OPINION NO. 84-075

Syllabus:

Absent a conflicting provision of a charter county, if a sheriff or prosecuting attorney finds that the exercise of his duty to keep moneys which have been acquired in connection with law enforcement and may be needed as evidence in a criminal trial may be performed most effectively if he deposits such moneys with a bank, trust

company, or building and loan association in an arrangement which assures that the evidence will not be tampered with and that the chain of evidence will not be disturbed, he may so deposit the moneys, subject to the requirements of R.C. 131.11, and interest earned on such moneys shall, pursuant to R.C. 2933.41(E), be placed in the general fund of the county.

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 18, 1984

I have before me your request for an opinion on the question whether a county may invest moneys seized as evidence in a criminal trial so long as the chain of evidence is not broken. You have also asked whether, if the county may invest such moneys, the county must pay the interest earned on such moneys to the party who is entitled to receive the moneys following the trial.

It is my understanding that your questions relate to circumstances in which county officials, in the course of enforcing laws relating to gambling or illegal substances, acquire quantities of money which are expected to be needed as evidence in criminal prosecutions. In current practice, the money is inventoried and placed in a vault in the office of the sheriff or the prosecuting attorney. You have informed me, however, that a local bank[1] has indicated a willingness to accept the money in sealed containers and to treat the money as part of its reserves, thereby enabling the county to realize interest on the funds without interrupting the chain of evidence. Assuming for the purposes of this opinion that the bank (or other institution involved) has resolved any federal or state banking issues with respect to its activity in the proposed arrangement, I will direct this opinion to your concerns as to the ability of the sheriff or prosecuting attorney to invest the funds and realize a gain on that investment.

I am aware of no rule or statute which expressly addresses the issues that you have raised. There are, however, provisions which relate to the care of property acquired in connection with law enforcement. R. Crim. P. 41(D), which governs the issuance of search warrants, states, in part: "Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant."[2] A sheriff or deputy sheriff is a law enforcement officer for purposes of the Rules of Criminal Procedure, R. Crim. P. 2, and the office of the sheriff is evidently a law enforcement agency for purposes of R. Crim. P. 41. See R. Crim. P. 41(C) (search warrant shall be directed to law enforcement officer). It has, further, been stated that "[t]he duties and obligations of a sheriff with respect to property taken [in a gambling raid] are substantially the same whether or not a warrant of search and seizure had been procured prior thereto. . . ." State v. Jacobs, 137 Ohio St. 363, 364-65, 30 N.E.2d 432, 433 (1940).

R.C. 2933.41, which deals generally with property held by a law enforcement agency under a variety of circumstances, states, in part:

(A) Property that has been lost, abandoned, stolen or lawfully

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1 See note 3, infra.

2 R.C. 2933.26 states: "When a warrant is executed by the seizure of property or things described therein, such property or things shall be kept by the judge, clerk, or magistrate to be used as evidence." R.C. 2933.27 provides: "If, upon examination, the judge or magistrate is satisfied that the offense charged with reference to things seized under a search warrant has been committed, he shall keep such things or deliver them to the sheriff of the county, to be kept until the accused is tried or the claimant's right is otherwise ascertained." Pursuant to Ohio Const. art. IV, §5(B), to the extent that any provision of the Rules of Criminal Procedure conflicts with a statutory provision, the provision of the rules prevails.

seized or forfeited, and that is in the custody of a law enforcement agency, shall be safely kept pending the time it is no longer needed as evidence, and shall be disposed of pursuant to this section.

(B) The law enforcement agency shall make a reasonable effort to locate the persons entitled to possession of property in its custody, and to notify them when and where it may be claimed. . . .

(C) A person loses any right he may have to possession of property:

(1) That was the subject, or was used in a conspiracy or attempt to commit, or in the commission, of an offense other than a traffic offense, and such person is a conspirator, accomplice, or offender with respect to the offense;

(2) When, in light of the nature of the property or the circumstances of such person, it is unlawful for him to acquire or possess it.

(D) Unclaimed and forfeited property in the custody of a law enforcement agency, shall be disposed of on application to and order of any court of record that has territorial jurisdiction over the political subdivision in which the law enforcement agency has jurisdiction to engage in law enforcement activities, as follows:

(1) Drugs shall be destroyed, or shall be placed in the custody of the secretary of the treasury of the United States for disposal or used for medical or scientific purposes under applicable federal law.

(2) Firearms and dangerous ordnance suitable for police work may be given to a law enforcement agency for that purpose. Firearms suitable for sporting use, or as museum pieces or collectors' items, may be sold at public auction pursuant to division (D)(6) of this section. Other firearms and dangerous ordnance shall be destroyed.

(3) Obscene materials shall be destroyed;

(4) Beer, intoxicating liquor, or alcohol seized from a person who is not the holder of a permit issued under Chapters 4301. and 4303. of the Revised Code or is an offender, and forfeited to the state under section 4301.45 and 4301.53 of the Revised Code shall be sold by the department of liquor control, if the department determines that the beer, intoxicating liquor, or alcohol is fit for sale. If any tax imposed under Title XLIII [43] of the Revised Code has not been paid in relation to the beer, intoxicating liquor, or alcohol, the proceeds of the sale shall first be used to pay the tax. All money collected under division (A)(4) of this section shall be paid to the state treasury. Any such beer, intoxicating liquor or alcohol that the department determines to be unfit for sale shall be destroyed.

(5) Money received by an inmate of a correctional institution from an unauthorized source or in an unauthorized manner shall be returned to the sender, if known, or deposited in the inmates' industrial and entertainment fund if the sender is not known.

(6) Other unclaimed or forfeited property may be sold at public auction, or disposed of as the court considers proper in the circumstances.

(E) The proceeds from property disposed of pursuant to this section shall be placed in the general fund of the state, the county, the township, or the municipal corporation, of which the law enforcement agency involved is an agency.

(F) This section does not apply to the collection, storage, or disposal of abandoned junk motor vehicles. This section shall not be construed to rescind or restrict the authority of a municipal law enforcement agency to keep and dispose of lost, abandoned, stolen, seized, or forfeited property under an ordinance of the municipal corporation.

(G) For purposes of this section, "law enforcement agency" includes correctional institutions. (Emphasis added.)

A sheriff or deputy sheriff and a prosecuting attorney or assistant prosecuting attorney are law enforcement officers for purposes of the Revised Code, R.C.

2901.01(K), and the office of the sheriff or prosecuting attorney may, therefore, be considered a law enforcement agency for purposes of R.C. 2933.41.

Pursuant to R. Crim. P. 41(D) and R.C. 2933.41, a sheriff who holds property which has been lawfully seized, whether or not pursuant to a search warrant, is charged with the safekeeping of that property. R. Crim. P. 41(D) provides that property seized under a warrant "shall be kept" by the law enforcement agency, and R.C. 2933.41(A) provides that property which has been lawfully seized and is in the custody of a law enforcement agency "shall be safely kept" until it is no longer needed. Similarly, when a prosecuting attorney holds property under R.C. 2933.41(A), that property is to be "safely kept" until it is no longer needed. While these provisions make a sheriff or prosecuting attorney responsible for property which may be needed as evidence and is in his custody, I do not believe that they require that the sheriff or prosecuting attorney himself retain actual physical control of the property, as long as he assures that it is being safely held. See generally Black's Law Dictionary 780 (5th ed. 1979) (defining "keep" as "[t] o take care of and to preserve from danger, harm or loss"). Use of the passive voice in both R. Crim. P. 41(D) and R.C. 2933.41(A) indicates that the emphasis is on the safe retention of the property, rather than upon the person who holds it. State v. Lytle, 48 Ohio St. 2d 391, 358 N.E. 2d 623 (1976), vacated, in part, on other grounds, 438 U.S. 910 (1978), supports the view that the focus of R. Crim. P. 41(D) is upon the protection of the property seized rather than upon the person who holds the property. In State v. Lytle, the Ohio Supreme Court stated that the last sentence of R. Crim. P. 41(D), the portion which is applicable here, "was intended to insure that the property seized under a warrant is not destroyed or otherwise misused." 48 Ohio St. 2d at 400, 358 N.E.2d at 629. The court rejected an argument that a gun was improperly obtained where authorities of one county transferred it to authorities of another county to use as evidence in the prosecution for murder, rather than keeping it, and stated: "we feel that both policy and practical considerations militate against such an interpretation." Id. See generally State v. Johnson, 112 Ohio App. 124, 137, 165 N.E.2d 814, 824 (Cuyahoga County 1960) (R.C. 2933.26 (quoted in note 2, supra) does not affect competency of items seized as evidence but "merely purports to provide for the preservation of the evidence until trial").

It is firmly established in Ohio, that, in addition to the powers expressly given by statute, a public official has, by implication, such additional powers as are necessary for the due and efficient exercise of the expressly granted powers. State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph 4) ("[w] here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"). It has, further, been recognized by the Ohio Supreme Court that, where public funds or other trust funds come into the hands of a public official and the law makes no specific provision as to what is to be done with them, the official may deposit the funds in a reputable bank in accordance with prevailing custom in the business community. Busher v. Fulton, 128 Ohio St. 485, 191 N.E. 752 (1934). That a sheriff or prosecuting attorney may, at least in certain instances, deposit funds which are held or controlled by him is reflected in R.C. 131.11, which sets forth standards for security required when certain officials, including sheriffs and prosecuting attorneys, deposit funds in a bank, trust company, or building and loan association.[3] See generally 1965 Op. Att'y Gen. No. 190 (overruled in part by 1982 Op. Att'y Gen. No. 82-054) (R.C. 131.11 implies that the clerk of a municipal court may deposit moneys received under R.C. 1901.31(F)); 1961 Op. Att'y Gen. No. 2720, p.748 (overruled in part by 1982 Op. Att'y

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3 Your letter refers generally to the investment of moneys seized as evidence, but the facts presented to me relate specifically to deposit in a bank. Under R.C. 131.11, deposits by a sheriff or prosecuting attorney in a bank, trust company, or building and loan association receive similar treatment. I am therefore, discussing deposits in any of those institutions, but I am not considering whether other types of investments might also be permitted.

Gen. No. 82-054) (R.C. 131.11 implies that a clerk of a court of common pleas may deposit moneys which he holds by virtue of his office and which do not belong to the county).

I note that R.C. 2933.41(F) expressly states that R.C. 2933.41 does not restrict the authority of a municipal law enforcement agency to keep and dispose of lost, abandoned, stolen, seized, or forfeited property under an ordinance of the municipal corporation. Ohio Const. art. XVIII, §3 grants municipalities authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Pursuant to Ohio Const. art. X, §3, the people of a county may adopt a charter which provides the form of government of the county and determines which officers shall be elected and the manner of their election. Such a charter "shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law," and may provide for the exercise by a county of powers vested in municipalities. Like a municipality, a charter county which has municipal powers may, within constitutional limits, adopt provisions governing the keeping and disposal of property which supersede those of R.C. 2933.41.

The citizens of Summit County have, pursuant to Ohio Const. art. X, §3, adopted a charter. Section 1.01 of Article I of the Charter of the County of Summit provides that the county has concurrent exercise (with cities within the county) of all powers vested in municipalities by the Ohio Constitution or general law. This authority would seem to permit Summit County to modify the provisions of R.C. 2933.41. It is, however, my understanding that the county has not done so. Section 4.01 of Article IV of the Charter of the County of Summit states: "The. . .Prosecuting Attorney. . .and Sheriff of the County shall be elected and their salaries and duties shall continue to be determined in the manner provided by general law, and they shall also perform such other duties as may be provided by ordinance or resolution of the County Council." No other provision of the Charter addresses these matters. It appears, therefore, that with respect to the questions you have raised, the general law of the state is applicable within your county.[4]

In accordance with the foregoing, I conclude that, absent a conflicting provision of a charter county, if a sheriff or prosecuting attorney finds that the exercise of his duty to keep moneys which may be needed as evidence may be performed most effectively by depositing such moneys with a bank, trust company, or building and loan association in an arrangement which assures that the evidence will not be tampered with and that the chain of evidence will not be disturbed, he may so deposit the moneys, subject to the provisions of R.C. 131.11.

Your letter asks generally what duties and liabilities the county would assume in connection with a deposit of the sort you have described. It is, however, my understanding that your primary concern is with the disposition of interest earned upon the seized funds.

The disposition of property which was seized under a search warrant is governed by R.C. 2933.28, as follows:

> If the accused is discharged by the judge or magistrate the property or other things seized under a search warrant shall be returned to the person in whose possession they were found, unless

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[4] It appears, in fact, that the Summit County charter restricts the authority of the County Council to modify the duties of the sheriff or prosecuting attorney. Section 4.01 of Article IV of the charter states that the duties of the sheriff "shall continue to be determined in the manner provided by general law" and authorizes the County Council to provide, by ordinance or resolution, other duties to be performed by the sheriff or prosecuting attorney, in addition to those provided by general law. I am not attempting, in this opinion, to consider particular changes which might be made to the existing scheme.

> the possession of such articles is in itself an offense, in which case they shall be destroyed. If the accused is convicted the property shall be returned to its owner, unless the possession of such articles is in itself an offense, in which case they shall be destroyed.

R.C. 2933.29 provides for the seizure of certain money or property won in gaming or gambling for the payment of a judgment growing out of such violation. These provisions relate to the question of who is entitled to receive moneys which were seized in connection with law enforcement and are no longer needed as evidence. See generally Ryals v. Collins, 46 Ohio Misc. 25, 345 N.E.2d 658 (Shaker Heights Mun. Ct. 1975). They do not, however, address the question of what should be done with any interest which such moneys may have earned.

More generally, R.C. 2933.41, quoted above, governs the disposition of property held by a law enforcement agency when such property is no longer needed as evidence. Like R.C. 2933.28 and R.C. 2933.29, R.C. 2933.41 fails to expressly discuss the disposition of any interest which may have accrued to moneys that have been held as evidence. I am, further, unaware of any case, rule or other statute which addresses such an issue. For the reasons discussed below, it is, however, my judgment that such interest may be considered "proceeds from property disposed of pursuant to" R.C. 2933.41 and that, pursuant to R.C. 2933.41(E) and absent a conflicting provision of a municipality or charter county, such interest "shall be placed in the general fund of the state, the county, the township, or the municipal corporation, of which the law enforcement agency involved is an agency."

The reference in R.C. 2933.41 to "proceeds from property disposed of pursuant to this section" clearly includes moneys received when unclaimed or forfeited property is sold at public auction under R.C. 2933.41(D)(6). I believe, however, that it also includes any interest earned on property which is disposed of pursuant to R.C. 2933.41. The word "proceeds" is a general one, defined as "that which results or accrues," and may clearly include interest earned by an investment. The Random House Dictionary of the English Language 1147 (unabridged ed. 1973). Further, R.C. 2933.41(E) speaks of the "proceeds from property" (emphasis added), rather than the proceeds from disposal pursuant to R.C. 2933.41, thereby indicating that it relates to all moneys derived from any of the property covered by R.C. 2933.41, rather than only to moneys derived from sales under that section. I conclude, therefore, that the word "proceeds," as used in R.C. 2933.41(E), includes interest earned on property held by a sheriff or county prosecutor.

One concern raised by this interpretation is that interest may be earned by the property prior to the time at which disposal of the property is made pursuant to R.C. 2933.41. It is, however, clear that R.C. 2933.41(A) governs all property that has been lawfully acquired in connection with law enforcement and is in the custody of a law enforcement agency. All such property shall, pursuant to R.C. 2933.41(A), be safely kept until it is no longer needed as evidence and then be disposed of pursuant to R.C. 2933.41. It is, therefore, reasonable to consider all property which is kept under R.C. 2933.41(A) as property which will ultimately be disposed of pursuant to R.C. 2933.41 and, thus, to include interest earned on such property as proceeds under R.C. 2933.41(E), even though the interest may accrue before the disposal is made.[5]

In the situation which you have described, the sheriff or prosecuting attorney is responsible for keeping and disposing of the moneys which have been seized. No local provision addresses the disposition of interest. See R.C. 2933.41(F); note 4,

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[5] I note that, under R.C. 2933.41(D), court approval will be required for the disposal of any unclaimed or forfeited property; no such approval is needed for investment of the sort described in this opinion. Such a distinction results from the fact that the duty of safekeeping is lodged in the sheriff or county prosecutor. The court is responsible for ascertaining that the disposal of property is properly handled, once there is no longer a need for the property to be kept.

supra. Thus, the proceeds from such property—in this case, the interest earned—shall, pursuant to R.C. 2933.41(E), be placed in the general fund of the county. I note that this result is consistent with the provisions of R.C. 5705.10: "All revenue derived from a source other than the general property tax, for which the law does not prescribe use for a particular purpose, including interest earned on the principal of any special fund, regardless of the source or purpose of the principal, shall be paid into the general fund." See R.C. 309.08 (providing that prosecuting attorney shall "pay to the county treasurer all moneys belonging to the state or county which come into his possession"); R.C. 325.31 (providing that sheriff shall pay into the county treasury, to the credit of the general fund, all "fees, costs, penalties, percentages, allowances, and perquisites" collected by his office for official services); 1937 Op. Att'y Gen. No. 1106, vol. II, p. 1927 (coins found in slot machines which were seized by a sheriff constituted money coming into the hands of an officer in his official capacity and, as money from "other sources," were to be paid into the general fund of the county under G.C. 5625-10 [now R.C. 5705.10]).

You have asked whether the interest earned on seized funds which have been deposited should be paid to the party who is entitled to receive the funds when they are no longer needed as evidence. Such a result might be supported by a theory that the sheriff or prosecuting attorney holds the moneys in trust for the person who ultimately receives them, and that interest should follow the principal of the trust. Such a theory was reflected in R.C. 2919.02, which stated:

> It is not unlawful under section 2919.01 of the Revised Code [embezzlement provisions]. . .for a county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, or county recorder to deposit fees and trust funds coming into their custody as such officers, until such time as said officers are required to make payment of the official earnings of their offices into their respective fee funds under section 325.31 of the Revised Code, and until such time as the trust funds, held by them in their official capacities, may be paid to the person, firm, or corporation entitled to same, and any interest earned and paid upon said deposits shall be apportioned to, and become a part of, said fees or trust funds, and shall in no instance accrue to, and be received by, the official making said deposits, for his own use. (Emphasis added.)

See 1982 Op. Att'y Gen. No. 82-054; 1965 Op. No. 190 (overruled in part by 1982 Op. Att'y Gen. No. 82-054); 1961 Op. No. 2720 (overruled in part by 1982 Op. Att'y Gen. No. 82-054). R.C. 2919.02 was, however, repealed by 1971-1972 Ohio Laws 1866, Part II (Am. Sub. H.B. No. 511, eff. Jan. 1, 1974). I do not find, therefore, that such a theory is supported by existing law. Rather, current statutes governing the disposition of interest earned on funds deposited by public officials reflect the policy that interest earned on such funds does not follow the principal but is, instead, paid into the general fund of the appropriate subdivision. See R.C. 135.351 ("[e]xcept as provided in [R.C. 1545.22, relating to park districts], all interest earned on money included within the county treasury shall be credited to the general fund of the county"); R.C. 1901.31 (providing for payment of interest earned on moneys deposited by the clerk of a municipal court into the treasury of the municipal corporation or the county); R.C. 2335.25 (providing that interest received on moneys deposited by a clerk of a court of common pleas or a county court shall be paid into the treasury of the county); R.C. 5705.10 ("[a]ll revenue derived from a source other than the general property tax, for which the law does not prescribe use for a particular purpose, including interest earned on the principal of any special fund, regardless of the source or purpose of the principal, shall be paid into the general fund"). See generally Op. No. 82-054 (discussing repeal of R.C. 2919.02 and history of R.C. 1901.31 and R.C. 2335.25, and concluding that interest earned on prepaid and unearned costs deposited by a probate court judge should be paid into the county treasury to the credit of the general fund); 1982 Op. Att'y Gen. No. 82-035; 1982 Op. Att'y Gen. No. 82-031. In fact, the provisions of Ohio Const. art. VIII, §6, which prohibit a county from raising money for, or lending its credit to, a company, corporation, or association, may raise questions concerning the constitutionality of an arrangement under which interest earned on funds deposited by a county official is paid to a private person. See generally State ex rel. Saxbe v.

Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964) (construing Ohio Const. art. VIII, §4); Village of Brewster v. Hill, 128 Ohio St. 343, 190 N.E. 766 (1934); State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 330 N.E.2d 454 (Franklin County 1974) (Ohio Const. art. VIII, §§4 and 6 are to be given similar constructions).

Based on the foregoing, it is my opinion, and you are hereby advised, that, absent a conflicting provision of a charter county, if a sheriff or prosecuting attorney finds that the exercise of his duty to keep moneys which have been acquired in connection with law enforcement and may be needed as evidence in a criminal trial may be performed most effectively if he deposits such moneys with a bank, trust company, or building and loan association in an arrangement which assures that the evidence will not be tampered with and that the chain of evidence will not be disturbed, he may so deposit the moneys, subject to the requirements of R.C. 131.11, and interest earned on such moneys shall, pursuant to R.C. 2933.41(E), be placed in the general fund of the county.