

**LETTER OPINION  
2003-L-55**

November 21, 2003

Mr. James O. Johnson  
Mercer County State's Attorney  
PO Box 39  
Stanton, ND 58571

Dear Mr. Johnson:

Thank you for your letter asking whether firearms found in close proximity to controlled substances seized during a drug investigation are subject to forfeiture in the absence of evidence of violence or intimidation.

A person may be permanently deprived of firearms or other property seized by a public official only if the property is contraband or subject to forfeiture. State v. Faleide, 652 N.W.2d 312, 314 (N.D. 2002). This follows from the fact that, in general, if property is no longer needed as evidence and the property is not contraband or forfeitable property, it must be returned to its owner. See 41 N.D.R. Crim. P. 41(e) (“A person aggrieved by . . . the deprivation of property may move the trial court for the return of property on the ground of being entitled to lawful possession of the property”); see also United States v. Chambers, 192 F.3d 374, 377 (3d Cir.1999) (“[After the criminal proceedings,] the person from whom the property was seized is presumed to have a right to its return, and the government must demonstrate that it has a legitimate reason to retain the property”).

There are three main forfeiture laws in North Dakota.<sup>1</sup> Two of them are purely civil proceedings; the third allows forfeiture after conviction of certain criminal offenses. The

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<sup>1</sup> There are also several special forfeiture laws: N.D.C.C. § 12.1-06.1-05 (forfeiture of property used by an enterprise engaged in a pattern of racketeering activity); N.D.C.C. § 12.1-28-02(4)(c) (forfeiture of an unlawfully used “coin-operated gaming device”); N.D.C.C. ch. 20.1-10 (forfeiture of . . . guns . . . used, or held with intent to be unlawfully used, in pursuing, taking, or attempting to take . . . wild birds, wild animals, or fish[, if the violation is a criminal offense]); N.D.C.C. § 39-08-01.3 (forfeiture of motor vehicle owned by person with multiple convictions for driving under the influence of intoxicating liquor); and N.D.C.C. § 39-30-04 (forfeiture of tools and other property of a chopshop).

first two forfeiture laws do not require evidence of violence or intimidation as an element of forfeiture.

Section 19-03.1-36(1)(h), N.D.C.C., provides for forfeiture of “all . . . personal property . . . acquired or derived from the purchase, attempted purchase, delivery, attempted delivery, manufacturing or attempted manufacturing of any controlled substance.” Cases arising under this section frequently involve forfeiture of money. See, e.g., State v. \$17,515.00 in Cash Money, (No. 20030008), 2003 WL 22673972 (N.D. Nov. 13, 2002); State v. Ronngren, 356 N.W.2d 903 (N.D. 1984). In \$17,515.00 in Cash Money, the money was found in a backpack located on a bed near the dresser on which there was a safe containing cocaine. State v. \$17,515.00 in Cash Money, 2003 WL 22673972 at 1. The trial court found, based on circumstantial evidence, and testimony of law enforcement officers, that the money was derived from illegal drug transactions and ordered it forfeited to the State. Id. The order of forfeiture was affirmed. Id.

The burdens of proof in a contested forfeiture proceeding are set forth in N.D.C.C. § 19-03.1-36.6, which “clearly provides that, once the State establishes probable cause to believe the property is forfeitable, the ultimate burden of proof shifts to the claimant to prove by a preponderance of the evidence that the property is not forfeitable.” Id. at 4. Thus, to obtain forfeiture under N.D.C.C. § 19-03.1-36(1)(h), the state must establish probable cause to believe that the firearms seized in this case were the consideration for, or obtained with the proceeds of, an unlawful controlled substance transaction. The weapons will then be forfeited to the state unless “any owner or person with a legal interest in the property to be forfeited” proves by a preponderance of evidence “that the property to be forfeited is not subject to forfeiture.” N.D.C.C. § 19-03.1-36.6.

The second statute provides for forfeiture of “[p]roperty that is illegally possessed or is contraband” or is “[p]roperty that has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense.” N.D.C.C. § 29-31.1-01(1)(a) and (b). It is difficult to provide a formula that specifies exactly how substantially property must aid drug conduct before it can be said to facilitate that conduct. Compare United States v. One 1979 Porsche Coupe, 709 F.2d 1424 (11th Cir. 1983) (applying “substantial connection” test), with United States v. Real Estate Known as 916 Douglas Ave., 903 F.2d 490, 493 (7th Cir. 1990) (facilitation does not occur when property has only an “incidental or fortuitous connection to criminal activity”). Other decisions applying the substantial connection test but finding an insufficient connection in the particular case include United States v. One 1976 Ford F-150 Pick-Up, 769 F.2d 525, 527 (8th Cir. 1985) (per curiam) (holding that vehicle was not “substantially associated” with criminal activity and, therefore, forfeiture was not authorized), and Riley v. 1987 Station Wagon, 650

N.W.2d 441, 445 (Minn. 2002) (connection between Jeep and conspiracy “was neither direct nor substantial”); therefore the Jeep was not subject to forfeiture).

In United States v. Ceballos-Torres, 218 F.3d 409 (5th Cir. 2000), the Fifth Circuit Court of Appeals, in the course of discussing what it means to “possess a firearm in furtherance” of a drug trafficking crime (which results in an additional sentence under 18 U.S.C. § 924(c)(1)(A)), provides a list of “factors that would help determine whether a particular defendant’s possession [of firearms] furthers, advances or helps forward a drug trafficking offense.” Id. at 412, 414. These factors “might include: the type of drug activity that is being conducted, accessibility of the firearm, the type of weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found.” Id. at 414-15. Some factors would tend to show that the possession of firearms was not in furtherance of drug trafficking. “For example, a drug dealer whose only firearms are unloaded antiques mounted on the wall does not possess those firearms ‘in furtherance’ of drug trafficking. Nor will a drug trafficker who engages in target shooting or in hunting game likely violate the law by keeping a pistol for that purpose that is otherwise locked and inaccessible.” Id. at 415. Although these examples apply to a federal sentencing law, each may be instructive for determining whether a firearm is property “used or intended to be used to facilitate” a controlled substances offense under N.D.C.C. § 29-31.1-01(1)(b).

The presence of a firearm at the scene of a crime or in the premises, vehicle or property that is searched by a public official does not automatically justify forfeiture of the firearm. Both N.D.C.C. §§ 19-03.1-36(1)(h) and 29-31.1-01(1)(b), however, permit the forfeiture of firearms seized by a law enforcement official in the absence of violence or intimidation, assuming each of the requirements for forfeiture of property under those sections is established as required by law. Whether the firearms seized in this case were “acquired or derived” from the purchase, delivery, or manufacturing of a controlled substance, or were “used, or intended to be used, to facilitate the commission of a criminal offense,” and, therefore, are subject to forfeiture under N.D.C.C. §§ 19-03.1-36(1)(h) or 29-31.1-01(1)(b) depends on the resolution of factual issues, which this office has historically declined to resolve when issuing a legal opinion. N.D.A.G. 2002-F-07.

The third forfeiture law does require violence or intimidation. Section 61.1-01-02, N.D.C.C., provides a firearm or dangerous weapon is subject to forfeiture if a person is convicted of a felony or a misdemeanor involving violence or intimidation, and a “firearm or dangerous weapon [was] used or possessed while in the commission of [such an offense].” N.D.C.C. § 62.1-01-02. (Emphasis added.) Because a drug offense is not an offense “involving violence or intimidation,” the firearms forfeiture authority in

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N.D.C.C. § 62.1-01-02 may be used only if a drug offender is separately charged and convicted of an offense that involves violence or intimidation. See, e.g., N.D.C.C. § 12.1-17-04 (terrorizing).

I trust this discussion will be helpful.

Sincerely,

Wayne Stenehjem  
Attorney General

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