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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000433-MR

JOSEPH K. MCCALED

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 11-CR-00530

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Joseph K. McCaleb appeals from an order entered February 23, 2016, by the Campbell Circuit Court granting a motion by the Commonwealth pursuant to Kentucky Revised Statutes (KRS) 514.130, to forfeit images on computers and storage devices owned by McCaleb. For the reasons stated, we affirm.

McCaleb was indicted in June 2011 for two counts of burglary in the second degree, KRS 511.030; five counts of theft by unlawful taking (value of \$500 or more), KRS 514.030; and one count of theft by unlawful taking (value under \$500), KRS 514.030. While employed as an installer by DirecTV, McCaleb stole underwear from the homes of his customers. He also used their personal information to “friend” them on Facebook and learn when they were out of town in order to burglarize their homes.

McCaleb admitted that he has a fetish for underwear and lingerie, and stole such items from his victims over twenty times in 2011. The Commonwealth estimated that between ten and twenty thousand pictures of underwear were found on McCaleb’s electronic devices and approximately twenty-five CDs were filled with pictures of stolen underwear. The spreadsheets and pictures of underwear were saved and stored on multiple electronic devices.

After his indictment and his entry of a plea of not guilty, McCaleb filed a series of motions, both *pro se* and through counsel, to suppress the evidence recovered at his parents’ home in Franklin, Ohio, and at another address in Middletown, Ohio. The suppression proceedings continued until April 2, 2013, when he entered a plea of guilty pursuant to an agreement with the Commonwealth. McCaleb pleaded guilty to one of the burglary counts and the remaining counts were all amended to theft by unlawful taking of property valued at less than \$500. Under the terms of the final judgment entered on June 20, 2013, all sentences were ordered to run concurrently for a total sentence of six years but

consecutively to any sentence relating to charges McCaleb had incurred in Boone County.

Approximately two years later, McCaleb filed a *pro se* pleading and supporting memorandum styled “Motion to Return Property Illegally Seized” McCaleb sought to recover nineteen different items he claimed had been illegally seized by the police. The Commonwealth responded by filing on July 15, 2015, a motion to forfeit certain items and also filed notices indicating which items McCaleb could immediately retrieve.

The trial court conducted a forfeiture hearing on January 19, 2016. At the hearing, the only items remaining at issue consisted of three computers or hard drives containing numerous photographs of the stolen items. The Commonwealth explained that it had offered to delete the hard drives and then return them to McCaleb, arguing that he should never be allowed to recover the photographs of the underwear and lingerie. The trial court agreed. It entered an order on February 23, 2016, granting the Commonwealth’s motion to forfeit all the pictures of the various items of clothing seized from McCaleb, and ordering the return of the computers and hard drives upon the deletion of said items. This appeal by McCaleb followed.

The forfeiture statute provides in relevant part as follows:

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.

Kentucky Revised Statutes (KRS) 514.130(1).

McCaleb argues, in reliance on *Lepper v. Commonwealth*, an unpublished opinion of this Court, that the trial court erred in ordering the photographs to be forfeited because they were not used in the commission or furtherance of any of the offenses he committed. 2011 WL 4408731 (Ky. App. Sept. 23, 2011) (2010-CA-001216-MR). *Lepper* is factually distinguishable. In that case, the circuit court found Lepper's automobile subject to forfeiture because it was purchased with proceeds from thefts he had committed. The circuit court failed, however, to make the mandated statutory finding under KRS 514.130(1) that the automobile was used in the commission or furtherance of the theft offenses. The *Lepper* case was remanded to the circuit court to reconsider its order of forfeiture. By contrast, in McCaleb's case, the circuit court did make the mandated finding, and interpreted "furtherance" broadly to encompass the concept of re-victimization of the victims if McCaleb was allowed to retain the pictures and thereby enjoy the fruits of his crimes. Its order also stated:

Just as a bank robber would not be allowed to retain stolen proceeds from a bank or an individual using stolen credit cards would not be permitted to keep any items purchased using those stolen credit cards, so this Defendant cannot be permitted to retain photographs of the fruits of his illegal endeavors. Photographs of the underwear in question which were stolen from the various victims in these cases is no different than items

purchased with stolen proceeds or items purchased using stolen credit cards or checks. (Footnote omitted.)

We agree with the trial court's reasoning. It is undisputed that the undergarments themselves constituted "property held in violation" of KRS Chapter 514. McCaleb stole the items not for their innate market value but to satisfy his sexual fetish. As the Commonwealth has argued, the mere fact that McCaleb converted these highly personal items to a digital platform as a means to satisfy this fetish, should not shield these images from forfeiture. Under the unique facts of this case, allowing McCaleb to retain the images would in effect allow him to retain the fruits of his crime for the purpose for which he intended them.

McCaleb argues that some of the photographs in question are not of items relating to his convictions. He provides no citations to the record to show that he raised this issue before the trial court, he did not raise this issue at the forfeiture hearing, and it was never addressed by the trial court in its order.

"[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986).

"It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Fischer v.*

Fischer, 348 S.W.3d 582, 588 (Ky. 2011) (citation omitted). "It is not the job of the appellate courts to scour the record in support of an appellant[']s argument."

Dennis v. Fulkerson, 343 S.W.3d 633, 637 (Ky. App. 2011).

For the foregoing reasons, the order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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