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Seizure of Controlled Substances and Related Property

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Seizure of Controlled Substances and Related Property

Reference Number: CTAS-1289

The sheriff is authorized, upon process issued by the court having jurisdiction over the property, to seize:

1. All controlled substances that have been manufactured, distributed, dispensed or acquired in violation of Title 39, Chapter 17, Part 4 or Title 53, Chapter 11, Parts 3 and 4;
2. All raw materials, products and equipment of any kind that are used, or intended for use, in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance in violation of Title 39, Chapter 17, Part 4 or Title 53, Chapter 11, Parts 3 and 4;
3. All property that is used, or intended for use, as a container for the property described above;
4. All conveyances, including aircraft, vehicles or vessels, that are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of the property described above;
5. All books, records, and research products and materials, including formulas, microfilm, tapes and data that are used, or intended for use, in violation of Title 39, Chapter 17, Part 4 or Title 53, Chapter 11, Parts 3 and 4;
6. Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of the Tennessee Drug Control Act of 1989, compiled in Title 39, Chapter 17, Part 4, and Title 53, Chapter 11, Parts 3 and 4, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act, compiled in Title 39, Chapter 17, Part 4, and Title 53, Chapter 11, Parts 3 and 4; and
7. All drug paraphernalia as defined by T.C.A. § 39-17-402.

T.C.A. § 53-11-451(a). *See Payne v. Breuer*, 891 S.W.2d 200, 203 (Tenn., 1994) (The above statute clearly requires that a warrant be obtained prior to any seizure made under it unless one of the stated exceptions applies.).

Seizure without process may be made if:

1. The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
2. The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, Parts 3 and 4;
3. The sheriff has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
4. The sheriff has probable cause to believe that the property was used or is intended to be used in violation of Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, Parts 3 and 4.

T.C.A. § 53-11-451(b). In *Fuqua v. Armour*, 543 S.W.2d 64, 68 (Tenn. 1976), the Tennessee Supreme Court held that T.C.A. § 52-1443(b)(4) [the earlier version of T.C.A. § 53-11-451(b)(4)] is constitutional only if the statute is construed to include an "exigent circumstances" requirement. The court stated:

T.C.A. § 52-1443(b)(4) should not be construed as authorizing the seizure of an automobile without a warrant under circumstances such as those disclosed in the facts of this case. The fact that probable cause exists for seizure is not enough; there must also exist "exigent circumstances"; therefore, T.C.A. § 52-1443(b)(4) should be construed as authorizing a seizure without a warrant, upon probable cause, only when "exigent circumstances" exist justifying summary seizure. "No amount of probable cause can justify a warrantless search or seizure, absent 'exigent circumstances.'" *Coolidge v. New Hampshire*, [403 U.S. 443, 468 (1971)]. Thus construed and restricted, T.C.A. § 52-1443(b)(4) may constitutionally be applied.

Fuqua, 543 S.W.2d at 68.

Property taken or detained by the sheriff under T.C.A. § 53-11-451 is not subject to replevin but is deemed to be in the custody of the sheriff subject only to the orders and decrees of the court that has jurisdiction over the property. T.C.A. § 53-11-451(d). *See State v. Vukelich*, 2002 WL 31249910 (Tenn. Crim. App. 2002) (property held in *custodia legis*, or in the custody of the law). When the sheriff seizes property under Title 39, Chapter 17, Part 4, or Title 53, Chapter 11, Parts 3 and 4, the sheriff may (1) place the property under seal, (2) remove the property to a place designated by the sheriff; or (3) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

T.C.A. § 53-11-451(d). Regardless of any other method of disposition of the property, the sheriff may, with the permission of the court and under such terms and conditions as are approved by the court, use the property taken or detained in the drug enforcement program of the county. In addition, with the approval of the court having jurisdiction over the property, the sheriff may sell the property and use the proceeds for the drug enforcement program of the county. T.C.A. § 53-11-451(d)(4). See *State v. Blackmon*, 78 S.W.3d 322, 332 (Tenn. Crim. App. 2001) (judicial authorization to use seized property).

Pursuant to T.C.A. § 40-33-201, all personal property, including conveyances, subject to forfeiture under the provisions of T.C.A. § 53-11-451 shall be seized and forfeited in accordance with the procedure set out in Title 40, Chapter 33, Part 2. See *also* Rules of Tennessee Department of Safety Administrative Division, CHAPTER 1340-2-2, The Rules of Procedure for Asset Forfeiture Hearings.

Notice of Seizure

Reference Number: CTAS-1292

Upon the seizure of any personal property subject to forfeiture pursuant to T.C.A. § 40-33-201, the seizing officer must prepare a receipt entitled "Notice of Seizure" and provide the person found in possession of the property, if known, a copy of the receipt. The notice of seizure is a standard form promulgated by the agency charged by law or permitted by agreement with conducting the forfeiture proceeding for the particular property seized. T.C.A. § 40-33-203(a) and (c). The notice of seizure must contain the following:

1. A general description of the property seized and, if the property is money, the amount seized;
2. The date the property was seized and the date the notice of seizure was given to the person in possession of the seized property;
3. The vehicle identification number (VIN) if the property seized is a motor vehicle;
4. The reason the seizing officer believes the property is subject to seizure and forfeiture;
5. The procedure by which recovery of the property may be sought, including any time periods during which a claim for recovery must be submitted; and
6. The consequences that will attach if no claim for recovery is filed within the applicable time period.

T.C.A. § 40-33-203(c). See *Holt v. Young*, 2001 WL 1285880, *5 (Tenn. Ct. App. 2001).

Upon the seizure of a conveyance, the seizing officer must make reasonable efforts to determine the owner or owners of the property seized as reflected by public records of titles, registrations and other recorded documents. T.C.A. § 40-33-203(b)(1). If the conveyance seized is a commercial vehicle or common or contract carrier and the person in possession of the vehicle at the time of seizure does not have an ownership interest in the vehicle, the seizing officer must make reasonable efforts to determine the owner of the conveyance and notify the owner of the seizure. If the cargo is not contraband and is not subject to forfeiture under some other provision of state or federal law, the seizing agency must release the cargo to the owner or transporting agent upon request. If the interest of the owner of the commercial vehicle or common or contract carrier is not subject to forfeiture under T.C.A. § 40-33-210(a)(2), then the vehicle or carrier is not subject to forfeiture, and the seizing officer may not seek a forfeiture warrant. The seizing agency must release the vehicle or carrier to the owner or transporting agent upon request. T.C.A. § 40-33-203(b)(2) and (b)(4). For purposes of T.C.A. § 40-33-203(b), "commercial vehicle" includes a private passenger motor vehicle that is used for retail rental for periods of 31 days or less.

If the conveyance seized is a commercial vehicle or common or contract carrier and the person in possession of the vehicle at the time of seizure has an ownership interest in the vehicle, the seizing officer must make reasonable efforts to determine the common or contract carrier responsible for conveying the cargo and notify the carrier of the seizure. If the cargo is not contraband and is not subject to forfeiture under some other provision of state or federal law, the seizing agency must release the cargo to the owner or transporting agent upon request. T.C.A. § 40-33-203(b)(3).

Forfeiture Warrant

Reference Number: CTAS-1290

Once personal property is seized pursuant to the applicable provision of law, no forfeiture action can proceed unless a forfeiture warrant is issued in accordance with T.C.A. § 40-33-204 by a judge who is authorized to issue a search warrant. The forfeiture warrant authorizes institution of the forfeiture proceeding. T.C.A. § 40-33-204(a). General sessions judges may authorize magistrates or judicial commissioners to issue forfeiture warrants. However, prior to such authorization, the general sessions judge must train and certify that the magistrates or judicial commissioners understand the procedure and

requirements relative to issuing a forfeiture warrant. T.C.A. § 40-33-204(c)(3).

The officer making the seizure must apply for a forfeiture warrant by filing an affidavit within five working days following the property seizure. The forfeiture warrant is based upon proof by affidavit and must have attached to it a copy of the Notice of Seizure. The affidavit in support of the forfeiture warrant must state the legal and factual basis making the property subject to forfeiture. If the owner or co-owner of the property was not the person in possession of the property at the time of seizure and can be determined from public records of title, registrations or other recorded documents, the affidavit must state with particular specificity the officer's probable cause for believing that the owner or co-owner of the property knew that such property was of a nature making its possession illegal or was being used in a manner making it subject to forfeiture as well as the legal and factual basis for the forfeiture of such interest. If the interest of a secured party with a duly perfected security interest as reflected in the public records of title, registration or other recorded documents is sought to be forfeited, the affidavit must state with particular specificity the officer's probable cause that the secured party's interest in the property is nevertheless subject to forfeiture as well as the legal and factual basis for the forfeiture of such interest. T.C.A. § 40-33-204(b).

If the seizing officer asserts to the judge that he or she was unable to determine the owner of the seized property or whether the owner's interest is subject to forfeiture within the required five-day period, the judge may grant up to 10 additional days to seek a forfeiture warrant. In order to grant additional time, the judge must find that the seizing officer has exercised due diligence and good faith in attempting to determine the owner of the property or whether the owner's interest is subject to forfeiture and made a factual showing that because of the existence of extraordinary and unusual circumstances an exception to the five-day forfeiture warrant requirement is justified. T.C.A. § 40-33-204(c)(2).

If the person in possession of the property is not the registered owner as determined from public records of titles, registration or other recorded documents, the judge may consider other indicia of ownership that proves that the possessor is nonetheless an owner of the property. Such other indicia of ownership shall include, but is not limited to, the following:

1. How the parties involved regarded ownership of the property in question;
2. The intentions of the parties relative to ownership of the property;
3. Who was responsible for originally purchasing the property;
4. Who pays any insurance, license or fees required to possess or operate the property;
5. Who maintains and repairs the property;
6. Who uses or operates the property;
7. Who has access to use the property; and
8. Who acts as if they have a proprietary interest in the property.

T.C.A. § 40-33-204(d).

The judge will issue the forfeiture warrant if the judge finds that the offered proof establishes probable cause to believe that the property is subject to forfeiture and if the property is owned by one whose interest is described in public records of titles, registrations or other recorded documents, that the owner's interest is subject to forfeiture. T.C.A. § 40-33-204(c)(1). Once the forfeiture warrant has been issued, the officer must, within seven working days, send the warrant, a copy of the affidavit and the notice of seizure to the Department of Safety Legal Division. The sheriff's office must maintain a copy of the notice of seizure for all property seized at its main office. The notices and receipts are public records. T.C.A. § 40-33-204(g). If no forfeiture warrant is issued and the property is not needed for evidence in a criminal proceeding, the sheriff's office must return the property to the owner, as determined from public records of titles, registration or other recorded documents, or if the owner cannot be determined, to the person in possession of the property at the time of seizure. T.C.A. § 40-33-204(f).

Upon receipt of the documents, the legal division will notify any other owner, as may be determined from public records of titles, registration or other recorded documents, or secured party that a forfeiture warrant has been issued. T.C.A. § 40-33-204(g). Any person asserting a claim to the seized property may, within 30 days of being notified by the legal division that a forfeiture warrant has issued, file a written claim requesting a hearing and stating the person's interest in the seized property for which a claim is made. T.C.A. § 40-33-206(a). See T.C.A. § 40-33-205 regarding interests of a secured party. Only the sheriff or the sheriff's designee may be permitted to negotiate or enter into any type of settlement agreement or agreements prior to the forfeiture hearing. In no event may any officer involved in seizing the property be allowed to negotiate or enter into any type of settlement agreement or agreements prior to the forfeiture hearing. All negotiated settlements by the sheriff's office are subject to the approval of the commissioner of safety. T.C.A. § 40-33-212. If a claim or proof of a security interest is not filed with

the legal division within the specified time, the seized property will be forfeited and disposed of as provided by law. T.C.A. § 40-33-206(c).

Within 30 days from the day a claim is filed, the legal division will establish a hearing date and set the case on the docket. T.C.A. § 40-33-207(a). At the hearing, if it is determined that the state has carried the burden of proof with regard to all parties claiming an interest in the property and the ruling of the commissioner of safety is adverse to the claimant or claimants, the property will be sold or disposed of as provided by law. T.C.A. § 40-33-210(d). Once property has been forfeited, it is the duty of the sheriff to remove it for disposition in accordance with the law. T.C.A. § 53-11-451(e).

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