

4105

2009-2010 Regular Sessions

I N S E N A T E

April 9, 2009

Introduced by Sen. AUBERTINE -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law, in relation to the seizure and forfeiture of property or money furnished in the illegal exchange of a controlled substance

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 3388 of the public health law, as added by chapter
2 878 of the laws of 1972, subdivision 2 as amended by chapter 843 of the
3 laws of 1980, subdivision 3 as amended by chapter 419 of the laws of
4 1986, subdivision 4 as amended by chapter 527 of the laws of 1987 and
5 subdivision 7 as amended by chapter 655 of the laws of 1990, is amended
6 to read as follows:
7 S 3388. Seizure and forfeiture of vehicles, vessels or aircraft
8 unlawfully used to conceal, convey or transport controlled substances
9 AND OF PROPERTY FURNISHED IN EXCHANGE FOR SUCH SUBSTANCES. 1. Except as
10 authorized in this article, it shall be unlawful to:
11 (a) transport, carry, or convey any controlled substance in, upon, or
12 by means of any vehicle, vessel or aircraft; or
13 (b) conceal or possess any controlled substance in or upon any vehi-
14 cle, vessel or aircraft, or upon the person of anyone in or upon any
15 vehicle, vessel or aircraft; or
16 (c) use any vehicle, vessel or aircraft to facilitate the transporta-
17 tion, carriage, conveyance, concealment, receipt, possession, purchase,
18 or sale of any controlled substance[.]; OR
19 (D) POSSESS PROPERTY FURNISHED IN EXCHANGE FOR ANY CONTROLLED
20 SUBSTANCE IN VIOLATION OF THIS ARTICLE.
21 2. (A) Any vehicle, vessel or aircraft which has been or is being
22 used in violation of subdivision one OF THIS SECTION, (except a vehicle,
23 vessel or aircraft used by any person as a common carrier in the trans-
24 action of business as such common carrier) AND PROPERTY, POSSESSED IN

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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VIOLATION OF PARAGRAPH (D) OF SUCH SUBDIVISION, shall be seized by any peace officer, acting pursuant to his OR HER special duties, or police officer, and forfeited as hereinafter in this section provided.

(B) A vehicle, vessel or aircraft is not subject to forfeiture unless used in connection with acts or conduct which would constitute a felony under article [220] TWO HUNDRED TWENTY of the penal law.

(C) FOR PURPOSES OF PARAGRAPH (D) OF SUBDIVISION ONE OF THIS SECTION AND THIS SUBDIVISION:

(1) THE TERM "PROPERTY" HAS THE ORDINARY, COMMON MEANING ASCRIBED TO IT AND INCLUDES REAL AND PERSONAL PROPERTY, MONEY, NEGOTIABLE AND NON-NEGOTIABLE INSTRUMENTS AND SECURITIES, AND THE BENEFITS AND PROPERTY RESULTING FROM THE USE OR EXCHANGE OF ANY OF THEM.

(2) IT SHALL BE A PRESUMPTION (SUBJECT TO REBUTTAL BY THE CLAIMANT) THAT ANY MONEY FOUND IN CLOSE PROXIMITY TO ANY CONTROLLED SUBSTANCE OWNED OR POSSESSED IN VIOLATION OF THIS ARTICLE OR IN CLOSE PROXIMITY TO ANY MATERIALS OR RECORDS USED IN CONNECTION THEREWITH, WAS MONEY FURNISHED IN VIOLATION OF PARAGRAPH (D) OF SUBDIVISION ONE OF THIS SECTION.

3. The seized property shall be delivered by the officer having made the seizure to the custody of the district attorney of the county wherein the seizure was made, except that in the cities of New York, Yonkers, Rochester and Buffalo the seized property shall be delivered to the custody of the police department of such cities and such property seized by a member or members of the state police shall be delivered to the custody of the superintendent of state police, together with a report of all the facts and circumstances of the seizure.

4. It shall be the duty of the attorney general in seizures by members of the state police, otherwise it shall be the duty of the district attorney of the county wherein the seizure is made, if elsewhere than in the cities of New York, Yonkers, Rochester or Buffalo, and where the seizure is made in such cities it shall be the duty of the corporation counsel of the city, to inquire into the facts of the seizure so reported to him OR HER and if it appears probable that a forfeiture has been incurred by reason of a violation of this section, for the determination of which the institution of proceedings in the supreme court is necessary, to cause the proper proceedings to be commenced and prosecuted, not later than twenty days after written demand by a person claiming ownership thereof, to declare such forfeiture, unless, upon inquiry and examination, such district attorney, attorney general or corporation counsel decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case, the district attorney, the attorney general or corporation counsel shall cause such seized property to be returned to the owner thereof. The procedure for proceedings instituted under this section shall conform as much as possible to the procedure for attachment.

5. Notice of the institution of the forfeiture proceeding shall be served either:

(a) personally on the owners of the seized property; or

(b) by registered mail to the owners' last known address and by publication of the notice once a week for two successive weeks in a newspaper published or circulated in the county wherein the seizure was made.

6. Forfeiture shall not be adjudged where the owners establish by preponderance of the evidence that:

(a) the use of such seized property, in violation of subdivision one of this section, was not intentional on the part of any owner; or

1 (b) said seized property was used in violation of subdivision one of
2 this section by any person other than an owner thereof, while such
3 seized property was unlawfully in the possession of a person who
4 acquired possession thereof in violation of the criminal laws of the
5 United States, or of any state.

6 7. The district attorney, the superintendent of state police or the
7 police department having custody of the seized property, after such
8 judicial determination of forfeiture, shall EXCEPT WITH RESPECT TO
9 MONEY, at their discretion, either retain such seized property for the
10 official use of their office, division or department, or, by a public
11 notice of at least five days, sell such forfeited property at public
12 sale; provided, however, that where such property is subject to a
13 perfected lien such property may not be retained for their official use
14 unless all such liens on the property to be retained have been or will
15 be satisfied. The net proceeds of any such sale, after deduction of the
16 lawful expenses incurred, AND ALL SEIZED MONEY shall be paid into the
17 general fund of the county wherein the seizure was made except that the
18 net proceeds of the sale of property AND ALL MONEY seized in the cities
19 of New York, Yonkers, Rochester and Buffalo shall be paid into the
20 respective general funds of such cities, and THE NET PROCEEDS of the
21 sale of property AND ALL MONEY seized by the state police into the
22 general fund of the state.

23 8. Whenever any person interested in any property OR MONEY which is
24 seized and declared forfeited under the provisions of this section files
25 with a justice of the supreme court a petition for the recovery of such
26 forfeited property OR MONEY, the justice of the supreme court may
27 restore said forfeited property OR MONEY upon such terms and conditions
28 as he OR SHE deems reasonable and just, if the petitioner establishes
29 either of the affirmative defenses set forth in subdivision six of this
30 section and that the petitioner was without personal or actual knowledge
31 of the forfeiture proceeding. If the petition be filed after the sale
32 of the forfeited property, any judgment in favor of the petitioner shall
33 be limited to the net proceeds of such sale, after deduction of the
34 lawful expenses and costs incurred by the district attorney, police
35 department or corporation counsel.

36 9. No suit or action under this section for wrongful seizure shall be
37 instituted unless such suit or action is commenced within two years
38 after the time when the property was seized.

39 S 2. This act shall take effect immediately.