Asset Forfeitures

and the Application of

Ohio Revised Code Title 2981

John D. Ferrero
Stark County Prosecuting Attorney

Presented by: Gerard T. Yost
Assistant Prosecuting Attorney
Civil Division – Asset Forfeitures
(330) 451-7856
E-mail GTYost@co.stark.oh.us

Purpose governing Forfeiture

- Provide economic disincentives and remedies to deter and offset the economic effect of offenses
- Ensure proportionality of forfeitures
- Protect innocent 3rd parties
- Prioritize restitution for victims

Property subject to Forfeiture *

- Contraband involved in an offense
- Proceeds of the crime
  - Money derived directly from the offense
  - Items purchased with the money earned illegally

- Instrumentality of the Crime
  - Used or intended to be used in the commission or facilitation of an offense if:
    - Felony offense
    - Misdemeanor with forfeiture specifically authorized
    - An attempt to commit a felony
    - And:
      - Offense could not have been committed without the item
      - Primary use of the item was to commit the offense
      - Extent the item furthered the commission of the offense

Abandoned Property

- Property collected as evidence
- Found property
- Seized items for forfeiture but not filed because of timing or amount too small

- Can lump numerous small cases together
- Must give notice to owner and allow them to pick up item (use reasonable efforts to notify them by certified mail)
- Publish notice in newspaper

Special Remedies – 2981.03

- Court may, upon application of State, issue an order taking any reasonable action necessary to preserve the reachability of the property
  - Restraining orders
  - Injunctions
  - Requiring a bond posting
  - Insurance policy
  - Inspection(s)
  - Order placement of a lien against the property
  - Appointment of receiver or trustee

Seizure and notification

- Law Enforcement officer may seize property with "Probable Cause" to believe it is subject to forfeiture.
- If property is titled or registered:
  - Shall give Certified mail notice at "Last known address" as soon as practical after seizure.
  - May also give notice orally or by any means including telephone
  - If unable to notify after reasonable good faith efforts, those documented efforts will constitute fulfillment of the notice requirement

Timing

- If property is seized and no criminal forfeiture is filed the county prosecutor where the seizure occurred shall commence a civil forfeiture
  - Within 30 days for Mobile instrumentality and personal, business, or governmental records
  - Within 60 days for all other items
  - Time may be extended by agreement of the parties
  - Time may be extended by the court for good cause

Automatic Stay

- The filing of a charging instrument for an offense that is also the basis of a civil forfeiture action shall stay the civil action
  - This is new – under the old law a stay was granted if requested by the prosecutor

Underlying Criminal Offense

- A civil action for forfeiture may be commenced regardless of whether the offender has:
  - Pleaded Guilty to the underlying offense
  - Been convicted of the underlying offense

Advantages in Civil Forfeiture

- Can utilize the civil discovery process to discover assets that may have been missed and include them
- Use civil discovery to gain evidence – interrogatories, depositions, admissions etc. are all good tools and a lot of times not understood by the claimants and even their attorneys that are more familiar with criminal cases
- The approach to the claimant's 5th amendment privilege is different and proves to be an advantage (negative presumption if used)

- Can call the defendant himself to the witness stand and question him
- Can introduce prior convictions and criminal history in the hearing
- Can use remedies available under the Civil rules:
  - Default Judgment
  - Summary Judgment

Diminishing or interfering with forfeitable property 2981.07

- It is a separate criminal offense to destroy, damage, remove, or transfer property subject to forfeiture
- It is also an offense to take action regarding property subject to forfeiture to:
  - Prevent the State's seizure of the property
  - Prevent the Court's jurisdiction over the property
  - Devalue the property (place liens on it)

Penalties

- Based on value of the forfeitable property similar to a theft offense:
  - Under $500 – M1
  - $500 to $4999 – F5
  - $5000 to $99,999 – F4
  - $100,000 or more - F3

Forfeiture assets

$$ Cash $$

- Do we have enough evidence to seize?
- Do we have enough evidence to forfeit?
  - We must prove cash is proceeds so if he gives an explanation for the cash we will have to prove otherwise
  - We need more than cash and drugs on the individual at the time of arrest!
    - This is the beginning of your forfeiture case not the end of it.

Evidence to assist the forfeiture

- Test money for drug traces
- Get statements from individuals (Miranda may apply so be aware)
- Document any unsolicited statements (Miranda certainly doesn't apply to these)
- Include observations in reports (such as you witnessed a hand to hand transaction prior to contact)

- Document "Buy Money" in the cash
- Detail how and where the cash was received (was it in wallet or money clip or stuffed in shoe or crotch)
- Document if drugs and money found together (in the same can, box or crown royal bag)
- Document the denominations - they may matter (all large bills, all $20's, etc.)
- Prior record and prior forfeitures are also important considerations

Vehicles

- Proceeds or instrumentality (or both)
- Proceeds – evidence is the same as cash
- Instrumentality:
  - Could Defendant have committed the offense without the vehicle
  - Was the primary use of the vehicle to commit the offense
  - To what extent did the vehicle further the commission of the offense

Innocent Owner

- A true Innocent owner has a defense to forfeiture
- Determine if a true innocent owner or merely a straw title holder to insulate the defendant from forfeiture
  - Interview registered owner ASAP (even by phone) before defendant has the time to organize a story
  - Check title history to learn when they took "ownership" and what they paid for the vehicle (was it a gift or less than value transfer)

Real Property

- Instrumentality (grow or storage facility)
- Proceeds (paid for with drug money)
  - Proportionality test applies to instrumentality but not proceeds
  - May have an argument for both

Personal property

- Should you seize the 52" plasma TV
- Should you seize the 13" color TV
- Should you seize the slate pool table
- Should you seize the leather living room suite
- Should you seize the video game system
- Should you seize the power tools
- Should you seize the diamond rings

Considerations

- Can you move it – is it worth trying
- Can you store it
- Can you safe guard it
- Are you likely to damage it by moving or storing it
- What is its true value
- Can you insure it won't get lost

Documentation

Reports

- Copy reports and narrative supplements for all seizure cases (Do narrative reports if a seizure has occurred)
- Seizure files should be maintained with the information for forfeiture case preparation
- Include in your narrative:
  - Nature of property to the offense
  - Location of the property at seizure
  - Condition of the property at seizure
  - Statements of Defendant and others involved
  - Conditions of arrest or warrant execution

Investigative Planning

Stop and arrest seizures

- No particular planning involved but be alert and observant
- Question defendant's employment or source for the item
- Test cash for drug traces
- Check ownership of assets
- Interview (even by phone) alleged innocent owners
  - Opens the door for falsification if we can prove they are fronting for the defendant to avoid forfeiture

Long term investigations

- Continue the investigation under the same case number or have an easy way to cross reference to ease compiling the evidence for a pattern or course of conduct
- Maintain consistence of investigators
  - Although not always possible or practical – it is best when one officer or unit follows a case through

Forfeiture Investigations

Vs.

Criminal case Investigations

- Forfeiture usually focuses on pattern, life style or big picture
- Criminal case usually focuses on the point in time of the particular crime

Nature or conduct of the Defendant

- Is the defendant making a living from the activity or supplementing a legitimate income or business
- Is the obvious asset(s) the proceeds or should we dig further to discover other assets
- How big is our fish?
  - Street dealer or supplier or major player

Nature of the underlying offense

- Is this a possession or a trafficking case
- Are the assets truly proceeds or instrumentality
  - Possession of drugs and money at the same time is not enough – look further

Investigation considerations

- Be alert and aware of possible forfeitures with all arrests – especially drug arrests
- Follow the money – asset tracing is very important to forfeiture cases
- Background information is important
  - Employment history
  - Family history (finances)
  - Potential for assets to be gifts
  - Inheritance
  - Criminal history (especially crimes that might be income generating

Preliminary information

- Begin financial profile at the beginning of the criminal investigation to determine what you are dealing with
  - Unexplained standard of living
  - Lots of home improvements (may be money laundering at Home Depot)
  - Frequent vacations (most legitimate jobs and businesses don't afford this)
  - Assets frequently listed in other people's name

- Even in stop and arrest cases a preliminary investigation is essential
  - Explanation for the asset in his possession
  - Employment
  - Ownership of the item (Who owns the car and talk to them)

Search Warrants

- Application should always include:
  - Financial records
  - Bank records
  - Asset ownership records
  - Evidence of money laundering
  - Business records
    - Remember it is always easier to obtain financial information and records from the defendant himself than it is to shoot in the dark to locate the information

Other sources of financial information

- Subpoenas – once a case is open
- Civil discovery process – once case is open
- Mail covers – who is suspect getting mail from – who is sending bank statements
- Grand Jury
  - Requires a strict policy and compliance with the policy – no fishing expeditions

Cautions

- Don't lose sight of the criminal investigation
- Primary focus is to stop criminal activity not generating revenue
- Careful not to appear to be "selling" criminal plea bargains
- Adhere to forfeiture policy to avoid appearance of haphazard approach
- Recognize real "innocent owners"

Networking and cooperation

- Multi-jurisdictional pacts are helpful when property is in multiple locations
- Agency cooperation is essential within a county or geographic area as big cases frequently cross jurisdictional lines
- Equitable sharing agreements with federal agencies
  - Frequently local jurisdictions can pick up asset forfeitures that don't meet the federal threshold to forfeit