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CRIMES AND OFFENSES Forfeiture of Property Used in Burglary or Armed Robbery: Provide for Forfeiture of Motor Vehicles, Tools, and Weapons Used in Burglary or Armed Robbery

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CRIMES AND OFFENSES

Forfeiture of Property Used in Burglary or Armed Robbery: Provide for Forfeiture of Motor Vehicles, Tools, and Weapons Used in Burglary or Armed Robbery

CODE SECTIONS: O.C.G.A. §§ 16-16-1 to -2 (new)
BILL NUMBER: HB 340
ACT NUMBER: 461
GEORGIA LAWS: 1995 Ga. Laws 1051, § 4
SUMMARY: The Act provides for forfeiture of motor vehicles, tools, and weapons used in the commission of a burglary or an armed robbery.¹
EFFECTIVE DATE: July 1, 1995

History

Burglary is the most frequently committed crime, and armed robbery is one of the most violent crimes.² For these reasons, the Georgia General Assembly enacted this portion of HB 340.³ HB 340 increases penalties for burglary and armed robbery by mandating the forfeiture of motor vehicles, tools, and weapons used in the commission of these offenses.⁴

HB 340

The Act, drafted by Representative Roy E. Barnes, contains provisions similar to the former drug forfeiture act.⁵

1. HB 340 addresses three different subject matters. Only section 4, addressing motor vehicle forfeiture, will be covered in this *Peach Sheet*[™]. Section 1 addresses trade secrets. Sections 2 and 3 address pen registers, and are discussed in a separate *Peach Sheet* found within this issue. See *Legislative Review*, 12 GA. ST. U. L. REV. 138 (1995).

2. Telephone Interview with Rep. Roy E. Barnes, House District No. 33 (Apr. 26, 1995) [hereinafter Barnes Interview]. Rep. Barnes sponsored HB 340. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*; Telephone Interview with David Fowler, Coordinator of the Drug Prosecutions Division of the Prosecuting Attorney's Council of Georgia (July 13, 1995). The general property forfeiture statute is found at 1974 Ga.

The Act first defines "armed robbery" and "burglary."⁶ The Act then states that "[a]ll motor vehicles, tools, and weapons which are used or intended for use in any manner in the commission of or to facilitate the commission of a burglary or armed robbery are subject to forfeiture."⁷ The bill, as introduced, provided for the forfeiture of a motor vehicle used in one of these crimes.⁸ The House Judiciary Committee expanded the scope of the forfeiture provision to include tools and weapons and required only that they be "intended for use" in the crime.⁹ Forfeiture of these additional items is based on the rationale that they are "instrumentalities" of the crime itself.¹⁰

The Act requires forfeiture upon conviction of burglary or armed robbery, but provides exceptions in which the motor vehicle would not be subject to forfeiture.¹¹ These exceptions include: motor vehicles that are common carriers, motor vehicles that are being used without the owner's knowledge or consent, and motor vehicles that are "encumbered by a bona fide security interest."¹² Another exception, which was added by the House Judiciary Committee, protects the interest of an uninvolved co-owner.¹³

The original bill provided an additional exception if the offense was burglary and it was the defendant's first offense.¹⁴ However, when the bill came before the Senate Judiciary Committee, Senator Arthur B. "Skin" Edge, IV, disagreed with this measure of leniency, and the committee deleted this exception.¹⁵

Laws 221 (codified at O.C.G.A. 16-13-49 (1992 & Supp. 1995)).

6. O.C.G.A. § 16-16-1 (Supp. 1995). "As used in this chapter, the term: (1) 'Armed robbery' means the offense defined in subsection (a) of Code Section 16-8-41. (2) 'Burglary' means the offense defined in subsection (a) of Code Section 16-7-1." *Id.*

7. *Id.* § 16-16-2(a).

8. HB 340, as introduced, 1995 Ga. Gen. Assem.

9. HB 340 (HCS), 1995 Ga. Gen. Assem.

10. Barnes Interview, *supra* note 2.

11. O.C.G.A. § 16-16-2(a) (Supp. 1995).

12. *Id.*

13. *Id.* § 16-16-2(a)(2).

14. HB 340, as introduced, 1995 Ga. Gen. Assem.

15. HB 340 (SCS), 1995 Ga. Gen. Assem.; Record of Proceedings in the Senate Special Judiciary Committee (Mar. 8, 1995) (remarks by Sen. Arthur B. "Skin" Edge, IV, Senate District No. 28) (available in Georgia State University College of Law Library).

The Act delineates the circumstances under which property used in a burglary or armed robbery may be seized without a warrant.¹⁶ The Act gives precise guidelines by which property is to be seized.¹⁷ After the seizure of property, the seizing officer must report the seizure to the district attorney within twenty days.¹⁸ After the seizure is reported, the district attorney files an in rem complaint for forfeiture of the property.¹⁹ This complaint must describe the property and must be served on the known owners of the property.²⁰ If the whereabouts of the owner are unknown or if the owner resides out of state, publication "in the newspaper in which the sheriff's advertisements are published" is sufficient.²¹

The Act states that the property owner then has thirty days in which to respond to the complaint and sets forth mandatory items to be included in the answer.²² If no answer is filed, the court will order disposition of the property; "[i]f an answer is filed, a hearing must be held within sixty days."²³

Property seized pursuant to this Act shall either be retained for official use or sold.²⁴ If the property is sold, the monies realized will first be used to reimburse the interest of secured parties and to pay all costs incident to the process.²⁵ The remaining monies shall be used for law enforcement purposes, at the discretion of the chief officer, except that funds shall not be used to pay salaries or rewards.²⁶ The Act concludes by providing that any agency receiving funds under this Act shall be required to submit an annual report itemizing property received and the uses made of said property.²⁷

The constitutionality of statutes requiring forfeiture of property is a contentious issue.²⁸ Forfeitures of property are in

16. O.C.G.A. § 16-16-2(b) (Supp. 1995).

17. *Id.* § 16-16-2(c).

18. *Id.* § 16-16-2(d). This twenty-day provision mirrors the law of drug paraphernalia forfeiture. Barnes Interview, *supra* note 2.

19. O.C.G.A. § 16-16-2(d) (Supp. 1995).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* § 16-16-2(e)(1)(A)-(B).

25. *Id.* § 16-16-2(e)(2)(A).

26. *Id.*

27. *Id.* § 16-16-2(e)(2)(B).

28. *Compare* Austin v. United States, 113 S. Ct. 2801 (1993) *with* Calero-

rem actions, which are civil proceedings against the property itself.²⁹ It is for this reason that the constitutional protections surrounding the criminal defendant historically have not proved to be a bar to these proceedings.³⁰ However, in *Austin v. United States*,³¹ the Supreme Court applied the Eighth Amendment doctrine of excessive fines to an in rem property forfeiture, stating that the penalty and the crime must be proportional.³² This ruling represented a departure from previous interpretations of the Excessive Fines Clause; before *Austin*, the Excessive Fines Clause was applied only to criminal defendants.³³

Similarly, the Double Jeopardy Clause of the Fifth Amendment may affect the application of this Act.³⁴ The Double Jeopardy Clause bars multiple punishments; thus, if a forfeiture is anything other than remedial in nature, it may be considered a punishment for Fifth Amendment purposes.³⁵ The Double Jeopardy Clause does not limit its scope to criminal punishments.³⁶ In *United States v. Halper*, the Court stated that a civil fine may be so excessive as to constitute a criminal punishment, thereby invoking the Fifth Amendment.³⁷

The General Assembly debated the constitutionality of the Act's forfeiture provisions. Nevertheless, the opposition to forfeiture was minimal due to the seriousness of the offenses involved.³⁸

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Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

29. T. Michelle Ator, Note, *Constitutional Law—21 U.S.C. 881 and the Eighth Amendment: Application of the Proportionality Requirement to Civil Forfeitures: Austin v. United States*, 113 S. Ct. 2801 (1993), 17 U. ARK. LITTLE ROCK L.J. 95, 96 (1994).

30. *Id.*

31. 113 S. Ct. 2801 (1993).

32. *Id.* at 2812.

33. See *Ingraham v. Wright*, 430 U.S. 651, 664-68 (1977).

34. See *United States v. Halper*, 490 U.S. 435 (1989).

35. *Id.* at 448-50.

36. *Id.*

37. *Id.*

38. Barnes Interview, *supra* note 2.