



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS



Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 2 (as passed by the Senate)
Sponsor: Senator Peter J. Lucido
Committee: Judiciary and Public Safety

Date Completed: 2-19-19

RATIONALE

Generally, asset forfeiture is a legal process that allows law enforcement officers to seize property that is suspected to be connected to criminal activity. Criminal asset forfeiture occurs when an individual's property is forfeited as part of his or her sentencing following a conviction. In contrast, in a civil asset forfeiture proceeding, the government files a civil action against the property, not the individual, so the property may be seized even if the person is not charged or convicted of a crime.

Currently, the Public Health Code allows law enforcement officers to seize property if they have probable cause to suspect that it has been used for or derived from a controlled substance violation. If property is seized, the government must notify the property owner of its intent to forfeit and dispose of the property. If the owner does not claim an interest in the property, the government must declare the property forfeited and dispose of it as provided in the Code. However, if the property owner objects to the forfeiture, the government must prove by clear and convincing evidence that the property forfeited is connected to a drug-related crime. If successful, the State may retain the property, or sell it and give the proceeds to the law enforcement agency that seized the property.

Some people believe that Michigan's current civil asset forfeiture process does not go far enough to protect individuals' personal property rights and their right to due process. It has been suggested that forfeiture of property valued at less than \$50,000 should not be allowed unless the defendant was convicted of a crime or signed a plea agreement.

CONTENT

The bill would amend Article 7 (Controlled Substances) the Public Health Code to do the following:

- Specify that property seized for a violation of Article 7 would not be subject to forfeiture or disposition unless certain circumstances applied, including that the property owner was convicted of a violation of Article 7, or if he or she executed a signed form relinquishing ownership of the property.**
- Require a prosecuting attorney or, if applicable, the Attorney General, to review the seizure of the property and approve its forfeiture, if a person relinquished ownership of the property.**
- Allow a person claiming an interest in certain property that was seized without process to file a written claim expressing any objection to forfeiture.**
- Require the State Court Administrative Office (SCAO) to develop and make available forms for relinquishing ownership of property, and forms to assert an ownership interest in seized property valued at less than \$50,000.**

The bill would take effect 90 days after its enactment.

Forfeiture, Disposition of Property

Under the bill, except as otherwise provided, property could be seized as provided in Section 7522 for a violation of Article 7 of the Code, but would not be subject to forfeiture under Section 7521 or disposition under Section 7524 (see **BACKGROUND** for more information on those sections) unless one of the following applied:

- A criminal proceeding involving or relating to the property had been completed and the defendant was convicted of a violation of Article 7.
- A criminal proceeding involving or relating to the property had been completed and the defendant entered into a plea agreement that was approved by the presiding criminal court.
- No person claimed any interest in the property.
- The owner of the property executed a signed form stating that he or she was relinquishing ownership of the property and provided the form to the law enforcement agency that seized the property.

If a person executed a form relinquishing ownership of property, the prosecuting attorney for the county in which the property was seized or, if the Attorney General were actively handling a case involving or relating to the property, the Attorney General, would have to review the seizure and approve the forfeiture of the property before it could be forfeited.

The State Court Administrative Office would have to develop and make available to law enforcement agencies, the court, and the public a form for relinquishing ownership of property. An executed form would be confidential and would not be subject to disclosure under the Freedom of Information Act.

The seizure and forfeiture or disposition of property would not prohibit the immediate destruction of property that could not be lawfully possessed by any person or that was dangerous to the health or safety of the public regardless of whether the person was convicted of a violation of Article 7.

Applicability

The provisions described above would apply to forfeiture proceedings that were pending on, or initiated on or after, January 1, 2020.

Those provisions also would not apply to forfeiture proceedings in which the aggregate net equity value of the property seized exceeded \$50,000, excluding the value of contraband.

Objection to Forfeiture

Section 7523 of the Code prescribes the procedure to be used if property is seized without process under Section 7522, and the total value of the property seized does not exceed \$50,000. The procedure requires the local unit of government that seized the property or, if the property was seized by the State, the State, to notify the property owner that the property has been seized, and that the local unit of government or, if applicable, the State, intended to forfeit and dispose of the property by delivering a written notice to the owner or by sending the notice by certified mail.

Unless all criminal proceedings involving or relating to the property have been completed, the seizing agency immediately must notify the prosecuting attorney for the county in which the property was seized or, the Attorney General, as applicable, of the seizure of the property and the intention to forfeit and dispose of it.

A person claiming an interest in property that is subject of a notice may, within 20 days after receiving it or of the date it was first published, file a written claim signed by the claimant with the local unit of government or the State expressing his or her interest in the property.

Under the bill, a person claiming an interest in the property also could file a written claim expressing any objection to forfeiture. An objection would have to be written, verified, and signed by the claimant, and would have to include a detailed description of the property and the property interest asserted. The verification would have to be notarized and include a certification stating that the undersigned had examined the claim and believed it to be, to the best of his or her knowledge, true and complete. A written claim would have to be made on a form developed by the SCAO.

The State Court Administrative Office would have to develop and make available to law enforcement agencies, courts, and the public a form for asserting an ownership interest in property seized without process as provided under the bill. The form would have to require a claimant to provide a detailed description of the property, his or her ownership interest in the property, and a signed attestation that the claimant had a bona fide ownership interest in the property.

MCL 333.7523

BACKGROUND

Under Section 7521 of the Public Health Code, the following property is subject to forfeiture:

- A controlled substance that has been manufactured, distributed, used, possessed, or acquired in violation of Article 7.
- Raw material, product, or equipment that is used, or intended for use, in manufacturing, compounding, processing, or delivering a controlled substance in violation of Article 7.
- Property that is used or intended for use as a container for property described in either of the first two provisions.
- A conveyance, including an aircraft, vehicle, or vessel used or intended for use to transport property described in either of the first two provisions, for the purpose of sale or receipt, subject to several exceptions.
- Books, records, and research products and materials used, or intended for use, in violation of Article 7.
- Any other drug paraphernalia.

Section 7522 specifies that property that is subject to forfeiture under Article 7 or pursuant to Section 7521 may be seized upon process issued by the circuit court having jurisdiction over the property. Seizure without process may be made under any of the following circumstances:

- Incident to lawful arrest, pursuant to a search warrant, or pursuant to an inspection under an administrative inspection warrant.
- The property is the subject of a prior judgment in favor of the State in an injunction or forfeiture proceeding under Article 7.
- There is probable cause to believe that the property is directly or indirectly dangerous to health or safety.
- There is probable cause to believe that the property was used or is intended to be used in violation of Article 7.

Under Section 7524, when property is forfeited under Article 7, the local unit of government that seized the property may do any of the following, or if the property is seized by or in the custody of the State, the State may do any of the following:

- Retain the property for official use.
- Sell the property that is not required to be destroyed by law and that is not harmful to the public.
- Require the Michigan Board of Pharmacy to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Drug Enforcement Administration (within the United States Department of Justice) for disposition.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Under the bill, seized property would not be subject to forfeiture unless the owner was convicted, signed a plea agreement, or relinquished ownership of it. If the owner relinquished the property, the prosecuting attorney or, if applicable, the Attorney General would have to review the seizure of the property and approve its forfeiture. Regardless of a law enforcement officer's or agency's intentions and motivations, requiring a conviction to forfeit seized property is more consistent with personal property and due process protections guaranteed under the Michigan and United States Constitutions. Currently, Michigan law requires police to demonstrate by clear and convincing evidence that an asset is connected to a crime in order for forfeiture to occur; however, criminal convictions require a higher burden of proof: beyond a reasonable doubt. Under current law, an individual could be deprived of his or her property or assets even if there is insufficient evidence for a criminal conviction. This violates the presumption of innocence by punishing people before they have been found guilty of a crime. Every individual must be afforded the fundamental right to due process, and the bill is a fair compromise of protecting individuals' private property rights and allowing law enforcement officers and agencies to do their jobs.

Response: Safeguards already exist under Michigan law to protect individuals' due process rights. Law enforcement officers must have probable cause in order to seize property or money, and must prove by clear and convincing evidence (previously the standard was a preponderance of the evidence) that the property was part of or derived from a crime before it can be forfeited.

Opposing Argument

Civil asset forfeiture is an important tool for combating drug-related crimes, which is even more necessary as the opioid crisis worsens. Asset forfeiture is one of the most effective methods for taking resources away from drug trafficking organizations and preventing them from profiting from criminal activity. The bill could impede its effectiveness, and may allow criminals to keep the proceeds from their illegal activities. For example, if the police raid a drug house after a dealer has sold off his supply, the only evidence of the crime may be the money. If a prosecutor did not have enough other evidence to get a conviction because the drugs were gone, the money from the drug sale would have to be returned.

Opposing Argument

Proceeds from forfeiture are used to help fund law enforcement operations, and many police departments rely on asset forfeiture because of budget cuts. According to the 2018 Asset Forfeiture Report compiled by the Michigan State Police, asset forfeiture funds are used to "enhance law enforcement by providing resources for equipment, personnel, vehicles, training, and supplies". Seized assets also allow law enforcement agencies to contribute to nonprofit organizations that assist in citizen crime solving. Losing any kind of financial resources could be detrimental to these agencies and the programs they administer. If police departments and law enforcement agencies were to lose financial resources, they likely would have to seek appropriations from the Legislature to continue funding valuable crime-fighting programs.

Response: Asset forfeiture is an important and valuable tool that helps prevent people from profiting from criminal activity. However, the civil asset forfeiture process should protect innocent property owners and discourage law enforcement agencies from "policing for profit". According to testimony presented before the Senate Committee on Judiciary and Public Safety, nationwide and in Michigan, there are reports that law enforcement agencies have abused broad civil forfeiture laws to fund their operations, and that some seizures of personal property have been made in error. Often, many small business owners carry large sums of cash to the bank or other business locations, or to make large supply purchases. Current law creates an incentive for law enforcement agencies and officers to "police for profit", and exposes individuals or small businesses to possible seizure and forfeiture of their money or property by overzealous law enforcement officers seeking to increase their departments' funding.

FISCAL IMPACT

The bill would have an indeterminate negative impact upon the Michigan State Police (MSP) and local law enforcement agencies and a minimal impact on the State Court Administrative Office.

The bill would add restrictions as to when law enforcement agencies could seize cash and property related to crimes under the Public Health Code, specifically controlled substance violations. Chiefly, the bill would restrict forfeiture of property for controlled substance violations to those instances in which a conviction eventually followed, either by trial or plea agreement.

According to the 2018 Asset Forfeiture Report compiled by the MSP, over \$13.1 million in cash and property was awarded to law enforcement agencies across Michigan for calendar year 2017. This includes awards to MSP and local law enforcement agencies. This amount covers 6,662 forfeitures, of which 5,558, or 83%, were made because of violations of the Public Health Code. Of those 6,662 forfeitures, 2,368 concerned instances in which formal charges were brought and a conviction eventually followed, 2,876 concerned instances in which charges were brought but a conviction is still pending. The remaining 1,418 (21%) concerned forfeiture instances that did not result in a conviction, or a conviction was not verified by the reporting data. The bill would prohibit forfeiture of property without a corresponding conviction. It cannot be determined what percentage of property or cash went to the MSP or local law enforcement agencies. Also, additional data indicating the amount of money seized under the Code is not available, but it is likely the bill would reduce revenue from forfeiture by several million dollars statewide.

Additionally, the bill would require the SCAO to create and make available two forms: one for the owner of seized property to relinquish that property, and one for claimants to assert an ownership interest in seized property valued at less than \$50,000. The cost for creating and distributing these forms likely would be nominal.

Fiscal Analyst: Michael Siracuse

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.