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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001295-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 16-CR-00205

JONATHAN E. OLINGER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

KRAMER, JUDGE: The Commonwealth of Kentucky appeals the Perry Circuit Court's order denying the Commonwealth's motion for forfeiture. After a careful review of the record, we affirm because KRS¹ 514.130(1) does not apply to Olinger's case.

¹ Kentucky Revised Statute.

I. FACTUAL AND PROCEDURAL BACKGROUND

Jonathan E. Olinger was indicted on charges of first-degree robbery and tampering with physical evidence. The Commonwealth provided an offer on a plea of guilty, which stated that the Commonwealth would amend the robbery charge to a charge of second-degree robbery in exchange for Olinger's guilty plea. The Commonwealth's offer also stated that the Commonwealth would recommend sentences of ten years of imprisonment on the second-degree robbery charge and five years of imprisonment on the tampering with physical evidence charge, with both sentences to run concurrently. The Commonwealth would recommend that Olinger forfeit his interest in the gun used during the robbery and pay \$560.00 restitution to the store he robbed. The plea offer further provided that the Commonwealth would move for an order requiring Olinger to forfeit the vehicle used in the crime.

Olinger moved to enter a guilty plea in accord with the Commonwealth's plea offer. The circuit court accepted his guilty plea to the amended charge of second-degree robbery and the charge of tampering with physical evidence.

Prior to sentencing, the Commonwealth moved for an order of forfeiture and disposition. Its motion sought "an order forfeiting and disposing of seized property[.]" The Commonwealth stated its reason for the motion was that

the Hazard City Police had confiscated from Olinger a 2003 GMC Denali vehicle used in the robbery and Olinger had entered a guilty plea to the charges of second-degree robbery and tampering with physical evidence. Therefore, the Commonwealth concluded that the seized property should be forfeited to the Hazard City Police. Olinger opposed the motion.

The circuit court sentenced Olinger to ten years of imprisonment for the second-degree robbery conviction and five years of imprisonment for the tampering with physical evidence conviction, with both sentences to run concurrently with each other. It also ordered him to forfeit his interest in the gun seized at the time of the crime; to pay \$560.00 restitution; and to stay away from the victims, their family, and the store that he robbed.

The Commonwealth filed a supplement to its motion for forfeiture alleging that the Denali was used in the commission of the crime. The Commonwealth contended that the vehicle should be forfeited pursuant to KRS 514.130.

The circuit court denied the Commonwealth's motion for forfeiture and disposition. The court reasoned that the Commonwealth had "not shown an adequate legal authority for the proposed taking."

The Commonwealth now appeals, contending that KRS 514.130(1) does not limit forfeiture of personal property exclusively to those crimes defined

within Chapter 514, but allows forfeiture in other crimes where theft is a necessary element of the offense, such as robbery. Olinger opposes the Commonwealth's appeal.

II. ANALYSIS

This appeal involves the interpretation of a statute. Regarding the rules of statutory construction, KRS 446.080 provides, in pertinent part,

(1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.

. . . .

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

This Court has summarized the rules of statutory construction as follows:

The primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider the intended purpose of the statute—the reason and spirit of the statute—and the mischief intended to be remedied. The courts should reject a construction that is unreasonable and absurd, in preference for one that is reasonable, rational, sensible and intelligent. . . . In addition, the courts must construe statutes in a manner that saves their constitutionality

whenever possible consistent with reason and common sense. On the other hand, a court should not add words or cure an omission to give constitutionally permissible meaning where none would otherwise exist. Under the doctrine of *in pari materia*, statutes having a common purpose or subject matter must be construed together.

Commonwealth v. Kerr, 136 S.W.3d 783, 785 (Ky. App. 2004) (internal quotation marks and citations omitted).

The statute at issue in this case is KRS 514.130(1), which provides:

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.

The Kentucky Supreme Court has stated that “[w]hen 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.)” *Commonwealth v. Fint*, 940 S.W.2d 896, 898 (Ky. 1997). If the judge finds that it was so used,

and if the owner raises a constitutional defense to the forfeiture, then additional findings must be made . . . in order to conclude whether application of the forfeiture statute to that case would violate the “excessive fines” clauses of section 17 of our Constitution and the Eighth Amendment of the Constitution of the United States.

(The “proportionality” test.) On appeal, the trial judge’s findings and conclusions will be upheld unless “clearly erroneous.”

Id. (Citation omitted).

As stated above, KRS 514.130(1) begins with the phrase “[u]pon the conviction of any person for the violation of any offense in this chapter. . . .” Therefore, the legislature clearly intended it to apply only to people convicted for violations of offenses listed in Chapter 514 of the Kentucky Revised Statutes. In the present case, Olinger was convicted of second-degree robbery, which is a violation of KRS 515.030, set forth in Chapter 515; and of tampering with physical evidence, which is a violation of KRS 524.100, set forth in Chapter 524. Consequently, because he was not convicted of any violations set forth in Chapter 514, the forfeiture provision of KRS 514.130(1) does not apply to his case; hence, the circuit court’s decision was not in error. The redress the Commonwealth seeks should be made through the legislative branch, as it would require a modification of the statute at issue—something this Court is not permitted to do.

Accordingly, the order of the Perry Circuit Court is affirmed.

ALL CONCUR.

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