



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 6

TO: MEMBERS OF THE STUDY COMMITTEE ON THE REVIEW OF CRIMINAL PENALTIES

FROM: David Moore and Michael Queensland, Staff Attorneys

RE: Options for Legislation

DATE: December 11, 2014

At the November 12, 2014 meeting of the Study Committee on the Review of Criminal Penalties, the study committee raised various questions about how changing a misdemeanor to a civil forfeiture would affect how the offense is charged and prosecuted and requested more information about these issues. The specific issues raised concerned: (1) the authority of law enforcement officers to issue citations for civil forfeitures; and (2) the discovery rules that apply in civil forfeiture actions.

This Memo provides general background on these issues and summarizes options for legislation should the study committee wish to address them. The listed options are not necessarily exhaustive, but rather provide a starting point for consideration.

ENFORCEMENT OF OFFENSES PUNISHABLE BY A FORFEITURE

In Wisconsin, any conduct punishable by a forfeiture is a civil offense, not a crime. [See s. 939.12, Stats.] The statutes direct that “where a forfeiture is imposed by statute, it may be recovered in a civil action unless the act or omission is punishable by fine and imprisonment, or by fine or imprisonment.” [s. 778.01, Stats.] Forfeiture offenses are prosecuted by the district attorney on behalf of the state in circuit court. [s. 978.05 (2), Stats.] Alternatively, a forfeiture offense may also be prosecuted by a municipal attorney in a municipal court instead if the violation is of a municipal ordinance or an offense that the statutes require a municipality to enforce. [See s. 800.02, Stats.]

CITATION AUTHORITY FOR FORFEITURE VIOLATIONS

Background

A law enforcement officer generally only has authority to issue a citation for a forfeiture violation when a statute specifically provides that a citation may be issued for violations of that offense. When a statute authorizes a law enforcement officer to issue a citation for a civil offense violation, the citation is generally sufficient to serve as the initial pleading for the action and gives a court jurisdiction over the person. [s. 778.25 (1) (b), Stats.] When authority for a law enforcement officer to issue a citation for a forfeiture offense violation is not provided by statute, the offense is prosecuted by a district attorney through the filing of a complaint.

Section 778.25, Stats., creates a citation procedure for certain specific violations, such as offenses related to underage alcohol consumption. A citation issued under s. 778.25, Stats., must contain:

- The signature of the issuing agent or officer or by an officer who has authority to make an arrest for the violation.
- The name, address, and date of birth of the defendant and the name and address of the defendant's parents or guardian, if a minor.
- The name and department of the issuing agent or officer.
- The violation alleged, the time and place of occurrence, a statement that the defendant committed the violation, the statute, rule, or ordinance violated, and a designation of the violation in language which can be readily understood.
- A date, time, and place for the court appearance, and a notice to appear.
- Provisions for deposit in lieu of a court appearance.
- Notice that if the defendant makes a deposit and fails to appear in court at the time fixed in the citation, the failure to appear will be considered tender of a plea of no contest and submission to a forfeiture, plus costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit. The notice shall also state that the court may decide to summon the defendant or, if the defendant is an adult, issue an arrest warrant for the defendant rather than accept the deposit and plea.
- Notice that the defendant may, by mail prior to the court appearance, enter a plea of not guilty and request another date for a court appearance.
- Notice that if the defendant does not make a deposit and fails to appear in court at the time fixed in the citation, the court may consider the nonappearance to be a plea of no contest and enter judgment accordingly or the court may issue a summons or an arrest warrant.

Other examples of forfeiture offenses for which there are specific citation procedures include: (1) municipal ordinance offenses; (2) traffic offenses; and (3) violation of trespass laws. [See ss. 66.0114 (1), 345.20, 778.26, and 800.02 (2), Stats.]

Options

Option 1: The study committee could maintain current law.

Option 2: The study committee could apply the citation procedure under s. 778.25, Stats., to all civil forfeiture violations, except those for which there is already a specific citation procedure.

DISCOVERY PROCEDURE FOR CIVIL FORFEITURE PROCEEDINGS

During the study committee's November 12 meeting, the study committee asked for information about whether changing an offense from a misdemeanor to a forfeiture would change the discovery rules that apply in a proceeding to enforce that offense. The short answer is that different rules of discovery generally apply to misdemeanor proceedings and civil forfeiture proceedings.

Under current law, there are specific discovery rules for certain types of offenses; for example, discovery is generally limited for traffic-related offenses, whether the offense is civil or criminal. But in general, the criminal procedure rules of discovery apply to misdemeanor proceedings and the civil procedure rules of discovery apply to civil forfeiture proceedings. [*State v. Bausch*, 2014 WI App 12.]

Options

Option 1: The study committee could maintain current law.

Option 2: The study committee could specify that the criminal procedure rules of discovery in s. 971.23, Stats., apply to civil forfeiture proceedings.

Note 1: The Wisconsin Court of Appeals recently addressed the issue of which rules of discovery – civil or criminal – apply in an action to recover a forfeiture that is commenced under the civil forfeiture chapter. [*Bausch*, 2014 WI App 12.] The court rejected the State's argument that because forfeiture proceedings are "quasi-criminal proceedings," the criminal discovery rules apply. The court observed that civil forfeiture procedure is governed by the small claims chapter and that this chapter specifies that the rules governing the practice and procedure of claims brought under that chapter are the rules of civil procedure, except where a different procedure is prescribed elsewhere. The court further noted that criminal procedures apply in forfeiture actions only to the extent that the Legislature has so directed, and the Legislature has not expressly provided that the criminal procedure rules of discovery apply to actions commenced under the civil forfeiture chapter. Option 2 would change the law to expressly provide that the criminal procedure rules of discovery apply to civil forfeiture proceedings.

Note 2: The study committee could also adopt this option – to apply the rules of criminal discovery to civil forfeiture proceedings – for proceedings in which the offense is punishable by

an amount below a certain amount (e.g., \$5,000 or \$10,000) and maintain current law for forfeiture proceedings in which the offense is punishable by a high forfeiture amount.

Option 3: The study committee could prohibit pretrial discovery in civil forfeiture proceedings except in cases where the defendant moves for discovery and the court grants the motion.

Note 1: If the study committee wishes to adopt this option it could consider using the discovery rule in s. 125.14 (6) (b), Stats., which pertains to alcohol beverage offenses, as a model. This statute provides:

In a prosecution for a violation of this chapter that may result in the imposition of a forfeiture, neither party is entitled to pretrial discovery, except that, if the defendant moves within 30 days after the initial appearance in person or by an attorney and shows cause therefor, the court may order that the defendant be allowed to inspect documents, including lists of names and addresses of witnesses, if available, and to test under s. 804.09, under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed.

Note 2: As with Option 2, the study committee could adopt this option for civil forfeiture proceedings in which the offense is punishable by an amount below a certain amount and maintain current law for forfeiture proceedings in which the offense is punishable by a high forfeiture amount.

DM:MQ:ksm