



ALAN WILSON
ATTORNEY GENERAL

June 3, 2013

Crystal Moore, Chief of Police
Latta Police Department
109 NW Railroad Avenue
Latta, South Carolina 29565

Dear Chief Moore,

You have requested an opinion of this Office concerning the disposition of weapons seized by law enforcement for offenses other than those covered by the Preservation of Evidence Act.¹ Specifically, you ask the following questions:

- 1) What is the procedure for disposing of firearms seized for the unlawful carrying of a handgun pursuant to S.C. Code § 16-23-20, an offense which is generally within the jurisdiction of general sessions court? What if the charge is dismissed by the Solicitor's office or not indicted? What is the length of time that our department has to preserve these weapons in our evidence room?
- 2) What is the procedure for disposing of weapons seized for the charge of carrying a concealed weapon in violation of S.C. Code § 16-23-460? If a person is found guilty of this charge in municipal court, what are the procedures for obtaining that weapon as a forfeiture to our agency? What is the length of time that these weapons have to be preserved in our evidence room?
- 3) What are our obligations and requirements to any individual where a weapon was seized in relation to any weapons charge and, subsequently, the offender completes PTI (pre-trial intervention) or their records are expunged? What are we required to do with the weapon? Do we have to notify them to give their weapons back? If not, how do we go about disposing of the weapons if they have completed PTI?
- 4) If a weapon is currently in evidence and the corresponding charge is dismissed, the weapon would then be considered preserved in our evidence room for safekeeping. Once a criminal history has been run on the individual from whom the weapon was originally seized, what are the procedures for disposing of the weapon in this situation? If a certified letter has to be sent to any individual requesting them to contact our office in reference to a safekeeping issue involving a weapon, what is the length of time our office has to preserve this

¹ See S.C. Code §§ 17-28-300 to -360.

weapon from the date of certified receipt or what if the individual is unable to be located? What are the proper procedures for disposing of a weapon under these circumstances?

5) Prior to disposal of any weapons we understand we have to ensure the weapon is clear of any warrants or wants through NCIC (National Crime Information Center). Upon completion of this, what has to be completed in order to place these weapons into the inventory for use by the department or to be able to trade these weapons to a licensed dealer?

Law/Analysis

Question 1

S.C. Code § 16-23-20 (Supp. 2007) provides that unless one of the exceptions listed therein applies, “[i]t is unlawful for anyone to carry about the person any handgun, whether concealed or not” The penalty for a violation of the preceding section is set forth in § 16-23-50(A)(2) which states:

(2) A person violating the provisions of Section 16-23-20 is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

§ 16-23-50(A)(2). The procedures for the confiscation and disposition of a handgun involved in a violation of § 16-23-20 is set forth in subsection (B) of that same statute:

(B) In addition to the penalty provided in this section, the handgun involved in the violation of this article must be confiscated. The handgun must be delivered to the chief of police of the municipality or to the sheriff of the county if the violation occurred outside the corporate limits of a municipality. The law enforcement agency that receives the confiscated handgun may use it within the agency, transfer it to another law enforcement agency for the lawful use of that agency, trade it with a retail dealer licensed to sell handguns in this State for a handgun or any other equipment approved by the agency, or destroy it. **A weapon must not be disposed of in any manner until the results of any legal proceeding in which it may be involved are finally determined.**² If the State Law Enforcement Division seized the handgun, the division may keep the handgun for use by its forensic laboratory. Records must be kept of all confiscated handguns received by the law enforcement agencies under the provisions of this article.

§ 16-23-50(B) (emphasis added). As you indicate, a charge for a violation of § 16-23-20 is generally within the jurisdiction of a general sessions court as it carries a potential penalty of a one thousand dollar fine or one year in prison, or both.³

² This sentence was added via amendment in 1998. See Act No. 297 of 1998.

³ See § 22-3-540 (“Magistrates shall have exclusive jurisdiction of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days”); § 22-3-550(A) (“Magistrates have

Our State Supreme Court has addressed the forfeiture of property pursuant to penal statutes similar in nature to § 16-23-50(B) on at least two occasions. In Shipman v. Du Pre, 222 S.C. 475, 73 S.E.2d 716 (1952), the Court addressed the constitutionality of a statute providing:

[I]n addition to a fine or imprisonment as providing in other sections, any boat trawling for shrimp in the waters of South Carolina, without first securing a license so to do, shall be confiscated, with its rigging and equipment, to the State, and shall be sold by the State at public sale to the highest bidder for cash before the Court House door of the County in which captured, after giving 10 days notice of said sale in a newspaper published in said County.

Id. at 479, 73 S.E.2d at 717. Referencing the language in the statute providing for confiscation “in addition to the punishment” for other sections, the Court noted the statute conditioned forfeiture upon a prior conviction. Id. at 480-81, 73 S.E.2d at 718. The Court concluded due process was not violated because the statute “allows the parties charged a hearing and postpones the sale of the boat until determination of the criminal case against the operators, and conditions forfeiture upon a conviction of the criminal charge.” Id.

In a later case, Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981), two defendants challenged the forfeiture of certain property seized from them in conjunction with their convictions for night hunting for deer. One of the items was a shotgun belonging to someone else who had no knowledge that it was being used unlawfully. Id. at 106, 276 S.E.2d at 292. The statute providing for the confiscation and forfeiture of such property stated as follows:

Every vehicle, boat, animal and firearm used in the hunting of deer at night is hereby declared forfeited to the State and shall be confiscated by any peace officer, who shall forthwith deliver it to the Director of the Division of Game or his duly authorized agent.

Id. at 108, 276 S.E.2d at 293 n.1.

The Court in Moore found that because the requirement of a conviction prior to confiscation was “clearly implicit” in the statute, the defendants “were in no way deprived of a due process opportunity to be heard under the circumstances.” Id. at 108, 276 S.E.2d at 293. Furthermore, the Court went on to state the following with regards to due process rights of the defendants and the innocent third party as to the property seized for the criminal offense:

Since the legislature has elected to make forfeiture a punishment contingent upon a criminal conviction for night hunting, it is clear that only the seized property belonging to the criminal defendants is subject to forfeiture. This result must follow because the statutes provide only the criminal defendants with notice and an opportunity to be heard.

jurisdiction of all offenses which may be subject to the penalties of a fine or forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both”).

The result we reach is compelled by the nature of the statutes before us. In fact, property used in the commission of crimes and which is therefore otherwise subject to forfeiture is not necessarily protected merely because it is owned by an innocent third party. It is clear however that if all property seized is intended to be subject to forfeiture, then the parties claiming an interest in the property must be afforded the basic due process notice and hearing rights. As stated at 37 C.J.S. Forfeitures s 5 b, at pp. 11-12:

Notice must be given to the owner of the property seized and those claiming an interest therein of the proceedings; there must be either personal notice to the owner, or at least a proceeding in rem with notice by publication; and a hearing must be had at which they can be heard, except in a few cases of necessity. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution.

A party with an interest in the seized property must be given the opportunity to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law.

Id. at 108-09, 276 S.E.2d at 293 (citations and quotations omitted).

The Fourth Circuit has explained the Court's holding in Moore with regards to criminal statutes making forfeiture a punishment contingent upon a conviction as follows: "The South Carolina Supreme Court held [in Moore] that the only hearing required, when there is an *automatic* forfeiture, is one to allow an innocent third party claiming an interest in one of the forfeited guns to be heard." Hackworth v. C.I.R., 155 F. App'x 627, 631 (4th Cir. 2005) (emphasis added).

Like the statutes considered in Shipman and Moore, § 16-23-50(B) provides for the automatic forfeiture of a handgun involved in a violation of § 16-23-20 as a punishment contingent upon a conviction. Like the statute in Shipman, § 16-23-50(B) provides for confiscation of the handgun "[i]n addition to the penalty" provided for in § 16-23-50(A)(2). Therefore, a conviction under § 16-23-20 is necessary before the handgun involved in the violation may be confiscated by the appropriate law enforcement agency and subject to forfeiture. As indicated in Moore, since the Legislature elected to make forfeiture under § 16-23-50(B) a punishment contingent upon a conviction under § 16-23-20, the confiscated handgun is subject to automatic forfeiture without a separate civil forfeiture proceeding if it is owned by the individual convicted.⁴ This is because an individual convicted of violating § 16-23-20

⁴ This stands in contrast to other statutes providing that the forfeiture of property involved in the violation of a criminal offense must be accomplished through the initiation of a separate civil proceeding. See, e.g., § 56-6-6240(B) (providing where a person is convicted for 4th or subsequent offense of driving under suspension, "the sheriff or chief of police shall initiate an action in the circuit court of the county in which the vehicle was confiscated to accomplish forfeiture"); City of Sumter Police Dep't v. One (1) Blue Mazda Truck VIN No. JM2UF1132N0294812, 330 S.C. 371, 378, 498 S.E.2d 894, 897 (Ct. App. 1998) ("The provision for forfeiture of the driver's vehicle contained in section 56-5-6240 is a separate *civil* proceeding") (emphasis in original).

receives the requisite notice and opportunity for a hearing under due process at trial. A separate hearing with regards to forfeiture is only required if an innocent third party claims an interest in the confiscated property.

As for the disposition of a handgun confiscated for a violation of § 16-23-20, § 16-23-50(B) goes further than those provisions in Shipman and Moore to provide that the “weapon must not be disposed of in any manner until the results of *any legal proceeding* in which it may be involved are *finally determined*.” (Emphasis added). In light of the broad language used in this provision, we are unable to advise as to any and all legal proceedings which may involve a weapon seized pursuant to § 16-23-50(B). However, in situations where the individual convicted is the owner of the confiscated handgun, we believe this language should be interpreted to mean disposition must wait until after the defendant has, at the very least, exhausted his right to an appeal or allowed the time period in which an appeal may be filed to expire. In the event a separate forfeiture proceeding is held to address a third party’s claim of an interest in the confiscated handgun, we believe disposition must wait until any such claim is ultimately resolved. Thus, we suggest you notify and consult your circuit solicitor before disposing of any handgun pursuant to § 16-23-50(B) to ensure that all legal proceedings in which it may be involved have been finally determined.

As for any situation where a charge for a violation of § 16-23-20 is disposed of in the defendant’s favor, whether it be dismissed, nolle prossed, or the defendant is found not guilty, a law enforcement agency has no right to the continued possession of the seized handgun. As previously stated, a conviction is a prerequisite to the confiscation and disposal of a handgun pursuant to § 16-23-50(B). Therefore, if no conviction is obtained, the handgun should be returned to the defendant or the rightful owner if he or she can be identified.

Question 2

As for the offense of unlawfully carrying a concealed weapon, § 16-23-460(A) provides:

(A) A person carrying a deadly weapon usually used for the infliction of personal injury concealed about his person is guilty of a misdemeanor, **must forfeit** to the county, or, **if convicted in a municipal court, to the municipality, the concealed weapon**, and must be fined not less than two hundred dollars nor more than five hundred dollars or imprisoned not less than thirty days nor more than ninety days.

§ 16-23-460(A) (Supp. 2008) (emphasis added).

The statute explicitly requires a conviction prior to forfeiture. Furthermore, the language of the statute indicates that, upon conviction in municipal court, the weapon is forfeited “to the municipality.” Consistent with the plain language of the statute and prior opinions construing this language, the weapon is forfeited to the governing body of the municipality, not the municipal police department. See Op. S.C. Att’y Gen., 2001 WL 957747 (July 3, 2001) (stating that upon a conviction pursuant to § 16-23-460, “ownership of the weapon would pass to the municipality or county at the time of forfeiture [and] [t]he governing body of the county or municipality would be able to exercise the rights of ownership over the pistol in accordance with the general law”). The governing body of the municipality would then have the authority to decide how the weapon should be disposed of. Thus, whether or not the weapon is

transferred to the municipal police department is entirely within the discretion of the municipality's governing body.

Question 3

You ask generally what the department's responsibilities and obligations are when a weapon is seized in relation to a weapons charge and the individual charged subsequently completes PTI or is convicted and subsequently has their record expunged. Participation in a PTI program is governed by the Pretrial Intervention Act ("the PTI Act"), §§ 17-22-10 et seq. The PTI Act provides the following with regards to an individual's successful completion of a PTI program:

(a) In the event an offender successfully completes a pretrial intervention program, the solicitor **shall effect a noncriminal disposition of the charge or charges pending against the offender.** Upon such disposition, the offender may apply to the court for an order to destroy all official records relating to his arrest and no evidence of the records pertaining to the charge may be retained by any municipal, county, or state entity or any individual, except as otherwise provided in Section 17-22-130. **The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest.** No person as to whom the order has been entered may be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest in response to any inquiry made of him for any purpose.

§ 17-22-150(a) (emphasis added).

In consideration of the language in § 17-22-150(a) above, an individual who successfully completes a PTI program with regards to a weapons charge does not receive a conviction for such charge; the charge is instead disposed of and "it is as if the arrest never occurred" State v. Joseph, 328 S.C. 352, 359, 491 S.E.2d 275, 278 (Ct. App. 1997). Since a conviction is required prior to the confiscation or forfeiture of a weapon for violations of § 16-23-20 or § 16-23-460(A), upon the successful completion of a PTI program any weapon seized in relation to such charges must generally be returned to the individual from whom it was seized or to the rightful owner if he or she can be identified.

However, the PTI Act requires the individual charged participating in the program and the solicitor to enter into a specific agreement which must include, among other things, "the terms of the intervention program." § 17-22-120; see also § 17-22-90 ("An offender who enters into an intervention program shall: ... (3) agree, in writing, to the conditions of the intervention program established by the solicitor"). Furthermore, the law enforcement agency involved in the arrest are permitted to make recommendations as to the applicant's entry into a PTI program. § 17-22-80. Therefore, it is possible that a PTI agreement may require the applicant to agree to forfeit a weapon involved in a violation as a condition of acceptance into the program. However, in the absence of express language in the PTI agreement requiring forfeiture, the weapon should be returned to the individual from whom it was seized or to the rightful owner if identifiable.

You also ask about situations where individuals have records pertaining to weapons charges against them expunged. As previously discussed, the only relevant question with regards to the forfeiture

of a weapon involved in the violation of one of the weapons offenses at issue is whether a conviction of those offenses is first obtained. Thus, the expungement of records pertaining to such charges is of no consequence as to the forfeiture of the weapon involved.

Question 4

You ask what your Department must do with a confiscated weapon after a weapons charge is dismissed and a criminal history check search has been run on the individual from whom the weapon was seized. We presume your question concerns situations in which the criminal history search turns up nothing which would prevent the person from whom the weapon was confiscated from possessing the seized weapon. As previously stated, in any case where no conviction is obtained against a person charged with a violation of § 16-23-20 or § 16-23-460(A), any weapon seized in relation to such charge should be returned to the individual from whom it was seized or to the rightful owner if his or her identity can be determined. As to the specific procedures to be followed in notifying and returning the weapon to the individual from whom it was seized or another person who is the rightful owner, the Department should probably follow the procedures set forth in Chapter 21 of Title 27 concerning the disposition of confiscated and stolen property. Specifically, § 27-21-20 provides:

(A) If property has been recovered by a sheriff of a county or chief of police of a municipality and ownership is ascertained, the sheriff or chief of police must notify its owner as provided by subsection (B).

(B) A sheriff or chief of police must provide notice:

(1) within fifteen days;

(2) by registered mail, return receipt requested;

(3) describing the property and including an identifying serial number if available; and

(4) advising the owner that the property may be sold at auction pursuant to Section 27-21-22 if not reclaimed within sixty days of mailing of the notice.

(C) If after diligent efforts the owner of the property cannot be ascertained or if the property is not reclaimed or sold at public auction, the sheriff of a county or chief of police of a municipality may dispose of any recovered stolen or abandoned property as provided in this subsection.

(1) Property that is not suitable for sale, including, but not limited to, clothing, food, prescription drugs, weapons, household cleaning products, chemicals, or items that appear nonusable, including, but not limited to:

(a) electric components that appear to have been skeletonized, where parts have been removed and are no longer in working order; or

(b) items that have been broken up and only pieces exist may be destroyed by the jurisdiction holding the property.

(2) The sheriff or chief of police may use any property recovered by his jurisdiction if the property is placed on the jurisdiction's inventory as property of the jurisdiction.

(3) The sheriff or chief of police, with the consent of the appropriate governing body, may turn over to any organization exempt from tax under Section 501(c)(3) of the Internal Revenue Code of 1986, items of abandoned or recovered property that may be used for the betterment of that organization. However, the accrued value of the items given to an individual organization as provided above by a sheriff or chief of police shall not exceed a value of one thousand dollars in the respective government entity's fiscal year.

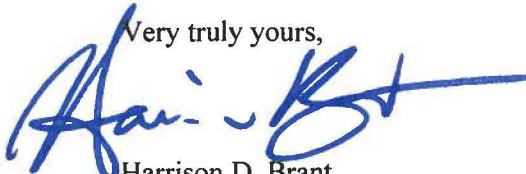
(D) A jurisdiction recovering property pursuant to the provisions of this section shall maintain a permanent record of all property recovered and its disposition.

§ 27-21-20.

Question 5

The procedures for the disposition of a weapon subject to automatic forfeiture upon a conviction for a violation of the relevant statutes at issue are sufficiently set forth in the analysis above.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



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