

## Opinion No. 87-20

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**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Paula G. Maynes, Assistant Attorney General

**TO:** Mr. Willard Lewis, Secretary, Department of Finance and Administration, 425 State Capitol Building, Santa Fe, New Mexico 87501

### QUESTIONS

Whether proceeds from the sale of property seized before November 25, 1986 under the New Mexico Controlled Substances Act, but not disposed of by order of the District Court, may be channeled to the state police bureau of narcotics instead of the Public School Fund.

### CONCLUSIONS

Yes.

### ANALYSIS

The New Mexico Controlled Substances Act provides that certain property is subject to forfeiture and disposal if it is seized incident to an arrest under the Act; if the enforcement officer has probable cause to believe that the property is dangerous to health or safety; or if the property was or is intended to be used in violation of the Act. § 30-31-35(B) NMSA (1985 Cum. Supp.). The statute, adopted in 1980, provides for the disposal of property after forfeiture in this way:

E. When property is forfeited under the Controlled Substances Act, the law enforcement agency seizing it shall:

\* \* \*

**(3) in case of property seized by the state police, forward property, the proceeds from the sale of which are not required to revert to the general fund, to the state police, bureau of narcotics for disposition** ; provided that motor vehicles seized by the state police may be loaned to the governor's organized crime prevention commission for use in undercover work, the entire cost of operating such vehicles to be borne by the governor's organized crime prevention commission.

§ 30-31-35(E) NMSA (1985 Cum. Supp.) (Emphasis added).

Article XII, section 4 of the New Mexico Constitution in effect at the time this legislation was enacted provided that "[a]ll fines and forfeitures collected under general laws... shall constitute the current school fund of the state." In the November 1986 general election this section of the Constitution was amended. The amendment was effective on November 25, 1986. Section 4 now provides: "All forfeitures (sic), **unless otherwise provided by law**, and all fines collected under general laws...shall constitute the current school fund of the state." (emphasis added). Before passage of the amendment to article XII, the legislature did not have authority under the Constitution to pass legislation that would divert proceeds from forfeitures to any fund other than the school fund. Accordingly, for the period between enactment of the legislation in 1980 and passage of the constitutional amendment in 1986, all forfeitures under the Act have been channeled to the current school fund, because the existing constitutional language rendered subsection (E) ineffective.

The question posed raises two issues. The first issue is whether passage of the constitutional amendment validated the provisions of subsection (E), which permit channeling of forfeited property to the state police rather than the current school fund. The second issue presented is whether property seized before the amendment's passage, but of which the court has not disposed, can now be disposed of in accordance with the Act's provisions. This issue requires interpretation of the statutory language defining the relative interests of the owner of the seized property and of the state.

The first question is whether passage of the constitutional amendment ratified or confirmed the channeling of proceeds or the property itself to the state police after forfeiture. When a new constitutional provision adopts or ratifies, either expressly or by implication, previously unconstitutional legislation, the adoption or ratification validates the previously unconstitutional statute. See, e.g., *Lee v. Superior Court*, 191 Cal. 46, 214 P. 972 (Cal. 1923); *Foutenot v. Young*, 128 La. 20, 54 So. 408 (La. 1911). Although there was no express ratification or adoption, it can be implied that the legislature intended the language of the proposed amendment to cure any constitutional defects in the statute. The Senate Joint Resolution provided the title of the proposed amendment as:

#### A JOINT RESOLUTION

#### PROPOSING AN AMENDMENT TO ARTICLE 12, SECTION 4 OF THE CONSTITUTION OF NEW MEXICO TO ENHANCE LAW ENFORCEMENT CAPABILITIES.

S.J. Res. 11, 37th Legis., 2d Sess. (1986). This title indicates the Legislature's intent to obtain ratification of the provisions of the Controlled Substances Act by proposing an amendment to the Constitution that would permit law enforcement agencies to retain proceeds or actual property seized under the Act. This added source of funding and property would "enhance law enforcement capabilities."

In a case involving legislation supplementing judicial salaries out of county treasuries, the Supreme Court of Georgia affirmed the effectiveness of the legislation following passage of a constitutional amendment. *Hammond v. Clark*, 71 S.E. 479 (Ga. 1911). The Georgia Supreme Court described the process in this way:

The legislature undertook to make an increase in the salaries of judges in certain circuits, and to have the increase paid by the counties therein containing cities of not more than a certain population. On account of provisions in the Constitution of the state, this court held that the Legislature could not supplement salaries of the judges of the Superior court from county treasuries. (Citation omitted). Thereupon, not seeking to reverse such adjudication, but recognizing it, the Legislature proposed, and the people ratified, an amendment to the Constitution, by which that was rendered constitutional which previously the Legislature could not constitutionally do.

71 S.E. at 489. Similarly, the Controlled Substances Act provision permitting proceeds of the forfeiture and disposal of property seized under the Act to be channeled to the state police bureau of narcotics was rendered constitutional by the passage of the amendment to article XII. The constitutional amendment was presented to the voters at the November 1986 general election. S.J. Res. 11, 37th Legis., 2d Sess. (1986). The results of the November general election were certified on November 25, 1986, and thus that is the date upon which the provisions in section 30-31-35(E) took effect. § 1-13-15 NMSA (1985 Repl.).

The remaining issue is whether property seized before November 25, 1986 but of which the court has not ordered disposal can be channeled to the state police bureau of narcotics as provided in the Act rather than to the current school fund. To answer this question, the statute's language must be examined to determine the nature and extent of the state's interest in the property that was seized. The Act provides that all personal property subject to forfeiture, § 30-31-34 NMSA (1985 Cum. Supp.), may be seized with, or under certain circumstances without, a court order. § 30-31-34(A) and (B) NMSA (1985 Cum. Supp.). After a law enforcement agency seizes the property, the seized items are deemed to be in the law enforcement agency's custody and "not subject to replevin." § 30-31-35(D) NMSA (1985 Cum. Supp.). This disposition is analogous to common-law bailment, where the possession of personal property is transferred without the transfer of ownership for the accomplishment of a particular purpose. J. Cribbet, *Principles of the Law of Property* 83 (2d ed. 1975). See also *Hertz Corp. v. Paloni*, 95 N.M. 212, 619 P.2d 1256 (Ct. App. 1980); *Allstate Ins. Co. v. Auto Driveaway Co.*, 87 N.M. 77, 529 P.2d 303 (Ct. App. 1974). The Act provides that after seizure of the property, civil court proceedings must be instituted within 30 days in a district court of competent jurisdiction to determine whether the property should be forfeited to the state. § 30-31-35(C) NMSA (1985 Cum. Supp.). During the time it takes to institute a civil suit and to prosecute the case to a final determination, the Act states that the property shall be deemed to be "in the custody of the law enforcement agency." § 30-31-35 (D) NMSA (1985 Cum. Supp.). Although the owner retains his ownership interest in the property pending outcome of the case, the district court finally determines

whether the property is forfeited to the state under the Act. Until the final order is entered determining the property as forfeit, there is no actual forfeiture to the state.

For this reason, all property seized but not adjudicated forfeit by a district court before November 25, 1986, may be disposed of in accordance with section 30-31-35(D). Upon the entry after that date of a district court order or decree determining it to be forfeited property under the Controlled Substances Act, the state police bureau of narcotics may receive the proceeds of a forfeiture under Section 30-31-35(E)(3) NMSA (1985 Cum. Supp.).

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