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GREG ZOELLER
INDIANA ATTORNEY GENERAL

OFFICIAL OPINION 2010-1

May 12, 2010

Stephen J. Johnson
Executive Director
Indiana Prosecuting Attorneys Council
302 West Washington Street, Room E-205
Indianapolis, Indiana 46204-2767

Re: Civil Forfeitures and the Common School Fund

Dear Mr. Johnson:

You requested a legal opinion on the following issue:

Does the fine and forfeitures provision in Article 8, § 2 of the Indiana Constitution apply to civil forfeiture actions brought under Ind. Code ch. 34-24-1?

It is our opinion that Article 8, § 2 of the state constitution does not apply to forfeiture actions brought under Ind. Code ch. 34-24-1. Article 8 of the Indiana Constitution provides for the funding of the common school fund, part of which is derived “from the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue.” Art. 8, § 2. A proceeding under Indiana’s forfeiture law is civil in nature, and it is only fines and forfeitures from criminal proceedings that must be paid into the common school fund.

Background

The Indiana Constitution provides that a funding source for the common school fund is “fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue”. Article 8, § 2. Under Indiana’s forfeiture statute, Ind. Code § 34-24-1-1 *et seq.*, the proceeds from forfeiture proceedings are properly allocated to the appropriate law enforcement agencies and any excess is then paid to the state for the common school fund. Ind. Code § 34-24-1-4(d)(2)(C)(i) and (D).

Discussion

Both of Indiana’s constitutions have directed fiscal penalties resulting from violations of the penal laws to be used as a source of public funding for education and our Supreme Court has consistently held that those penalties are to be derived only from civil, and not criminal, proceedings. The Indiana Constitution of 1816 provided for public support of county seminaries from “all fines assessed for any breach of the penal laws” in the counties where the crime took place. Ind. Const. of 1816, art. 9 § 3. In examining that provision, the Court concluded that “a suit on a penal statute is not a criminal but a civil cause.” *The Common Council of the Town of Indianapolis v. Fairchild*, 1 Ind. 315, 318 (1848). The Court held that the framers intended that “fines” meant “not penalties or forfeitures for violations of criminal statutes, but pecuniary punishments for breaches of the criminal law.” *Id.*

The Constitutional Convention of 1850 abolished the county seminaries and established common schools. “Unlike the 1816 Constitution, however, its 1851 successor created the Common School Fund and prescribed a methodology for financial support . . .” *Bonner v. Daniels*, 907 N.E.2d 516, 521 (Ind. 2009). The common school fund is derived from various

sources of revenue, one of those being “from the fines assessed for breaches of the penal laws of the state, and from all forfeitures which may accrue.” Ind. Const. 1851, art 8, § 2.

In considering the term “forfeitures” as it appears in Art. 8, §2, the Court observed the following:

A forfeiture may be generally defined to be the loss of what belongs to a person in consequence of some fault, misconduct or transgression of law. In the connection in which the term “forfeitures” is used in the Constitution, it evidently means the loss of a certain sum of money as the consequence of violating the provisions of some statute, or the refusal to comply with some requirement of law.

The State, ex rel. Baldwin, Attorney General v. The Board of Commissioners of the County of Marion, 85 Ind. 489, 493 (1882). The Court’s equating a forfeiture with a fine is based on its reference to a contemporary law dictionary and is consistent with an observation of the United States Supreme Court that in early forfeiture statutes enacted by Congress and in dictionaries of the late eighteenth century, the word “fine” was understood to include ‘forfeiture’ and vice versa.” *Austin v. United States*, 509 U.S. 602, 614 n. 7 (1993).

In subsequent rulings the Court held, consistent with its observations about the Constitution of 1816 in *Fairchild*, that for purposes of Art. 8 § 2, a “fine” is a penalty to be recovered “in criminal prosecutions” not “by a civil action.” *Burgh v. State ex rel. McCormick*, 108 Ind. 132, 135, 9 N.E. 75, 76 (1886). In the case of *State v. Indiana & I. S. R. Co.*, 133 Ind. 69, 32 N.E. 817 (1892), the Court considered a statute that provided for the forfeiture of funds to the county “to be recovered in a civil action” if a railroad failed to properly display notice of a train’s estimated time of arrival. As in *Fairchild* and *Burgh*, the Court held that money collected in a civil action need not go to the state common school fund, but could go in a direction chosen

by the legislature including to “a fund for the service of public officers.” *Id.* at 820.¹ *See also Toledo, St. L. & K.C.R. Co. v. Stevenson*, 131 Ind. 203, 30 N.E. 1082, 1082 (1892); *Judy v. Thompson*, 156 Ind. 533, 60 N.E. 270, 271 (1901); *State v. Town of Roseland*, 178 Ind. App. 661, 383 N.E.2d 1076, 1080 (1978), *reh’g denied*.

In *Caudill v. State*, 613 N.E.2d 433, 436 (Ind. Ct. App. 1993) the Court of Appeals, provided a detailed discussion of the nature and purposes of the forfeiture statute. A major holding of the decision is that the general assembly intended forfeiture to be a civil and not criminal proceeding. First, forfeiture is in the nature of an action *in rem*, a traditionally civil action, because jurisdiction depends upon the location of the property seized. 613 N.E.2d at 437. Second, the forfeiture statute appears in Title 34 among actions that are unquestionably civil (tort claims against governmental entities, civil action for crime victims, civil remedies for RICO activities), and not in Title 35, which comprises Indiana’s criminal laws. *Id.* Third, the court found that the forfeiture statute serves remedial, non-punitive purposes.

Finally, in *\$100 v. State*, 822 N.E.2d 1001, 1015 (Ind. Ct. App.2005) *trans. denied*, the Court of Appeals directly addressed the question of whether Ind. Code § 34-24-1 was unconstitutional. In *\$100*, Abbi Ellenstein was charged by Information with two counts of Dealing in Marijuana as a class D felony, and one count of Maintaining a Common Nuisance as a class D felony. She ultimately pled guilty to possession of marijuana under 30 grams as a class A misdemeanor, and the other counts were dismissed.

After she pled guilty, the Evansville Police Department filed a Complaint for Forfeiture, seeking \$100 and a 1993 black Cadillac that were in Ellenstein’s possession when she was

¹ In *Burgh and Indiana & I.S.R.*, a portion of the funds went to the county prosecutor.

arrested for the acts leading to her criminal charges. The Evansville Police also filed a Complaint for Forfeiture, seeking \$998.00 that was found at Ellenstein's residence. Ellenstein filed a response that argued the forfeiture statute was unconstitutional. The trial court conducted a bench trial on the forfeiture issue and at the end of the trial the judge ordered the vehicle forfeited, but all the money returned to Ellenstein. Ellenstein appealed but the court found that, "Ellenstein's guilty plea to dealing in marijuana was sufficient to permit the trial court to conclude by a preponderance of the evidence that, when Ellenstein was in her Cadillac with a pound of marijuana, she was transporting it for the purpose of committing dealing in marijuana." \$100 at 1007. In addressing Ellenstein's constitutional challenge, the court held that:

[F]orfeiture statutes are *in rem* civil proceedings against property, not against a person. The forfeiture does not occur automatically upon conviction of a crime; rather a separate proceeding must be conducted by the State. Accordingly, the forfeitures at issue are not the "fines assessed for breaches of the penal laws" discussed in Article 8, Section 2 of the Indiana Constitution.

\$100 at 1015.

Over the years, the courts have held that Article 8, § 2 of the state constitution does not pertain to civil fines and forfeitures. As the ruling in \$100 makes clear, that tenet also applies to the civil forfeiture statute found at Ind. Code ch. 34-24-1.

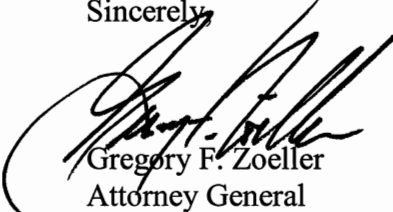
Conclusion

Article 8, § 2 of the state constitution does not apply to forfeiture actions brought under Ind. Code ch. 34-24-1 because that provision of the constitution pertains only to forfeitures

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attendant to criminal proceedings. Actions brought under Ind. Code ch. 34-24-1, however, are civil in nature.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory F. Zoeller", is written over the typed name. The signature is stylized with a large initial "G" and "Z".

Gregory F. Zoeller
Attorney General

Gordon White
Deputy Attorney General