



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 28, 1996

Betty C. Strom, Esquire
Deputy Solicitor, Eighth Judicial Circuit
P. O. Box 516
Greenwood, South Carolina 29648-0516

In Re: Informal Opinion

Dear Ms. Strom:

You have inquired regarding S.C. Code Ann. Sec. 56-5-6240. You state the following:

[t]he circumstances of the specific case are that the defendant was arrested for a fourth or subsequent violation of the DUI or DUS law. His vehicle was seized at the time of the arrest. The registered owner was notified of the seizure and a hearing was held wherein the owner was determined not to be an innocent owner, therefore, the seized vehicle remained in law enforcement's custody. Now, the registered owner who is not the defendant of the DUS or DUI case is wanting to purchase the vehicle from the law enforcement agency.

I am requesting if this would be a valid transfer under the statute.

LAW / ANALYSIS

Inasmuch as you reference Section 56-5-6240, I assume that the procedures set forth therein will be followed in this instance. Thus, I deem your question to be whether the original owner can bid upon the vehicle at the required public auction referenced in that statute. Section 56-5-6240 is a lengthy statute which provides in summary the

following sequence of events with respect to "a fourth or subsequent offense within last 5 years for DUS or a fourth or subsequent offense within last 10 years for DUI":

Confiscation / Return of Vehicle

1. For a fourth or subsequent offense within last 5 years for DUS or a fourth or subsequent offense within last 10 years for DUI, persons must have their vehicle they drove during this offense forfeited if the offender is the owner of record or resident of household of owner of record under the terms and conditions in Subsections (B) and (C). At the time of arrest for a fourth or subsequent conviction of DUI or DUS, the arresting officer or other law enforcement officer of that agency "must confiscate" the vehicle.
2. Officer "shall deliver" immediately the vehicle to the sheriff or chief of police of the jurisdiction where vehicle was seized or by his authorized agent.
3. Sheriff or chief of police by certified mail "shall notify" the registered owner of the confiscation within seventy-two hours.
4. Upon notification, registered owner has 10 days to request a hearing before the presiding judge of the judicial circuit or his designated hearing officer within 10 days of receipt of the request.
5. Vehicle "must" be returned to owner of record if owner can show by preponderance of evidence that (a) the use of the vehicle was not either expressly or impliedly authorized; (b) owner of record did not know the driver had no valid license.
6. Sheriff or chief "shall" provide notice by certified mail of the confiscation to all lienholders of record within 10 days of confiscation.

Forfeiture of Vehicle

1. Upon conviction of driver [for 4th DUS or DUI], sheriff or chief "shall" initiate an action in circuit court of county where vehicle was seized to accomplish forfeiture.

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2. Notice must be given to owners of record, lienholders of record and "other persons claiming an interest in the vehicle" to provide an opportunity to "appear and show why" vehicle should not be forfeited and disposed of.
3. Failure to appear by a "person claiming an interest in the vehicle" after having been given notice constitutes a waiver of the claim; but failure to appear does not alter or affect the claim of a lienholder of record.
4. Hearing by court held.
5. Court disposes of vehicle, either by ordering vehicles forfeited to sheriff or chief and sold in "the manner provided in this section" or returning it to the owner of record.
6. Court orders a vehicle forfeited unless (1) the use of the vehicle on the occasion of arrest was not either expressly or impliedly authorized; or (2) the owner of record did not know the driver had no valid license; in either event, the court shall order vehicle returned to owner.
7. Forfeiture is subordinate in priority to all valid liens and encumbrances.

Abandonment

1. If person fails to appeal conviction within 10 days thereof, the forfeited vehicle is considered abandoned and must be disposed of as provided by Section 56-5-5640.
2. But if the fair market value of vehicle is less than \$500, vehicle must be sold as scrap to highest bidder after receiving at least two bids.

Several rules of statutory construction are pertinent here. In interpreting any statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988).

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The court must apply the clear and unambiguous terms of the statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

Section 56-5-6240, which was amended in 1992, states that "[i]f the person [from whom the vehicle was confiscated and forfeited] fails to file an appeal within ten days after the conviction, the forfeited vehicle is considered abandoned and must be disposed of as provided by Section 56-5-5640. However, if the fair market value of the vehicle is less than five hundred dollars, it must be sold as scrap to the highest bidder after receiving at least two bids." (emphasis added).¹

Section 56-5-5640 provides:

[i]f an abandoned vehicle has not been reclaimed as provided for in Sec. 56-5-5630, the sheriff or chief of police shall sell the abandoned vehicle at a public auction. The purchaser of the vehicle shall take title to it free and clear of all liens and claims of ownership, shall receive a sales receipt from the sheriff or chief of police and shall be entitled to register the purchased vehicle and receive a certificate of title. The sales receipt at such sale shall be sufficient title only for purposes of transferring the vehicle to a demolisher for demolition,

¹Formerly, Section 56-5-6240(C) provided that

[t]he law enforcement agency making the arrest or its authorized agent shall sell the confiscated vehicle at public auction for cash to the highest bidder in front of the county courthouse in the county where it was confiscated or at another suitable location in that county after having given ten day's public notice of the sale by posting advertisement on the door or bulletin board of the county courthouse or other location of the public auction, and by publishing an advertisement of the auction at least once in a newspaper of general circulation in the county at least ten days before the auction, upon the sale, the agency or its agent shall pay over the net proceeds, after the payment of the liens and encumbrances on the vehicle, and after payment of the proper costs and expenses, if any, of the seizure, advertisement, and sale including any proper expense incurred for the storage of the confiscated vehicle, to the State or the political subdivision of this State of which the law enforcement is a part, for use in law enforcement.

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wrecking or dismantling, and in such case no further titling of the vehicle shall be necessary. The expenses of the auction, the costs of towing, preserving and storing the vehicle which resulted from placing the vehicle in custody, and all notice and publication costs incurred pursuant to Sec. 56-5-5630, shall be reimbursed from the proceeds of the sale of the vehicle. Any remainder from the proceeds of the sale shall be held for the owner of the vehicle or entitled lienholder for ninety days and then shall be deposited in the general fund of the county or municipality.

This Office has heretofore concluded that, if Section 56-5-5640 is deemed applicable, a municipality cannot convert an abandoned vehicle to its own use, but must follow the provisions of Section 56-5-5610 through 56-5-5680, including Section 56-5-5640 regarding a public auction. Op. Atty. Gen., No. 82-52 (July 27, 1982).

Nothing in these various statutory provisions explicitly prohibits the original owner from bidding at public auction on the vehicle. Moreover, nothing expressly forbids purchase of the vehicle if the individual is deemed the highest bidder. Indeed, Section 56-5-5640 specifically states that the sheriff or chief of police shall sell the vehicle at a "public auction". Our Supreme Court has repeatedly emphasized that a public auction or sale must include all persons. As was stated by the Court in Ex Parte Keller, 185 S.C. 283, 291, 194 S.E. 15 (1937),

[a] 'public sale' is one made at auction to the highest bidder; a sale where all person have the right to come in and bid. For this reason, the courts have always been careful to guard against any irregularities in the conduct of a judicial sale. It must be held in a public place, and full and ample notice of the time and place of the sale and the terms thereof are required to be given. An the chilling of bids has often been the ground for vitiating a judicial sale.

As is stated in 35 C.J. 39,40: "Since it is in the interest of justice that a judicial sale should be so conducted as to yield to the owner, the best price that can fairly be had, free, fair and competitive bidding is contemplated at such a judicial sale, and the law does not tolerate any influence likely to prevent competition; ... any conduct on the part of those actively engaged in the selling or bidding that tends to prevent

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a fair, free, open sale, or stifle or suppress free competition, is contrary to public policy, vitiates the sale, and constitutes ground for setting it aside upon the complaint of the injured party."

(emphasis added). See also, Martin and Walter v. Evans, 2 Rich. Eq. 368 (1845). Therefore, since the sale is required to be made at a "public auction", it would be inconsistent with the concept of a "public" sale to exclude the original owner of the vehicle from bidding on the vehicle just like everybody else.

The case of State v. One 1983 Chevrolet Van Serial No. 1GCCG15D8D 104615, 309 Md. 327, 524 A.2d 51 (1987) is instructive in this regard. There, pursuant to statute, a vehicle was confiscated, forfeited and ordered to be sold by the secured party "in a commercially reasonable manner." However, the order of the lower court further provided that the vehicle could not be sold "to the person, or persons, who was the registered owner prior to" the hearing because such would defeat the intent of the forfeiture statute - that the individual lose the vehicle permanently. The appellate court disagreed. Examining the forfeiture provision, the Court stated:

[w]e have found nothing in § 297 of Art. 27 prohibiting the sale of a forfeited vehicle to its former owner. The only restriction imposed by § 297 in this frame of reference is that the sale be "in a commercial reasonable manner." And we have determined that the sale to the former owner is not prohibited by that requirement. Therefore, unless some other statute provides to the contrary, there is no impediment to the purchase of the vehicle by the former owner.

524 A.2d at 57. Further explaining, the Court observed that

[t]he language used in the various amendments clearly reflected the legislative scheme. It is to permit an innocent secured party to repossess a vehicle seized by the police and require its release to that party for resale in a commercially reasonable manner. The usual rights of redemption, however, which are enjoyed by a buyer who suffers ordinary commercial repossession are not available, nor may the buyer receive any part of the proceeds of the sale.

524 A.2d at 59. (emphasis added).

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Likewise, here, I see nothing in either Section 56-5-6240 or 56-5-5640 which mandates exclusion of the original owner of the vehicle from bidding upon it at the public auction. To my mind, when the General Assembly used the term "public auction" such phrase must have been intended to include the original owner. Moreover, when the Legislature amended Section 56-5-6240 in 1992, it had the opportunity to explicitly exclude the original owner if it so desired. Instead, the Legislature required that Section 56-5-5640 be followed, obviously, fully aware that the Section contained the explicit reference to a "public auction" being held. As was stated in a recent Informal Opinion of this Office, dated February 7, 1996, with respect to Section 56-5-6240,

[i]f the Court then determines that the owner of record is not entitled to return of the vehicle by virtue of the criteria set forth in Subsection (B), the Court orders the vehicle forfeited to the sheriff or chief of police and "sold in the manner provided in this section." This procedure appears to be according to Section 56-5-5640 (the procedure for abandoned vehicles). Section 56-5-5640 provides in pertinent part as follows:

[i]f an abandoned vehicle has not been re-claimed as provided for in § 56-5-5630, the sheriff or chief of police shall sell the abandoned vehicle at a public auction.

Again, however, the statute makes explicit that the lienholder of record possesses priority. This means, of course, his interest must be satisfied first from the proceeds.

Also stated in that same opinion was the fact that

... it would appear that the provisions of Section 56-5-6240 are written in mandatory language and must be followed Moreover, it is further evident that our Supreme Court has mandated that the persons with an interest in the vehicle such as innocent owners of record, lienholders and others must be given notice and an opportunity to be heard prior to forfeiture and disposition of the proceeds of the property. The General Assembly has established this procedure in Section 56-5-6240 and, thus, I would advise that for this reason also the statute should be adhered to.

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Furthermore, the last sentence of Section 56-5-5640 - "[a]ny remainder from the proceeds of the sale shall be held for the owner of the vehicle or entitled lienholder for ninety days and then shall be deposited in the general fund to the county of municipality" - is not inconsistent with the original owner's bidding on the vehicle at public auction. The Legislature is deemed to be aware of prior legislation and not to have done a futile thing. Ingram v. Bearden, 212 S.C. 399, 47 S.E.2d 833 (1948). Statutes relating to the same subject matter should be harmonized if possible. Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973).

Applying these principles, if the vehicle has been forfeited in accordance with Section 56-5-6240, the original no longer has title to it, and title is vested in the seizing law enforcement agency. Section 56-5-6240 explicitly states that "[t]he court, after hearing, shall order that the vehicle be forfeited to the sheriff or chief of police and sold in the manner provided in this section" As stated above, this sale is made pursuant to Section 56-5-5640. Thus, the original owner is not an "owner of the vehicle" for purposes of the last sentence of Section 56-5-5640. To conclude otherwise would enable the original owner whose vehicle has been forfeited as an instrumentality of a criminal offense to be reimbursed from proceeds of the sale of the vehicle in addition to bidding upon the vehicle at "public auction". Such was not, in my opinion, the intent of the General Assembly.

Admittedly, this issue has not been addressed by our courts and judicial or legislative clarification is recommended to put the issue to rest. It could be argued that the General Assembly intended to avert a "potential revolving door" with respect to forfeitures. It could also be argued that upon forfeiture, which is done on the basis that the vehicle has been used as an instrumentality for a crime, "the registered owner loses all property rights in the automobile forever." 1983 Chevrolet Van v. State, 508 A.2d 503, 505 (Md. App. 1986). However, it would be a matter for the General Assembly to absolutely prohibit an original owner from bidding on the vehicle at the "public auction" required by statute. To date, the Legislature may have deemed that the loss of title by the vehicle and the requirement that the individual may repurchase it only after participation in bidding at a "public auction" is sufficient to address the problem. In the absence of such explicit prohibition, however, I am constrained to conclude that there is no legal prohibition against such original owner making a bid to purchase the vehicle from the seizing law enforcement agency.

Of course, in so concluding, it is presumed that such auction will be held fairly and completely "above board". The cases decided by our Supreme Court, and referenced above, require that any such sale must meet this requirement. Assuming this to be the case, however, only the General Assembly could prohibit the original owner from making a bid on the vehicle and, to date, it has not done so. The Legislature may wish to

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consider the issue anew as to whether it wishes to allow a person whose vehicle has been judicially forfeited pursuant to Section 56-5-6240 and thereby to be sold pursuant to Section 56-5-5640, to bid upon such vehicle.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General

RDC/ph