

ACT 104

H.B. NO. 2729

A Bill for an Act Relating to Forfeiture.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to implement the recommendations of the auditor's 1995 sunset evaluation of the Hawaii Omnibus Criminal Forfeiture Act, chapter 712A, Hawaii Revised Statutes. That Act, which provides for the seizure and forfeiture of certain property associated with specified offenses, and for the distribution of the property or its proceeds to state and county law enforcement agencies, is scheduled to be repealed on July 1, 1996, pursuant to Act 196, Session Laws of Hawaii 1993, section 1.

The auditor concluded that the public interest does not require repeal of the criminal forfeiture act. Although the department of the attorney general had properly implemented that law, the auditor found that the law should be amended in the interest of fairness by adopting certain provisions of the Uniform Controlled Substances Act (1994), issued by the National Conference of Commissioners on Uniform State Laws. The auditor therefore recommended making some changes to chapter 712A, including the following:

- (1) Require the government in civil judicial forfeiture cases—whether in judicial in rem proceedings, judicial in personam proceedings, or in administrative forfeiture cases removed to the courts at the request of the property claimant—to initially prove by a preponderance of the evidence that the property is subject to forfeiture; and

- (2) Require the courts to limit the scope of a forfeiture to the extent that they find the effect of the forfeiture grossly disproportionate to the nature and severity of the crime.

This Act implements these recommendations by the auditor.

Furthermore, the legislature finds that drug abuse is a growing concern in society and that education, prevention, and rehabilitation programs play a major role in reducing the number of substance abusers in the State. As such, one of the purposes of this Act is to allocate twenty per cent of all moneys deposited in the criminal forfeiture fund to programs designed to educate and dissuade individuals from experimenting with illegal drugs and to rehabilitate those who have already fallen prey to the lure of these illicit drugs.

SECTION 2. Chapter 712A, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§712A- Excessive forfeitures. The court shall limit the scope of a forfeiture judgment issued pursuant to section 712A-5(b) to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner’s conduct. In determining whether a forfeiture is grossly disproportionate, the court may consider:

- (1) The degree to which the property was used to facilitate the conduct that subjects property to forfeiture and the importance of the property to the conduct;
- (2) The gain received or expected by an owner from the conduct that subjects property to forfeiture and the value of the property subject to forfeiture;
- (3) The nature and extent of the owner’s culpability; and
- (4) The owner’s effort to prevent the conduct or assist in prosecution.”

SECTION 3. Section 712A-10, Hawaii Revised Statutes, is amended to read as follows:

“§712A-10 Administrative forfeiture. The prosecuting attorney may initiate administrative forfeiture of property other than real property, the estimated value of which is less than \$100,000, or of any vehicle or conveyance, regardless of value. Administrative forfeiture shall be processed in the following manner:

- (1) The prosecuting attorney shall file a petition with the attorney general, pursuant to rules adopted by the attorney general.
- (2) The prosecuting attorney shall give notice of pending forfeiture by making reasonable efforts to serve a copy of the petition in a manner provided in section 712A-8(a) or 712A-8(b) on all persons known to have an interest in the property, together with instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation.
- (3) The attorney general shall give notice of intention to forfeit the property administratively by publication in the manner provided in section 712A-8(c). Notice by publication shall include:
 - (a) A description of the property;
 - (b) The estimated value of the property;
 - (c) The date and place of the seizure;
 - (d) The offense for which the property is subject to forfeiture;
 - (e) Instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation; and

- (f) Notice that the property will be forfeited to the State if a claim and cost or in pauperis bond or petition for remission or mitigation is not filed in substantial compliance with this section.
- (4) Persons claiming an interest in the property may file either a petition for remission or mitigation of forfeiture, or a claim and cost or in pauperis bond, but not both, with the attorney general, within thirty days of notice by publication or receipt of written notice, whichever is earlier. Notwithstanding section 1-29, the thirty-day time period prescribed herein is computed by excluding the first day and including the last day, unless the last day is a Saturday, Sunday, or holiday and then it is also excluded, and the thirty-day time period runs until the end of the next day which is not a Saturday, Sunday, or a holiday. "Holiday" includes any day designated as a holiday pursuant to section 8-1.
- (5) Any person claiming seized property may seek remission or mitigation of the forfeiture by timely filing a petition with the attorney general. A petition for remission or mitigation shall not be used to challenge the sufficiency of the evidence to support the forfeiture or the actions of any government official but shall presume a valid forfeiture and ask the attorney general to invoke the executive power to pardon the property, in whole or in part. The petition shall be signed by the petitioner and sworn on oath before a notary public and shall contain the following:
 - (a) A reasonably complete description of the property;
 - (b) A statement of the interest of the petitioner in the property, as owner or interest-holder which may be supported by bills of sale, contracts, or mortgages, or other documentary evidence; and
 - (c) Facts and circumstances sufficient to show whether the petitioner:
 - (i) Owns or holds an interest in the seized property as defined by section 712A-1;
 - (ii) Had any knowledge that the property was or would be involved in any violation of the law;
 - (iii) Had any knowledge of the particular violation which subjected the property to seizure and forfeiture;
 - (iv) Had any knowledge that the user of the property had any record, including arrests, except when the person was acquitted or the charges dismissed due to lack of evidence, for the violation which subjected the property to seizure and forfeiture or for any crime which is similar in nature.

Any subsequent pleadings or written communications alleging matters pertaining to paragraph [(5)](b) or (c) of this section must also be signed by the petitioner and sworn on oath before a notary public.

- (6) If the attorney general, with sole discretion, determines that remission is not warranted, the attorney general may discretionarily mitigate the forfeiture where the petitioner has not met the minimum requirements for remission but where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship. Mitigation may also be granted where the minimum requirements for remission have been met but the overall circumstances are such that the attorney general determines that complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner which shall be deposited into the criminal forfeiture fund established under section 712A-16. Extenuating circumstances include:
 - (a) Language or culture barrier;

- (b) Humanitarian factors such as youth or extreme age;
 - (c) Presence of physical or mental disease, disorder, or defect;
 - (d) Limited or peripheral criminal culpability;
 - (e) Cooperation with the seizing agency or the prosecuting attorney; and
 - (f) Any contributory error on the part of government officials.
- (7) It shall be the duty of the attorney general to inquire into the facts and circumstances alleged in a petition for remission or mitigation of forfeiture. However, no petitioner is entitled to a hearing on the petition for remission or mitigation. Hearings, if any, shall be held at the discretion of the attorney general.
- (8) The attorney general shall provide the seizing agency and the petitioner a written decision on each petition for remission or mitigation within sixty days of receipt of the petition unless the circumstances of the case require additional time, in which case the attorney general shall notify the petitioner in writing and with specificity within the sixty-day period that the circumstances of the case require additional time and further notify the petitioner of the expected decision date.
- (9) Any person claiming seized property may seek judicial review of the seizure and proposed forfeiture by timely filing with the attorney general a claim and bond to the State in the amount of ten per cent of the estimated value of the property or in the sum of \$2,500, whichever is greater, with sureties to be approved by the attorney general, upon condition that if the claimant fails to prove that claimant's interest is exempt from forfeiture under section 712A-5, the claimant shall pay the State's costs and expenses, including reasonable attorneys fees incurred in connection with a judicial proceeding. In lieu of a cost bond, a claimant may file an in pauperis bond sworn on oath before a notary public. An in pauperis bond shall be in the form set out in the appendix to the rules of penal procedure. The claim shall be signed by the claimant and sworn on oath before a notary public and shall comply with the requirements of section 712A-12(5). Upon receipt of the claim and bond, the attorney general shall notify the prosecuting attorney who may discretionarily continue to seek forfeiture by petitioning the circuit court for forfeiture of the property within forty-five days of receipt of notice that a proper claim and bond has been filed. The prosecuting attorney may also elect to honor the claim in which case the prosecuting attorney shall notify the seizing agency and authorize the release of the seizure for forfeiture on the property [[or[]] on any specified interest in it.
- (10) If a judicial forfeiture proceeding is instituted subsequent to notice of administrative forfeiture[,] pursuant to paragraph (9), no duplicate or repetitive notice shall be required. The judicial proceeding, if any, shall adjudicate all timely filed claims. At the judicial proceeding, the claimant may testify, present evidence and witnesses on the claimant's behalf, and cross-examine witnesses who appear at the hearing. The State may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. The State has the initial burden of showing by a preponderance of the evidence that the claimant's interest in the property is subject to forfeiture. On such a showing by the State, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

- (11) In the event a claim and bond has not been filed in substantial compliance with this section, or if the attorney general, with sole discretion, determines that remission or mitigation is not warranted, the attorney general shall order forfeited all property seized for forfeiture. In the event the attorney general, with sole discretion, determines that remission or mitigation is warranted, the attorney general shall notify the seizing agency and the prosecuting attorney and order the release of the seizure for forfeiture on the property or on any specified interest in it. There shall be no appeal from the attorney general's decision or order of forfeiture or remission or mitigation.
- (12) Administrative proceedings and the adoption of rules under this section are exempt from the requirements of chapter 91, the Hawaii administrative procedure act, and are adjudicatory functions for the purposes of applicable sections of the Hawaii Revised Statutes."

SECTION 4. Section 712A-12, Hawaii Revised Statutes, is amended by amending subsection (8) to read as follows:

"(8) The State has the initial burden of showing [the existence of probable cause for seizure of the property.] by a preponderance of the evidence that the claimant's interest in the property is subject to forfeiture. On such a showing by the State, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture."

SECTION 5. Section 712A-13, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

"(1) If a forfeiture is authorized by law, it shall be ordered by a court on a petition for forfeiture filed by the prosecuting attorney in an in personam civil or criminal action. In any civil in personam action brought under this section, the owner or interest-holder may testify, present evidence and witnesses on the owner or interest-holder's behalf, and cross-examine witnesses who appear at the hearing. The State may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. The State has the initial burden of showing by a preponderance of the evidence that the owner or interest-holder's interest in the property is subject to forfeiture. On such a showing by the State, the owner or interest-holder has the burden of showing by a preponderance of the evidence that the owner or interest-holder's interest in the property is not subject to forfeiture."

SECTION 6. Act 260, Session Laws of Hawaii 1988, as amended by Act 197, Session Laws of Hawaii 1990, and Act 196, Session Laws of Hawaii 1993, is amended by amending section 7 to read as follows:

"SECTION 7. This Act shall take effect upon its approval[; provided that on July 1, 1996, this Act shall be repealed and sections 842-3, 329-55, and 701-119, Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the approval of this Act; provided further that the repeal of this Act shall not affect the rights and duties that matured, penalties that were incurred, property seizures that have been initiated, and properties that have been forfeited pursuant to this Act, and such rights, duties, penalties, seizures, and forfeitures shall be determined and adjudicated in accordance with the provisions of this Act]."

ACT 104

SECTION 7. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 8. Statutory material to be repealed is bracketed. New statutory material is underscored.¹

SECTION 9. This Act shall take effect upon its approval.

(Approved June 12, 1996.)

Note

1. Edited pursuant to HRS §23G-16.5.