

No: 151

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1988



ENROLLED

COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 151

(By Senator PALUMBO, ET AL)



PASSED MARCH 11, 1988

In Effect 90 DAYS FROM Passage



***ENROLLED**

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 151

(SENATORS PALUMBO, PARKER AND JACKSON, *original sponsors*)

[Passed March 11, 1988; in effect ninety days from passage.]

AN ACT to repeal section five hundred five, article five, chapter sixty-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend said chapter sixty-a by adding thereto a new article, designated article seven, relating to forfeiture proceedings in illegal drug offenses; setting forth short title; legislative findings; enumerating items subject to forfeiture; exceptions; authorizing certain persons to seize property; disposition of contraband and other items seized; setting forth procedure for seizure of forfeitable property; when process issued by court necessary for seizure; setting forth when property may be seized without process; disposition of such property; establishing civil proceeding for forfeiture; setting forth the time, contents of and procedure for filing a petition for forfeiture; when court may order the forfeiture of property; prohibiting transfer of property during pendency of proceeding; setting forth time for appeal and notice thereof; providing for the disposition of forfeited moneys, securities and other negotiable instruments; distribution of proceeds; providing for the disposition of other forfeited property; and setting forth the time and manner of disposition of proceeds thereof.

Be it enacted by the Legislature of West Virginia:

That section five hundred five, article five, chapter sixty-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter sixty-a be amended by adding thereto a new article, designated article seven, all to read as follows:

ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.

§60A-7-701. Short title.

- 1 This article shall be known and cited as the "West
- 2 Virginia Contraband Forfeiture Act."

§60A-7-702. Legislative findings.

- 1 The Legislature hereby finds and declares that the seizure
- 2 and sale of items under the provisions of this article is not
- 3 contemplated to be a forfeiture as the same is used in article
- 4 twelve, section five of the West Virginia constitution and to
- 5 the extent that such seizure and sale may be found to be
- 6 such a forfeiture, the Legislature hereby finds and declares
- 7 that the proceeds from a seizure and sale under this article
- 8 is not part of net proceeds as the same is contemplated by
- 9 such article twelve, section five of the West Virginia
- 10 constitution.

§60A-7-703. Items subject to forfeiture; persons authorized to seize property subject to forfeiture.

- 1 (a) The following are subject to forfeiture:
- 2 (1) All controlled substances which have been
- 3 manufactured, distributed, dispensed or possessed in
- 4 violation of this chapter;
- 5 (2) All raw materials, products and equipment of any
- 6 kind which are used, or intended for use, in manufacturing,
- 7 compounding, processing, delivering, importing or
- 8 exporting any controlled substance in violation of this
- 9 chapter;
- 10 (3) All property which is used, or has been used, or is
- 11 intended for use, as a container for property described in
- 12 subdivision (1) or (2);
- 13 (4) All conveyances, including aircraft, vehicles or
- 14 vessels, which are used, have been used, or are intended for
- 15 use, to transport, or in any manner to facilitate the

16 transportation, sale, receipt, possession or concealment of
17 property described in subdivision (1) or (2), except that:

18 (i) No conveyance used by any person as a common
19 carrier in the transaction of business as a common carrier
20 shall be forfeited under this section unless it appears that
21 the person owning such conveyance is a consenting party or
22 privy to a violation of this chapter;

23 (ii) No conveyance shall be forfeited under the
24 provisions of this act if the person owning such conveyance
25 establishes that he neither knew, nor had reason to know,
26 that such conveyance was being employed or was likely to
27 be employed in a violation of this chapter; and

28 (iii) No bona fide security interest or other valid lien in
29 any conveyance shall be forfeited under the provisions of
30 this article, unless the state proves by a preponderance of
31 the evidence that the holder of such security interest or lien
32 either knew, or had reason to know, that such conveyance
33 was being used or was likely to be used in a violation of this
34 chapter.

35 (5) All books, records, research products and materials,
36 including formulas, microfilm, tapes and data which are
37 used, or have been used, or are intended for use, in violation
38 of this chapter;

39 (6) All moneys, negotiable instruments, securities or
40 other things of value furnished or intended to be furnished
41 in violation of this chapter by any person in exchange for a
42 controlled substance, all proceeds traceable to such an
43 exchange, and all moneys, negotiable instruments and
44 securities used, or which have been used, or which are
45 intended to be used to facilitate any violation of this
46 chapter: *Provided*, That no property may be forfeited under
47 this paragraph, to the extent of the interest of an owner, by
48 reason of any act or omission established by that owner to
49 have been committed or omitted without his knowledge or
50 consent;

51 (7) All real property, including any right, title and
52 interest in any lot or tract of land, and any appurtenances or
53 improvements, which are used, or have been used, or are
54 intended to be used, in any manner or part, to commit, or to
55 facilitate the commission of a violation of this chapter
56 punishable by more than one year imprisonment: *Provided*,
57 That no property may be forfeited under this paragraph, to

58 the extent of an interest of an owner, by reason of any act or
59 omission established by that owner to have been committed
60 or omitted without his knowledge or consent.

61 The requirements of this subsection pertaining to the
62 removal of seized property are not mandatory in the case of
63 real property and the appurtenances thereto.

64 (b) Property subject to forfeiture under this article may
65 be seized by any person granted enforcement powers in
66 section five hundred one, article five of this chapter
67 (hereinafter referred to as the “appropriate person” in this
68 article).

69 (c) Controlled substances listed in article two of this
70 chapter which are manufactured, possessed, transferred,
71 sold or offered for sale in violation of this chapter are
72 contraband and shall be seized and summarily forfeited to
73 the state. Controlled substances which are seized or come
74 into the possession of the state, the owners of which are
75 unknown, are contraband and shall be summarily forfeited
76 to the state upon the seizure thereof.

77 (d) Species of plants from which controlled substances
78 may be derived which have been planted or cultivated in
79 violation of the provisions of this chapter, or of which the
80 owners or cultivators are unknown, or which are wild
81 growths, may be seized and summarily forfeited to the state
82 upon the seizure thereof.

83 (e) The failure, upon demand by the appropriate person,
84 or his authorized agent, of the person in occupancy or in
85 control of land or premises upon which the species of plants
86 are growing or being stored, to produce an appropriate
87 registration, or proof that he is the holder thereof,
88 constitutes authority for the seizure and forfeiture of the
89 plants.

90 (f) Notwithstanding any provision of this article to the
91 contrary, controlled substances listed in article two of this
92 chapter and species of plants from which controlled
93 substances may be derived shall either be destroyed or used
94 only for investigative or prosecutorial purposes.

95 (g) Notwithstanding any other provisions of this article
96 to the contrary, any items of real property or any items of
97 tangible personal property sold to a bona fide purchaser
98 will not be subject to forfeiture unless the state establishes
99 by clear and convincing proof that such bona fide purchaser

100 knew or should have known that such property had in the
101 previous three years next preceding such sale been used in
102 violation of this chapter or that such property is a
103 controlled substance.

§60A-7-704. Procedures for seizure of forfeitable property.

1 (a) Seizure of property made subject to forfeiture by the
2 provisions of this article may be made upon process issued
3 by any court of record having jurisdiction over the property.

4 (b) Notwithstanding the provisions of subsection (a) of
5 this section, seizure of property subject to forfeiture by the
6 provisions of this article may be made without process if:

7 (1) The seizure is incident to a lawful arrest or pursuant
8 to a search under a search warrant or an inspection
9 warrant;

10 (2) The property subject to seizure has been the subject
11 of a prior judgment in favor of the state in a forfeiture
12 proceeding based upon this article;

13 (3) The appropriate person has probable cause to
14 believe that the property is directly or indirectly dangerous
15 to health or safety; or

16 (4) The appropriate person has probable cause to
17 believe that the property was used or intended for use in
18 violation of this chapter.

19 (c) In the event of seizure pursuant to subsection (b) of
20 this section, forfeiture proceedings shall be instituted
21 within ninety days of the seizure thereof.

22 (d) Property taken or detained under this section shall
23 not be subject to replevin, but is deemed to be in the custody
24 of the appropriate person, subject only to the orders and
25 decrees of the court having jurisdiction over the forfeiture
26 proceedings. When property is seized under this article, the
27 appropriate person may:

28 (1) Place the property under seal;

29 (2) Remove the property to a place designated by him; or

30 (3) Require the appropriate law-enforcement agency to
31 take custody of the property and remove it to an
32 appropriate location for disposition in accordance with
33 law.

34 The requirements of this subsection pertaining to the
35 removal of seized property are not mandatory in the case of
36 real property and appurtenances thereto.

§60A-7-705. Procedures for forfeiture.

- 1 (a) (1) Any proceeding wherein the state seeks
2 forfeiture of property subject to forfeiture under this article
3 shall be a civil proceeding. A petition for forfeiture may be
4 filed on behalf of the state and any law-enforcement agency
5 making a seizure under this article by the prosecuting
6 attorney of a county, or duly appointed special prosecutor.
- 7 (2) A petition for forfeiture may be filed and
8 proceedings held thereon in the circuit court of the county
9 wherein the seizure was made, the real property subject to
10 forfeiture is situate, or the circuit court of the county
11 wherein any owner of the property subject to forfeiture may
12 reside.
- 13 (3) Any civil trial stemming from a petition for
14 forfeiture brought under this chapter at the demand of
15 either party shall be by jury.
- 16 (4) A petition for forfeiture of the seized property shall
17 be filed within ninety days after the seizure of the property
18 in question. The petition shall be verified by oath or
19 affirmation of a law-enforcement officer representing the
20 law-enforcement agency responsible for the seizure or the
21 prosecuting attorney and shall contain the following:
 - 22 (i) A description of the property seized;
 - 23 (ii) A statement as to who is responsible for the seizure;
 - 24 (iii) A statement of the time and place of seizure;
 - 25 (iv) The identity of the owner or owners of the property,
26 if known;
 - 27 (v) The identity of the person or persons in possession of
28 the property at the time seized, if known;
 - 29 (vi) A statement of facts upon which probable cause for
30 belief that the seized property is subject to forfeiture
31 pursuant to the provisions of this article is based;
 - 32 (vii) The identity of all persons or corporations having a
33 perfected security interest or lien in the subject property, as
34 well as the identity of all persons or corporations known to
35 the affiant who may be holding a possessory or statutory
36 lien against such property.
 - 37 (viii) A prayer for an order directing forfeiture of the
38 seized property to the state, and vesting ownership of such
39 property in the state.
- 40 (b) At the time of filing or as soon as practicable
41 thereafter, a copy of the petition for forfeiture shall be

42 served upon the owner or owners of the seized property, as
43 well as all holders of a perfected security interest or lien or
44 of a possessory or statutory lien in the same class, if known.
45 Should diligent efforts fail to disclose the lawful owner or
46 owners of the seized property, a copy of the petition for
47 forfeiture shall be served upon any person who was in
48 possession or alleged to be in possession of the property at
49 the time of seizure, where such person's identity is known.
50 The above service shall be made pursuant to the provisions
51 of the West Virginia Rules of Civil Procedure. Any copy of
52 the petition for forfeiture so served shall include a notice
53 substantially as follows:

54 "To any claimant to the within described property: You
55 have the right to file an answer to this petition setting forth
56 your title in, and right to possession of, the property within
57 thirty days from the service hereof. If you fail to file an
58 answer, a final order forfeiting the property to the state will
59 be entered, and such order is not subject to appeal."

60 If no owner or possessors, lien holders or holders of a
61 security interest be found, then such service may be by Class
62 II legal publication in accordance with the provisions of
63 article three, chapter fifty-nine of this code and the
64 publication area shall be the county wherein such property
65 was located at the time of seizure and the county wherein
66 the petition for forfeiture is filed.

67 (c) In addition to the requirements of subsections (b)
68 above, the prosecuting attorney or law-enforcement officer
69 upon whose oath or affirmation the petition for forfeiture is
70 based, shall be responsible for the publication of a further
71 notice. Such further notice that a petition for forfeiture has
72 been filed shall be published by Class II legal advertisement
73 in accordance with article three, chapter fifty-nine of this
74 code. The publication area shall be the county wherein the
75 property was seized and the county wherein the petition for
76 forfeiture is filed. The notice shall advise any claimant to
77 the property of their right to file a claim on or before the
78 date set forth in the notice, which date shall not be less than
79 thirty days from the date of the first publication. The notice
80 shall specify that any claim must clearly state the identity of
81 the claimant and an address where legal process can be
82 served upon that person. In addition such notice shall
83 contain the following information:

84 (1) A description of the property seized;
85 (2) A statement as to who is responsible for the seizure;
86 (3) A statement of the time and place of seizure;
87 (4) The identity of the owner or owners of the property,
88 if known;

89 (5) The identity of the person or persons in possession of
90 the property at the time of seizure, if known.

91 (6) A statement that prayer for an order directing
92 forfeiture of the seized property to the state, and vesting
93 ownership of such property in the state shall be requested of
94 the court.

95 (d) If no answer or claim is filed within thirty days of the
96 date of service of the petition pursuant to subsection (b) of
97 this section, or within thirty days of the first publication
98 pursuant to subsection (b) of this section, the court shall
99 enter an order forfeiting the seized property to the state. If
100 any claim to the seized property is timely filed, a time and
101 place shall be set for a hearing upon such claim. The
102 claimant or claimants shall be given notice of such hearing
103 not less than ten days prior to the date set for the hearing.

104 (e) At the hearing upon the claim or claims, the state
105 shall have the burden of proving by a preponderance of the
106 evidence that the seized property is subject to forfeiture
107 pursuant to the provisions of this chapter.

108 (f) Any order forfeiting property to the state and entered
109 pursuant to this section perfects the state's right, title and
110 interest in the forfeited property and relates back to the
111 date of seizure: *Provided*, That in any proceeding under this
112 article the circuit court shall in its final order make specific
113 findings with respect to whether or not probable cause to
114 seize such property existed at the time of such seizure.

115 (g) During the pendency of a forfeiture proceeding, it is
116 unlawful for any property owner or holder of a bona fide
117 security interest or other valid lien holder to transfer or
118 attempt to transfer any ownership interest or security
119 interest in seized property with the intent to defeat the
120 purpose of this article, and the court wherein the petition
121 for forfeiture is filed may enjoin a property owner or holder
122 of a security interest or other lien holder from making such
123 a transfer should one come to its attention. Any such
124 transfer which is made in violation of the provisions of this
125 subsection shall have no effect upon an order of the court

126 forfeiting seized property to the state if a notice of lis
127 pendens is filed prior to the recording of the instrument of
128 transfer.

129 (h) The court may void any transfer of property made
130 before or after a forfeiture proceeding has been
131 commenced, which is subject to forfeiture, if the transfer
132 was not to a bona fide purchaser without notice for value.

133 (i) An appeal of a decision of the circuit court
134 concerning a forfeiture proceeding brought pursuant to this
135 chapter must be filed within one hundred twenty days of the
136 date of entry of the final appealable order. The appellant
137 shall be required to give notice of intent to appeal within
138 thirty days of the entry of such appealable order.

**§60A-7-706. Disposition of forfeited moneys, securities or
other negotiable instruments; distribution of
proceeds.**

1 (a) Whenever moneys, securities or other negotiable
2 instruments are forfeited under the provisions of this
3 article, such proceeds shall be distributed as follows:

4 (1) Ten percent of such proceeds shall be tendered to the
5 office of the prosecuting attorney which initiated the
6 forfeiture proceeding;

7 (2) The balance shall be deposited in a special law-
8 enforcement investigation fund. Such fund shall be
9 administered by the chief of the law-enforcement agency
10 that seized the forfeited property.

11 (b) No funds shall be expended from the special law-
12 enforcement investigation fund except as follows:

13 (1) In the case of the funds belonging to the department
14 of public safety, such funds shall only be expended at the
15 direction of the superintendent of such department and in
16 accordance with the provisions of section fifteen, article
17 two, chapter five-a of this code and the provisions of
18 subsection (j), section two, article two, chapter twelve of
19 said code;

20 (2) In the case of funds belonging to the office of either
21 the sheriff or prosecuting attorney of any county in which
22 such special fund has been created, the funds therein may
23 only be expended in the manner provided in sections four
24 and five, article five, chapter seven of this code; and

25 (3) In the case of funds belonging to the police

26 department of any municipality in which such special fund
27 has been created, the funds therein may only be expended in
28 the manner provided in section twenty-two, article
29 thirteen, chapter eight of said code.

**§60A-7-707. Disposition of other forfeited property;
distribution of proceeds.**

1 (a) When property other than that referred to in section
2 seven hundred six of this article is forfeited under this
3 article, the circuit court ordering such forfeiture, upon
4 application by the prosecuting attorney or the chief of the
5 law-enforcement agency that seized said forfeited
6 property, may direct that:

7 (1) Title to the forfeited property be vested in the law-
8 enforcement agency so petitioning; or

9 (2) The law-enforcement agency responsible for the
10 seizure retain the property for official use; or

11 (3) The forfeited property shall be offered at public
12 auction to the highest bidder for cash. Notice of such public
13 auction shall be published as a Class III legal advertisement
14 in accordance with article three, chapter fifty-nine of this
15 code. The publication area shall be the county where the
16 public auction will be held.

17 (b) When a law-enforcement agency receives property
18 pursuant to this section, the court may, upon request of the
19 prosecuting attorney instituting the forfeiture proceeding,
20 require the law-enforcement agency to pay unto the office
21 of said prosecuting attorney, a sum not to exceed ten
22 percent of the value of the property received to compensate
23 said office for actual costs and expenses incurred.

24 (c) The proceeds of every public sale conducted
25 pursuant to this section shall be paid and applied as
26 follows: First, to the balance due on any security interest
27 preserved by the court; second, to the costs incurred in the
28 storage, maintenance and security of the property; third, to
29 the costs incurred in selling the property.

30 (d) Any proceeds of a public sale remaining after
31 distribution pursuant to subsection (c) of this section shall
32 be distributed as follows:

33 (1) Ten percent of such proceeds shall be tendered to the
34 office of the prosecuting attorney who initiated the
35 forfeiture proceeding.

36 (2) The balance shall be deposited in a special law-
37 enforcement investigation fund. Such fund shall be
38 administered by the chief of the law-enforcement agency
39 that seized the forfeited property sold and shall take the
40 form of an interest bearing account with any interest earned
41 to be compounded to the fund. Any funds deposited in the
42 special law-enforcement investigative fund pursuant to
43 this article shall be expended only to defray the costs of
44 protracted or complex investigations, to provide additional
45 technical equipment or expertise, to provide matching
46 funds to obtain federal grants or for such other law-
47 enforcement purposes as the chief of the law-enforcement
48 agency may deem appropriate; however, these funds may
49 not be utilized for regular operating needs.

50 (e) If more than one law-enforcement agency was
51 substantially involved in effecting the seizure and
52 forfeiture of property, the court wherein the petition for
53 forfeiture was filed shall equitably distribute the forfeited
54 property among the law-enforcement agencies. In the event
55 of a public sale of such property pursuant to subsection (a)
56 of this section, the court shall equitably distribute any
57 proceeds remaining after distribution pursuant to
58 subsections (c) and (d)(1) of this section among such law-
59 enforcement agencies for deposit into their individual
60 special law-enforcement investigative fund. Equitable
61 distribution shall be based upon the overall contribution of
62 the individual law-enforcement agency to the investigation
63 which led to the seizure.

64 (f) Upon the sale of any forfeited property for which
65 title or registration is required by law, the state shall issue a
66 title or registration certificate to any bona fide purchaser at
67 a public sale of such property conducted pursuant to
68 subsection (a) of this section. Upon the request of the law-
69 enforcement agency receiving, pursuant to the order of the
70 court, or electing to retain, pursuant to subsection (a) of this
71 section, any forfeited property for which title or
72 registration is required by law, the state shall issue a title or
73 registration certificate to the appropriate governmental
74 body.

75 (g) Any funds expended pursuant to the provisions of
76 this section, shall only be expended in the manner provided
77 in subsection (b), section seven hundred five of this article.

78 (h) Every prosecuting attorney or law-enforcement
79 agency receiving forfeited property or proceeds from the
80 sale of forfeited property pursuant to this article shall
81 submit an annual report to the body which has budgetary
82 authority over such agency. Such report shall specify the
83 type and approximate value of all forfeited property and
84 the amount of proceeds from the sale of forfeited property
85 received in the preceding year. No county or municipality
86 may use anticipated receipts of forfeited property in their
87 budgetary process.

88 (i) In lieu of the sale of any forfeited property subject to
89 a bona fide security interest preserved by an order of the
90 court, the law-enforcement agency receiving the forfeited
91 property may pay the balance due on any security interest
92 preserved by the court from funds budgeted to the office or
93 department or from the special fund and retain possession
94 of the forfeited property for official use pursuant to
95 subsection (a) of this section.

96 (j) In every case where property is forfeited, disposition
97 of the forfeited property, in accordance with this article,
98 shall be made within six months of the date upon which the
99 court of jurisdiction orders such forfeiture. Should the
100 office or agency receiving the property fail either to place
101 the property in official use or dispose of the property in
102 accordance with law, the court of jurisdiction shall cause
103 disposition of the property to be made with any proceeds
104 therefrom to be awarded to the state.

105 (k) No such disposition shall occur until all applicable
106 periods for filing a notice of intent to appeal has expired
107 and no party in interest shall have filed such notice. The
108 filing of such notice of intent to appeal shall stay any such
109 disposition until the appeal has been finally adjudicated or
110 until the appeal period of one hundred eighty days has
111 expired without an appeal having actually been taken or
112 filed, unless a valid extension of such appeal has been
113 granted by the circuit court under the provisions of section
114 seven, article four, chapter fifty-eight of this code.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Sam O. Williams
.....
Chairman Senate Committee

Bernard V. Kelly
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

John C. Miller
.....
Clerk of the Senate

Donald D. Kopp
.....
Clerk of the House of Delegates

Don Torbert
.....
President of the Senate

John A. Chaberski
.....
Speaker House of Delegates

The within *approved* this the *30th*
March
day of 1988.

Andrew J. ...
.....
Governor

PRESENTED TO THE

GOVERNOR

Date

3/18/88

Time

4:30 p.m.

*3/23/88 Returned per
request of Senate Clerk
Dodd Miller
A.T.*

SECOND RECEIPT
PRESENTED TO THE

GOVERNOR

Date

3/23/88

Time

3:55 p.m.

RECEIVED

1988 APR -5 AM 8 49

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE