

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 258

FISCAL
NOTE

BY SENATORS TRUMP AND WOELFEL

[Introduced January 13, 2016;

Referred to the Committee on the Judiciary.]

1 A BILL to amend and reenact §60A-7-702, §60A-7-703, §60A-7-704, §60A-7-705, §60A-7-706
 2 and §60A-7-707 of the Code of West Virginia, 1931, as amended; and to amend said code
 3 by adding thereto two new sections, designated §60A-7-708 and §60A-7-709, all relating
 4 to the West Virginia Contraband Forfeiture Act; adopting a clear and convincing evidence
 5 standard; shortening time to institute forfeiture proceedings; designating persons be made
 6 respondents to a petition for forfeiture; redirecting disposition of all forfeited property;
 7 providing for disposition of property when forfeiture is not ordered; and providing for effects
 8 of amendments to the law on pending actions.

Be it enacted by the Legislature of West Virginia:

1 That §60A-7-702, §60A-7-703, §60A-7-704, §60A-7-705, §60A-7-706 and §60A-7-707 of
 2 the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code
 3 be amended by adding thereto two new sections, designated §60A-7-708 and §60A-7-709, all
 4 to read as follows:

ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.

§60A-7-702. Legislative findings.

1 The Legislature hereby finds and declares that the seizure and sale of items under the
 2 provisions of this article ~~is not contemplated to be a forfeiture as the same is used in article twelve,~~
 3 ~~section five of the West Virginia Constitution and to the extent that such seizure and sale may be~~
 4 ~~found to be such a forfeiture,~~ the Legislature hereby finds and declares that the proceeds from a
 5 seizure and sale under this article is not part of net proceeds as the same is contemplated by
 6 such article twelve, section five of the West Virginia Constitution.

**§60A-7-703. Items subject to forfeiture; persons authorized to seize property subject to
 forfeiture.**

1 (a) The following are subject to forfeiture:

2 (1) All controlled substances which have been manufactured, distributed, dispensed or
 3 possessed in violation of this chapter;

4 (2) All raw materials, products and equipment of any kind which are used, or intended for
5 use, in manufacturing, compounding, processing, delivering, importing or exporting any controlled
6 substance in violation of this chapter;

7 (3) All tax-not-paid tobacco products, as that term is defined in section two, article
8 seventeen, chapter eleven of this code, declared to be contraband under said article;

9 (4) All property which is used, or has been used, or is intended for use, as a container for
10 property described in subdivision (1), (2) or (3) of this subsection;

11 (5) All conveyances, including aircraft, vehicles or vessels, which are used, have been
12 used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale,
13 receipt, possession or concealment of property described in subdivision (1), (2) or (3) of this
14 subsection, except that:

15 (i) A conveyance used by any person as a common carrier in the transaction of business
16 as a common carrier shall not be forfeited under this section unless ~~it appears~~ the state proves
17 by clear and convincing evidence that the person owning the conveyance is a consenting party
18 or privy to a violation of this chapter;

19 (ii) A conveyance shall not be forfeited under the provisions of this article unless the state
20 proves by clear and convincing evidence that if the person owning the conveyance ~~establishes~~
21 ~~that he or she~~ neither knew, nor had reason to know, that the conveyance was being employed
22 or was likely to be employed in a violation of this chapter; and

23 (iii) A bona fide security interest or other valid lien in any conveyance shall not be forfeited
24 under the provisions of this article, unless the state proves by ~~a preponderance of the~~ clear and
25 convincing evidence that the holder of the security interest or lien either knew, or had reason to
26 know, that the conveyance was being used or was likely to be used in a violation of this chapter;

27 (6) All books, records, research products and materials, including formulas, microfilm,
28 tapes and data which are used, or have been used, or are intended for use, in violation of this
29 chapter;

30 (7) All moneys, negotiable instruments, securities or other things of value furnished or
31 intended to be furnished in violation of this chapter by any person in exchange for a controlled
32 substance, all proceeds traceable to the exchange and all moneys, negotiable instruments and
33 securities used, or which have been used, or which are intended to be used to facilitate any
34 violation of this chapter: *Provided*, That no property may be forfeited under this subdivision, to the
35 extent of the interest of an owner, ~~by reason of any act or omission established by~~ unless the
36 state proves by clear and convincing evidence that the owner to have been committed or omitted
37 without his or her knowledge or consent committed an act or omission, or knowingly gave consent
38 for, an act that was a violation of this chapter; and

39 (8) All real property, including any right, title and interest in any lot or tract of land, and any
40 appurtenances or improvements, which are used, or have been used, or are intended to be used,
41 in any manner or part, to commit or to facilitate the commission of a violation of this chapter
42 punishable by more than one year imprisonment: *Provided*, That no property may be forfeited
43 under this subdivision, to the extent of an interest of an owner, ~~by reason of any act or omission~~
44 ~~established by that owner to have been committed or omitted without his or her knowledge or~~
45 ~~consent~~ unless the state proves by clear and convincing evidence that the owner committed an
46 act or omission, or knowingly gave consent for the act that predicates the act that was a violation
47 of this chapter punishable by more than one year imprisonment.

48 The requirements of this subsection pertaining to the removal of seized property are not
49 mandatory in the case of real property and the appurtenances to the real property.

50 (b) Property subject to forfeiture under this article may be seized by any person granted
51 enforcement powers in section five hundred one, article five of this chapter (hereinafter referred
52 to as the "appropriate person" in this article).

53 (c) Controlled substances listed in article two of this chapter which are manufactured,
54 possessed, transferred, sold or offered for sale in violation of this chapter are contraband and
55 shall be seized and summarily forfeited to the state. Controlled substances which are seized or

56 come into the possession of the state, the owners of which are unknown, are contraband and
57 shall be summarily forfeited to the state upon the seizure of the controlled substances.

58 (d) Species of plant from which controlled substances may be derived which have been
59 planted or cultivated in violation of the provisions of this chapter, or of which the owners or
60 cultivators are unknown, or which are wild growths may be seized and summarily forfeited to the
61 state upon the seizure of the plants.

62 (e) The failure, upon demand by the appropriate person, or his or her authorized agent, of
63 the person in occupancy or in control of land or premises upon which the species of plants are
64 growing or being stored, to produce an appropriate registration, or proof that he or she is the
65 holder of an appropriate registration, constitutes authority for the seizure and forfeiture of the
66 plants.

67 (f) Notwithstanding any provision of this article to the contrary, controlled substances listed
68 in article two of this chapter and species of plants from which controlled substances may be
69 derived shall either be destroyed or used only for investigative or prosecutorial purposes.

70 (g) Notwithstanding any other provisions of this article to the contrary, any items of real
71 property or any items of tangible personal property sold to a bona fide purchaser are not subject
72 to forfeiture unless the state establishes by clear and convincing proof that the bona fide
73 purchaser knew or should have known that the property had in the previous three years next
74 preceding the sale been used in violation of this chapter or that the property is a controlled
75 substance.

§60A-7-704. Procedures for seizure of forfeitable property.

1 (a) Seizure of property made subject to forfeiture by the provisions of this article may be
2 made upon process issued by any court of record having jurisdiction over the property.

3 (b) Notwithstanding the provisions of subsection (a) of this section, seizure of property
4 subject to forfeiture by the provisions of this article may be made without process if:

5 (1) The seizure is incident to a lawful arrest or pursuant to a search under a search warrant

6 or an inspection warrant;

7 (2) The property subject to seizure has been the subject of a prior judgment in favor of the
8 state in a forfeiture proceeding based upon this article;

9 (3) The appropriate person has probable cause to believe that the property is directly or
10 indirectly dangerous to health or safety; or

11 (4) The appropriate person has probable cause to believe that the property was used or
12 intended for use in violation of this chapter.

13 (c) In the event of seizure pursuant to subsection (b) of this section, forfeiture proceedings
14 shall be instituted within ~~ninety~~ thirty days of the seizure thereof.

15 (d) Property taken or detained under this section shall not be subject to replevin, but is
16 deemed to be in the custody of the appropriate person, subject only to the orders and decrees of
17 the court having jurisdiction over the forfeiture proceedings. When property is seized under this
18 article, the appropriate person may:

19 (1) Place the property under seal;

20 (2) Remove the property to a place designated by him or her;

21 (3) Require the appropriate law-enforcement agency to take custody of the property and
22 remove it to an appropriate location for disposition in accordance with law; or

23 (4) In the case of seized moneys, securities or other negotiable instruments, place the
24 assets in any interest-bearing depository insured by an agency of the federal government.

25 The requirements of this subsection pertaining to the removal of seized property are not
26 mandatory in the case of real property and appurtenances thereto.

§60A-7-705. Procedures for forfeiture.

1 (a) (1) Any proceeding wherein the state seeks forfeiture of property subject to forfeiture
2 under this article shall be a civil proceeding. A petition for forfeiture may be filed on behalf of the
3 state and any law-enforcement agency making a seizure under this article by the prosecuting
4 attorney of a county, or duly appointed special prosecutor.

5 (2) A petition for forfeiture may be filed and proceedings held thereon in the circuit court
6 of the county wherein the seizure was made, the real property subject to forfeiture is situate, or
7 the circuit court of the county wherein any owner of the property subject to forfeiture may reside.

8 (3) Any civil trial stemming from a petition for forfeiture brought under this chapter at the
9 demand of either party shall be by jury.

10 (4) A petition for forfeiture of the seized property shall be filed within ninety days after the
11 seizure of the property in question. The petition shall be verified by oath or affirmation of a law-
12 enforcement officer representing the law-enforcement agency responsible for the seizure or the
13 prosecuting attorney and shall contain the following:

14 (i) A description of the property seized;

15 (ii) A statement as to who is responsible for the seizure;

16 (iii) A statement of the time and place of seizure;

17 (iv) The identity of the owner or owners of the property, if known;

18 (v) The identity of the person or persons in possession of the property at the time seized,
19 if known;

20 (vi) A statement of facts upon which probable cause for belief that the seized property is
21 subject to forfeiture pursuant to the provisions of this article is based;

22 (vii) The identity of all persons or corporations having a perfected security interest or lien
23 in the subject property, as well as the identity of all persons or corporations known to the affiant
24 who may be holding a possessory or statutory lien against such property;

25 (viii) A prayer for an order directing forfeiture of the seized property to the state, and
26 vesting ownership of such property in the state.

27 (b) The persons who are the owners of the seized property, the persons who were in
28 possession of the seized property at the time of the seizure and the persons who are the holders
29 of a perfected security interest or lien shall all be named as respondents in the petition for
30 forfeiture. At the time of filing or as soon as practicable thereafter, a copy of the petition for

31 forfeiture shall be served upon the owner or owners of the seized property, as well as all holders
32 of a perfected security interest or lien or of a possessory or statutory lien in the same class, if
33 known. Should diligent efforts fail to disclose the lawful owner or owners of the seized property, a
34 copy of the petition for forfeiture shall be served upon any person who was in possession or
35 alleged to be in possession of the property at the time of seizure, where such person's identity is
36 known. The above service shall be made pursuant to the provisions of the West Virginia Rules of
37 Civil Procedure. Any copy of the petition for forfeiture so served shall include a notice substantially
38 as follows:

39 "To any claimant to the within described property: You have the right to file an answer to
40 this petition setting forth your title in, and right to possession of, the property within thirty days
41 from the service hereof. If you fail to file an answer, a final order forfeiting the property to the state
42 will be entered, and such order is not subject to appeal."

43 If no owner or possessors, lienholders or holders of a security interest be found, then such
44 service may be by Class II legal publication in accordance with the provisions of article three,
45 chapter fifty-nine of this code, and the publication area shall be the county wherein such property
46 was located at the time of seizure and the county wherein the petition for forfeiture is filed.

47 (c) In addition to the requirements of subsection (b) above, the prosecuting attorney or
48 law-enforcement officer upon whose oath or affirmation the petition for forfeiture is based, shall
49 be responsible for the publication of a further notice. Such further notice that a petition for forfeiture
50 has been filed shall be published by Class II legal advertisement in accordance with article three,
51 chapter fifty-nine of this code. The publication area shall be the county wherein the property was
52 seized and the county wherein the petition for forfeiture is filed. The notice shall advise any
53 claimant to the property of their right to file a claim on or before the date set forth in the notice,
54 which date shall not be less than thirty days from the date of the first publication. The notice shall
55 specify that any claim must clearly state the identity of the claimant and an address where legal
56 process can be served upon that person. In addition such notice shall contain the following

57 information:

58 (1) A description of the property seized;

59 (2) A statement as to who is responsible for the seizure;

60 (3) A statement of the time and place of seizure;

61 (4) The identity of the owner or owners of the property, if known;

62 (5) The identity of the person or persons in possession of the property at the time of
63 seizure, if known;

64 (6) A statement that prayer for an order directing forfeiture of the seized property to the
65 state, and vesting ownership of such property in the state shall be requested of the court.

66 (d) If no answer or claim is filed within thirty days of the date of service of the petition
67 pursuant to subsection (b) of this section, or within thirty days of the first publication pursuant to
68 subsection (b) of this section, the court shall enter an order forfeiting the seized property to the
69 state. If any claim to the seized property is timely filed, a time and place shall be set for a hearing
70 upon such claim. The claimant or claimants shall be given notice of such hearing not less than
71 ten days prior to the date set for the hearing.

72 (e) At the hearing upon the claim or claims, the state shall have the burden of proving by
73 ~~a preponderance of the~~ clear and convincing evidence that the seized property is subject to
74 forfeiture pursuant to the provisions of this chapter.

75 (f) Any order forfeiting property to the state and entered pursuant to this section perfects
76 the state's right, title and interest in the forfeited property and relates back to the date of seizure:
77 *Provided*, That in any proceeding under this article the circuit court shall in its final order make
78 specific findings with respect to whether or not probable cause to seize such property existed at
79 the time of such seizure.

80 (g) During the pendency of a forfeiture proceeding, it is unlawful for any property owner or
81 holder of a bona fide security interest or other valid lienholder to transfer or attempt to transfer
82 any ownership interest or security interest in seized property with the intent to defeat the purpose

83 of this article, and the court wherein the petition for forfeiture is filed may enjoin a property owner
 84 or holder of a security interest or other lienholder from making such a transfer should one come
 85 to its attention. Any such transfer which is made in violation of the provisions of this subsection
 86 shall have no effect upon an order of the court forfeiting seized property to the state if a notice of
 87 lis pendens is filed prior to the recording of the instrument of transfer.

88 (h) The court may void any transfer of property made before or after a forfeiture proceeding
 89 has been commenced, which is subject to forfeiture, if the transfer was not to a bona fide
 90 purchaser without notice for value.

91 (i) An appeal of a decision of the circuit court concerning a forfeiture proceeding brought
 92 pursuant to this chapter must be filed within one hundred twenty days of the date of entry of the
 93 final appealable order. The appellant shall be required to give notice of intent to appeal within
 94 thirty days of the entry of such appealable order.

**§60A-7-706. Disposition of forfeited moneys, securities or other negotiable instruments;
 distribution of proceeds.**

1 (a) Whenever moneys, securities or other negotiable instruments are forfeited under the
 2 provisions of this article, such proceeds shall be distributed as follows:

3 (1) Ten percent of the proceeds shall be tendered to the office of the prosecuting attorney
 4 which initiated the forfeiture proceeding;

5 (2) The balance shall be paid over to the State Treasurer of the state for deposit and
 6 investment in accordance with section five, article twelve of the West Virginia Constitution.
 7 ~~deposited in a special law enforcement investigation fund. The fund may be placed in any interest-~~
 8 ~~bearing depository insured by an agency of the federal government. The fund shall be~~
 9 ~~administered by the chief of the law enforcement agency that seized the forfeited property.~~

10 ~~(b) No funds shall be expended from the special law enforcement investigation fund~~
 11 ~~except as follows:~~

12 ~~(1) In the case of the funds belonging to the State Police, the funds shall only be expended~~

13 ~~at the direction of the superintendent of the State Police and in accordance with the provisions of~~
 14 ~~article two, chapter eleven-b of this code and the provisions of subdivision (10), subsection (b),~~
 15 ~~section two, article two, chapter twelve of this code;~~

16 ~~(2) In the case of funds belonging to the office of either the sheriff or prosecuting attorney~~
 17 ~~of any county in which the special fund has been created, the funds therein may only be expended~~
 18 ~~in the manner provided in sections four and five, article five, chapter seven of this code; and~~

19 ~~(3) In the case of funds belonging to the police department of any municipality in which~~
 20 ~~the special fund has been created, the funds therein may only be expended in the manner~~
 21 ~~provided in section twenty-two, article thirteen, chapter eight of this code.~~

§60A-7-707. Disposition of other forfeited property; distribution of proceeds.

1 (a) When property other than that referred to in section seven hundred six of this article is
 2 forfeited under this article, the circuit court ordering the forfeiture, shall direct that ~~upon application~~
 3 ~~by the prosecuting attorney or the chief of the law enforcement agency that seized said forfeited~~
 4 ~~property, may direct that:~~

5 ~~(1) Title to the forfeited property be vested in the law enforcement agency so petitioning;~~
 6 ~~or~~

7 ~~(2) The law enforcement agency responsible for the seizure retain the property for official~~
 8 ~~use; or~~

9 ~~(3) The the forfeited property shall be offered at public auction to the highest bidder for~~
 10 ~~cash. Notice of such public auction shall be published as a Class III legal advertisement in~~
 11 ~~accordance with article three, chapter fifty-nine of this code. The publication area shall be the~~
 12 ~~county where the public auction will be held.~~

13 ~~(b) When a law enforcement agency receives property pursuant to this section, the court~~
 14 ~~may, upon request of the prosecuting attorney initiating the forfeiture proceeding, require the law-~~
 15 ~~enforcement agency to pay unto the office of said prosecuting attorney a sum not to exceed ten~~
 16 ~~percent of the value of the property received to compensate said office for actual costs and~~

17 ~~expenses incurred.~~

18 ~~(e)~~ (b) The proceeds of every public sale conducted pursuant to this section shall be paid
19 and applied as follows: First, to the balance due on any security interest preserved by the court;
20 second, to the costs incurred in the storage, maintenance and security of the property; third, to
21 the costs incurred in selling the property.

22 ~~(d)~~ (c) Any proceeds of a public sale remaining after distribution pursuant to subsection
23 ~~(e)~~ (b) of this section shall be distributed as follows:

24 (1) Ten percent of such proceeds shall be tendered to the office of the prosecuting attorney
25 who initiated the forfeiture proceeding.

26 (2) The balance shall be paid over to the treasurer of the state for deposit and investment
27 in accordance with section five, article twelve of the West Virginia Constitution. ~~deposited in a~~
28 ~~special law-enforcement investigation fund. Such fund shall be administered by the chief of the~~
29 ~~law-enforcement agency that seized the forfeited property sold and shall take the form of an~~
30 ~~interest-bearing account with any interest earned to be compounded to the fund. Any funds~~
31 ~~deposited in the special law-enforcement investigative fund pursuant to this article shall be~~
32 ~~expended only to defray the costs of protracted or complex investigations, to provide additional~~
33 ~~technical equipment or expertise, to provide matching funds to obtain federal grants or for such~~
34 ~~other law-enforcement purposes as the chief of the law-enforcement agency may deem~~
35 ~~appropriate; however, these funds may not be utilized for regular operating needs.~~

36 ~~(e)~~ ~~If more than one law-enforcement agency was substantially involved in effecting the~~
37 ~~seizure and forfeiture of property, the court wherein the petition for forfeiture was filed shall~~
38 ~~equitably distribute the forfeited property among the law-enforcement agencies. In the event of a~~
39 ~~public sale of such property pursuant to subsection (a) of this section, the court shall equitably~~
40 ~~distribute any proceeds remaining after distribution pursuant to subsection (c) and subdivision (1),~~
41 ~~subsection (d) of this section among such law-enforcement agencies for deposit into their~~
42 ~~individual special law-enforcement investigative fund. Equitable distribution shall be based upon~~

43 ~~the overall contribution of the individual law enforcement agency to the investigation which led to~~
44 ~~the seizure.~~

45 (f) ~~(d)~~ Upon the sale of any forfeited property for which title or registration is required by
46 law, the state shall issue a title or registration certificate to any bona fide purchaser at a public
47 sale of the property conducted pursuant to subsection (a) of this section. ~~Upon the request of the~~
48 ~~law enforcement agency receiving, pursuant to the order of the court, or electing to retain,~~
49 ~~pursuant to subsection (a) of this section, any forfeited property for which title or registration is~~
50 ~~required by law, the state shall issue a title or registration certificate to the appropriate~~
51 ~~governmental body.~~

52 (g) ~~Any funds expended pursuant to the provisions of this section, shall only be expended~~
53 ~~in the manner provided in subsection (b), section seven hundred five of this article.~~

54 (h) ~~(e)~~ Every prosecuting attorney ~~or law enforcement agency~~ receiving forfeited property
55 or proceeds from the sale of forfeited property pursuant to this article shall submit an annual report
56 to the ~~body which has budgetary authority over such agency~~ county commission. Such report
57 shall specify the type and approximate value of all forfeited property and the amount of proceeds
58 from the sale of forfeited property received in the preceding year. No county ~~or municipality~~ may
59 use anticipated receipts of forfeited property in their budgetary process.

60 (i) ~~In lieu of the sale of any forfeited property subject to a bona fide security interest~~
61 ~~preserved by an order of the court, the law enforcement agency receiving the forfeited property~~
62 ~~may pay the balance due on any security interest preserved by the court from funds budgeted to~~
63 ~~the office or department or from the special fund and retain possession of the forfeited property~~
64 ~~for official use pursuant to subsection (a) of this section.~~

65 (j) ~~In every case where property is forfeited, disposition of the forfeited property, in~~
66 ~~accordance with this article, shall be made within six months of the date upon which the court of~~
67 ~~jurisdiction orders forfeiture. Should the office or agency receiving the property fail either to place~~
68 ~~the property in official use or dispose of the property in accordance with law, the court of~~

69 ~~jurisdiction shall cause disposition of the property to be made with any proceeds therefrom to be~~
 70 ~~awarded to the state.~~

71 ~~(k)~~ (f) No disposition shall occur until all applicable periods for filing a notice of intent to
 72 appeal has expired and no party in interest shall have filed such notice. The filing of the notice of
 73 intent to appeal shall stay any such disposition until the appeal has been finally adjudicated or
 74 until the appeal period of one hundred eighty days has expired without an appeal having actually
 75 been taken or filed, unless a valid extension of the appeal has been granted by the circuit court
 76 under the provisions of section seven, article four, chapter fifty-eight of this code.

77 ~~(l) The special law enforcement investigative funds of each law enforcement agency may~~
 78 ~~be placed in an interest-bearing depository insured by the federal government.~~

§60A-7-708. Disposition of property when forfeiture is not ordered.

1 (a) A police agency which seizes property pursuant to this article shall return the seized
 2 property to the owner if:

- 3 (1) No petition of forfeiture is filed within the time provided in this article;
- 4 (2) The petition for forfeiture of the property is withdrawn or dismissed; or
- 5 (3) The judgment of the circuit court in the forfeiture proceedings is that the property is not
 6 subject to forfeiture.

7 (b) Notwithstanding the provisions of subsection (a) of this section, no seized property
 8 may be returned to the owner thereof if it is unlawful for the owner to possess the seized property.

9 (c) Property that is returned to the owner under this section shall be returned free of any
 10 charges, costs or expenses incurred by any person in connection with the seizure or storage of
 11 the seized property.

§60A-7-709. Effect of 2016 amendments upon pending actions.

12 As of the effective date of the amendments to this article enacted during the regular
 13 session of the Legislature in 2016, the amendments shall apply to all seizures and forfeiture
 14 actions pending in the courts of the state and all commenced thereafter.

NOTE: The purpose of this bill is to under the West Virginia contraband forfeiture act adopt a clear and convincing evidence standard; shorten the time to institute forfeiture proceedings; designate persons to be made respondents to a petition for forfeiture; redirect the disposition of all forfeited property; provide for the disposition of property when forfeiture is not ordered; and provide for the effects of amendments to the law on pending actions.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.