

DRUG CRIMES: CIVIL ASSET FORFEITURE

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House Bill 4158 (reported from committee as substitute H-5)

Sponsor: Rep. Peter J. Lucido

Committee: Judiciary

Complete to 5-8-18

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: House Bill 4158 would amend the Public Health Code to:

- Prohibit civil asset forfeitures for crimes involving controlled substances unless there is a conviction or plea agreement, no one claims the property, or the property owner relinquishes the property that was seized.
- Limit the bill's provisions to seizures of property valued at \$50,000 or less (excluding the value of the contraband).
- Apply the bill to forfeiture proceedings pending on, or initiated on or after, January 1, 2019.
- Require the State Court Administrative Office to develop and make available a form to relinquish a property right and also a form for a property owner to file a written objection regarding forfeiture of property seized without a warrant.

FISCAL IMPACT: The bill would have an indeterminate, yet possibly substantive, fiscal impact on state and local law enforcement agencies. (See *Fiscal Information*, below, for a detailed discussion.)

THE APPARENT PROBLEM:

Michigan law allows property to be seized by governmental entities if the property is suspected of having been used for or derived from crimes connected with controlled substances. Generally speaking, the state's civil asset forfeiture provisions allow the seizing entity to petition a court to have that property forfeited, meaning that the seizing entity takes possession of the seized property. Forfeited property can then be used or sold by the seizing entity and, in some instances, used for law enforcement purposes.

Civil asset forfeiture laws are generally believed to deter crime by taking away the financial incentive for the criminal activity; for example, besides the threat of going to prison, a person could also lose cars, homes, or jewelry bought with money gained from the illegal activity. Seizing a house or equipment used in the manufacture of controlled substances can shut down or hinder further criminal actions at that location, thus decreasing or preventing crime.

In recent years, civil asset forfeiture laws have come under scrutiny in Michigan and across the country. Detractors say that they are misused and even abused, with some calling seizure and forfeiture practices "policing for profit." According to some, money from the sale of forfeited property can be an incentive for aggressive seizure and forfeiture policies.

Over the past few years, several states have revised their civil forfeiture statutes to beef up property protections for citizens, with one state, New Mexico, ending civil forfeiture altogether and allowing a jury to decide whether the seized property was an instrument of the crime. At least 11 other states require a criminal conviction before some or all forfeiture proceedings can

be initiated. In 2015 and 2016, Michigan enacted legislation that, among other things, required governmental entities to file annual reports with the Department of State Police (MSP) regarding property that was seized and forfeited, required MSP to post the information on its website, raised the threshold for forfeiture of property related to controlled substance violations under the Public Health Code to clear and convincing evidence, and, for property seizures with a value that does not exceed \$50,000 conducted without a warrant, eliminated the requirement that a written claim by the property owner to recover the property be accompanied by a bond.¹

Despite the recent changes, some feel that the protections did not go far enough. For instance, the seized property is not automatically returned if charges are not brought or are dropped or the person is acquitted. Though citizens can petition a court to have their property returned when it is not connected to the commission of a crime, many citizens cannot afford the court costs and legal fees to do so, especially considering that the typical case involves about \$500 worth of assets. For such small property seizures, some would like to see further changes to require a conviction or guilty plea before the seizing entity could forfeit or dispose of the property.

THE CONTENT OF THE BILL:

House Bill 4158 would add a new section to Article 7 of the Public Health Code (Controlled Substances) to prohibit property seized for a violation of Article 7, as provided in Section 7522, from being subject to forfeiture under Section 7521 or a disposition under Section 7524 (see ***Background Information***, below) unless one of the following applies:

- A criminal proceeding involving or relating to the property has been completed and the defendant is convicted of a controlled substance violation under Article 7 or enters into a plea agreement approved by the presiding criminal court.
- No person claims any interest in the property as provided under Section 7523.
- The owner of the property relinquishes ownership of the property on a signed form and provides that form to the seizing law enforcement agency. This would trigger a requirement for the prosecuting attorney for the county in which the property had been seized or the attorney general (if the attorney general was actively handling a case involving or related to the property) to review the seizure of the property and approve the forfeiture before the property could be forfeited.

The bill would not prohibit the immediate destruction of property that is not lawfully possessed by any person or that is dangerous to the health or safety of the public, regardless of whether the person is convicted of a violation of Article 7.

Form to relinquish property

Under the bill, the State Court Administrative Office (SCAO) would be required to develop and make available to law enforcement agencies, the courts, and the public the form described in the bill. An executed form would be confidential and would not be subject to disclosure under the Freedom of Information Act.

¹ Public Acts 148 to 154 of 2015 and Public Act 418 of 2016.

Applicability

The bill would apply only to forfeiture proceedings pending on, or initiated on or after, January 1, 2019, and only to a forfeiture proceeding in which the aggregate net equity value of the property and currency seized was \$50,000 or less, excluding the value of contraband.

Property valued below \$50,000 for which there was no warrant

Section 7523 of the Code provides a procedure to be followed if the property was seized under Section 7522 without process (warrant) and the total value of the seized property is \$50,000 or less. Among other things, the procedure requires the seizing entity to notify the property's owner of the seizure and of the intent to forfeit and dispose of the property. Any person claiming an interest in that property has 20 days to file a signed, written claim expressing interest in the property.

To the current procedure, the bill would add that any objection to forfeiture can be included in the claim on a form to be developed by the SCAO. An objection would have to be written, verified, and signed by the claimant, and 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 believes it to be, to the best of his or her knowledge, true and complete.

Form asserting a claim for property less than \$50,000

The SCAO would be required to develop and make available to law enforcement agencies, courts, and the public a form for asserting an ownership interest in seized property. 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 he or she has a bona fide ownership interest in the property.

The bill would take effect 90 days after being enacted.

MCL 333.7523 and proposed MCL 333.7521a

BACKGROUND INFORMATION:

Article 7 of the Public Health Code (Controlled Substances) prohibits certain activities, such as the manufacture, delivery, and possession of controlled substances, and establishes penalties for violations. Under Section 7522, certain property involved in drug crimes may be seized with a warrant, or without a warrant under certain circumstances such as incident to a lawful arrest. The types of property subject to forfeiture are listed in Section 7521. Besides obvious objects such as the illegal drugs and associated paraphernalia and books and records (including formulas) related to drug offenses, vehicles such as cars, boats, and planes can also be seized and forfeited if used to commit or facilitate a drug violation. Anything of value, including cash, may also be seized and subject to forfeiture if used or intended to be used to facilitate a violation or if furnished or intended to be furnished in exchange for a controlled substance, imitation controlled substance, or other drug in violation of Article 7 and traceable to the exchange.

Section 7524 allows the state or the local unit of government that seized the property to retain it for official use or sell any property that is not required by law to be destroyed and that is not harmful to the public. The proceeds, and any money or other things of value, must be deposited with the state treasurer if the state was the seizing entity or with the appropriate treasurer having

budgetary authority of a local seizing entity, and must be disposed of as specified: to cover expenses related to the maintenance of the property while in custody, for instance, or costs associated with the sale of the property, among other things. Lights for plant growth or scales that were forfeited may be donated to elementary or secondary schools or colleges or universities for educational purposes.

FISCAL INFORMATION:

House Bill 4158 would have an indeterminate, yet possibly substantive, fiscal impact on the Department of State Police and local law enforcement agencies. The effect on law enforcement agencies' budgets would depend upon the prevalence of civil asset forfeiture in controlled substance cases in which criminal convictions, plea agreements, deportations, or no contest pleas on forfeited assets are not realized, and the extent to which these funds are relied upon to support a law enforcement agency's operations. In some cases, the changes to asset forfeiture law proposed in House Bill 4158 could result in a law enforcement agency's requiring additional funds from other sources to replace forgone controlled substance-related forfeiture revenues.

The bill would not affect forfeitures in which the aggregate value of the forfeited property and currency exceeds \$50,000. However, because the bill limits forfeiture to those cases that result in convictions, plea agreements, no one claiming an interest in the property, or a property owner relinquishing the property, the bill is likely to decrease the number of cases for which forfeiture revenue could be realized. Law enforcement agencies that do not substantively rely on revenues from civil asset forfeitures from controlled substance cases involving \$50,000 or less would likely see little to no decrease in forfeiture revenues. It is not clear how prevalent forfeiture cases involving assets valuing, in aggregate, greater than \$50,000 are statewide.

According to the Department of State Police 2017 Asset Forfeiture Report,² of the 1,277 state and local agencies and local units of government that reported on asset forfeiture between February and December of 2016, 266 law enforcement entities filed reports that included asset forfeiture. During the same reporting period, a total of 4,955 forfeitures were related to violations of the Public Health Code, and of *all* cases reported statewide in which forfeiture was authorized, 523 were not linked to criminal charges; 196 were linked to charges that did not result in convictions; and 2,490 were linked to convictions, with an additional 1,547 charges that were still pending as of the reporting period. Total net statewide forfeiture proceeds were approximately \$12.3 million during the reporting period, and of the proceeds resulting from forfeitures under violations of the Public Health Code, the largest proportions were utilized to support costs for law enforcement equipment (30%) and personnel (10%), with an additional 21% equally distributed among costs for vehicles (7%), training (7%), and supplies and materials (7%).

² 2017 Asset Forfeiture Report, Department of State Police, Grants and Community Services Division:
http://www.michigan.gov/documents/msp/2017_Asset_Forfeiture_Report-2017-06-30_-FINAL_606009_7.pdf

ARGUMENTS:

For:

The bill strengthens changes made in recent years to the drug forfeiture laws by restricting the circumstances under which the state or a local seizing entity can dispose of or forfeit property in cases involving a property value of \$50,000 or less. Often the seized property eligible to be returned to the owner is worth about \$500 to \$1,000, an amount that may be significant to its owner but not worth lawyer and court fees that can reach \$20,000 or more to reclaim the property. Because forfeiture is a civil proceeding, court-appointed attorneys are not provided to indigent or low-income persons. Moreover, some say the lack of forfeiture provisions within the Michigan Medical Marihuana Act make registered users and caregivers vulnerable to raids. Small business owners also have reported being suspected of illegal activity when found to be carrying large amounts of cash to purchase supplies.

Further, by the time a case is dropped or the person acquitted, the property may already have been disposed of despite a claim to recover the seized property having been properly filed. Some report lengthy waits to get property returned, having only partial amounts of the property returned, or, if the property had already been disposed of, having to accept only a partial return on what the original property had been worth.

The bill addresses these weaknesses in current law by requiring, for cases involving property equal to or less than \$50,000, that the property could not be subject to forfeiture or disposition by the seizing entity unless the defendant in the criminal case was convicted or pled guilty to the charges. If the owner of the property did not claim it or relinquished ownership, the seizing entity could keep, sell, or dispose of the property as provided for under the forfeiture provisions.

The bill would also require a standardized form to be developed and made available to law enforcement and to people whose property was seized that will make it easier for a property owner to relinquish ownership and, for those whose property was seized without a warrant, to file a claim to have their property returned.

Reportedly, most of the revenue from forfeitures is from cases in which tens or hundreds of thousands of dollars, even millions, are involved. Since the bill would not apply to such seizures, some feel it unlikely that state or local law enforcement agencies would experience economic hardships from any loss of revenue under the bill's provisions.

Against:

According to testimony presented in opposition to the bill, incidents of abuse by law enforcement agencies regarding seizures and forfeitures are low. Most agencies follow proper procedures. In some counties, prosecutors will even quickly review a case and identify property that is clearly not associated with criminal activity and that should be returned immediately. Additionally, adequate due process protections already exist in law. For instance, law enforcement must prove—by clear and convincing evidence—that the property is connected with a crime before it can be forfeited.

Representatives of law enforcement say that forfeiture is a necessary tool in the fight against illegal drug trafficking because it not only removes property used in the commission of drug crimes, but also prevents criminals from profiting from criminal activity or using those funds

to defend themselves. It also is a useful tool to employ against lower-level participants to build cases against major offenders. Since the proceeds from forfeiture benefit law enforcement and nonprofit agencies by helping to fund their operations, restricting its use may imperil public safety by draining those funds from local police departments and making it easier for criminals to operate. A requirement for conviction or relinquishment, even though only for smaller property amounts, could be circumvented if a criminal hid assets or kept possessions or cash minimal to stay below the \$50,000 threshold.

POSITIONS:

The following entities indicated support for the bill on 5-1-18:

- ACLU of Michigan
- Mackinac Center for Public Policy
- NFIB Michigan (National Federation of Independent Business)
- Law Enforcement Action Partnership (LEAP)
- Americans for Prosperity

The following entities testified in support of, or indicated support for, an earlier version of the bill that also applied only to property seizures not exceeding \$50,000, on 2-6-18:

- The Law Office of Michael Komorn
- Institute for Justice
- Michigan Moms United
- Michigan Freedom Fund

The following entities indicated or testified to a neutral position regarding the bill:

- The Department of State Police (5-1-18)
- Waterford Township Police Department (2-6-18)

The following entities indicated opposition to the bill on 5-1-18:

- Michigan Sheriff's Association
- Michigan Association of Chiefs of Police
- Wayne County Prosecutors Office
- Oakland County Sheriff Office

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Kent Dell

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.