfeiture of Lepper's automobile was proper. In conformity therewith, the circuit court held an evidentiary hearing. Following the hearing, the circuit court ordered the automobile forfeited by order entered June 2, 2010. This appeal follows.

Lepper contends that the circuit court erred as a matter of law in ordering the forfeiture of his automobile. Lepper argues that forfeiture of the automobile was only proper if it was "used in the commission or furtherance" of the theft offenses per KRS 514.130. As his automobile was not so used, Lepper believes the circuit court erred.

KRS 514.130 provides, in relevant part:

(1) Upon the conviction of any person for the violation of any offense in this chapter all property held in violation of this chapter, and any personal property, including but not limited to vehicles or aircraft, used in the commission or furtherance of an offense under this chapter or in the transportation of stolen property shall be forfeited as provided in [KRS 500.090](#) by court order and sold, destroyed or otherwise disposed of in accordance with [KRS 500.090](#).

Under the plain terms of KRS 514.130(1), personal property is subject to forfeiture if defendant is convicted of an offense under Chapter 514 and the property was utilized “in the commission or furtherance” of said offense. In *Commonwealth v. Fint*, 940 S.W.2d 896, 898 (Ky. 1997), the Kentucky Supreme Court instructed the trial court:

When a trial judge is faced with a [KRS 514.130\(1\)](#) issue, a finding of fact must first be made as to whether the property in question was used in the commission of the offense or in the transportation of stolen goods. (The “instrumentality” test.)

In the case *sub judice*, the circuit court found that Lepper’s automobile was purchased “with proceeds from the crimes” of which he pleaded guilty and, thus, was subject to forfeiture under KRS 514.130(1). Yet, the circuit court failed to make the mandated finding that Lepper’s automobile was used in the commission or furtherance of the theft offenses. Without such a finding, the forfeiture of Lepper’s automobile pursuant to KRS 514.130(1) was improper. As such, we remand to the circuit court to reconsider its order of forfeiture under KRS 514.130(1) in accordance with *Fint*, 940 S.W.2d 896.

Lepper also urges this Court to “vacate the restitution order” for violation of KRS 532.033. Upon review of the record, it is clear that there is no written restitution order. Moreover, neither the forfeiture order nor the final order of imprisonment ordered Lepper to pay restitution. In the forfeiture order, the circuit court did recite that Lepper “agreed to pay restitution to the victims;” however, such is simply a reference to the plea agreement. Consequently, there is no “restitutional order” to vacate; hence, we reject this allegation of error.

Lepper finally maintains that the circuit court erred by ordering him to pay court costs as an indigent. Lepper points out that the circuit court found him to be indigent and appointed trial counsel. Moreover, he was found to be a pauper under KRS 453.190 and KRS 31.110 and allowed to appeal *in forma pauperis*. Lepper maintains that the circuit court erroneously ordered him to pay \$156 in court costs.

In light of the recent Supreme Court opinion in *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010), the Commonwealth concedes in its appellate brief that the circuit court erred. In *Travis*, the Supreme Court held that court costs may not be assessed upon an indigent defendant. *Id.* As Lepper qualifies as an indigent, we reverse the circuit court’s imposition of court costs of \$156 upon Lepper.

For the foregoing reasons, the Order of the Boone Circuit Court is reversed in part, vacated in part, and remanded for proceedings consistent with this opinion.

LAMBERT, SENIOR JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

CLAYTON, JUDGE, DISSENTING: Respectfully, I dissent from that portion of the majority's opinion that remands this matter for a hearing pursuant to KRS 514.130. Based upon the facts presented in this case, the 1999 Saturn automobile was purchased after the offenses, and therefore, it was not used in the commission or the furtherance of the offense.

As stated by the majority, KRS 514.130 and *Com. v. Flint*, 940 S.W.2d 896 (Ky. 1997), require that property used "in the commission or furtherance" of the offense is to be forfeited. The trial court found that the proceeds were used to purchase the Saturn, but this factor is not enough to require the forfeiture. Since the vehicle was purchased after the commission of the offenses, it could not have been used in the commission or furtherance of the offense. Further, I believe that an additional hearing is not necessary since the facts are not in dispute.

Since there was no petition filed within ninety days seeking restitution (KRS 431.200), the court has now lost jurisdiction to enter a restitution order. Thus, I would not remand this matter for a hearing but I would vacate the order of forfeiture.

BRIEFS FOR APPELLANT:

Robert C. Yang  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Michael J. Marsch  
Assistant Attorney General  
Frankfort, Kentucky