



WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR DAVID CRAIG

FROM: Margit S. Kelley, Senior Staff Attorney

RE: Description of 2017 Senate Bill 61, Relating to Asset Forfeitures, and Senate Substitute Amendment 2 to Senate Bill 61 and Senate Amendment 1 to Senate Substitute Amendment 1

DATE: February 16, 2018

This memorandum describes 2017 Senate Bill 61 (“the bill”), related to forfeiture of property seized in relation to a crime, Senate Substitute Amendment 2 to the bill (“the substitute amendment”), and where applicable, Senate Amendment 1 to the substitute amendment.

Among other modifications to current law, the bill and the substitute amendment make various changes, described below, to two forfeiture statutes: (1) the forfeiture statute under the Controlled Substances Act, which governs the forfeiture of property seized in connection with a drug-related crime; and (2) the forfeiture statute under the sentencing laws, which relates to property seized in relation to other (non-drug-related) crimes.¹ Unless otherwise indicated, the changes described below apply to both of those statutes.

Very generally, state law provides that all property, real or personal, including money, may be subject to forfeiture if it was used in the course of, intended for use in the course of, or directly or indirectly derived from or realized through the commission of a crime. [ss. 961.55 (1) (f) and 973.075 (1) (a), Stats.] A forfeiture action may be commenced either as part of a criminal prosecution, by alleging the forfeiture in the criminal complaint (criminal forfeiture) or as a civil action, independent of a criminal case (civil forfeiture). In a civil forfeiture case, the court may enter a judgment “in rem” (against the property itself) or against a party personally, or both. Forfeitures commenced under the Controlled Substances Act are civil forfeitures; all other forfeitures may be commenced as either a civil forfeiture or a criminal forfeiture.

¹ The Controlled Substances Act forfeiture procedures are set forth in ss. 961.55 to 961.56, Stats. Forfeiture procedures for all other crimes are set forth in ss. 973.075 to 973.077, Stats.

CRIMINAL CONVICTION REQUIREMENT

Current Law

In a civil forfeiture proceeding, state law provides that the defendant may request that the forfeiture proceedings be adjourned until after the adjudication of any charge concerning a crime which was the basis for the seizure of the property. A court must grant this request. [ss. 961.555 (2) (a) and 973.076 (1) (b) 1., Stats.]

The Bill

The bill eliminates this process. Instead, the bill prohibits an item from being subject to forfeiture unless a person is convicted of the criminal offense that was the basis for the seizure of the item or that is related to the action for forfeiture. In a civil forfeiture action, the proceedings must be adjourned until after the defendant is convicted of any charge concerning a crime which was the basis for the seizure of the property. The bill provides that a court may waive this conviction requirement, upon a motion by the prosecuting attorney, if the prosecuting attorney shows by clear and convincing evidence that any of the following applies:

- The defendant has died.
- The defendant was deported by the U.S. government.
- The defendant has been granted immunity in exchange for testifying or otherwise assisting a law enforcement investigation or prosecution.
- The defendant fled the jurisdiction after being arrested, charged with a crime that includes the forfeiture of property, and released on bail.

The Substitute Amendment

The substitute amendment makes the following changes to the bill:

- Revises the last reason to specify only that the defendant has fled the jurisdiction.
- Adds the following additional reasons for which the court may waive the conviction requirement:
 - The property has been unclaimed for a period of at least nine months.
 - The property is contraband that is subject to forfeiture.

The substitute amendment also allows forfeiture actions under the Controlled Substances Act to be commenced as criminal forfeiture actions.

PRETRIAL HEARING REGARDING THE RETURN OF SEIZED PROPERTY

Current Law

In general, current law authorizes any person claiming the right to possession of seized property to apply for its return to the court located in the county where the property was seized or where the search warrant was returned. If an application is filed, the court must hold a hearing to hear all claims to the seized property's ownership. The court may also commence a hearing on its own initiative. Before the hearing, the court must also order notice to the district attorney (DA) and all persons who may have an interest in the property.

With the exception of property that is contraband, a firearm, dangerous weapon, or ammunition, the court must order that the property be returned to the person who has proven the right to possession to the court's satisfaction if either of the following apply:²

- The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence.
- All proceedings and investigations in which it might be required have been completed.

[s. 968.20, Stats.]

The Bill

The bill creates a new pretrial hearing process governing court determinations regarding the validity of a seizure of property and provides that a person who has been subject to a seizure of property has the right to this pretrial hearing. The person may file a motion with the court that claims the right to possession of seized property at any time prior to 60 days before the trial for the crime that gave rise to the seizure. The court must hear the motion no more than 30 days after the motion is filed, except that either party may, by agreement or for good cause, move the court for one extension of no more than 10 days. The state must file an answer showing probable cause for the seizure at least 10 days before the hearing of the motion.

Following the hearing, the court must order the seized property to be returned if it finds any of the following:

- It is likely that the final judgment will be that the state must return the property to the person, and the property is not reasonably required to be held for investigatory reasons.
- The property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding, and the property is not reasonably required to be held for investigatory reasons. If the court makes this

² Seized property may not be returned if it is contraband. Also, there are additional procedures set forth in the statutes that apply to a seized firearm, dangerous weapon, or ammunition.

finding, it may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized, and require an accounting.

If a court orders the property to be returned, the court must order the person to not sell, transfer, assign, or otherwise encumber the property until the court either orders the property to be returned to its rightful owner or orders the property to be forfeited. Also, if the person is subsequently convicted or found to have committed the offense, the court must order the person to surrender the returned property for the forfeiture proceedings.

The Substitute Amendment

Rather than create a new pretrial hearing process, the substitute amendment provides that a person who has been subject to a seizure of property has a right to a pretrial hearing and amends current law to incorporate provisions of the bill, discussed above. Specifically, the substitute amendment makes the following changes to the hearing under current law, described above:

- Requires that any person claiming the right to possession of seized property must file an application for its return under s. 968.20, Stats., within 120 days of the initial appearance, if an initial appearance is scheduled.
- Requires that if an application for a hearing on the return of seized property is filed, the hearing must occur no more than 30 days after a motion is filed, except that either party may, by agreement or for good cause, move the court for one extension of no more than 10 days.
- Modifies the timeline by which a court must order property to be returned to the person who has proven the right to possession to the court's satisfaction. Specifically, a court must order that the property be returned if any of the following apply:
 - It is likely that the final judgment will be that the state must return the property to the claimant and the property is not reasonably needed as evidence or for other investigatory reasons, or if needed, satisfactory arrangements can be made for its return.
 - The property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding, the property is not likely to be needed for victim compensation, restitution, or fines, and the property is not reasonably needed as evidence or for other investigatory reasons. If the court makes this finding, it may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized and require an accounting.
 - All proceedings and investigations in which the property might be required have been completed.

- Requires that, if a court orders the property to be returned, the court must order the person to not sell, transfer, assign, or otherwise encumber the property until the court either orders the property to be returned to its rightful owner or that the property be forfeited. Also, if the person is subsequently convicted or found to have committed the offense, the court must order the person to surrender the returned property for the forfeiture proceedings.

RETURN OF PROPERTY IN INSTANCES OF ACQUITTAL OR DISMISSAL OF CHARGES

Current Law

Current law does not specifically require a court to return property if there is an acquittal or dismissal of charges for the offense which was the basis of the forfeiture action.

The Bill

The bill requires a court to return any property subject to forfeiture within 30 days of an acquittal or dismissal of charges for the offense which was the basis of the forfeiture action.

The Substitute Amendment

The substitute amendment retains this requirement. The substitute amendment also does the following:

- Requires the court to order the return of any property subject to forfeiture six months after a seizure that was the basis of the forfeiture action if no charges have been issued and no extension has been granted.
- Provides that if the property is co-owned by two or more defendants in a criminal action, and one or more defendant co-owners are acquitted or the charges against the defendant or defendants are dismissed, the judge must have discretion to dispose of the co-owned property in accordance with the proportionality guidelines set forth in the bill as the judge deems appropriate.

INNOCENT OWNER PROTECTIONS

Current Law

Under current law, all forfeiture actions must be made with due provision for the rights of innocent persons. [ss. 961.55 (3) and 973.075 (5), Stats.] For example, no vehicle may be subject to forfeiture for any act or omission that the owner establishes occurred without the owner's knowledge or consent. Likewise, property that is encumbered by a bona fide security interest perfected before the date of the commission of the crime may not be required to be forfeited if the holder of the security interest neither had knowledge of nor consented to the commission of the violation. In this instance, current law requires that the holder of the security interest be paid from the proceeds of the forfeiture.

The Bill

The bill expressly prohibits the property of an innocent owner from being forfeited and provides a mechanism by which property subject to forfeiture may be returned to an innocent owner. The bill also provides that when a person claims to be the innocent owner of seized property, the person has the burden to prove by clear and convincing evidence that he or she has a legal right, title, or interest in the seized property when claiming he or she is an innocent owner. If this burden is met, then the state has the burden to prove by clear and convincing evidence that the person is not innocent. Specifically, the state has the burden of proving the following by clear and convincing evidence:

- If the person acquired an ownership interest **before** the conduct giving rise to the property being subject to forfeiture occurred, that the person had actual or constructive knowledge of the underlying crime giving rise to the forfeiture in order to proceed with a forfeiture action against the property.
- If the person acquired an ownership interest **after** the conduct giving rise to the property being subject to forfeiture occurred, that either: (1) the person had actual or constructive knowledge that the property was subject to forfeiture; or (2) that the person was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

If the state does not meet its burden of proof, the court must find that the property is the property of an innocent owner and is not subject to forfeiture. The court must order the state to relinquish all claims of title to the property.

The bill also provides that the defendant or convicted offender may invoke the right against self-incrimination or the marital privilege during the forfeiture-related stage of the prosecution. The bill authorizes the trier of fact at the hearing to draw an adverse inference from the invocation of the right or privilege.

The Substitute Amendment

The substitute amendment retains these provisions of the bill, described above. The substitute amendment also clarifies that a person who claims to be an innocent owner of property that is subject to forfeiture may petition the court at any time for the return of his or her seized property.

DISPOSITION OF FORFEITED PROPERTY UNDER THE CONTROLLED SUBSTANCES ACT

Current Law

Current law authorizes a law enforcement agency to take one of the following actions with respect to property seized by the agency's officer or employee under the Controlled Substances Act:

- Retain it for official use.
- Sell that which is not required to be destroyed by law and which is not harmful to the public and use 50% of the amount received from the sale for “forfeiture expenses.”³ The remaining amount must be deposited in the school fund.
- Require the sheriff of the county in which the property was seized to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Wisconsin State Crime Laboratory Bureau for disposition.
- If the forfeited property is money, retain 70% of the first \$2,000, plus 50% of the remaining amount, for the payment of forfeiture expenses. The remaining amount must be deposited in the school fund.

[s. 961.55 (5), Stats.]

The Bill

The bill repeals the authority to retain property forfeited under the Controlled Substances Act for official use or to pay for agency expenses. Specifically, under the bill, a law enforcement agency is authorized to take one of the following actions with respect to property seized by the agency’s officer or employee under the Controlled Substances Act:

- Sell that which is not required to be destroyed by law and which is not harmful to the public and deposit all proceeds in the school fund.
- Require the sheriff of the county in which the property was seized to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Wisconsin State Crime Laboratory Bureau for disposition.

The bill requires the agency to deposit any forfeited money in the school fund.

The Substitute Amendment

The substitute amendment also narrows current law regarding an agency’s range of options for disposing of property subject to forfeiture under the Controlled Substances Act, but, unlike the bill, the substitute amendment authorizes an agency to retain property for official use or to pay for expenses in limited circumstances.

Under the substitute amendment, an agency is authorized to take one of the following actions with respect to property seized by the agency’s officer or employee under the Controlled Substances Act:

³ In this context, “forfeiture expenses” includes all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs and the costs of investigation and prosecution reasonably incurred. [s. 961.55 (5) (b), Stats.]

- If the property is a vehicle, retain the vehicle for official use, for a period up to one year. By the end of that period, the agency must either:
 - Deposit 30% of the value of the vehicle, as determined by the Department of Revenue (DOR), into the school fund, in order to retain the vehicle. If an agency later sells the vehicle for an amount that exceeds the amount previously deposited, the excess amount must be deposited in the school fund.
 - Sell the vehicle and use a portion, not to exceed 50%, of the amount received from the sale, for “forfeiture expenses,”⁴ if the agency produces an itemized report of actual forfeiture expenses and submits the report to the Department of Administration (DOA) to make it available on DOA’s website. The remaining amount must be deposited in the school fund.
- Sell that which is not required to be destroyed by law and which is not harmful to the public and use a portion, not to exceed 50%, of the amount received from the sale, for forfeiture expenses, if the agency produces an itemized report of actual forfeiture expenses and submits the report to DOA to make it available on DOA’s website. The remaining amount must be deposited in the school fund.
- Require the sheriff of the county in which the property was seized to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Wisconsin State Crime Laboratory Bureau for disposition.
- If the forfeited property is money, retain a portion, not to exceed 50%, of the amount received, for the payment of forfeiture expenses, if the agency produces an itemized report of actual forfeiture expenses and submits the report to DOA to make it available on DOA’s website. The remaining amount must be deposited in the school fund.

DISPOSITION OF PROPERTY FORFEITED IN CONNECTION WITH NON-DRUG-RELATED CRIMES

Current Law

For forfeitures to which the Controlled Substances Act does not apply, current law authorizes a law enforcement agency that seizes property to do any of the following:

- Sell the forfeited property that is not required by law to be destroyed or transferred to another agency and use 50% of the amount received from the sale for forfeiture expenses. The remaining amount must be deposited in the school fund.

⁴ The substitute amendment applies the current definition of “forfeiture expenses” to each of the disposition options. Accordingly, for disposition under the Controlled Substances Act and in connection with non-drug-related crimes, under the substitute amendment, “forfeiture expenses” includes all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, court costs, and the costs of investigation and prosecution reasonably incurred. [s. 961.55 (5) (b), Stats.]

- Retain any forfeited vehicle for official use or sell the vehicle and handle the proceeds the same as proceeds from the sale of other property.

Current law requires any forfeited money to be deposited in the school fund.

The Bill

The bill removes the authority to retain a forfeited vehicle for official use. In addition, the bill removes the authority to deduct 50% of the amount received from the sale of forfeited property for forfeiture expenses. Instead, the bill requires agencies to deposit all proceeds from the sale of forfeitures in the school fund.

The Substitute Amendment

The substitute amendment retains the authority for a law enforcement agency that seizes property to use certain proceeds from the sale of forfeited property for agency expenses. Specifically, it authorizes an agency to retain a portion, not to exceed 50%, of the amount received from the sale of forfeited property, for forfeiture expenses, if the agency produces an itemized report of actual forfeiture expenses and submits the report to DOA to make it available on DOA's website.

Under the substitute amendment, an agency may retain a vehicle for official use, for a period up to one year. By the end of that period, the agency must either:

- Deposit 30% of the value of the vehicle, as determined by DOR, into the school fund, in order to retain the vehicle. If an agency later sells the vehicle for an amount that exceeds the amount previously deposited, the excess amount must be deposited in the school fund.
- Sell the vehicle and use a portion, not to exceed 50%, of the amount received from the sale, for forfeiture expenses, if the agency produces an itemized report of actual forfeiture expenses and submits the report to DOA to make it available on DOA's website. The remaining amount must be deposited in the school fund.

LIMITATIONS ON ASSISTANCE IN FEDERAL FOREITURE PROCEEDINGS

Current Law

Current law does not prohibit state and local law enforcement agencies from transferring seized property to a federal agency for the purposes of forfeiture litigation. Rather, a state or law enforcement agency may conduct joint investigations with federal agencies to enforce federal criminal laws. Alternatively, if a state or local law enforcement agency seizes property, it may request that a federal agency participating in a federal asset forfeiture program adopt the seizure and proceed with a federal forfeiture action.⁵

⁵ U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (April 2009), www.justice.gov/criminal-afmls/file/794696/download, at pages 1, 3, and 6.

Under the U.S. Department of Justice Asset Forfeiture Program, any state or local law enforcement agency, including a prosecutorial office (e.g., a DA's office), that directly participates in an investigation or prosecution resulting in a federal forfeiture may receive an equitable share of the net proceeds of the forfeiture by entering into an "equitable sharing agreement" with the federal seizing agency. For example, in adoptive cases where 100% of the pre-seizure activity was performed by a state or local law enforcement agency, the state or local agency's share will generally be 80% of the net proceeds.⁶

The Bill

With respect to both drug crimes and general crimes, the bill prohibits state and local employees and agencies from entering into an agreement to transfer property to a federal agency for the purposes of forfeiture litigation, unless one of the following situations applies:

- The seized property includes more than \$50,000 of U.S. currency.
- The property may be forfeited only under federal law.

Unless one of the above criterion applies, the bill requires law enforcement agencies to refer seized property to the appropriate state prosecuting attorney for forfeiture proceedings under state law.

However, the bill specifies that the bill must not be construed to restrict a law enforcement officer or agency from collaborating with a federal agency to seize contraband or property that the law enforcement agency has probable cause to believe is subject to forfeiture through an intergovernmental joint task force.

The Substitute Amendment

The substitute amendment generally does not limit a state or local law enforcement agency's authority to enter agreements or transfer property as part of the federal asset forfeiture program. However, the substitute amendment requires a state or local law enforcement agency that refers seized property to a federal agency to produce an itemized report of actual forfeiture expenses and submit the report to DOA to make it available on DOA's website.

Under the substitute amendment, if there is a federal or state criminal conviction for the crime that was the basis for the seizure, a state or local law enforcement agency may accept all proceeds. If there is no federal or state conviction, the agency may accept the proceeds only if the defendant has died, the defendant was deported, the defendant has been granted immunity in exchange for testifying or other assistance, the defendant has fled the jurisdiction, or the property has been unclaimed for at least nine months.

⁶ *Id.*, at page 12.

BURDEN OF PROOF

Current Law

In forfeiture proceedings, current law provides that the state has the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that property is subject to forfeiture.

The Bill

Instead, the bill requires the state to prove that the property is subject to forfeiture by clear and convincing evidence.

The Substitute Amendment

The substitute amendment does not modify the provisions of the bill relating to burden of proof.

EXCESSIVE FINES PROPORTIONALITY TEST

Current Law

The Eighth Amendment to the U.S. Constitution prohibits government imposition of excessive fines.⁷ [U.S. Const. amend. VIII.] Currently, Wisconsin courts apply a multi-factor “proportionality test,” articulated by the U.S. Supreme Court in *U.S. v. Bajakajian*, 524 U.S. 321 (1998), to determine whether a civil forfeiture constitutes an unconstitutionally excessive fine. [*State v. Boyd*, 2000 WI App 208.] Under that test, the amount of a forfeiture must bear some relationship to the gravity of the offense it is designed to punish. The following factors are considered:

- The nature of the offense.
- The purpose for enacting the statute.
- The fine commonly imposed upon similarly situated offenders.
- The harm resulting from the defendant’s conduct.

Current law does not impose additional statutory requirements relating to determinations regarding whether a forfeiture is excessive.

The Bill

The bill creates new statutory requirements governing court determinations regarding whether a civil forfeiture is excessive. Under the bill, a court may not order the forfeiture of property if the court finds that the forfeiture is either of the following:

⁷ Wisconsin courts have assumed that the Eighth Amendment applies to the states. [*State v. Hammad*, 569 N.W.2d 68, 70 (Wis. Ct. App. 1997).]

- Grossly disproportional to the crime for which the person whose property was seized was convicted.
- Unconstitutionally excessive under the U.S. or Wisconsin Constitutions.

In addition, the bill provides that a person alleging that a forfeiture does not satisfy the above requirements has the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that the forfeiture does not meet those requirements.

The bill requires a court to consider the following factors in determining whether a forfeiture satisfies the requirements listed above:

- The seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused by the person.
- The extent to which the person participated in the offense.
- The extent to which the property was used in committing the offense.
- The sentence imposed on the person for the offense.
- Whether the person completed or attempted to complete the offense.
- The fair market value of the property.
- The value of the property to the person, including the hardship to the person if the property is forfeited.
- The hardship to the person's family members if the property is forfeited.

Finally, the bill prohibits a court from considering the value of the property to the state when making that determination.

The Substitute Amendment

The substitute amendment generally retains the provisions of the bill relating to court evaluation of forfeitures. However, it replaces the list of eight factors that a court must consider with the following list of four factors, which are similar to the factors established in state and federal case law:

- The seriousness of the offense.
- The purpose of the statute authorizing the forfeiture.
- The maximum fine for the offense.
- The harm that actually resulted from the defendant's conduct.

ATTORNEY FEES

Current Law

Current law does not specifically provide for attorney fees in forfeiture proceedings.

The Bill

The bill provides that a person who prevails in an action to return property subject to forfeiture must be awarded reasonable attorney fees by the state. For this purpose, the bill specifies that a person “prevails” if they recover more than 50%, by value, of the money or other property that is claimed.

The Substitute Amendment

The substitute amendment maintains, without revision, the provisions of the bill relating to attorney fees.

Senate Amendment 1 to the Substitute Amendment

Senate Amendment 1 to the substitute amendment removes the requirement to award reasonable attorney fees, and instead specifies that reasonable attorney fees may be awarded if the court finds that the agency or prosecuting attorney has arbitrarily and capriciously pursued the forfeiture action.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

MSK:ksm