



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Roland Boyd
Criminal District Attorney
Collin County
McKinney, Texas

Attention: Honorable Dwight Whitwell

Dear Sir:

Opinion No. 0-4892
Re: Legality of procedure un-
der Article 666-44, Ver-
non's Annotated Penal Code,
with respect to the order
of sale of a motor vehicle
used in the illegal trans-
portation of liquor, and a
related question.

Your letter of recent date requesting the opinion
of this department on the questions stated therein reads in
part as follows:

"Will you please advise this office your
opinion on the following questions:

"Under Article 666-44 of the Penal Code
which deals with the illegal transportation of
liquor we find this language, 'The court upon
conviction of the person so arrested shall order
the alcoholic beverages disposed of as provided
in this act and unless good cause to the con-
trary is shown by the owner, shall order the
sale by public auction of the property seized,
and the officer making the sale, after deduct-
ing the expenses of keeping the property, the
seizure and the cost of sale, shall pay all liens
and so forth'. The punishment of the liquor con-
trol act make the offenses misdemeanors of which
the county court is the only court that has jur-
isdiction. Acting under the wording of this

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statute our county court, after conviction of the offenses in that court for the illegal transportation of liquor, in the same case and on the same docket sheet enters an order directing the sheriff to sell the motor vehicle involved in the case.

"Question No. One. In view of the fact that the constitution of Texas provides that the District Court shall have exclusive jurisdiction of all civil suits on behalf of the state to declare forfeitures, is this statute and the above procedure under it, legal or illegal?

"Question No. Two. Article 950 of the Code of Criminal Procedure provides that the County Attorney shall receive a commission of 10% and the county clerk 5% on all fines and forfeitures and judgments in behalf of the state or county for the collection of money. Does this statute authorize the county court to direct the sheriff to pay such commissions to said officers on the selling price of a forfeited automobile, to be paid out of the proceeds of the sale?

"In this connection, we desire to call your attention to the case of Pharris vs. Kimbrough 118 S. W. (2d) pg. 662 and particularly the following language at the bottom of page 663 wherein the Austin Court of Civil Appeals says, 'Under the statute involved and the authorities, the guilt of the automobile, or the state's right of forfeiture, is imputed upon the conviction of the owner or person using the automobile in the commission of the offense; and relates back to the date of the commission of the offense. The proceeding is therefore not to forfeit, but to enforce the forfeiture that has resulted under the statute from the conviction of unlawful transportation of intoxicating liquor, in the commission of which offense the automobile was used.'

"Our own personal ideas of the situation is that this whole proceeding is a criminal proceeding

over which the county court has jurisdiction and is not such a civil action and forfeiture as would place exclusive jurisdiction in the district court, and since as a result of the efforts of the county attorney a conviction results in a prosecution, and as a result of such conviction a forfeiture of the car follows and a judgment is thereby secured ordering the sale, and as a result of the sale the State Liquor Board receives large sums of money in cash. It occurs to us that this is a forfeiture or judgment on which the above mentioned fees should be paid.

"We are having a large number of these proceedings in this county and during the past year have paid into the State Liquor Board several thousand dollars on which no local officer received any fees which, by the way, would have gone to the benefit of our officer's salary fund. In the event you hold that such fees are collectable in such proceedings, will you also advise if the court will be authorized to direct the withholding out of future sales sufficient funds to pay fees in past proceedings out of which no fees were collected."

In answer to your first question we direct your attention to our opinions Nos. 0-4898 and 0-4693 which hold that the procedure with reference to the sale of motor vehicles under Article 666-44, Vernon's Annotated Penal Code, as set out in your letter is legal and the proper procedure to follow in such cases. In your first question you also asked whether or not this statute (Article 666-44, supra), is legal or illegal? We assume that you raise the question of the constitutionality of this statute. In the case of *Phariss v. Kimbrough*, 118 S. W. (2d) 662, the question as to the constitutionality of the statute (Article 666-44, supra), was raised on certain grounds as mentioned therein and the court held the statute to be constitutional.

We now consider the second question submitted by you. Article 950, Vernon's Annotated Code of Criminal Procedure, provides:

"The district or county attorney shall be entitled to 10% of all fines, forfeitures or

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moneys collected for the state or county, upon judgments recovered by him; and the clerk of the court in which said judgments are rendered shall be entitled to 5% of the amount of said judgments, to be paid out of the amount when collected."

Referring to this statute (Article 950, supra) it is stated in Texas Jurisprudence, Volume 15, page 424:

"This enactment was intended to cover all recoveries of money for the state or county for which a particular proceeding is instituted and prosecuted to judgment of recovery in favor of the state or county."

Commissions on adjudged forfeitures become due to the attorneys representing the State only when the money is collected, and they are to be taken out of such money; they are not costs and cannot be taxed as such. (State v. Dyches, 28 Tex. 535; Texas Jurisprudence, Volume 19, page 817.)

We do not think that the procedure with reference to the sale of a motor vehicle under Article 666-44, supra, is a procedure to declare a forfeiture as contemplated by the Constitution. The procedure involved in the disposition of the property seized under said statute is not a proceeding to forfeit. We direct your attention to the language of the court in the case of Pharise v. Kimbrough, 118 S.W. (2d) 662, where the court is referring to such a proceeding and says:

"The proceeding is therefore not to forfeit; but to enforce the forfeiture that has resulted under the statute from the conviction of unlawful transportation of intoxicating liquor, in the commission of which offense the automobile was used.
. . ."

We do not think that the statute (Article 950, supra) is broad enough to allow the commission mentioned therein to the county or district attorney or to the clerk of the court in the proceeding under consideration. It will be noted that Article 666-44, supra, among other things, provides in effect that the officer making the sale, after deducting the expenses of keeping the property, the seizure, and the costs of sale,

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shall pay all liens according to the priorities which are established by intervention or otherwise at said hearing or in other proceedings brought for said purpose, as being bona fide, and as having been created without the lien or having any notice that the vehicle was being used or was to be used for any illegal transportation of liquor shall pay the balance of the proceeds to the Board to be allocated as permit fees.

In connection with the foregoing it is our further opinion that the district or county attorney would not be entitled to any commission under Article 335, Vernon's Annotated Civil Statutes. In support of this statement we direct your attention to our opinion No. 0-2410 (Conference Opinion No. 0-3105) construing Article 335, Vernon's Annotated Civil Statutes.

Copies of all the above mentioned opinions referred to are enclosed herewith. We also enclose herewith copies of our opinions Nos. 0-4722 and 0-4040 construing Article 666-44, Vernon's Annotated Penal Code.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*

Ardell Williams
Assistant

AW:db

Enclosures

Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

