

Stricken language would be deleted from and underlined language would be added to present law.

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As Engrossed: S3/16/17 S3/23/17

A Bill

SENATE BILL 727

By: Senators Collins-Smith, A. Clark, Rice, B. King

For An Act To Be Entitled

AN ACT CONCERNING THE CIVIL FORFEITURE OF ASSETS
INVOLVED IN CERTAIN CRIMINAL OFFENSES; AND FOR OTHER
PURPOSES.

Subtitle

CONCERNING THE CIVIL FORFEITURE OF ASSETS
INVOLVED IN CERTAIN CRIMINAL OFFENSES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 5-5-204(a)(1)(A), concerning the forfeiture of conveyances used in the commission of a criminal offense, is amended to read as follows:

(a)(1)(A) Upon conviction and after a pretrial hearing requested under § 5-5-205 and a hearing trial or finding of guilt on the matter, when the circuit court having jurisdiction over the conveyance seized finds by a preponderance of the evidence that a ground for a forfeiture exists under this subchapter, the circuit court may enter an order to sell the conveyance.

SECTION 2. Arkansas Code Title 5, Chapter 5, Subchapter 2, is amended to add an additional section to read as follows:

5-5-205. Right to a pretrial hearing on validity of seizure.

(a)(1) Following the seizure of property under this subchapter, a defendant or a third party claiming an interest in the property has a right to a pretrial hearing to determine the validity of the seizure.

(2) The claimant may claim at any time the right to possession of the property by filing a motion establishing the validity of the



claimant's interest in the property and requesting the circuit court to issue a writ of replevin.

(3) The circuit court shall hear the motion no more than thirty (30) days after the motion is filed.

(4) The state shall file an answer showing probable cause for the seizure of the property and any motions at least ten (10) days before the pretrial hearing.

(b) The circuit court shall grant the motion under subdivision (a)(2) of this section if it finds that:

(1) It is likely the final judgment will be that the state must return the property to the claimant;

(2) The property is not reasonably required to be held for investigatory or evidentiary reasons; or

(3)(A) The property is the only practicable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding and the use of the property to pay for legal representation is found by the court to be reasonable.

(B) The circuit court may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized and may require an accounting.

(c) In lieu of ordering the issuance of the writ of replevin under this section, the circuit court may order the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in the action or order other relief as may be just.

SECTION 3. Arkansas Code § 5-5-303 is amended to read as follows:

5-5-303. Petition for forfeiture – Order.

(a)(1) The prosecuting attorney of the judicial district within whose jurisdiction there is property that is sought to be forfeited ~~pursuant to~~ under § 5-5-302 shall promptly proceed against the property by filing in the circuit court having jurisdiction of the property a petition for an order to show cause why the circuit court should not order forfeiture of the property.

(2) The petition shall be verified and shall set forth:

(A) A statement that the action is brought ~~pursuant to~~ under § 5-5-302;

(B) The law enforcement agency bringing the action;

(C) A description of the property sought to be forfeited;

(D) A statement that on or about a date certain the property was used or intended to be used in a criminal act ~~constituting that~~ resulted in a finding of guilt for theft of livestock or that a criminal act ~~constituting~~ resulted in a finding of guilt for theft of livestock that took place in, upon, or by means of the property;

(E) A statement detailing the facts in support of ~~subsection (a)~~ subdivision (a)(1) of this section; and

(F) A list of all persons known to the law enforcement agency, after diligent search and inquiry, who may claim an ownership interest in the property by title or registration or by virtue of a lien allegedly perfected in the manner prescribed by law.

(b)(1) Upon receipt of a petition complying with the requirements of subsection (a) of this section, the circuit ~~judge of the~~ court having jurisdiction shall issue an order to show cause setting forth a statement that this subchapter is the controlling law.

(2) ~~In addition, the order~~ The order issued under subdivision (b)(1) of this section shall set schedule a date pretrial hearing at least forty-one (41) days from the date of first publication of the order ~~pursuant to~~ required under subsection (c) of this section for any person claiming an interest in the property to file such pleadings as the person desires as to why the circuit court should not order the forfeiture of the property to use, sale, or other disposition by the law enforcement agency seeking forfeiture of the property.

(3) The circuit court shall further order that any person who does not appear on that date is deemed to have defaulted and waived any claim to the property.

(c)(1) The prosecuting attorney shall give notice of the forfeiture proceedings by:

(A) Causing to be published a copy of the order to show cause two (2) times each week for two (2) consecutive weeks in a newspaper having general circulation in the county where the property is located; and

(B) Sending a copy of the petition and order to show cause by certified mail, return receipt requested, to any person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure, if:

(i) *The property is of a type for which title or registration is required by law;*

(ii) *The owner of the property is known in fact to the law enforcement agency at the time of seizure; or*

(iii) *The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.*

(2) *The law enforcement agency is obligated only to make diligent search and inquiry as to the owner of the property and if, after diligent search and inquiry, the law enforcement agency is unable to ascertain the owner, the requirement of actual notice by mail with respect to a person having a perfected security interest in the property is not applicable.*

(d)(1) A defendant or a third party claiming an interest in the property has a right to notice of and to participate in the pretrial hearing set by the court under subdivision (b)(2) of this section to determine the validity of the seizure.

(2) The claimant may claim at any time the right to possession of the property by filing a motion establishing the validity of the claimant's interest in the property and requesting the circuit court to issue a writ of replevin.

(3) The circuit court shall hear the motion at the pretrial hearing required under subdivision (b)(2) of this section.

(4) The state shall file an answer showing probable cause for the seizure of the property and any motions at least ten (10) days before the pretrial hearing.

(5) The circuit court shall grant the motion under subdivision (d)(2) of this section if it finds that:

(A) It is likely the final judgment will be that the state must return the property to the claimant;

(B) The property is not reasonably required to be held for investigatory or evidentiary reasons; or

(C)(i) The property is the only practicable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding and the use of the property to pay for legal representation is found by the court to be reasonable.

(ii) The circuit court may order the return of funds

or property sufficient to obtain legal counsel but less than the total amount seized and may require an accounting.

(6) In lieu of ordering the issuance of the writ of replevin, the circuit court may order the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in the action, or order other relief as may be just.

~~(d)~~(e) At the ~~hearing~~ trial on the matter, the petitioner has the burden to establish that the property is subject to forfeiture as provided in § 5-5-302.

~~(e)~~(f) The final order of forfeiture by the circuit court perfects in the law enforcement agency right, title, and interest in and to the property and relates back to the date of the seizure.

~~(f)~~(g) Physical seizure of property is not necessary in order to allege in a petition under this section that property is forfeitable.

~~(g)~~(h) Upon filing the petition, the prosecuting attorney for the judicial district may also seek such protective order as is necessary to prevent the transfer, encumbrance, or other disposal of any property named in the petition.

SECTION 4. The introductory language of Arkansas Code § 5-64-505(a), concerning items subject to forfeiture upon the initiation of a civil proceeding filed by the prosecuting attorney, is amended to read as follows:

(a) Items Subject to Forfeiture. The following are subject to forfeiture upon the initiation of a civil proceeding filed by the prosecuting attorney and when so ordered by the circuit court in accordance with this section after an offense charged resulted in a plea of guilty or nolo contendere or a finding of guilty by the circuit court, however, no property is subject to forfeiture based solely upon a misdemeanor possession of a Schedule III, Schedule IV, Schedule V, or Schedule VI controlled substance:

SECTION 5. Arkansas Code § 5-64-505(c), concerning seizure of property that is subject to forfeiture, is amended to read as follows:

(c)(1) Seizure of Property. Property subject to forfeiture under this chapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the property on petition filed by the prosecuting attorney of the judicial circuit. Seizure without process may be

made if:

~~(1)~~(A) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

~~(2)~~(B) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

~~(3)~~(C) The seizing law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

~~(4)~~(D) The seizing law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(2)(A) Following the seizure of property under this chapter, a defendant or a third party claiming an interest in the property has a right to a pretrial hearing to determine the validity of the seizure.

(B) The claimant may claim at any time before sixty (60) days before trial of the related criminal offense the right to possession of the property by filing a motion establishing the validity of the claimant's interest in the property and requesting the circuit court to issue a writ of replevin.

(C) The circuit court shall hear the motion no more than thirty (30) days after the motion is filed.

(D) The state shall file an answer showing probable cause for the seizure of the property and any motions at least ten (10) days before the pretrial hearing.

(E) The circuit court shall grant the motion under subdivision (c)(2)(B) of this section if it finds that:

(i) It is likely the final judgment will be that the state must return the property to the claimant;

(ii) The property is not reasonably required to be held for investigatory or evidentiary reasons; or

(iii)(a) The property is the only practicable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding and the use of the property to pay for legal representation is found by the court to be reasonable.

(b) The circuit court may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized and may require an accounting.

(F) In lieu of ordering the issuance of the writ of replevin, the circuit court may order the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in the action, or order other relief as may be just.

SECTION 6. Arkansas Code § 5-64-505(e)(1), concerning custody of property seized for forfeiture, is amended to read as follows:

(1) Property ~~seized for forfeiture under this section is not subject to replevin, but~~ is deemed to be in the custody of the seizing law enforcement agency subject only to an order or decree of the circuit court having jurisdiction over the property seized.

SECTION 7. Arkansas Code § 5-64-505(h)(1), concerning the final disposition of a court proceeding involving a forfeiture of property, is amended to read as follows:

(1) When the circuit court having jurisdiction over the seized property finds upon a hearing by ~~a preponderance of the~~ clear and convincing evidence that grounds for a forfeiture exist under this chapter, the circuit court shall enter an order:

SECTION 8. Arkansas Code § 5-64-806 is amended to read as follows:
5-64-806. Seizure and forfeiture.

Any property, including money, used in violation of a provision of this subchapter and that resulted in a plea of guilty or nolo contendere or a finding of guilty by the court may be seized and forfeited to the state in the manner prescribed under § 5-5-201 et seq.

SECTION 9. Arkansas Code § 5-73-130 is amended to read as follows:
5-73-130. Seizure and forfeiture of firearm – Seizure and forfeiture of motor vehicle – Disposition of property seized.

(a) If a person under eighteen (18) years of age is unlawfully in possession of a firearm, the firearm shall be seized and, after an adjudication of delinquency or a conviction, is subject to forfeiture.

(b) If a felon or a person under eighteen (18) years of age is unlawfully in possession of a firearm in a motor vehicle, the motor vehicle is subject to seizure and, after an adjudication of delinquency or a conviction, subject to forfeiture.

(c) As used in this section, "unlawfully in possession of a firearm" does not include any act of possession of a firearm that is prohibited only by:

(1) ~~Section 5-73-127, unlawful to possess loaded center fire weapons in certain areas~~ Possession of loaded center-fire weapons in certain areas, § 5-73-127; or

(2) A regulation of the Arkansas State Game and Fish Commission.

(d) The procedures for forfeiture and disposition of the seized property are as follows:

(1) The prosecuting attorney of the judicial district within whose jurisdiction ~~the~~ property is seized that is sought to be forfeited shall promptly proceed against the property by filing in the circuit court a petition for an order to show cause why the circuit court should not order forfeiture of the property; and

(2) The petition shall be verified and shall ~~set forth~~ include:

(A) A statement that the action is brought ~~pursuant to~~ under this section;

(B) The law enforcement agency bringing the action;

(C) A description of the property sought to be forfeited;

(D) A statement that on or about a date certain there was an adjudication of delinquency or a conviction and a finding that the property seized is subject to forfeiture;

(E) A statement detailing the facts in support of subdivision (d)(1) of this section; and

(F) A list of all persons known to the law enforcement agency, after diligent search and inquiry, who may claim an ownership interest in the property by title or registration or by virtue of a lien allegedly perfected in the manner prescribed by law.

(e)(1) Upon receipt of a petition complying with the requirements of ~~subdivision (d)(1)~~ subsection (d) of this section, the circuit court judge having jurisdiction shall issue an order to show cause setting forth a statement that this subchapter is the controlling law.

(2) ~~In addition, the order~~ The order issued under subdivision (e)(1) of this section shall set schedule a date pretrial hearing at least forty-one (41) days from the date of first publication of the order pursuant to required under subsection (f) of this section for all persons claiming an interest in the property to file such pleadings as they desire as to why the circuit court should not order the forfeiture of the property for use, sale, or other disposition by the law enforcement agency seeking forfeiture of the property.

(3) The circuit court shall further order that any person who does not appear on that date is deemed to have defaulted and waived any claim to the subject property.

(f)(1) The prosecuting attorney shall give notice of the forfeiture proceedings by:

(A) Causing a copy of the order to show cause to be published two (2) times each week for two (2) consecutive weeks in a newspaper having general circulation in the county where the property is located with the last publication being not less than five (5) days before the show cause hearing; and

(B) Sending a copy of the petition and order to show cause by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(i) The property is of a type for which title or registration is required by law;

(ii) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(iii) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The law enforcement agency is only obligated to make diligent search and inquiry as to the owner of the property, and if, after diligent search and inquiry, the law enforcement agency is unable to ascertain the owner, the requirement of actual notice by mail with respect to a person having a perfected security interest in the property is not applicable.

(g)(1) A defendant or a third party claiming an interest in the property has a right to notice of and to participate in the pretrial hearing

set by the court under subdivision (e)(2) of this section to determine the validity of the seizure.

(2) The claimant may claim at any time the right to possession of the property by filing a motion establishing the validity of the claimant's interest in the property and requesting the circuit court to issue a writ of replevin.

(3) The circuit court shall hear the motion at the pretrial hearing required under subdivision (e)(2) of this section.

(4) The state shall file an answer showing probable cause for the seizure of the property and any motions at least ten (10) days before the pretrial hearing.

(5) The circuit court shall grant the motion under subdivision (g)(2) of this section if it finds that:

(A) It is likely the final judgment will be that the state must return the property to the claimant;

(B) The property is not reasonably required to be held for investigatory or evidentiary reasons; or

(C)(i) The property is the only practicable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding and the use of the property to pay for legal representation is found by the court to be reasonable.

(ii) The circuit court may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized and may require an accounting.

(6) In lieu of ordering the issuance of the writ of replevin, the circuit court may order the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in the action, or order other relief as may be just.

~~(g)(h)~~ At the hearing on the matter ~~trial~~, the petitioner has the burden to establish that the property is subject to forfeiture by a preponderance of the evidence.

~~(h)(i)~~ In determining whether or not a motor vehicle should be ordered forfeited, the circuit court may take into consideration the following factors:

(1) Any prior criminal conviction or delinquency adjudication of the felon or ~~juvenile~~ minor;

(2) Whether or not the firearm was used in connection with any other criminal act;

(3) Whether or not the vehicle was used in connection with any other criminal act;

(4) Whether or not the ~~juvenile~~ minor or felon was the lawful owner of the vehicle in question;

(5) If the ~~juvenile~~ minor or felon is not the lawful owner of the vehicle in question, whether or not the lawful owner knew of the unlawful act being committed that gives rise to the forfeiture penalty; and

(6) Any other factor the circuit court deems relevant.

~~(i)~~(j) The final order of forfeiture by the circuit court shall perfect in the law enforcement agency right, title, and interest in and to the property and shall relate back to the date of the seizure.

~~(j)~~(k) Physical seizure of property is not necessary in order to allege in a petition under this section that the property is forfeitable.

~~(k)~~(l) Upon filing the petition, the prosecuting attorney for the judicial district may also seek such protective orders as are necessary to prevent the transfer, encumbrance, or other disposal of any property named in the petition.

~~(l)~~(m) The law enforcement agency to which the property is forfeited shall:

(1) Destroy any forfeited firearm; and

(2) Either:

(A) Sell the motor vehicle in accordance with subsection ~~(m)~~(n) of this section; or

(B) If the motor vehicle is not subject to a lien that has been preserved by the circuit court, retain the motor vehicle for official use.

~~(m)~~(l)(n)(1) If a law enforcement agency desires to sell a forfeited motor vehicle, the law enforcement agency shall first cause notice of the sale to be made by publication at least two (2) times a week for two (2) consecutive weeks in a newspaper having general circulation in the county and by sending a copy of the notice of the sale by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(A) *The property is of a type for which title or registration is required by law;*

(B) *The owner of the property is known in fact to the law enforcement agency at the time of seizure; or*

(C) *The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.*

(2) *The notice of the sale shall include the time, place, and conditions of the sale and a description of the property to be sold.*

(3) *The property shall then be disposed of at public auction to the highest bidder for cash without appraisal.*

~~(n)~~(o) *The proceeds of any sale and any moneys forfeited shall be applied to the payment of:*

(1) *The balance due on any lien preserved by the circuit court in the forfeiture proceedings;*

(2) *The cost incurred by the seizing law enforcement agency in connection with the storage, maintenance, security, and forfeiture of the property;*

(3) *The costs incurred by the prosecuting attorney or attorney for the law enforcement agency, approved by the prosecuting attorney, to which the property is forfeited; and*

(4) *Costs incurred by the circuit court.*

~~(e)~~(p) *The remaining proceeds or moneys shall be deposited into a special county fund to be titled the "Juvenile Crime Prevention Fund", and the moneys in the fund shall be used solely for making grants to community-based nonprofit organizations that work with juvenile crime prevention and rehabilitation.*

/s/Collins-Smith