

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: CS/SB 1044

INTRODUCER: Criminal Justice Committee and Senator Brandes and others

SUBJECT: Forfeiture of Contraband

DATE: February 26, 2016

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Dugger</u>	<u>Cannon</u>	<u>CJ</u>	Fav/CS
2. <u>Harkness</u>	<u>Sadberry</u>	<u>ACJ</u>	Recommend: Fav/CS
3. <u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1044 amends the Florida Contraband Forfeiture Act to require that the owner of seized property be prosecuted and convicted of or plead guilty or nolo contendere to a criminal act, without regard to whether adjudication is withheld, before the civil forfeiture of the property becomes final. Until then, the state acquires provisional title to the property upon seizure.

In addition, the bill requires that the property owner be arrested before property may be seized under the act, unless the owner and state agree that the property owner will become an active confidential informant.

If the owner of the seized property cannot be found after 3 months, after a diligent effort by the seizing agency, the property is deemed a contraband article and forfeited pursuant to the provisions of the act. If the owner is found, the agency must return the property to the owner within 5 days after a court finding that the owner has a bona fide security interest, is an innocent owner, or has had the criminal charges dropped or dismissed.

The bill amends s. 322.34, F.S., to conform to the changes made to s. 932.703, F.S.

This bill does not have a state fiscal impact.

The bill is effective July 1, 2016.

II. Present Situation:

The Florida Contraband Forfeiture Act, ss. 932.701-932.706, F.S., provides for the seizure and civil forfeiture of property related to criminal and non-criminal violations of law. Contraband and other property may be seized when utilized during a violation of, or for the purpose of violating, the act. Property constituting a “contraband article” includes:

- A controlled substance as defined in ch. 893, F.S., or a substance, device, paraphernalia, or currency or other means of exchange that was used, attempted, or intended to be used in violation of ch. 893, F.S.;¹
- Gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, attempted, or intended to be used in violation of Florida gambling laws;
- Equipment, liquid or solid, which was used, attempted, or intended to be used, in violation of Florida beverage or tobacco laws;
- Motor fuel upon which the motor fuel tax has not been paid;
- Personal property that was used or attempted to be used as an instrumentality in, or to aid or abet the commission of, any felony, or which is acquired by proceeds obtained from a violation of the act;
- Real property that was used or attempted to be used as an instrumentality in, or to aid or abet the commission of, any felony, or which is acquired by proceeds from a violation of the Act;
- Any personal property in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c), F.S.;
- A motor vehicle offered for sale in violation of s. 320.28, F.S.;
- A motor vehicle used in the course of committing a violation of s. 322.34(9)(a), F.S.;
- Photographs, films, or other recorded images, recorded in violation of s. 810.145, F.S., and possessed for amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person;
- Real property which is acquired by the proceeds of Medicaid fraud under ss. 409.920, F.S., or 409.9201, F.S.;
- Personal property in the possession of, or belonging to, any person which is acquired by the proceeds of Medicaid fraud under ss. 409.920, F.S., or 409.9201, F.S.; and
- Personal property that is used or attempted to be used as an instrumentality in the commission of, or in aiding and abetting in the commission of, a person’s third or subsequent violation of s. 509.144, F.S.²

Currently, any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of the act, or in, upon, or by means of which any violation of the act has taken or is taking place, may be seized and forfeited subject to the provisions of the act.³ All rights to, interest in, and title to contraband articles used in violation of the act immediately vest in the seizing law enforcement agency upon seizure.⁴

¹ The totality of the facts presented by the State must clearly establish probable cause to believe that a nexus exists between the article seized and the narcotics activity. Section 932.701(2)(a)1., F.S.

² Section 932.701(2)(a), F.S.

³ Section 932.703(1), F.S.

⁴ Section 932.703(1)(c), F.S.

Seizure Process

Personal property may be seized at the time of the violation or subsequent to the violation based upon a law enforcement officer's determination that probable cause exists to believe the property is being used in violation of the act. A person is entitled to notice⁵ must be given notice, at the time of seizure or within 5 days of the seizure by certified mail, of his or her right to have a court review such determination in a postseizure adversarial preliminary hearing.⁶ When a court review is desired, the person entitled to notice must request it in writing by certified mail. The agency must hold a hearing within 10 days after receiving the request.

Unlike personal property, the seizure of real property may not occur until the person entitled to notice has the opportunity to attend a pre-seizure adversarial hearing, at which time the court determines whether or not probable cause exists to justify the seizure.⁷ The seizing agency must make a diligent effort to notify persons entitled to notice of the seizure.

If the court finds probable cause that the property was used in violation of the act, it must authorize the seizure or continued seizure of the contraband article.⁸

Forfeiture Proceedings

If the person entitled to notice does not request a hearing, the seizing law enforcement agency must promptly proceed against the contraband article by filing a complaint in the circuit court within 45 days after the seizure, requesting the court to issue a judgment of forfeiture.⁹

Under the act, the civil forfeiture trial must be decided by a jury unless that right is waived by the claimant.¹⁰ At trial, the seizing agency must prove that the contraband article was being used in violation of the act by clear and convincing evidence. Property may not be forfeited under the act unless the seizing agency shows by the preponderance of the evidence that the owner or any co-owner knew or should have known, that the property was being used in criminal activity.¹¹

Once this occurs, the right, title, and interest in and to such property shall be perfected in the seizing agency, subject only to the rights of bona fide lienholders.¹² The act also provides that it is an affirmative defense to forfeiture that the nexus between the property and the underlying violation was incidental or entirely accidental.¹³

⁵ Section 932.701(2)(e), F.S., defines a "person entitled to notice" as any owner, entity, bona fide lienholder, or person in possession of the property subject to forfeiture when seized, who is known to the seizing agency after a diligent search and inquiry. Interests of bona fide lienholders, property held jointly by a husband and wife, interests in property held jointly, and rental cars may not be forfeited under s. 932.703, F.S.

⁶ The court review must occur within 15 days after the notice is received. Section 932.703(2), F.S.

⁷ The hearing must occur within 10 days of the filing of the lis pendens or as soon as practicable. Section 932.703(2)(b), F.S.

⁸ Section 932.703(2)(c), F.S.

⁹ Sections 932.701(2)(c), and 932.704(4), F.S.

¹⁰ Section 932.704(5), F.S. The act authorizes the claimant and the seizing law enforcement agency to settle the forfeiture action prior to the conclusion of the forfeiture proceeding. Section 932.704(7), F.S.

¹¹ Sections 932.703(6)(a), F.S.

¹² Section 932.704(8), F.S.

¹³ Section 932.703(8), F.S.

If the claimant prevails, the seizing agency must pay claimants the reasonable loss of value of the property or loss of income. The agency cannot assess fees and costs against a successful claimant and is required to pay reasonable attorney fees and costs up to \$1,000 if the claimant prevails at the adversarial preliminary hearing.¹⁴

Disposition of Forfeited Property

Once a seizing agency has been awarded a final judgment granting of forfeiture of the property it may:

- Retain the property for the agency's use;
- Sell the property at a public auction or by sealed bid to the highest bidder; or
- Salvage, trade, or transfer the property to any public or nonprofit organization.¹⁵

If the property has a lien attached and the agency sells the property, the proceeds of the sale are to be distributed in this order:

- Payment of the balance due on any lien preserved by the court in the forfeiture proceedings.
- Payment of the cost incurred by the seizing agency in connection with the storage, maintenance, security, and forfeiture of such property.
- Payment of court costs incurred in the forfeiture proceeding.¹⁶

The proceeds which remain after all liens and debts against the forfeited property are paid are then deposited into a special law enforcement trust fund established by the governing body of a county or municipality. These proceeds and interest may not be used to meet normal operation expenses.¹⁷

Any local law enforcement agency that acquires at least \$15,000 under the act within a fiscal year must expend or donate no less than 15 percent of these proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program. The agency has discretion to determine which program receives the funds.¹⁸

If the seizing agency is a state agency, the remaining proceeds are deposited into the General Revenue Fund.¹⁹

¹⁴ Sections 932.704(9) and (10), F.S.

¹⁵ Section 932.7055(1), F.S.

¹⁶ Sections 932.7055(3) and (4), F.S.

¹⁷ Section 932.7055(5)(a), F.S.

¹⁸ Section 932.7055(5)(c)3., F.S.

¹⁹ The following agencies have their own forfeiture trust funds: FDLE; Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco; Department of Highway Safety and Motor Vehicles; Fish and Wildlife Conservation Commission; state attorney offices; school board security agencies; State University System police departments; Department of Agriculture and Consumer Services; Department of Military Affairs; Medicaid Fraud Control Unit of the Department of Legal Affairs; Division of State Fire Marshal of the Department of Financial Services; and Division of Insurance Fraud of the Department of Financial Services. Section 932.7055(6), F.S.

III. Effect of Proposed Changes:

The bill amends s. 932.703, F.S., to require that the owner of seized property be prosecuted and convicted of or plead guilty or nolo contendere to a criminal act, without regard to whether adjudication is withheld, before the civil forfeiture of the property becomes final. Final forfeiture occurs when title or other indicia of ownership passes to the state. Until then, the state acquires provisional title to the property upon seizure.

In addition, the bill requires the property owner be arrested before property may be seized under the act. Currently, there is no requirement that the owner of seized property be arrested or convicted of a criminal act before the property may be seized and forfeited.

Property may be seized immediately in lieu of an arrest if the property owner agrees with the state to become a confidential informant and:

- The confidential informant status is agreed upon between the seizing agency and the property owner and the property owner actively participates in gathering criminal intelligence or investigative information for an active criminal investigation.
- The seizing agency may not use the threat of property seizure or forfeiture when offering the property owner the status of a confidential informant in lieu of an arrest.
- If charges are brought against the property owner, the property is returned to the owner at the end of the active criminal investigation or the cessation of the status of confidential informant.
- Final forfeiture of the property may be included in the agreement to serve as a confidential informant.

If after a diligent effort by the seizing agency, the owner of the seized property cannot be found after 3 months, the property is deemed a contraband article and forfeited pursuant to the provisions of the act. If the owner is found, the agency will be required to return the property to the owner within 5 days after a:

- Court finding that the owner has a bona fide security interest in the property;
- Court finding that the owner is an innocent owner;
- Acquittal or dismissal of the criminal charge against the owner that was the basis of the forfeiture proceedings; or
- Disposal of the criminal charge that was the basis of the forfeiture proceedings by nolle prosequi.

The bill provides that the seizing agency is responsible for any damage, storage fee, and related cost applicable to the property.

The bill amends s. 322.34, F.S., to conform to the changes made to s. 932.703, F.S.

The bill is effective July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill requiring an arrest and criminal conviction may result in a reduction of property being seized by and forfeited to law enforcement agencies.

C. Government Sector Impact:

This bill does not have a state fiscal impact; however, the bill may reduce the number of seizures and forfeitures under the act because of the criminal nexus requirement thereby reducing revenue to seizing law enforcement agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Office of Program Policy Analysis and Government Accountability (OPPAGA) recently reviewed Florida's current civil asset forfeiture practices by local law enforcement agencies and released its findings in a report entitled *Civil Asset Forfeiture in Florida: Policies and Practices*.²⁰ Some of the findings in the report included the following:

- There is no current requirement for law enforcement agencies to report seizures and forfeitures under the act and without statewide information, the Legislature does not know the extent of civil asset forfeiture practices in Florida.²¹

²⁰ Florida Legislature, Office of Program Policy Analysis and Government Accountability, Report No. 15-10 (Nov. 2015), available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1510rpt.pdf> (last visited Feb. 25, 2016).

²¹ *Id.* at 11.

- Vehicles and currency were the most commonly seized assets, related primarily to drug offenses.²²
- An arrest was made in conjunction with most seizures during Fiscal Year 2013-2014.²³
- Many assets were returned to the owners, either in whole or in part.²⁴
- Sixteen percent of seizure actions were contested by an adversarial hearing request, and one percent resulted in a civil trial.²⁵
- Responding agencies reported spending over \$12 million in forfeited assets during Fiscal Year 2013-2014.²⁶

Also included in the report were the following options that could be considered by the Legislature when making changes to the Florida Contraband Forfeiture Act:

- Require law enforcement agencies to report seizure actions and forfeitures to the state at least annually;²⁷
- Require a criminal conviction before forfeiture;²⁸
- Increase the evidentiary standard of proof from clear and convincing to beyond a reasonable doubt;²⁹ and
- Restrict the use of civil asset forfeiture proceeds.³⁰

The bill codifies the option of requiring a criminal conviction before final forfeiture.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 322.34, 403.413, and 932.703.

IX. Additional Information:

- A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

See PCS 808816 by Fiscal Policy (Recommended by Appropriations Subcommittee on Criminal and Civil Justice) on February 11, 2016.

²² *Id.* at 4.

²³ *Id.* at 5. Responding agencies gave the following examples of when an arrest is not possible to make at the time of seizure: an arrest is premature because the officer was unable to positively identify the owner of the cash and illegal drugs; an arrest is premature during an ongoing economic crime investigation but the seizure of currency is ripe; and an arrest is premature when owners of property subject to seizure are willing to give information on higher level crimes leading to later related arrests.

²⁴ *Id.* at 7 and 8.

²⁵ *Id.* at 7.

²⁶ *Id.* at 9. Responding agencies indicated they used forfeiture money primarily for supporting substance abuse and crime prevention programs, buying additional equipment, defraying costs of complex investigations, providing additional expertise, providing matching funds to obtain federal grants, and buying automatic external defibrillators. *Id.* at 10.

²⁷ Thirty-three states have some sort of reporting requirement. *Id.* at 11.

²⁸ Several states, including Minnesota, Montana, Nevada, New Mexico, and North Carolina, have this requirement. *Id.* at 12.

²⁹ Florida is one of 11 states that has a clear and convincing proof standard, which is higher than most other states. Nebraska, North Carolina, and Wisconsin use the criminal standard of proof, beyond a reasonable doubt. *Id.* at 12.

³⁰ *Id.* at 13.

CS by Criminal Justice on January 25, 2016:

- Requires that a property owner be arrested before the property may be seized, unless the owner and state agree that the property owner will become a confidential informant.
- Requires that the property be returned to the confidential informant if charges are not brought against him or her at the conclusion of the criminal investigation.
- Clarifies that forfeiture is final when the property owner is convicted of or pleads guilty or nolo contendere to a criminal offense, without regard to whether adjudication is withheld.

B. Amendments:

None.