



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86-11

Richard E. LaMunyon
Chief of Police
City Hall, 4th Floor
455 North Main
Wichita, Kansas 67202

Re: Public Health -- Controlled Substances --
Forfeitures

Synopsis: No conflict exists between Kansas and federal statutes regarding the distribution of money obtained from forfeiture of property in cases involving controlled substances. The state forfeiture statute is not applicable to cases brought in federal court; rather, the federal provisions apply. Cited herein: K.S.A. 65-4135, 21 U.S.C. §881.

Dear Chief LaMunyon:

You have requested our opinion concerning the disposition of proceeds from sale of property seized under the forfeiture statutes. Specifically, you ask whether federal law and the United States Attorney General's guidelines regarding forfeiture are inconsistent with the laws of Kansas.

The pertinent section of the federal regulations is §III(d) (3) (e) of the United States Attorney General's Guidelines on Seized and Forfeited Property (authorized by 21 U.S.C. §881), which states:

"(e) Property will be transferred only in cases where the tangible property or cash will be credited to the budget of the state or local agency that directly participated in the seizure or forfeiture, resulting in an increase of law enforcement resources for that specific state or local agency."
(Emphasis added.)

Forfeiture of property seized for violations of Kansas controlled substances laws is authorized by K.S.A. 65-4135(e). That statute provides in part:

"(e) When property is forfeited under this act the law enforcement agency having custody of it may: (1) Retain it for official use;

"(2) sell that which is not required to be destroyed by law and which is not harmful to the public;

"(3) transfer it for medical or scientific use to any state agency in accordance with the rules and regulations of the board;

"(4) require the sheriff of the county in which the property is located to take custody of the property and remove it to an appropriate location for disposition in accordance with law; or

"(5) forward it to the bureau for disposition.

"The proceeds from the sale under paragraph (2) and any moneys forfeited under this section shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs. The proceeds from such sale and any moneys forfeited under this section remaining after payment of such expenses shall be transferred to the general fund

of the unit of government having custody
of the forfeited property or money."
(Emphasis added.)

In our opinion, it is evident that forfeitures which occur in those cases which are prosecuted by the federal government will be governed by the federal guidelines. Only in cases prosecuted by the state will the state forfeiture statute be utilized.

The jurisdiction to prosecute controlled substance charges, and thus invoke the forfeiture statutes, is concurrent between the federal and state governments. When jurisdiction is concurrent, the principle of priority governs. This principle states that, where two courts have jurisdiction, the first one to exercise that jurisdiction holds it to the exclusion of the other. The United States Supreme Court recognized this principle in Taylor v. Taintor, 16 Wall 366, 21 L.Ed. 287, 290 (1873).

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function." (Citations omitted.)

The question then becomes whether the federal and state laws are in such conflict that the state law is rendered invalid by the supremacy clause. In the case of Jones v. Rath Packing Co., 430 U.S. 519, 51 L.Ed.2d 604, 614 (1977), the Supreme Court held:

"The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress."

We do not believe the state law is an obstacle to the purposes of the federal act. Both the state forfeiture statute and the federal regulations are penal in nature. They are aimed at punishing criminals by taking away property used during the violation. Nothing in the Kansas law appears to be in conflict with the "full purposes and objectives of Congress." Therefore, it is our opinion that the Kansas law is not inconsistent with the federal guideline's purpose of punishing individuals who break drug laws by seizing the property used in committing the crime.

In our opinion, funds which result from a sale under the federal forfeiture regulation may be treated as any other federal aid. As previously noted, federal regulations dictate that money from items seized under 21 U.S.C. §881 must go directly to the budget of the law enforcement agency assisting in the seizure. Nothing in state law would prevent that from happening, in that K.S.A. 65-4135(e) concerns property forfeited under that act. Accordingly, as federal forfeitures are not in any way connected with the state forfeiture statute, proceeds from such forfeitures do not have to be disposed of in the same way as state proceeds.

In conclusion, no conflict exists between the federal regulation and the state statute on disposition of proceeds from forfeitures. If charges are filed in federal court pursuant to federal law, the federal regulation would control, with the money going directly to the local law enforcement agency. If the charge is filed in state court pursuant to state law, then the Kansas forfeiture statute would control.

Very truly yours,


ROBERT T. STEPHAN
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Deputy Attorney General