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ATTORNEY GENERAL OPINION NO. 82-168

Mr. David K. Martin  
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200 South Chestnut  
Olathe, Kansas 66061

Re: Criminal Procedure -- Search and Seizure --  
Custody and Disposition of Seized Property

Cities, Second Class -- Sale of Firearms  
Found and Unclaimed or Used as Evidence in  
Municipal Court -- Disposition of Proceeds

Synopsis: Firearms seized as evidence for use in district courts  
may be sold, at the court's discretion, and the proceeds  
shall be paid to the state treasurer.

In cities of the second class which have elected to  
establish police and fire department pension funds  
as authorized by K.S.A. 1981 Supp. 14-10a02, firearms  
seized for use as evidence and firearms which are  
found and unclaimed may be sold and the proceeds  
paid into the pension funds. However, pursuant to the  
constitutional grant of home rule power, such cities  
may modify this procedure by charter ordinance, and  
cities of the second class which are not subject to  
this statute may provide by ordinance for the dispo-  
sition of such firearms. Cited herein: K.S.A.  
12-4103, K.S.A. 1981 Supp. 14-10a02, K.S.A. 20-2801,  
21-4206, 22-2102, 22-2512, Kan. Const., Art. 12, §5.

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Dear Mr. Martin:

As city attorney for the City of Mission, you inquire whether a city may sell firearms which are in its possession and retain the proceeds. Specifically, you ask if such a sale would be proper under the following circumstances:

1. When the firearms were seized as evidence for district court cases;
2. When the firearms were seized as evidence for municipal court cases; or
3. When firearms have been found and are unclaimed.

Since Mission is a city of the second class, we assume that your questions are phrased in this context, and we will respond accordingly.

One procedure for disposing of firearms seized under a valid search warrant or validly seized without a warrant is set forth in K.S.A. 22-2512, which provides in part:

"When property seized is no longer required as evidence, it shall be disposed of as follows . . . . (5) Firearms, ammunition, explosives, bombs, and like devices, which have been used in the commission of crime, may be returned to the rightful owner, destroyed or sold in the discretion of the court having jurisdiction of the property. The sale and distribution of the proceeds shall be as provided in K.S.A. 21-4206."

K.S.A. 21-4206 states that the proceeds of any such sale "shall be paid to the state treasurer pursuant to K.S.A. 20-2801," which requires district court clerks to remit "all moneys payable to the state treasurer from fines, penalties and forfeitures to the state treasurer" on at least a monthly schedule.

From the foregoing, it is apparent that the manner of disposition of firearms used as evidence in district court is within the discretion of the district court. If the district court should authorize sale of the firearms pursuant to K.S.A. 22-2512, the proceeds of such sale would necessarily be remitted to the state treasurer in accordance with K.S.A. 21-4206 and 20-2801.

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K.S.A. 22-2512 is a part of the Kansas Code of Criminal Procedure, the scope of which is set forth in K.S.A. 22-2102, as follows:

"The provisions of this code shall govern proceedings in all criminal cases in the courts of the state of Kansas, but shall have application to proceedings in police and municipal courts only when specifically provided by law." (Emphasis added).

As you will note, the emphasized portion of the foregoing states that the Code of Criminal Procedure, which includes K.S.A. 22-2512, is not applicable to municipal court proceedings, unless specifically provided by law. After extensive research, we have been unable to locate any law which specifically makes K.S.A. 22-2512 applicable to municipal court proceedings. Therefore, we conclude that K.S.A. 22-2512 does not apply to municipal court proceedings.

We also have reviewed the Kansas Code of Procedure for Municipal Courts. Although this Code does not contain a specific provision concerning disposition of property seized as evidence for use in municipal courts, K.S.A. 12-4103 states, in part: "If no procedure is provided by this code, the court shall proceed in any lawful manner consistent with any applicable law and not inconsistent with this code." We believe that K.S.A. 1981 Supp. 14-10a02 is one such applicable law.

K.S.A. 1981 Supp. 14-10a02 provides for the establishment of police and fire department pension funds by certain cities of the second class and states, in part:

"For the purpose of creating, maintaining and funding such pension funds, the governing body of each city of the second class is hereby authorized and shall:

. . . .

"(c) place into said funds the proceeds of all lost or stolen securities, money or personal property which shall remain unclaimed in possession of any department of the city for six months, together with the proceeds of all unclaimed or confiscated property of any nature which shall have been in custody of the police department for a period of six months, and the city is hereby authorized to sell at public auction such property and place the proceeds into said pension funds in equal shares . . . ." (Emphasis added.)

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A city of the second class availing itself of this statute would be authorized to sell lost or stolen firearms which remain unclaimed in the possession of any city department; or unclaimed or confiscated firearms in the custody of the police department, after a period of six months. Under this statute, proceeds from all such sales would be required to be placed in the above described pension funds. (Incidentally, since municipal courts are not authorized to issue search warrants ( see K.S.A. 12-4103), it is presumed that the "confiscated" property described in K.S.A. 1981 Supp. 14-10a02 and relevant to this opinion is limited to property seized subject to valid arrest.)

K.S.A. 1981 Supp. 14-10a02 is a permissive, as opposed to mandatory, statute. This statute indicates that certain cities of the second class (which would include Mission) " may establish and maintain a separate pension fund." However, should a city elect to establish funds under the authority of this statute, the language in 14-10a02(c) would require that the proceeds of lost or stolen property shall be placed in the pension funds.

Certainly, a city of the second class could avoid the effects of 14-10a02 simply by not electing to establish the pension fund as authorized by that statute. There is also a possibility that a city, such as Mission, could avoid the requirements of K.S.A. 1981 Supp. 14-10a02 by enacting a charter ordinance in accordance with the grant of home rule power to cities under Article 12, Section 5 of the Kansas Constitution.

By this amendment, a city is empowered to determine its "local affairs and government," subject only to specified legislative enactments, including enactments applicable uniformly to all cities. In City of Junction City v. Griffin, 227 Kan. 332 (1980), the Kansas Supreme Court analyzed the legislature's ability to limit a city's exercise of its home rule powers, as follows:

"Regardless of whether an enactment of the state legislature addresses a matter of statewide or a matter of local concern, a city may in either case act by charter ordinance to exempt itself from all or part of the enactment unless the state enactment applies uniformly to all cities. Kan. Const. art. 12, §5(c)(1). The legislature may foreclose municipal legislative action only by an enactment of uniform application to all cities." 227 Kan. at 337.

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With this in mind, it requires little discussion to note that, since K.S.A. 1981 Supp. 14-10a02 is applicable only to certain cities of the second class, it is susceptible of modification by a second class city's charter ordinance.

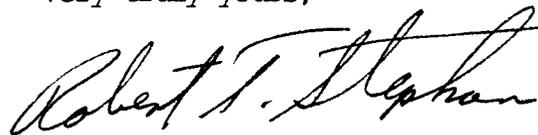
This office has not found any other statutes dealing with disposition of this type of property. Therefore, in the event a city should decide not to proceed under K.S.A. 1981 Supp. 14-10a02, there appears to be no other statutory authority precisely on point. In discussing the effect of legislative silence on the home rule power, the Kansas Supreme Court has held:

"[L]egislative silence on a subject no longer means absence of a city's authority to act in that area. No longer must Kansas cities rely on enabling statutes by the legislature in order to act by ordinance in matters of local concern." City of Junction City v. Lee, 216 Kan. 495, 498 (1975). See also Andersen Construction Co. v. City of Topeka, 228 Kan. 73, 79 (1980).

Therefore, it is apparent that since the legislature has not enacted a statute pertaining to disposition of this type of property, cities are free to enact ordinances addressing this issue.

Therefore, it is our opinion that a city of the second class which has established pension funds pursuant to K.S.A. 1981 Supp. 14-10a02 is statutorily required to sell lost, stolen or confiscated firearms in the possession of city officials after a period of six months, and apply the proceeds to police and fire department pension funds; however, pursuant to its home rule power, any such city could enact a charter ordinance exempting the city from the pertinent provisions of this statute and prescribing a different procedure for the disposition of such property. Cities of the second class which have not established such pension funds are free to adopt city ordinances regarding the disposition of such property.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Mary Mudrick  
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