



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 1, 1988

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88- 91

James E. Flory
Douglas County District Attorney
111 E. 11th Street
Lawrence, KS 66044

Re: Criminal Procedure -- Search and Seizure --
Custody and Disposition of Property No Longer
Required as Evidence

Synopsis: K.S.A. 1987 Supp 22-2512 applies to the
disposition of all evidence which is seized but is
no longer required for evidence, regardless of the
circumstances concerning its seizure or subsequent
use. When evidence is not turned over to the
rightful owner, then it is necessary for the
prosecuting attorney to obtain an order of the
district court before selling or destroying the
property. Cited herein: K.S.A. 1987 Supp.
22-2512; U.S. Const. Amend V; U.S. Const. Amend
XIV §1.

* * *

Dear Mr. Flory:

As District Attorney for the Seventh Judicial District, you request our opinion concerning the applicability of K.S.A. 1987 Supp. 22-2512. Specifically, you inquire whether K.S.A. 1987 Supp. 22-2512, which relates to the custody and disposition of property seized by law enforcement officers, applies in situations where the property seized is no longer required as evidence in a criminal prosecution because there is no suspect or insufficient evidence to commence prosecution. In regard to this question, you inquire whether

it is necessary for the prosecuting attorney to obtain an order of the district court to dispose of such property. You also ask whether the prosecuting attorney may order the disposal of evidence in accordance with K.S.A. 1987 Supp. 22-2512(2)(a)-(f).

Although K.S.A. 1987 Supp. 22-2512 does not directly state that it is applicable to evidence seized which is not needed because there is no suspect or insufficient evidence to commence a prosecution, this statute appears to apply in these circumstances. K.S.A. 1987 Supp. 22-2512(2) states that "when property seized is no longer required as evidence, it shall be disposed of as follows" This section does not state any reason why the evidence might no longer be required, it merely creates guidelines for the disposition of any evidence that has been seized. There is nothing in the Kansas Rules of Criminal Procedure that would lead to a contrary conclusion. Therefore, K.S.A. 1987 Supp. 22-2512(2) applies to the disposition of all evidence received regardless of how it was obtained or the reasons why it is no longer necessary.

It is necessary to obtain a court order to dispose of property taken as evidence if that disposition is to someone other than the rightful owner, or there is a dispute as to the ownership of the evidence. To allow otherwise would violate the owner's right of due process before being deprived of property. U.S. Const. Amend. V, Amend. XIV. In a case dealing with the disposition of evidence under K.S.A. 1987 Supp. 22-2512(4), the Kansas Supreme Court stated that in all cases dealing with forfeiture of private property through sale or destruction, "one fact is clear: the state must first proceed in some manner against the owners or against the property itself." State v. Durst, 235 Kan. 62, 67, 678 P.2d 1126 (1984).

Provisions of K.S.A. 1987 Supp. 22-2512(2)(b)-(f) concern the disposition of evidence where the property may not be returned to the owner:

"(b) [M]oney shall be restored to the owner unless it was contained in a slot machine or otherwise used in unlawful gambling or lotteries, in which case it shall be forfeited and shall be paid to the state treasurer pursuant to K.S.A. 20-2801, and amendments thereto;

"(c) property which is unclaimed or the ownership of which is unknown shall be sold at public auction to be held by the sheriff and the proceeds, less the cost of sale and any storage charges incurred in preserving it, shall be paid to the state treasurer pursuant to K.S.A. 20-2801, and amendments thereto;

"(d) articles of contraband, shall be destroyed, except that any such articles the disposition of which is otherwise provided by law shall be dealt with as so provided and any such articles the disposition of which is not otherwise provided by law and which may be capable of innocent use may in the discretion of the court be sold and the proceeds disposed of as provided in subsection (1)(b) [*];

"(e) 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, and the sale and distribution of the proceeds, shall be as provided in K.S.A. 21-4206 and amendments thereto;

"(f) controlled substances forfeited under the uniform controlled substances act shall be dealt with as provided under K.S.A. 65-4135 and amendments thereto."

K.S.A. 1987 Supp. 22-2512(2)(g) further shows the intent of the statute to require a court order for most dispositions of evidence:

"[U]nless otherwise provided by law, all other property shall be disposed of in such manner as the court in its sound discretion shall direct."

Thus, the court, not the prosecuting attorney has the power to dispose of property when it is not returned to the owner.

However, property that is returned to rightful owner under K.S.A. 1987 Supp. 22-2512(2) (a) does not require a court order as it does not involve either the sale or the destruction of the property:

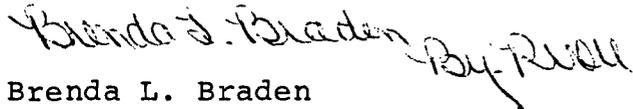
"(a) Property stolen, embezzled, obtained by false pretenses, or otherwise obtained unlawfully from the rightful owner thereof shall be restored to the owner." K.S.A. 1987 Supp. 22-2512 (2) (a).

The prosecuting attorney may authorize law enforcement officers to dispose of property when that disposition is to the rightful owner and there is no conflict in claims of ownership. Such a disposition is not in violation of a person's constitutional right to due process as the owner is not being deprived of his or her property rights. However, when evidence is to be sold or destroyed, a court order is necessary.

Very truly yours,



Robert T. Stephan
Attorney General of Kansas



Brenda L. Braden
Deputy Attorney General

RTS:BLB:cy