

**OPINION
74-497**

March 6, 1974 (OPINION)

Mr. Thomas F. Kelsch
State's Attorney
Burleigh County
P. O. Box 1901
Bismarck, ND 58501

Dear Mr. Kelsch:

This is in reply to your letter in which you state the following:

"Within the past year we have had several cases involving firearms and knives that were used by a defendant in the commission of a crime or were found on the person when he was arrested. In those instances we have requested, pursuant to section 62-04-04, North Dakota Century Code, that the weapon be forfeited. Unfortunately we find no procedure for disposing of that weapon.

"I therefore ask your written opinion as to what procedure should be used in this forfeiture, including who retains custody of the weapon, and may it be sold at a public auction, and does it have to be sold or could it be retained by a law enforcement agency for purposes such as an exhibit."

The statute to which you specifically refer provides:

"62-04-04. FORFEITURE OF WEAPONS BY PERSON ARRESTED AND CONVICTED OF CRIME. When any firearm or sharp or dangerous weapon which is usually used for attack is found on any person who is arrested and convicted of a felony or misdemeanor, such firearm or weapon shall be forfeited to the state."

Indeed, there are no procedures mentioned nor implied. Additionally, there are no provisions to be found in the laws of North Dakota that specifically refer to the disposition of firearms or weapons contemplated by section 62-04-04. It is therefore necessary to examine those statutory and constitutional provisions that in the opinion of this office are particularly applicable.

Section 29-06-24 of the North Dakota Century Code provides that:

"29-06-24. OFFENSIVE WEAPONS TAKEN - DELIVERY TO THE MAGISTRATE. Any person making a lawful arrest must take from the person arrested all offensive weapons which he may have about his person and must deliver them to the magistrate before whom he is taken."

The following statutes provide for the disposition of county property and forfeitures generally:

"11-27-01. BOARD OF COUNTY COMMISSIONERS AUTHORIZED TO SELL PROPERTY - PRIVATE AND PUBLIC SALE. The board of county

commissioners of any county may dispose of any property, either real or personal, which the county has acquired through purchase, forfeiture, or operation of law other than through tax sales proceedings, in accordance with the provisions of this chapter. When the property to be disposed of is estimated by the board to be of a value of less than one thousand dollars, it may be sold at private sale upon the proper resolution of the board. In all other cases, such property may be sold only at public sale."

12-01-13. DISPOSITION OF FINES, FORFEITURES, PECUNIARY PENALTIES, AND BAIL FORFEITURES. All fines, forfeitures, and pecuniary penalties prescribed as a punishment for a violation of state laws, when collected, shall be paid into the treasury of the proper county to be added to the state school fund * * *"

"15-03-01. PERMANENT FUNDS - STATE TREASURER IS CUSTODIAN. All moneys belonging to the permanent funds of the common schools and other public institutions derived from the sale of any of the lands described in section 15-01-02 or from any other source shall be paid to and held by the state treasurer and shall be subject to the order of the board of university and school lands. Such moneys shall be paid over on the order of the board for investment as provided in this chapter whenever the board requires the same. The state treasurer shall be the custodian of all bonds, notes, mortgages, and evidences of debt arising out of the management of the permanent funds."

Section 153 of Article IX of the Constitution of North Dakota provides:

"SECTION 153. All proceeds of the public lands that have heretofore been, or may hereafter be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands; the proceeds of property that shall fall to the state by escheat; all gifts, donations, or the proceeds thereof that come to the state for the support of the common schools, or not otherwise appropriated by the terms of the gift."

It is our opinion that the following procedure must be employed for the disposition of weapons or firearms pursuant to the above quoted provisions.

It is well established that subsequent to the disarming of the arrested person, section 29-06-24 of the North Dakota Century Code transfers custody and control of the weapons to the committing magistrate. Whenever the offender is amenable to prosecution by the county for violation of state laws, the arresting officer must actually complete delivery of such property to the county magistrate. Therefore, in effect, the county is entrusted with the responsibility of possession and accountability of the property. Section 29-01-26 requires that the county magistrate identify the weapon and make an appropriate written account, either by issuing a receipt or entering

pertinent information in his docket.

As stated in section 62-04-04, conviction of the offender terminates his title to the property and the state acquires ownership by operation of the statutory forfeiture. The county, nowever, retains possession of the property and is required to provide an orderly disposition pursuant to the statutes that provide for the transfer of county property. Therefore, since the county has acquired possession of the property by operation of law, section 11-27-01 is applicable. The board of county commissioners is then compelled to make an appropriate determination. Although a private sale is authorized by section 11-27-01, it is not mandatory, and, therefore, all property may be sold at public auction. The procedure and requirements of a public sale are described in sections 11-27-02 and 11-27-03.

The provisions relating to the sale of weapons generally are found in chapters 62-01 and 62-02 of the North Dakota Century Code. However, this office renders no comment respecting the applicability or inapplicability of any federal statutes or regulations to a sale of weapons by a county.

It is noted that section 11-27-07 provides for the disposition of the proceeds of the sale of county property, stating that such proceeds "shall go into the general fund of the county." We conclude, however, that section 11-27-07 is not controlling. Rather, we are compelled to adopt the application of section 12-01-13 which specifically provides that forfeitures "shall be paid into the treasury of the proper county to be added to the state school fund." This statute especially relates to forfeitures effected by the violation of state laws.

Thus, the proceeds derived from the sale of firearms or weapons must be paid into the state school fund. Pursuant to section 15-03-01 the proceeds shall then be transferred from the county treasury to the state treasurer, thereby accomplishing the required transfer of the property to the state. This is consistent with section 153 of the North Dakota Constitution.

In conclusion, the forfeiture of property such as weapons and firearms taken pursuant to section 62-04-04 of the North Dakota Century Code must operate in compliance with all of the aforementioned provisions. The retention by a law enforcement agency of a weapon as an exhibit for display purposes is neither contemplated nor allowed by law. However, this does not place any restriction upon the retention of a weapon as evidence in a court of law.

I trust that the foregoing answers your inquiry.

Sincerely yours,

Allen I. Olson

Attorney General