



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**CRAWFORD C. MARTIN  
ATTORNEY GENERAL**

August 25, 1969

Honorable Henry Wade  
District Attorney  
Dallas County Government Center  
Dallas, Texas 75202

Opinion No. M-456

Re: Discretion of District Attorney to refrain from filing forfeiture suits under Article 725d, Penal Code, and whether proposed alternate procedures are prohibited.

Dear Mr. Wade:

Your letter requesting an opinion presents the above questions and states that:

"The proposed procedure is proposed to be used only in a fact situation limited to one wherein a motor vehicle has been seized as having been used in the transportation, concealment or possession of contraband narcotics. It is further limited to cases in which it is clearly evident that there exists a registered bona fide lienholder whose interest is greater than the present value of the seized motor vehicle."

You further state generally that your office must handle a multitude of these situations and that filing forfeiture proceedings in court inherently involve expense and delay because of necessary service upon the registered owner, the driver if he is other than the registered owner, and the lienholder; that often all of the parties cannot be located, the proceedings must be delayed, and that service of citation, particularly out-of-state, is expensive; that considerable time is consumed in a hearing even after the case has been

reached on the court calendar; and after such expenditure of time and effort the seized automobile is released to the lienholder.

Pertinent portions of Section 2 of Article 725d, Vernon's Penal Code, read as follows:

"Any . . . vehicle . . . which is being used in violation of Section 1 of this Act shall be seized and forfeited to the Texas Department of Public Safety, Narcotics Section, under the provisions of this Act; . . . and provided further, no . . . vehicle . . . shall be forfeited where it is shown that the illegal act has been committed by some person other than the owner thereof while such . . . vehicle . . . was in the possession of any person who acquired or retained such possession in violation of any law of this State or of the United States."

Section 3 provides for enforcement of the Act and reads:

"Any officer authorized by the provisions of the Acts enumerated in Section 1 of this Act to enforce such acts may seize any vessel, vehicle or aircraft violating the provisions of this Act."

Article 725b, Penal Code, (Narcotic Drug Regulations) is specifically enumerated in Section 1 of Article 725d. Section 22 of Article 725b provides, in part, as follows:

"It is hereby made the duty of the Department of Public Safety, its officers, agents, inspectors, and representatives, and of all peace officers within the State, including all peace officers operating under the jurisdiction of the Department of Public Safety, or that may hereafter operate

under its jurisdiction and all County Attorneys, District Attorneys, and the Attorney General to enforce all provisions of this Act, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this State, and of all other States, relating to narcotic drugs. (Emphasis added)

". . ."

Section 4 of Article 725d concerning notice to the parties provides, in part:

"The seizing officer shall immediately file in the name of the State of Texas. . .a notice of said seizure and intended forfeiture. . ."

Subsections (a) and (b) of Section 4 provide for service of citation, as in other civil cases, upon the owner of the vehicle and upon any registered lienholder.

Subsection (c) provides that if the motor vehicle to be forfeited is susceptible to registration in this State and is believed to be registered under the laws of this State, the officer in charge of filing the forfeiture suit shall make inquiry to the Highway Department as to who is the record owner and who, if any, holds any lien or liens against such vehicle. The officer in charge of filing such suit shall cause any lienholder to be made a party to the suit together with the record owner if the owner is any person other than the person in possession of the vehicle when it was seized. Provision is also made for the Attorney General, District Attorney and County Attorney, or any of them, to ascertain the licensee and lienholders if the vehicle is not registered in this State.

Subsection (d) provides that if a person was in possession of the vehicle when it was seized he shall be made a party defendant in such forfeiture suit and provides for service of citation if no one was in possession of the vehicle at the time it was seized and the owner thereof is unknown.

Subsection (e) provides that no suit instituted pursuant to the Act shall proceed to trial unless all the provisions of subsections (c) and (d) have been complied with.

Sections 6 and 7 of Article 725d read as follows:

"Sec. 6. If it shall appear that the owner of the . . . vehicle. . . has filed a verified answer denying the use of such . . . vehicle. . . in violation of this Act, then the burden shall rest upon the State, represented by the District Attorney to prove as in other penal cases, the violation of the provisions of this Act. Provided, however, that in the event no answer has been filed by the owner of said . . . vehicle. . . , the notice of seizure may be introduced into evidence and shall be prima facie evidence of said violation.

"At the hearing, any claimant of any right, title or interest in the . . . vehicle . . . may prove his lien, mortgage or conditional sales contract, to be bona fide and created without knowledge that the . . . vehicle . . . was to be used in violation of this Act.

"Sec. 7. If proof at the hearing shall disclose that the interest of any bona fide lienholder, mortgagee or conditional vendor is greater than the present value of the . . . vehicle. . . , the court shall order such . . . vehicle . . . released to him. If such interest

is less than the present value, and upon proof of violation of this Act, the court shall order the . . . vehicle . . . forfeited to the State." (All emphasis added.)

In view of the foregoing provisions, and particularly in light of the duties imposed upon enforcement personnel and district attorneys by the provisions of Article 725b, Section 22, it is the opinion of this office that once a motor vehicle has been seized by an officer for violation of Article 725d, it is the mandatory duty of the district attorney to file and prosecute the forfeiture suit in full accordance with the provisions of that Act.

However, once such a suit has been filed, the district attorney, in representing the State as lead counsel, has control over the suit and, under proper motion and hearing thereon, may discontinue the same upon order of the court. State ex rel Dishman v. Gary, 163 Tex. 565, 359 S.W.2d 456 (1962).

Your second question presents an alternative to court proceedings and is "based on a determination in advance by the district attorney as to whether the particular facts clearly show a bona fide lienholder whose interest is greater than the present value of the seized automobile," which in substance is proposed as follows:

"1. When the seizing officer has notified this office of the facts concerning the seizure of an automobile, the lienholder will be notified.

"2. If and when the lienholder, by affidavit and other proof, discloses to this office facts demonstrating himself to be a bona fide lienholder, that his lien is in an amount exceeding the present value of the seized automobile, that the record owner is in default on his obligation and the lienholder intends to foreclose his obligation, and that the lienholder's contract authorizes

him to repossess such automobile and he requests delivery to him for such purpose, then, as a matter of law, under the facts, even court proceedings could result only in such car being released to the lienholder. Under such uncontroverted facts, it is proposed that this office decline to file court proceedings, and so notify the seizing officer and the lienholder of such action and the grounds therefor.

"3. If and when the lienholder prepares and submits to the seizing officer a sworn statement summarizing his authority and his desire to repossess such seized automobile, and that if it is released to him for such purpose, then the lienholder will hold the city and the seizing officer harmless from any suit or liability arising out of such delivery to him, then such seized automobile will be released to such lienholder."

In State v. Cherry, 387 S.W.2d 149, 153 (Tex.Civ.App. 1965, no writ), the court said:

"The right of the State to forfeit a vehicle used in this vicious illegal traffic comes into existence instantaneously upon the commission of the proscribed act, and it remains only for the State to perfect its title by seizing the vehicle and obtaining the decree of forfeiture. 7 Fifths of Old Grand-Dad Whiskey v. United States, 10 Cir., 158 F.2d 34, cert. den. 330 U.S. 828; 67 S.Ct. 870, 91 L.Ed. 1277. The law specifies those innocent persons whose rights may transcend that of the State; and appellees simply failed to carry the burden of showing their inclusion within that favored group."

Article 725d places a duty upon the district attorney to institute forfeiture proceedings concerning a seized vehicle, and prove in the first instance, that the vehicle was being used in violation of this Act. The hearing provides an owner thereof the opportunity to bring himself within forfeiture exceptions and provides a lienholder the opportunity to prove his bona fide lien at the hearing and prove that his interest is greater than the present value of the vehicle. We therefore find, upon the facts presented, that the district attorney has no authority to release a seized vehicle to a lienholder in the absence of forfeiture proceedings and a proper court order.

Moreover, a forfeiture occurs where a person loses some property, right, privilege, or benefit in consequence of having done or omitted to do a certain act. The extra-judicial release of a seized vehicle by a district attorney to a lienholder would deprive the owner of a right in the vehicle when such issues could only be determined in an action for forfeiture and to which the owner and the lienholder are made parties.

Therefore, the procedure proposed by you as an alternative to court action is prohibited.

SUMMARY

When a motor vehicle has been seized by an officer pursuant to Article 725d, Vernon's Penal Code, it is the mandatory duty of a District Attorney to institute forfeiture proceedings; and, under the facts submitted, a procedure for releasing a seized vehicle to a lienholder by a District Attorney in absence of a proper court order would be prohibited.

Very truly yours,

  
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Honorable Henry Wade, Page 8, (M-456)

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