STATE OF NEW YORK

6440

2021-2022 Regular Sessions

IN SENATE

April 28, 2021

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

AN ACT to amend the penal law and the criminal procedure law, in relation to enacting the "criminal forfeiture process act"; and to repeal certain provisions of the penal law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "criminal forfeiture process act".

§ 2. Article 480 of the penal law is REPEALED and a new article 480 is added to read as follows:

ARTICLE 480

CRIMINAL FORFEITURE PROCESS

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

LBD05916-04-1

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§ 480.00 Legislative intent.

The legislature hereby finds that forfeiture is disfavored. The purpose of this article is to:

1. Deter criminal activity by reducing its economic incentives;

2. Confiscate property used in the violation of law and restrain profits from illegal conduct; and

3. Protect the due process rights of property owners.

§ 480.05 Definitions.

For the purposes of this article, the following terms shall have the following meanings:

1. "Abandoned property" means personal property left by an owner who relinquishes all rights to control of such property. Abandoned property shall not include real property.

2. "Actual knowledge" means direct and clear awareness of information, a fact, or a condition.

3. "Contraband" means any article or thing which a person is prohibited from obtaining or possessing by law, rule, or regulation, including, but not limited to, illegal drugs or firearms.

4. "Motor vehicle" means a motor vehicle as defined by section one hundred twenty-five of the vehicle and traffic law, except that such term shall include any trailer, snowmobile, airplane, vessel, or any equipment attached to one of such devices. "Motor vehicle" shall not include stolen property.

5. "Innocent owner" means an owner, an owner-in-joint-tenancy, or the defendant's heir or other owner of property subject to forfeiture who does not have actual knowledge of the use of his or her property in a crime which authorizes the forfeiture of such property. "Innocent owner" shall not include the defendant or a secured interest holder.

6. "Instrumentality" means property otherwise lawful to possess that is used in a crime that authorizes the forfeiture of such property. "Instrumentality" includes, but is not limited to, land, buildings, containers, conveyances, equipment, materials, products, tools, computers, computer software, telecommunications devices, firearms, ammunition and ammunition-and-firearm accessories.

7. "Law enforcement agency" means any state or local police force, or any other local, county, or state agency that has the authority under state law to engage in seizure and forfeiture.

8. "Proceeds" means money, securities, negotiable instruments or other means of exchange obtained from the sale of property or contraband.

9. "Prosecuting authority" means a municipal attorney, solicitor, district attorney, attorney general and other attorney acting under specific direction and authority, appointed or charged by law with the responsibility for prosecuting crime.

10. "Secured interest holder" means a person who is a secured creditor, mortgagee, lienholder, or other person who has a valid claim, security interest, mortgage, lien, leasehold, or other interest in property that is subject to forfeiture. "Secured interest holder" shall not include the defendant or an innocent owner.

§ 480.10 Jurisdiction.

1. This article shall only apply to property seized in relation to the following:

(a) a felony controlled substance offense under article two hundred twenty of this chapter or a felony offense involving cannabis under article two hundred twenty-two of this chapter;

(b) a felony prostitution offense under article two hundred thirty of this chapter;

(c) a felony offense involving driving under the influence of a controlled substance or alcohol; or

(d) an arrest or search conducted immediately subsequent to the hot pursuit of a person suspected of a felony offense for which property is subject to seizure and forfeiture.

2. There shall be no civil forfeiture under this article.

3. The court that has jurisdiction in the related criminal matter shall have jurisdiction over the forfeiture proceeding.

4. The forfeiture proceeding shall be part of the trial of the related crime. It shall follow a finding of the defendant's guilt or be conducted at the court's discretion. Such proceeding shall be conducted by the court without a jury.

§ 480.15 Seizure of personal property with process.

At the request of the prosecuting authority, the court may issue an ex parte order to attach, seize or secure personal property for which forfeiture is sought and to provide for its custody. Application, issuance, execution, and return are subject to state law and court rules.

§ 480.20 Seizure of personal property without process.

Personal property may be seized, as part of a lawful search, without a court order if:

1. The personal property subject to forfeiture is seized incident to a lawful arrest;

2. The state has probable cause to believe the delay caused by the necessity of obtaining process would result in the removal or destruction of the personal property that is forfeitable under this chapter; or

3. The personal property is the subject of a prior and valid judgment of forfeiture in favor of the state.

§ 480.25 Seizure or restraint of real property with process.

1. Real property shall not be seized or restrained without a court order.

2. A court shall not issue an order to seize real property unless the defendant and any other person with a known interest in such real property receive proper notice and are given an opportunity for a contested hearing to determine the existence of probable cause for such seizure.

3. Nothing in this section shall prohibit the prosecuting authority from seeking a lis pendens or restraining order to hinder the sale or

destruction of real property otherwise authorized by law. If the prosecuting authority obtains a lis pendens or restraining order, such prosecuting authority shall notify the defendant and any other person with a known interest in the property within thirty days.

4. Application, filing, issuance, execution, and return of any order shall be subject to the laws of the state of New York and any court rules generally applicable to such orders.

§ 480.30 Contraband and stolen property.

No property right shall exist in contraband or stolen property. Contraband and stolen property shall be subject to seizure. Contraband shall be disposed of according to the applicable state law for such article or thing. Stolen property shall be returned to its owner.

§ 480.35 Receipt.

1. When property is seized, the law enforcement officer shall give an itemized receipt to the person possessing such property at the time of seizure, or otherwise pursuant to section 690.50 of the criminal procedure law.

2. The receipt shall be numbered for future reference and shall constitute notice of seizure.

§ 480.40 Property exempt from seizure and forfeiture.

1. The following shall be exempt from seizure and forfeiture:

(a) United States currency totaling two hundred dollars or less; and

(b) A motor vehicle with a market value of less than two thousand dollars.

2. The prosecuting authority shall advise as to which publications that law enforcement agencies may use to establish the value of a motor vehicle in the prosecuting authority's jurisdiction.

3. A prosecuting authority may establish a minimum-dollar amount larger than those in paragraphs (a) and (b) of subdivision one of this section in the prosecuting authority's jurisdiction.

4. The presence or possession of United States currency, without other indicia of a crime that authorizes the forfeiture of property, shall be insufficient probable cause for the seizure of such currency.

§ 480.45 Waiver prohibition.

1. A law enforcement officer, other than the prosecuting authority, shall not request, require or induce a person to waive, for purpose of seizure or forfeiture, such person's interest in seized property.

2. A document purporting to waive interest or rights in seized property shall be void and inadmissible in court.

§ 480.50 Title.

1. Title to seized property subject to forfeiture shall vest with the state when the court issues a forfeiture judgment and shall relate back to the time when such property was seized or restrained.

2. Title to substitute assets shall vest when the court issues an order forfeiting such substitute assets.

§ 480.55 Counsel.

1. If a defendant in a criminal prosecution is represented by a public defender, such public defender's office may authorize representation of such defendant in the forfeiture proceeding and any other related proceeding.

2. If a defendant and any other person with an interest in seized property engages in pro se representation in a forfeiture-related proceeding before a judge, the court shall not be bound by the common law, court rules of evidence, statutory rules of evidence, technical or formal rules of evidence, pleading or procedure in the litigation related to the forfeiture of such property.

§ 480.60 Notice to other known owners.

1. The prosecuting authority shall perform a reasonable search of public records to identify any person, other than the defendant, known to have an interest in seized property subject to forfeiture.

2. The prosecuting authority shall give notice to any person identified to have an interest in seized property subject to forfeiture, who is not charged or indicted. The notice shall include, if available, the seizure receipt number pursuant to subdivision two of section 480.35 of this article. Notice shall be given as provided by the rules of the court.

3. The following language shall substantially and conspicuously appear in the notice required by this section:

"WARNING: You may lose the right to be heard in court if you do not file promptly a statement of interest or ownership. You do not have to pay a filing fee to file your notice."

4. If notice is not served on any persons appearing to have an interest in seized property and no time extension is granted or the extension period has expired, the prosecuting authority or court shall order the return of such property to the person from whom such property was seized upon the request of such person. Contraband shall not be returned.

§ 480.65 Prompt post-seizure hearing.

1. Following a seizure of property, a defendant or other person with an interest in such seized property shall have a right to a prompt post-seizure hearing.

2. A person with an interest in seized property may petition the court for a hearing.

3. At the court's discretion, the court may hold a post-seizure hearing:

(a) as a separate hearing; or

(b) at the same time as a probable-cause determination, a post-arraignment omnibus hearing or other pretrial hearing.

4. A party, by agreement or for good cause, may move for one extension of no more than ten days. Any motion shall be supported by affidavits or other submissions.

5. The court shall order the return of seized property if it finds:

(a) the seizure was invalid;

(b) a criminal charge has not been filed and no extension of the filing period is available;

(c) the seized property is not reasonably required to be held as evidence;

(d) the final judgment likely will be in favor of the defendant or any other person with an interest in the property; or

(e) the seized property is the only reasonable means for the defendant to pay for legal representation unless the prosecuting authority shows by clear and convincing evidence that the seized property is the instrumentality of or proceeds derived directly of the crime for which the defendant is charged.

6. At the court's discretion, it may order the return of enough funds and property, not needed as evidence, for the defendant to obtain counsel of choice but less than the total amount seized.

7. The provisions of this section shall not apply to contraband.

§ 480.70 Notice of proposed forfeiture.

1. In any case in which the state seeks forfeiture of property, other than under section 480.75 of this article, the prosecuting authority shall file with the court a notice of proposed forfeiture. The notice

shall accompany the initial or subsequent charging instrument. Such notice shall include the following information:

(a) a description of the property seized;

(b) the time, date and place of the seizure;

(c) the seizure receipt number pursuant to subdivision two of section 480.35 of this article, if available; and

(d) a description of how the seized property was used in or derived from the alleged crime.

2. The prosecuting authority may allege the forfeiture of seized property as a sanction related to the crime for which the defendant is charged, as part of sentencing consideration, or through other means to effectuate the criminal forfeiture of such property.

3. The notice shall not be read to any jury.

4. The state may amend the notice of proposed forfeiture at any time prior to trial.

5. The court may grant an unlimited number of ninety-day extensions for the filing of a criminal charge if, for each such extension, the court determines probable cause is shown and additional time is warranted.

6. The prosecuting authority shall serve the charging document or amendment and the notice of proposed forfeiture as provided by the rules of the court.

7. The court shall order the return of seized property to the owner if the prosecuting authority does not file a charging document or a notice of proposed forfeiture as provided by the court's rules, the period of an extension expires, or the court does not grant an extension.

§ 480.75 Notice of proposed forfeiture after indictment.

1. After the issuance of an indictment, the prosecuting authority shall file with the court responsible for the criminal trial a notice of proposed forfeiture. Such notice shall include the following information:

(a) a description of the property seized;

(b) the time, date and place of the seizure;

(c) the seizure receipt number pursuant to subdivision two of section 480.35 of this article, if available; and

(d) a description of how the seized property was used in or derived from the alleged crime.

2. The notice shall not to be read to any jury.

3. The prosecuting authority may allege, in the notice, the forfeiture as a sanction related to the crime for which the defendant is charged, as part of a sentencing consideration, or as other means to effectuate the criminal forfeiture of the property.

4. Upon application of the prosecuting authority, the court may enter a restraining order or injunction, or take other action to preserve the availability of property only:

(a) upon the issuance of an indictment according to subdivision one of this section; or

(b) prior to the issuance of an indictment, if the court determines there is a substantial probability the state will prevail on the issue of criminal forfeiture and that failure to enter the order will result in property being destroyed, removed from the jurisdiction, or otherwise made unavailable for forfeiture.

5. Any order entered pursuant to paragraph (b) of subdivision four of this section shall be effective for not more than ninety days, unless extended by the court for good cause shown or an indictment described by

paragraph (a) of subdivision four of this section has been issued subsequently.

§ 480.80 Discovery.

Discovery related to the forfeiture proceeding shall be subject to procedures set forth pursuant to the criminal procedure law.

§ 480.85 Trial, conviction, and standard of proof.

1. Property shall be forfeited if:

(a) the prosecuting authority secures a conviction of a crime that authorizes the forfeiture of property; and

(b) the prosecuting authority establishes by clear and convincing evidence the property is an instrumentality of or proceeds derived directly from the crime for which the state secured a conviction.

2. After the defendant's conviction, the court shall hold the forfeiture proceeding at its discretion. Such proceeding shall be conducted by the court without a jury.

3. Except as required by section 480.45 of this article, nothing in this article shall prevent property from being forfeited as part of:

(a) a plea agreement; or

(b) a grant of immunity or reduced punishment, with or without the filing of a criminal charge, in exchange for testifying or assisting a law enforcement investigation or prosecution.

4. To effectuate the purposes of paragraph (b) of subdivision three of this section, the parties may file a notice, under seal, with the court, if the defendant is represented by counsel. If the defendant is not represented by counsel, the prosecuting authority may file an ex parte notice, under seal, with the court. Such notice shall advise the court of the reason for granting immunity, reducing punishment or not filing a charge.

5. The court may use the notice provided for in subdivision four of this section in its consideration of an order to transfer title of the property to the state and to dispose of the property pursuant to section 480.145 of this article.

§ 480.90 Exceptions to the conviction requirement.

The court shall waive the conviction requirement and grant permanent title of the property to the state if the prosecuting authority files a motion no less than ninety days after seizure and shows by clear and convincing evidence that, before conviction, the defendant:

1. died;

2. was deported by the United States government;

3. abandoned the property; or

4. fled the jurisdiction.

§ 480.95 Proportionality.

1. The defendant may petition the court to determine, before or at trial, whether the forfeiture is unconstitutionally excessive under the state or federal constitution.

2. The defendant shall have the burden of establishing that the forfeiture is unconstitutionally excessive by a preponderance of the evidence at a hearing that shall be conducted by the court without a jury.

3. In determining whether the forfeiture is unconstitutionally excessive, the court shall consider all relevant factors including, but not limited to:

(a) the seriousness of the crime and its impact on the community, including the duration of the activity and harm caused by the defendant;

(b) the extent to which the defendant participated in the crime;

(c) the extent to which the property was used in committing the crime;

(d) the sentence to be imposed for committing the crime;
(e) whether the crime was completed or attempted;
(f) the hardship to the defendant if the forfeiture of a motor vehicle would deprive the defendant of the defendant's livelihood; and
(g) an unjust hardship from the loss of property to the defendant's family members or others if the property is forfeited.
4. In determining the value of the instrumentality subject to forfeiture, the court shall consider all relevant factors related to the fair market value of the property.
5. The court shall not consider the value of the property to the state in determining whether the forfeiture is unconstitutionally excessive.
§ 480.100 Secured interest holder.
1. Seized property encumbered by a security interest shall not be forfeited.
2. The prosecuting authority shall return seized property to a secured interest holder, other than the defendant or an innocent owner, up to the value of such interest. Contraband shall not be returned.
3. If the seized property is not returned, the secured interest holder may petition the court at any time before the court enters judgment in the criminal prosecution or grants a motion under section 480.90 of this article. The petition may include the seizure receipt number pursuant to subdivision two of section 480.35 of this article, if available.
4. The court shall hear the petition within thirty days after its filing or at the court's discretion. The hearing shall be held before the court alone, without a jury. The court may consolidate the hearing on the petition with any other hearing before the court in the case.
5. The secured interest holder shall establish by clear and convincing evidence the validity of the security interest, mortgage, lien, leasehold, lease, rental agreement or other agreement.
6. If the secured interest holder alleges a valid interest but the prosecuting authority seeks to proceed, the prosecuting authority shall prove by clear and convincing evidence that:
(a) the interest is invalid; or
(b) the interest resulted from a fraudulent conveyance; or
(c) the secured interest holder consented to the use of the property in the crime for which the defendant is charged.
7. If the prosecuting authority fails to meet its burden under subdivision six of this section, the court shall order the state to relinquish claims to the property, up to the value of the interest, and return the interest to the secured interest holder.
§ 480.105 Innocent owner.
1. Seized property of an innocent owner shall not be forfeited.
2. The prosecuting authority shall return seized property to an innocent owner. Contraband shall not be returned.
3. If the seized property is not returned, an innocent owner claimant may petition the court at any time before the court enters judgment in the criminal prosecution or grants a motion under section 480.90 of this article.
4. The innocent owner claimant shall file with the court a simple statement that sets forth:
(a) the claimant's right, title, or interest in the seized property;
(b) the time and circumstances of the claimant's acquisition of the interest in the seized property;
(c) additional facts supporting the claimant's claim;
(d) the relief sought by the claimant; and

(e) the seizure receipt number pursuant to subdivision two of section 480.35 of this article, if available.

5. The filing fee for the statement under this section shall be waived.

6. The court shall hear the petition within thirty days after its filing or at the court's discretion. The hearing shall be held before the court alone without a jury. The court may consolidate the hearing on the petition with any other hearing before the court in the case.

7. The claimant shall establish by clear and convincing evidence the validity of the interest in the seized property.

8. If subdivision seven of this section is satisfied and the prosecuting authority seeks to proceed, the prosecuting authority shall prove by clear and convincing evidence the claimant is not an innocent owner because:

(a) the claimant's interest in the seized property is invalid;

(b) the claimant had actual knowledge the seized property was used in or derived directly from the crime for which the defendant is charged;

(c) the claimant was willfully blind to the crime for which the defendant is charged; or

(d) the claimant was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

9. If the prosecuting authority fails to meet its burden in subdivision eight of this section, the court shall order the state to relinquish all claims and return the seized property to the innocent owner.

10. No information in the claimant's statement in subdivision four of this section shall be used as evidence in the criminal portion of the case.

11. Nothing in this section shall prohibit the claimant from providing information to any party or testifying in any trial as to facts the claimant knows.

12. The defendant or convicted offender may invoke the right against self-incrimination or the marital privilege during the forfeiture proceeding. The court may draw an adverse inference from the invocation of such right or privilege.

§ 480.110 Judgment.

1. If the prosecuting authority fails to meet its burden in the criminal or forfeiture proceeding, the court shall enter judgment dismissing the forfeiture proceeding and ordering the return of seized property to the rightful owner, unless the owner's possession of such property is illegal.

2. If the prosecuting authority meets its burden in the criminal or forfeiture proceeding, the court shall enter judgment forfeiting the seized property.

3. A court may enter judgment following a hearing, pursuant to a stipulation or plea agreement, or at the court's discretion.

§ 480.115 Substitution of assets.

Upon the prosecuting authority's motion following conviction or at the court's discretion, the court may order the forfeiture of substitute property owned solely by the defendant up to the value of property that is beyond the court's jurisdiction or cannot be located through due diligence, only if the prosecuting authority proves by a preponderance of the evidence that the defendant intentionally:

1. dissipated the property;

2. transferred, sold, or deposited property with a third party to avoid forfeiture;

3. diminished substantially the value of property; or

4. commingled property with other property that cannot be divided without difficulty.

§ 480.120 No additional remedies.

The prosecuting authority shall not seek personal money judgments or other remedies related to the forfeiture of property not provided for by this article.

§ 480.125 No joint-and-several liability.

A defendant shall not be jointly and severally liable for forfeiture awards owed by other defendants. When ownership is unclear, a court may order each defendant to forfeit property on a pro rata basis or by another means such court finds equitable.

§ 480.130 Appeals.

1. A party to a forfeiture proceeding, other than the defendant, may appeal the court's decision.

2. The defendant may appeal the court's decision regarding the seizure or forfeiture of property following final judgment in the forfeiture proceeding.

§ 480.135 Attorney fees.

In any proceeding in which a seized property owner's claim prevails by recovering at least half, by value, of such property or currency claimed, the seizing law enforcement agency shall be liable for:

1. Reasonable attorney fees and other litigation costs incurred by the claimant;

2. Post-judgment interest; and

3. In cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, any interest actually paid from the date of seizure.

§ 480.140 Return of property; damages and costs.

1. If the court orders the return of seized property, the law enforcement agency that holds such property shall return such property to the rightful owner within a reasonable period not to exceed five days after the date of the order.

2. The rightful owner shall not be subject to any expenses related to towing, storage or preservation of the seized property.

3. The law enforcement agency that holds the seized property shall be responsible for any damages, storage fees, and related costs applicable to property returned under this section.

§ 480.145 Disposition of property and proceeds.

1. At any time when contraband is no longer needed as evidence, the court may order it be destroyed pursuant to state law.

2. At any time when abandoned property or property seized from a defendant who died, was deported or fled the jurisdiction is no longer needed as evidence, the court may order it be sold.

3. If the forfeiture is granted, the court shall order the sale of forfeited property other than currency.

4. The court may order forfeited currency and sale proceeds to:

(a) pay restitution to the victim related to the underlying criminal offense;

(b) satisfy recorded liens, mortgages or filed security interests in the forfeited property;

(c) pay reasonable costs for the towing, storage, maintenance, repairs, advertising and sale, and other operating costs related to the forfeited property;

(d) reimburse the seizing law enforcement agency for non-personnel operating costs, including controlled-drug buy money, related to the investigation of the underlying criminal offense;

(e) be disbursed to the office of public safety to supplement existing statewide grants; and

(f) be deposited in the state's general fund.

§ 480.150 Sale restrictions.

No law enforcement agency shall sell forfeited property directly or indirectly to any employee of such law enforcement agency, to a person related to an employee by blood or marriage, or to another law enforcement agency.

§ 480.155 Preemption.

The provisions of this article shall preempt any local law to the contrary which regulate civil and criminal forfeiture.

§ 480.160 Limitation on federal adoption.

A law enforcement agency shall not offer for adoption any property seized under state law, to a federal agency for the purpose of forfeiture under the federal Controlled Substances Act, or other federal law unless such seized property includes United States currency that exceeds twenty thousand dollars.

§ 480.165 Limitation on state and federal joint task forces.

1. Except as permitted under subdivision two of this section, a joint task force of a law enforcement agency and a federal agency shall transfer seized property to the prosecuting authority for forfeiture litigation under this article.

2. Such joint task force may transfer seized property to the federal Department of Justice for forfeiture under federal law if such seized property includes United States currency that exceeds twenty thousand dollars.

3. A law enforcement agency shall be prohibited from accepting payment or distribution of any kind from the federal government if the federal government requires seized property that includes United States currency less than twenty thousand dollars, as established under subdivision two of this section, be transferred to the federal government for forfeiture under federal law.

4. Nothing in subdivision one or two of this section shall be construed to restrict a law enforcement agency from collaborating with a federal agency to lawfully seize contraband or property such law enforcement agency has probable cause to believe is subject to forfeiture.

5. Nothing in subdivision one or two of this section shall be construed to prohibit the federal government, acting alone, from seizing property and seeking forfeiture under federal law.

§ 480.170 Guidance.

1. A prosecuting authority, after consulting with the responsible United States Attorney, may establish guidelines for joint task forces and multijurisdictional collaboration in such prosecuting authority's jurisdiction.

2. The office of public safety, from time to time, shall publish on its public website best practices and shall offer training on seizure and forfeiture pursuant to this article.

§ 480.175 Severability.

If any clause, sentence, paragraph, section or part of this article shall be adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review, the judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part of this article directly involved in the controversy in which the judgment shall have been rendered.

§ 3. Subdivision 4 of section 690.10 of the criminal procedure law, as amended by chapter 612 of the laws of 1994, is amended and a new subdivision 5 is added to read as follows:

4. Constitutes evidence or tends to demonstrate that an offense was committed in this state or another state, or that a particular person participated in the commission of an offense in this state or another state, provided however, that if such offense was against the laws of another state, the court shall only issue a warrant if the conduct comprising such offense would, if occurring in this state, constitute a felony against the laws of this state[~~.~~]**; or**

5. As otherwise provided under article four hundred eighty of the penal law.

§ 4. Paragraph (a) of subdivision 1 of section 690.55 of the criminal procedure law is amended to read as follows:

(a) Retain it in the custody of the court pending further disposition thereof pursuant to subdivision two **of this section, by article four hundred eighty of the penal law,** or some other provision of law; or

§ 5. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.