

HOUSE BILL REPORT

SHB 1069

As Passed Legislature

Title: An act relating to seizure of property.

Brief Description: Providing for seizure of property involved in a felony.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Ludwig, Mielke, Riley, Mastin, Bray, Orr, Vance, H. Myers, Lisk, R. Johnson, Grant, Basich, Edmondson, Schmidt, Campbell, Van Luven, Rayburn, Foreman, Ballasiotes, Long, Kremen, Brough, Brumsickle, Horn, Forner, Karahalios, Chandler, Wood, Cooke, Roland and Silver.)

Brief History:

Reported by House Committee on:
Judiciary, February 9, 1993, DPS;
Passed House, March 8, 1993, 95-0;
Amended by Senate;
Passed Legislature, April 24, 1993, 96-0.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 16 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Padden, Ranking Minority Member; Ballasiotes, Assistant Ranking Minority Member; Campbell; Chappell; Forner; Johanson; Locke; Long; Mastin; H. Myers; Riley; Scott; Tate; and Wineberry.

Staff: Bill Perry (786-7123).

Background: State law contains several provisions authorizing law enforcement agencies to seek the forfeiture of property that has been used in or procured through the commission of certain crimes. For instance, the Uniform Controlled Substances Act includes a provision authorizing forfeiture of real and personal property when the property has been employed in the commission of a drug law violation, or has been acquired with the proceeds of illegal drug activity.

Forfeiture under existing laws is a civil procedure and it does not rely on a criminal arrest, charge, or conviction. Because it is a civil proceeding, the burden of proof on the

law enforcement agency is a preponderance of the evidence, rather than "beyond a reasonable doubt."

Under the drug law, the forfeited property may be disposed of in a number of ways, including sale or retention by the law enforcement agency. However, a law enforcement agency is to remit to the state 10 percent of the net value of any forfeited property. Net value is determined by the sale price if the property is sold, or by appraised value if it is retained, and is net of any security interest, landlord's claim, and costs of sale or appraisal. The 10 percent remitted to the state is deposited in the drug enforcement and education account.

Following the so-called "Son of Sam" killings in New York in 1977, several states, including Washington, passed laws to prohibit criminals from profiting from their crimes. Typically these laws were aimed at profits that might be made by a criminal from publishing or broadcasting his or her account of the crime.

Washington's law allows money from a charged or convicted person's interest in a contract for the sale of his or her story to be placed in an escrow account for the benefit of victims. The money is to be held for five years, during which time victims may bring civil suits to recover damages from the charged or convicted person. If charges are dismissed or if the person charged is acquitted, the money is to be returned to him or her. If after five years there are no civil actions pending for the money in the account, one-half of it is to be returned to the charged or convicted person, and one-half of it is to go to the crime victims' compensation fund.

New York's law, which is nearly identical to Washington's law, was struck down by the United States Supreme Court in the case of Simon & Schuster, Inc. v. New York State Crime Victims Board, 116 L. Ed. 2d 476 (1991). The court found that, although there is a compelling state interest in compensating victims of crime and in preventing criminals from benefiting from their crimes, the statute was not narrowly enough tailored to those ends. Because the statute imposed a content-based restriction on free speech, it could only have been upheld if it were narrowly aimed at those compelling state interests. Some members of the court also indicated that in at least one respect, the statute may actually be too narrow.

Features of the Washington law that may make it subject to the court's holding include the following:

First, the statute may be too broad because it covers any gross misdemeanor or felony, whether or not there was an identifiable victim.

Second, the statute may be too broad because it has no period of limitation.

Third, the statute may be too broad because it allows the state to take all of the proceeds of a book, movie, or other depiction, even though only a portion of the depiction deals with a crime.

Fourth, the statute may not be broad enough, because it applies only to "speech" related activities from which a criminal may profit.

In addition to this profits of crime law, there are other potential remedies that victims may seek against criminals. A civil suit by a victim or a wrongful death action by a victim's survivors may be brought. A judgment entered for the victim under such a suit could include recovery of both special damages, e.g., out-of-pocket expenses and future economic losses, and general damages, e.g., emotional harm, pain, and suffering. Also, at the time of sentencing, the court may impose victim restitution on the defendant. Restitution is limited to easily ascertainable damages for personal injury or property loss, actual expenses for medical treatment, and lost wages.

Summary of Bill: Two new property forfeiture laws are enacted. One is a general forfeiture law that applies to personal property used in or acquired in any felony crime. The other is a forfeiture law that applies to property acquired as profits from a criminal act.

GENERAL FORFEITURE. A general forfeiture statute is enacted covering personal property used in, or acquired through the commission of any felony crime not already covered by a specific forfeiture law. However, under this general forfeiture law, property may not be seized or forfeited until after the owner of the property has been convicted of the crime that gives rise to the forfeiture action.

All personal property used in, or acquired through the commission of any felony, is subject to forfeiture. Any law enforcement agency is authorized to seize such property.

The procedural requirements for a forfeiture are comparable to those contained in the Uniform Controlled Substances Act. Seizure of property may be made upon process issued by any Superior Court or without such process if necessary to preserve the public health and welfare. Within 15 days

after seizure, the law enforcement agency is to serve notice of the seizure on all known holders of interest in the property. Specific notice requirements apply to secured parties with perfected security interests.

Any person responding within 45 days of a notice of seizure is entitled to an opportunity to be heard. That hearing may be an administrative hearing before the chief law enforcement officer of the seizing agency or, at the election of the responding person, the case may be removed to a court of competent jurisdiction. Specific procedures, including notice requirements, are provided for the removal of a case to a court.

No property will be forfeited if the felony was committed without the consent or knowledge of the owner. A forfeiture of property encumbered by a security interest is subject to the interest of a secured party who neither had knowledge of nor consented to the commission of the felony at the time the security interest was created.

The law enforcement agency that seizes the property and causes the forfeiture may retain the property or sell it. Of the net value of forfeited property, 10 percent must be remitted to the state public safety and education account.

CRIMINAL PROFITS FORFEITURE. A new procedure is established for compensating the victims of crime and for preventing criminals from profiting from their crimes.

Property acquired by a convicted person as the result of his or her crime is subject to forfeiture. The prosecuting attorney in the county of conviction may seize the property. Procedures for seizure, notice and hearing are the same as under the general forfeiture law.

The following limitations and conditions apply:

- o Forfeiture is available only for crimes for which there is a victim
- o Forfeitures are subject to a period of limitation equal to the maximum sentence of incarceration that could have been imposed for the crime in question.
- o Forfeiture is available only to the extent the property in question was acquired as a result of the commission of the crime.
- o Forfeiture applies to any tangible or intangible property acquired as a result of the crime. The property covered includes, but is not limited to,

payment for any reenactment, depiction or account of the crime and any expression of the convicted person's thoughts, feelings, opinions, or emotions regarding the crime.

The proceeds of a forfeiture are to be distributed as follows: first, to the satisfaction of any judgment or restitution owed any victim; second, to the payment of the legal expenses of bringing the action; and third, to the crime victims' compensation fund. The court may establish escrow accounts or other arrangements to carry out the distribution of proceeds.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Getting at criminals' assets is one of law enforcement's best tools.

Testimony Against: These kinds of laws are being questioned nationwide because they lack sufficient procedural protections and have led to significant abuses by law enforcement agencies.

Witnesses: John Zulauf, Washington Association of Criminal Defense Lawyers (con).