

Policing for Profit?

A Primer on Ohio's Forfeiture Statutes

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They don't have to convict you. They don't even have to charge you with a crime. But they have your property."

– Henry Hyde (former R-Ill., U.S. House of Representatives, Judiciary Committee Chairman as quoted in CNN article)

This year U.S. Supreme Court Justice Clarence Thomas, in response to the Court's denial of certiorari in *Leonard v. Texas*, asked "whether modern civil forfeiture statutes can be squared with the Due Process Clause and our Nation's history." In other words, why is the government still permitted to seize property from persons without ever charging them with a crime?

Under Ohio law, there are primarily three situations where assets may be frozen or forfeited: (1) criminal forfeiture post-conviction (R.C. 2981.04); (2) preservation of assets pre-trial (R.C. 2981.03); and (3) civil forfeiture, where no charges are necessary (R.C. 2981.05). Each situation has its own procedure and requirements. Importantly, each has different collateral consequences for the owner of the property.

Ohio Forfeiture Law

Ohio forfeiture laws have been reformed twice recently. The first amendments went into effect July 1, 2007 ("2007 Amendments"), while the second went into effect April 6, 2017 ("2017 Amendments"). The 2007 Amendments were passed following a comprehensive review of Ohio's forfeiture statutes that started in 2000. The goal was to create laws that were easier to understand, more consistent, and fairer to all parties. The 2007 Amendments streamlined the existing criminal and civil asset forfeiture laws by creating a consolidated forfeiture provision located in Chapter 2981. The new Chapter set forth the following objectives: (1) providing economic disincentives and remedies to deter and offset the economic effect of offenses; (2) ensuring that seizures and forfeitures are proportionate to the offense committed; (3) protecting third parties from wrongful forfeiture; and (4) prioritizing restitution to victims. R.C. 2981.01(A).

While the 2007 Amendments did much to simplify Ohio's forfeiture laws, many argued that Ohio's law did little to protect individuals from wrongful forfeiture. Fixing what was seen as a broken system was the main purpose of the 2017 Amendments.

Property Subject to Forfeiture

Prior to the 2007 Amendments, property subject to forfeiture varied from statute to statute. However, a catch-all provision existed that made all "contraband" subject to forfeiture, which defined "contraband" to include all property used in a crime, including property that was lawfully possessed. With the 2007 Amendments, three categories of property, with precise definitions, became subject to forfeiture: (1) **contraband** involved in an offense; (2) **proceeds** derived from or acquired through the commission of an offense; and (3) an **instrumentality** used in or intended to be used in any felony or, when specifically authorized by statute or ordinance, in a misdemeanor when the use is sufficient to warrant forfeiture. R.C. 2981.02(A).

"Contraband" is defined as "any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense." R.C. 2901.01(A)(13). The definition eliminated the lawful possession of items used in a crime. Those items, now if forfeitable, must fall within the definition of "proceeds" or "instrumentality."

Prior to the 2007 Amendments, property acquired through the sale or transfer of "contraband" was considered "contraband," not "proceeds." Now, the category of "proceeds" has been added to the statute, and is specifically defined to cover ill-gotten gains. R.C. 2981.01(B)(11).

Proposed 2007 Amendments attempted to create a narrow scope of the term "instrumentality" to cover only "property otherwise lawful to possess that is substantially connected to an offense." But the 2007 Amendments' "instrumentality" definition dropped the "substantially connected" language, and instead

covers "property otherwise lawful to possess that is used in or intended to be used in an offense." R.C. 2981.01(B)(6). Accordingly, the term "instrumentality" is still all encompassing.

Criminal Forfeiture

The 2007 Amendments created consistency in criminal forfeiture law, which had been dependent on the predicate offense triggering forfeiture. The 2017 Amendments focused on affording property owners greater protections.

Criminal forfeiture only applies if a defendant is convicted of, or enters intervention in lieu of conviction for, an offense, and the charging document specifies: (1) the nature and extent of the alleged offender's interest in the property; (2) a description of the property; and (3) if the property is an alleged instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense. R.C. 2981.04(A)(1). Following conviction, or entry of intervention in lieu of conviction, the trier of fact determines whether the person's property shall be forfeited, and forfeiture shall be ordered only if the State proves by clear and convincing evidence that the property is in whole, or part, subject to forfeiture. R.C. 2981.04(B). Additionally, if property is forfeitable because it was an "instrumentality," the State must also "prove by clear and convincing evidence that the amount or value of the property subject to forfeiture is proportionate to the severity of the offense." R.C. 2981.09(A). The 2017 Amendments altered the burden of proof to the clear and convincing standard from the prior preponderance of the evidence standard.

After an order of forfeiture is entered, any person, other than the offender, who asserts a legal interest in the property subject to the forfeiture order may petition the court to adjudicate the validity of their alleged interest in the property. R.C. 2981.04(E)(1). If the interested party is a secured party or other lienholder of record, the party may file an affidavit in lieu of the petition. R.C. 2981.04(E)(2). Often an interested party will not avail itself of the process because of the time and monetary costs associated with the proceeding.

Preservation of Assets

While criminal forfeitures require a conviction, prosecutors have the ability to seize property in advance of conviction, and even in advance of the filing of formal charges. A prosecutor can seek an order protecting property when filing a charging document. R.C. 2981.03(B)(1) (a). Where a prosecutor is not ready to charge, he can seek an order protecting the property. R.C. 2981.03(B)(1)(b). A court may not grant the prosecutor's pre-charging request unless it determines: (1) there is a substantial probability the State will prevail on the forfeiture issue; (2) there is a substantial probability that failure to enter the order will result in the property being made unavailable; and (3) the need to preserve the property outweighs the hardship on the property owner. *Id.* Despite notice provisions, a court may issue an order preserving property without giving notice or a hearing to a person known to have an interest in the property, if the prosecutor demonstrates that the property is subject to forfeiture and that giving notice will jeopardize the availability of the property for forfeiture. R.C. 2981.03(B)(3).

In addition to requesting a hearing on the order, a person with an interest in seized property may seek the conditional release of the property by requesting possession from the person with custody of the property. The request must show that the person meets all of the following: (1) has a possessory interest in the property; (2) has sufficient ties to the community to provide assurance that the property will be available at the time of trial; and (3) that failure to conditionally release the property will cause the claimant a substantial hardship. R.C. 2981.03(D). If the custodian does not surrender the property within 15 days, a petition for conditional release may be filed with the court. R.C. 2981.03(D)(2).

However, there are exceptions to the hardship release of property. Property cannot be released if there is probable cause to believe that it is: (1) contraband; (2) property that must be held for a reasonable time as evidence; or (3) property that is likely to be used in additional offenses. R.C. 2981.03(D)(3). In addition, the property may not be released if the State establishes by a preponderance of the evidence that the property was acquired during the commission of the offense, or within a reasonable time after that period, and there is no likely source for the interest in the property other than as proceeds derived from or acquired through the commission of the offense. *Id.* Once property is seized, it will be costly to have it returned and difficult given the State's low burden of proof.

Civil Forfeiture

After the 2007 Amendments, prosecutors, instead of filing for criminal forfeiture or the preservation of property pending criminal forfeiture, could seek civil forfeiture. Civil forfeiture was fraught with problems leading to perceived abuses and innocent individuals having their property taken from them. These abuses were the catalyst for the 2017 Amendments.

The 2017 Amendments limit the circumstances under which civil forfeitures are permitted. When the property sought to be forfeited is valued at \$15,000 or less, generally a criminal conviction or intervention in lieu of conviction is required. R.C. 2981.05(C). The civil forfeiture action may be commenced simultaneously with, or after, the filing of criminal charges, but the proceeding will be stayed during the pendency of the criminal proceeding, and shall not proceed until after the defendant is convicted or enters intervention in lieu of conviction. *Id.* The only situations where a conviction will not be required is where property has been seized, a specified time has elapsed (either three months or one year) based on the facts, and: (1) the property owner is deceased; (2) an indictment for a felony or a gambling offense has been filed against the property owner and an arrest warrant issued, and the property owner is unable to be extradited or brought back to Ohio, or reasonable efforts have been made to locate and arrest the property owner, but the property owner has not been located; or (3) the property owner has not claimed the property subject to forfeiture or asserted an interest in the property. R.C. 2981.05(A).

A civil forfeiture that may proceed without a criminal conviction is permitted to be filed "against any person who is alleged to have received, retained, possessed, or disposed of proceeds, in an amount exceeding fifteen thousand dollars, knowing or having reasonable cause to believe that the proceeds were allegedly derived from the commission of an offense subject to forfeiture proceedings in violation of section 2927.21 of the Revised Code." R.C. 2981.05(D)(1). If charges are filed against the person, the civil action will be stayed. R.C. 2981.05(D)(2). During the civil action the State has the burden to prove by clear and convincing evidence: (1) that the person received, retained, possessed, or disposed of the proceeds involved; (2) that the person knew or had reasonable cause to believe that the proceeds were derived from the alleged commission of an offense specified

in R.C. 2927.21; and (3) the actual amount of the proceeds involved exceeds fifteen thousand dollars. R.C. 2981.05(D)(3). In addition, the State cannot directly or indirectly transfer or refer any property seized to any federal law enforcement authority or federal agency for purposes of forfeiture unless the value of the seized property exceeds \$100,000. R.C. 2981.14(B).

The 2017 Amendments have severely curtailed the State's ability to use civil forfeiture, forcing the State to rely on criminal proceedings prior to seizing assets.

Conclusion

Ohio has taken drastic steps to better safeguard an individual's property rights. Previously, we had a system where civil forfeitures could be used to take small amounts of money or property. These civil forfeitures were often uncontested because the cost of litigating the issue exceeded the value of the property seized. In addition, the General Assembly revised the burden of proof from a preponderance of evidence standard to a clear and convincing standard. These changes have recently been enacted, and it will take time to determine if these revisions will work in protecting everyday citizens from having their assets legally taken from them by the State, or if further amendments are necessary.



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