

CIVIL FORFEITURE IN NEVADA: ANOTHER WAY TO GET THE BAD GUYS

BY MARY KANDARAS, ESQ.

While working with a confidential informant, the police learned about local drug guru, Dave Dealer. They set up a “controlled buy” and had the confidential informant (CI) buy some cocaine. Dave Dealer came to the deal on a sweet Harley-Davidson, and sold a few grams to the CI. Gaining information that Dave Dealer was a player in the local drug scene, officers started surveillance. Over the course of several weeks, they saw Dave Dealer leave his home and drive to locations where he engaged in conduct that was consistent with drug deals. He usually drove a Cadillac. While watching his residence, officers noticed a lot of people coming and going at all hours of the day and night. People would come to the house and stay for a few minutes, then leave.



After receiving a search warrant for the residence and finding a trafficking quantity of cocaine in the home as well as marijuana, officers arrested Dave Dealer for trafficking and sales of controlled substances as well as maintaining a drug house. The police also found \$30,000 in cash at the residence. Dave Dealer started his way through the criminal system. At the same time, the case landed on the desk of the Deputy District Attorney assigned to civil forfeiture.

Civil forfeiture is the taking without compensation of assets and property involved in or derived from certain crimes. In Nevada, the law states that “any proceeds attributable to the commission or attempted commission of any felony” may be forfeited.¹ Proceeds include any property, or part of an item of property, derived directly or indirectly from the commission or attempted commission of a crime.

Based on that authority, the DA filed a complaint against Dave Dealer’s house, Harley-Davidson, Cadillac, a Mercedes parked in the driveway and \$30,000 U.S. currency found in the house. For good measure, the DA also named the \$1,999 found on his person at the time of arrest. The action was filed in the county where the property was located. Because the action was against real property, a lis pendens was filed.

The stated purposes of the civil forfeiture statutes include the punishment of the criminal, deterrence of illegal activity, removal of the tools of a criminal’s trade and protection of the community.² There is some theorizing about the basis for forfeiture, but it is generally agreed that English law provided three kinds of forfeiture:

- 1 Deodand, which required that the value of an item causing death be forfeited to the Crown;
- 2 Forfeiture upon conviction of a felony or treason; and
- 3 Statutory forfeitures of offending objects used in violation of the customs and revenue laws, such as a ship smuggling contraband.³



Civil forfeiture is an in rem civil proceeding against the property itself and determines the government's title to the property against the world.⁴ It differs from an in personam criminal proceeding that determines the government's interest in the property against the criminal defendant.

After filing the complaint against Dealer, the DA received a telephone call from his attorney. The attorney stated that the Mercedes in the driveway belonged to Dealer's mother, who knew nothing about the illegal activities occurring at her son's home. This information placed the forfeiture of the Mercedes at issue. The DA was aware of case law allowing the forfeiture of the property of a person not only innocent of wrongdoing but also not negligent in the use of the property.⁵ For instance, the United States Supreme Court upheld the forfeiture of an innocent wife's interest in a car she co-owned with her husband that the husband used without her knowledge to pick up a prostitute.⁶

However, in Nevada, property belonging to an innocent owner may not be forfeited unless the person turns a "blind eye" to facts that would lead a reasonable person to conclude that the property was derived from unlawful activity or would be used for an unlawful purpose.⁷ As a claimant to the property, the mother was entitled to notice of the suit, which was promptly sent. Because the Nevada Rules of Civil Procedure apply to forfeitures, the DA conducted discovery to determine exactly what the mother knew about her son's illegal activity. It turned out she knew nothing.⁸ The Mercedes was returned to the mother.

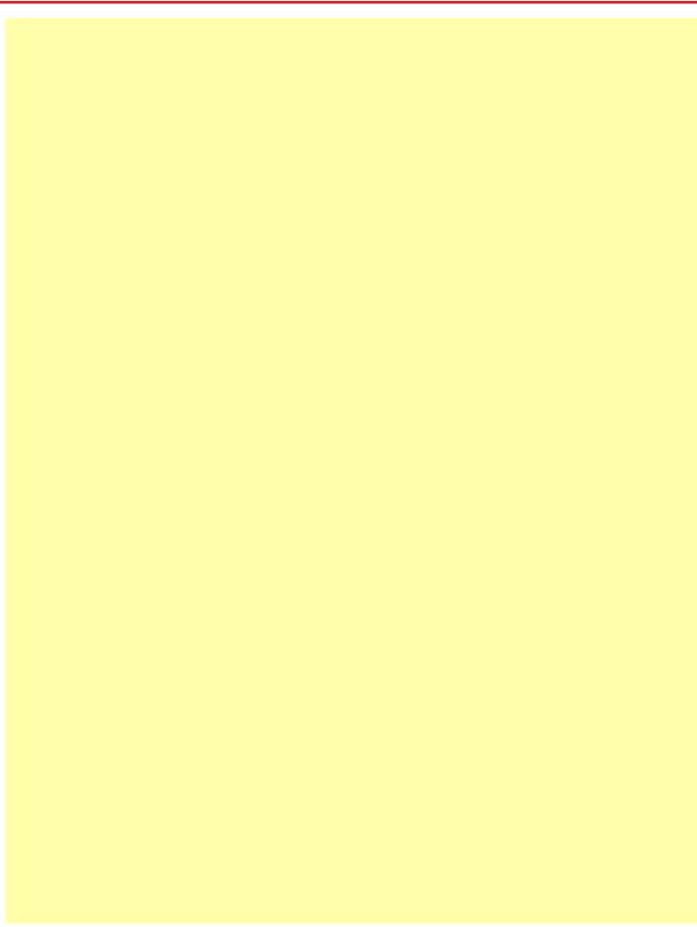
The forfeiture case against Dave Dealer was stayed pending the criminal case. Dealer's attorney was able to get the criminal case dismissed on a technicality. He called the DA with the news, expecting that the forfeiture case would

be dismissed as well. The DA informed Dealer's attorney that all that was required to seize the property was probable cause that it was subject to forfeiture. She also informed the attorney that the state must prove a violation of, not a conviction on, the controlled substances law or other felony.⁹ If there had been a final judgment of conviction, it would be conclusive evidence of all facts necessary to sustain the conviction against the claimant.

The parties proceeded to trial, which is entitled to priority setting over other civil matters. The government met its burden and showed by clear and convincing evidence that the property was subject to forfeiture. The clear and convincing standard is defined as highly probable or that which must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true. It does not require that the evidence negate all reasonable doubt or that the evidence must be uncontroverted.¹⁰ Because Dave Dealer was arrested for sales of a controlled substance and had more than \$300 in his possession, there was a rebuttable presumption that the cash was traceable to the exchange of a controlled substance and subject to forfeiture. Dave Dealer was unable to show a legitimate source for the \$1,999 in his pocket and the \$30,000 in his house. After the trial, the judge ordered all property forfeited.

During the action, the seized property was held by the law enforcement agency for disposition as authorized by the court, with the currency held in an interest-bearing account. After the

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forfeiture, the cars and house were sold. It was determined that there was a secured loan attached to the house, which had to be paid from the proceeds of the sale. Expenses associated with the proceeding were paid. The remaining balance went to the law enforcement agency who conducted the seizure.

A law enforcement agency that receives forfeiture proceeds is allowed to use the money for any lawful purpose, such as for equipment, but it may not be used for ordinary operating expenses. Even though Dave Dealer got off in the criminal case, the civil forfeiture succeeded in removing the tools of his trade and his profits. Moreover, the forfeited funds went to law enforcement. This case had a happy ending. Shortly thereafter, Dave Dealer was arrested for dealing out of a weekly motel. He was convicted of a felony and went to prison. The \$640 on his person was forfeited. ■



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- 1 NRS 179.1164(a). Statutory authorization for civil forfeiture is found in NRS 179.1156 through 179.121. NRS 453.301 authorizes forfeiture of property and items, such as money, vehicles and real property, linked to a violation of the controlled substances laws. There are specific forfeiture statutes for technological crimes and for criminal syndicates and racketeering. Instrumentalities of certain crimes, such as murder, may be forfeited pursuant to NRS 179.121. Because space in *Nevada Lawyer* is limited, statutory sources will not be cited.
- 2 See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (implementing forfeiture proceedings “fosters the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions.”)
- 3 *Austin v. United States*, 509 U.S. 602, 611 (1993); *The Malek Adhel*, 43 U.S. 210 (1844) (Story, J.) (addressing forfeiting an armed vessel accused of piracy and holding “this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.”)
- 4 *Van Oster v. Kansas*, 272 U.S. 465 (1926).
- 5 See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)
- 6 *Bennis v. Michigan*, 516 U.S. 442 (1996)
- 7 NRS 179.1164(2); see also *One 1978 Chevrolet Van v. County of Churchill*, 97 Nev. 510, 634 P.2d 1208 (1981) (Nevada’s forfeiture scheme does not allow forfeiture of innocent owner’s property – burden of proof is on law enforcement); NRS 179.11635 - “Willful blindness” means the intentional disregard of objective facts which would lead a reasonable person to conclude that the property was derived from unlawful activity or would be used for an unlawful purpose.
- 8 The Nevada Rules of Civil Procedure apply except where they conflict with the forfeiture rules pursuant to NRS 179.1171(1). In federal court, the initial disclosure requirements don’t apply to civil forfeiture. FRCP26(a)(1)(B)(ii)
- 9 NRS 179.1173(5); *A 1983 Volkswagen v. County of Washoe*, 101 Nev. 222, 699 P.2d 108 (1985)
- 10 29 Am. Jur. 2d Evidence Section 173