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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

November 7, 2001

The Honorable Harry C. Stille
Member, House of Representatives
9 Dogwood Drive
Due West, South Carolina 29639-0203

Re: Your Letter of October 5, 2001

Dear Representative Stille:

In your above-referenced letter, you request an opinion concerning the application of South Carolina's drug forfeiture statutes. Specifically, you present the following questions:

1. If a person is arrested under the drug statutes of our state and in trial is awarded a directed verdict of "not guilty", can they then have a civil forfeiture proceeding to take property that was found in their home at the time of arrest?
2. If a person is arrested under the drug statute of our state and in trial is awarded a directed verdict of "not guilty" with one of the reasons being the arresting authority used illegal means to search the party's property and used illegal evidence methods for the arrest, can a civil forfeiture proceeding to take property then proceed?
3. If an individual is sued in civil court, are they entitled to a trial by jury in a drug forfeiture case and must this civil trial take place?

South Carolina law on drug forfeiture can basically be found in two statutory provisions. S.C. Code Ann. §44-53-520 sets forth which items are subject to forfeiture and Section 44-53-530 sets forth the procedure for accomplishing a forfeiture. Generally, Section 44-53-520 provides that controlled substances themselves and any property used to facilitate the sale, manufacture, distribution, etc. of controlled substances or that represent proceeds of such activity is subject to forfeiture by the State. Section 44-53-530 provides that the forfeiture action is civil in nature and is to be commenced by the filing of a petition in the court of common pleas for the jurisdiction where the items were seized. The ultimate resolutions of your questions rest on the specific facts and circumstances surrounding the forfeiture action. While this Office cannot resolve such factual issues, I can provide you with an opinion on the general law in this area.

Respectfully,

Question 1

Section 44-53-520 states that certain property is subject to forfeiture if the property has sufficient ties to the sale, manufacture, distribution, etc. of controlled substances. Section 44-53-520(d) further provides that the property "is forfeited and transferred to the government at the moment of illegal use." There is no specific requirement in the Code that a criminal conviction for a controlled substance violation be obtained prior to or as a prerequisite to civil forfeiture. Without such a requirement, we must look to the general law in this area. As stated by the United States Supreme Court in a case originating in South Carolina, "neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges." United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The One Assortment of 89 Firearms Court further explained that:

[Defendant's] acquittal on charges brought under [Federal law] therefore does not estop the government from proving in a civil proceeding that the firearms should be forfeited [i]t is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.

Our Supreme Court has held that, pursuant to Section 44-53-520, the State's burden of proof is to show probable cause for forfeiture, not convince the fact finder of the defendant's guilt beyond a reasonable doubt. Medlock v. One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1996). Our Supreme Court further noted with reference to the drug forfeiture laws that:

Appellant's assertion that her acquittal of criminal charges shows her lack of culpability is incorrect. Merely because she was not convicted of committing drug offenses herself does not mean she did not know others were using her property to do so.

Id., 322 S.C. 133, 470 S.E.2d at 377.

Based on the foregoing, it is my opinion that an acquittal on criminal charges, even if by directed verdict, does not preclude the filing of a forfeiture action pursuant to Sections 44-53-520 and 530. The State does not carry the same burden in a forfeiture action as it does in a criminal trial. It may very well be possible for the State to meet its lesser burden in a forfeiture action where it could not meet the more onerous burden to establish criminal culpability.

Question 2

In criminal actions, evidence seized in violation of a defendant's constitutional right to be free from unreasonable searches and seizures (U.S. Const., 4th Amend.) is subject to the exclusionary rule. The exclusionary rule is a rule of law that excludes or suppresses evidence

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obtained in violation of an accused person's constitutional rights. In State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), our Supreme Court held that the "... exclusionary rule applies in civil forfeiture actions to suppress evidence seized in violation of the Fourth Amendment where the property sought to be forfeited is derivative contraband (property normally used for legal purposes)." Accordingly, if the circuit judge hearing a forfeiture action determined that "the arresting authority used illegal means to search the party's property and used illegal methods for arrest," he or she could exclude or suppress the evidence obtained as a result of the search and seizure.

The exclusion or suppression of evidence seized in violation of the Fourth Amendment, however, in and of itself, most likely would not preclude the filing of a forfeiture action. As the Georgia Court of Appeals held in Pitts v. State, 428 S.E.2d 650 (1993), a "forfeiture action is not barred by an illegal seizure if independent evidence exists connecting the forfeited property to illegal activities."

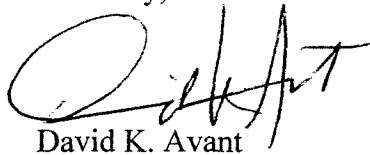
Based on the above, it is my opinion that a forfeiture action pursuant to Sections 44-53-520 & 530 may proceed despite the presence of a Fourth Amendment violation. Any evidence seized as a result of the violation, however, may be subject to suppression pursuant to the exclusionary rule.

Question 3

In Medlock v. 1985 Ford F-150 Pick Up, 308 S.C. 68, 417 S.E.2d 85 (1992), our Supreme Court reviewed this State's drug forfeiture laws in reference to a defendant/owner's request for a jury trial. In the case, the Court held "that defendant owners possess a right to a jury trial where the property subject to forfeiture under sections 44-53-520 and -530 is property normally used for lawful purposes." Accordingly, an "individual sued in civil court ... [would be] entitled to a trial by jury in a drug forfeiture case" Such a trial would have to take place for the property to be forfeited unless, the forfeiture was accomplished by consent pursuant to Section 44-53-530(d).

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "David K. Avant", written over a horizontal line.

David K. Avant
Assistant Attorney General

DKA/an