



Attorney General of New Mexico

P.O. Drawer 1508 Santa Fe, New Mexico 87504

505-827-6000
Fax 505-827-5826

HAL STRATTON
Attorney General

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OPINION
OF
HAL STRATTON
Attorney General

Opinion No. 89-32

BY: Elizabeth A. Glenn
Assistant Attorney General

TO: Theodore L. Raff
Deputy District Attorney
111 Union Station, SE
Albuquerque, New Mexico 87102

QUESTION:

1. Is the district attorney's office a "law enforcement agency" as the phrase is used in NMSA 1978, §30-31-35 and, as such, capable of receiving forfeited assets and expending those assets in the enforcement (prosecution) of the Controlled Substances Act?

2. When a vehicle is seized, forfeited and sold by the county sheriff's office pursuant to the Controlled Substances Act are the proceeds from such sale required to be deposited in the general fund of the county or may the proceeds revert directly to the sheriff's office to be used in the enforcement of the Controlled Substances Act?

CONCLUSION:

1. Yes, if the district attorney's office employs peace officers as authorized by law. The proceeds of forfeited property, however, may not be used to prosecute actions brought under the Controlled Substances Act.

2. The proceeds from a sale of forfeited motor vehicles by the county sheriff's office must be deposited in the county's general fund.

ANALYSIS:

In pertinent part, Section 30-31-35 of the Controlled Substances Act, NMSA 1978, §§30-31-1 to -42 (Repl. Pamp. 1989), provides:

A. Property subject to forfeiture and disposal under the Controlled Substances Act may be seized by any enforcement officer upon an order issued by the district court having jurisdiction.

...

D. Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement agency seizing it subject only to the orders and decrees of the district court. When property is seized under the Controlled Substances Act, the enforcement officer may:

(1) place the property under seal;

(2) remove the property to a place designated by the enforcement officer; or

(3) require the law enforcement agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

E. When property is forfeited under the Controlled Substances Act, the law enforcement agency seizing it shall:

(1) sell that which is not required to be destroyed by law. The proceeds shall revert to the general fund of the state, county or municipality as the case may be;

(2) take custody of the property for use by law enforcement agencies in the enforcement of the Controlled Substances Act or remove it for disposition in accordance with law; provided that where a motor vehicle has been seized by a municipal police department or a county sheriff's department within its respective jurisdictional boundaries, such department shall institute forfeiture proceedings; or

(3) in case of property seized by the state police, forward property, the proceeds from the sale of which are not required to revert to the general fund, to the state police, bureau of narcotics for disposition;...

For the reasons discussed below, we conclude that the term "law enforcement agency" used in this provision may include a district attorney's office and that Section 30-31-35(E)(1) requires that the proceeds of vehicles sold by a law enforcement agency must revert to the applicable general fund.

1. The term "law enforcement agency" is not defined for purposes of the Controlled Substances Act. If the legislature does not otherwise define a term used in a statute, courts will give the term its ordinary meaning. State ex rel. Maloney v. Sierra, 82 N.M. 125, 134, 477 P.2d 301, 310 (1970).

We noted in an earlier opinion that case law has defined a "law enforcement agency" as a body employing "law enforcement officers." See AG Op. No. 87-25 (1987) and cases cited therein. The dictionary defines law enforcement officers as "[t]hose whose duty it is to preserve the peace." Black's Law Dictionary 796 (5th ed. 1979). In Anchondo v. Corrections Dept., 100 N.M. 108, 110, 666 P.2d 1255, 1257 (1983), the New Mexico Supreme Court described the responsibilities held by law enforcement officers:

Traditionally, the duties of law enforcement officers include preserving the public peace, preventing and quelling public disturbances, enforcing state laws, including but not limited to the power to make arrests for violation of state laws.

The court stated that "[i]n determining whether a person is involved in law enforcement work, this Court has adhered to the concept of traditional law enforcement activities." Id.

For the most part, those engaging in traditional law enforcement activities are peace officers whose duties are described in NMSA 1978, §29-1-1. According to that provision a peace officer is required to:

investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware, ... to diligently file a complaint or information, if the circumstances are such as to indicate to a reasonably prudent person

that such action should be taken, and ... to cooperate with and assist the attorney general, district attorney or other prosecutor, if any, in all reasonable ways.

See also NMSA 1978, §31-1-2(F) (1984 Repl. Pamp.) (as used in Criminal Procedure Act, "police officer," "law enforcement officer," "peace officer," or "officer" means any full-time salaried officer who by virtue of his office or public employment is vested by law with the duty to maintain the public peace).

Until recently, a district attorney's office would not have qualified as a law enforcement agency. The New Mexico Constitution provides for a district attorney for each judicial district who "shall be the law officer of the state." N.M. Const. art. VI, §24. Case law describes a district attorney as "part of the judicial system of the state" and "a quasi-judicial officer." State ex rel. Ward v. Romero, 17 N.M. 88, 97, 125 P. 617, 620 (1912); State v. Chambers, 86 N.M. 383, 386, 524 P.2d 999, 1002 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974). Cf. Dellums v. Powell, 660 F.2d 802, 805 (D.C. Cir. 1981) (absolute immunity from personal damages liability extends to "quasi-judicial" functions of prosecutor and does not cover a prosecutor engaged in investigative or administrative activities). In Candelaria v. Robinson, 93 N.M. 786, 792, 606 P.2d 196, 202 (Ct. App. 1980), the court defined "law officer" as used in the constitution to mean "a public officer employed to administer or advise in legal matters."

The duties of a district attorney are set forth in NMSA 1978, §36-1-18 (Repl. Pamp. 1984). They essentially consist of prosecuting and defending cases on behalf of the state and applicable county, representing the county before the board of county commissioners and advising state and county officers. Although prosecuting cases and giving advice may be broadly characterized as part of the law enforcement process, cf. AG Op. No. 5669 (1953) (referring to district attorney as "chief law enforcement officer"); Everton v. Willard, 468 So.2d 936 (Fla. 1985) (discretionary, judgmental decisions made by a police officer, prosecutor and judge are all inherent in enforcing state laws), they are not the same functions which comprise the traditional law enforcement activities described by the New Mexico Supreme Court. See also Abalos v. Bernalillo County Dist. Attorney's Office, 105 N.M. 554, 560-61, 734 P.2d 794, 800-01 (Ct. App.) (district attorney is not a law enforcement officer as defined in the Tort Claims Act), cert. quashed, 106 N.M. 35, 738 P.2d 907 (1987); Candelaria v. Robinson, 93 N.M. at 790, 606 P.2d at 200 (same).

In 1988, the state legislature passed an amendment which authorized district attorneys to appoint "full-time staff as peace

officers for the purpose of investigating and enforcing the criminal laws of the state, within the district attorney's judicial district." 1988 N.M. Laws, ch. 92, §2 (codified at NMSA 1978, §36-1-5(A)(2),(B) (Cum. Supp. 1989)). Staff appointed as peace officers must comply with NMSA 1978, §29-7-8 (Cum. Supp. 1989), which describes the requirements necessary before a person can be appointed "on a permanent basis as a police officer to any law enforcement agency in this state."

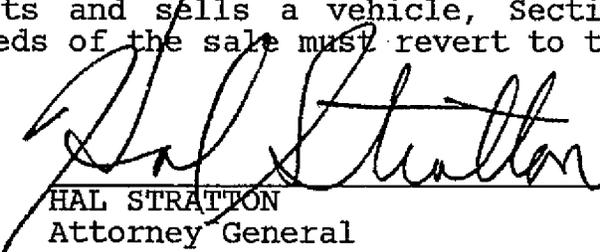
Because a district attorney is authorized to appoint peace officers to engage in traditional law enforcement activities, we conclude that a district attorney's office that employs such officers is a "law enforcement agency." See AG Op. No. 87-34 (1987) (because inspectors employed by Livestock Board have same duties as police officers, Board is a "law enforcement agency"); AG Op. No. 87-25 (1987) (inspectors of the Motor Transportation Division are law enforcement officers and Division is a "law enforcement agency"). Accordingly, to the extent that peace officers employed by a district attorney engage in seizing property under the Controlled Substances Act, the property may be disposed of by the district attorney's office after forfeiture according to Section 30-31-35(E) of the Controlled Substances Act.

We believe, however, that the proceeds may not be used to fund prosecutions. Under Section 30-31-35(E)(2), forfeited property may be used by law enforcement agencies "in the enforcement of the Controlled Substances Act." As we have discussed, the prosecutorial activities of district attorneys are "quasi-judicial" and are not included among the traditional duties of law enforcement officers. Because Section 30-31-E(2) was enacted before district attorneys were allowed to hire peace officers, it is likely that the legislature meant to encompass only those traditional functions when it used the term "enforcement" in Section 30-31-E(2). Significantly, Section 30-31-E(2) was not amended during the 1988 legislative session when district attorneys were authorized to appoint peace officers to their staffs. This indicates that the legislature did not intend to expand the existing meaning of the term "enforcement" to include prosecuting cases. We conclude, therefore, that a district attorney's office may use the proceeds of forfeited property only to fund the activities of peace officers on its staff in enforcing the Controlled Substances Act and the proceeds may not be used to fund prosecutions arising under the Act.

2. After property seized by a law enforcement agency has been forfeited, Section 30-31-35(E) provides the agency with three methods for proceeding. The agency shall:

- (1) sell that which is not required to be destroyed by law. The proceeds shall revert to the [appropriate] general fund...;
- (2) take custody of the property for use by law enforcement agencies in the enforcement of the Controlled Substances Act...; or
- (3) in case of property seized for the state police, forward property, the proceeds from the sale of which are not required to revert to the general fund, to the state police, bureau of narcotics for disposition.

Under Section 30-31-35(E)(2), property forfeited need not revert to the general fund, but may be used by law enforcement agencies to enforce the Controlled Substances Act. If, however, property is sold, subsection (1) provides that the proceeds shall revert to the proper general fund. Unless inconsistent with the manifest intent of the legislature or repugnant to the context of a statute, the rules of statutory construction provide that the word "shall" is mandatory. NMSA 1978, §12-2-2(I) (Repl. Pamp. 1988). Nothing in Section 30-31-35 or the Controlled Substances Act generally indicates that the legislature intended the provision governing proceeds of forfeited property to mean anything other than what it plainly states. Accordingly, if the county sheriff's office seizes, forfeits and sells a vehicle, Section 30-31-35(E)(1) applies, and proceeds of the sale must revert to the county's general fund.¹


HAL STRATTON
Attorney General


ELIZABETH A. GLENN
Assistant Attorney General

¹ There is a proviso to NMSA 1978, §30-31-35(E)(2) stating that "where a motor vehicle has been seized by a municipal police department or a county sheriff's department with [within] its respective jurisdictional boundaries, such department shall institute forfeiture proceedings." This provision relates only to forfeiture of property seized and has no effect on the methods of proceeding after the property has been forfeited.