

Opinion No. 2013-150

March 17, 2014

The Honorable Douglas House
State Representative
8923 Bridge Creek Road
North Little Rock, Arkansas 72120-9469

Dear Representative House:

I am writing in response to your request for my opinion on a question I will paraphrase as follows:

What is the proper disposition of possibly abandoned tools found over a year ago by a citizen on his private property adjacent to a rural county road and subsequently turned over to the county sheriff for investigation? The sheriff's office has reportedly claimed the property for official use.

By way of background, you recite the following facts relating to a constable's reported discovery "[o]ver a year ago" of "a number of power hand tools" on his property:

The tools were found adjacent to a county road on rural real property owned by [the constable]. The position of the tools indicates that a person intentionally threw the tools from the road, across a ditch, and beyond the right-of-way onto [the constable's] land. The identity of the person who deposited the tools is unknown. There was no evidence at the scene to determine whether the tools were stolen or abandoned. Assuming the tools were possibly stolen, [the constable] contacted the Pulaski County Sheriff. A Deputy Sheriff came to [the constable's] home and collected the tools. The Pulaski County sheriff has not been able to determine the owner.

[The constable] has inquired of the Sheriff's Office regarding the disposition of the property. The Sheriff's Office has informed him that ownership of the property will be retained by the Sheriff's Office for official use.

RESPONSE

As Attorney General, I am neither authorized nor equipped to act as a finder of fact, meaning that I cannot determine into what category the found tools fall for purposes of determining who has the right to their possession. I am further unauthorized to engage in the private practice of law, meaning that I cannot advise a private individual regarding the strength of his claim to property reportedly retained by a sheriff's department for official use.

DISCUSSION

In *Franks v. Pritchett*,¹ the Arkansas Court of Appeals reviewed the common-law standard to determine the right to possession of found property whose ownership is unascertainable.² The court prefaced its analysis with the following acknowledgment that the process of classification required in any such inquiry will in all instances be intensely factual:

The rights of a finder of property depend on how the found property is classified, and the character of the property should be determined by evaluating all the facts and circumstances present in the particular case.³

As an executive official, I am neither authorized nor equipped to perform the essentially judicial task of classifying such property in order to resolve competing claims thereto. I am further expressly precluded by statute from engaging in the private practice of law⁴ – a fact that in itself precludes me from indirectly advising

¹ 88 Ark. App. 243, 197 S.W.3d 5 (2004).

² See also *Terry v. Lock*, 343 Ark. 452, 27 S.W.3d 202 (2001) (adopting the common-law categories of found property summarized in *Franks*). For an application of the *Terry* standards by this office that predates the court's express adoption of common law, see Op. Att'y Gen. No. 97-136 (opining that under this test money found in a truly "lost" wallet turned over to police would belong to the finder, not the city, subject to the finder's obligation to make reasonable efforts to locate the true owner).

³ 88 Ark. App. at 246-47.

your constable-constituent regarding the strength of his claim to the found power tools.

In an observation possibly intended to question the Sheriff's Office's claim to the property, you declare: "There was no evidence at the scene to determine whether the tools were stolen. . . ." Under certain limited circumstances, property adjudged stolen may indeed be awarded to a law enforcement agency for official use. Specifically, a law enforcement department may by court order be awarded the use of "seized" stolen property that qualifies as "contraband."⁵ Your factual recitation, however, suggests that there is no pending criminal action in connection with which the tools might be characterized as having been "seized" and hence no occasion for a court to dispose of the tools as "contraband."⁶

Only a finder of fact could determine under what claim of right the sheriff's department is currently holding the property.⁷ As a general proposition, with

⁴ A.C.A. § 25-19-701 (Repl. 2002).

⁵ The pertinent statute defines "contraband" as including any "[a]rticle possessed under a circumstance prohibited by law," any "[w]eapon or other instrument used in the commission or attempted commission of a felony" and any "[o]ther article designated 'contraband' by law." A.C.A. § 5-5-101(b)(1)(A), (B) and (H) (Repl. 2013). With respect to the disposition of such property, the statute mandates that contraband (1) be destroyed or (2) upon court order, be either sold or "[r]etained for use by the law enforcement agency responsible for the arrest." *Id.* at subsection (c). As reflected in this statutory reference to "the arrest," it appears that the category of "seized property" possibly subject to forfeiture to a sheriff's department is only property "seized" incident to an arrest – a condition you suggest, but which I cannot confirm, was not met in this case. (A sheriff's department, however, may apparently *never* retain for official purposes property confiscated within any *city*. See A.C.A. § 24-11-415(a)(1)(A) (Supp. 2011) ("In all cities and towns, all goods confiscated by a police officer of the city, by the sheriff, or by an officer of the Department of Arkansas State Police within the city and that are no longer needed as evidence shall be sold at auction or Internet auction."); see also Op. Att'y Gen. No. 2009-103 (discussing the interrelationship between this statute and A.C.A. § 5-5-101). Moreover, only if the tools at issue were judicially determined to be contraband, and only then upon express court order, would the sheriff's department be entitled to retain the property for official use. Again, I am not situated to determine whether these conditions have been met.

⁶ The Arkansas Rules of Criminal Procedure set forth various rules relating to the disposition of property seized in conjunction with a pending criminal action. Ark. R. Crim. P. 15.1 through 15.5. In particular, Rule 15.5 provides that "[n]othing in this Article shall be construed to abrogate any civil remedy otherwise available. See discussion of remedies, *infra*. For a general overview of statutory law specifically addressing the disposition of property seized in connection with criminal activities, see Op. Att'y Gen. No. 2007-305.

⁷ I will note, in this regard, that any such resolution might well be in a civil court, even if the property is in official hands in connection with a criminal prosecution. See Ark. R. Cr. P. 15.2(f) (providing that, in a dispute over the right to possession of seized property, "the court hearing the matter may, in its discretion, return the things to the person from whom possession they were seized, or impound the things seized and remit the several claimants to appropriate civil process for determination of the claims").

respect to found property that is not contraband, determining the “rightful owner or possessor” would in each instance entail applying the common-law test for right to possession.⁸ This principle applies even to noncontraband property seized for use in a criminal proceeding, as the following provision in the Criminal Code reflects: “Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.”⁹

Finally, any dispute regarding the appropriate classification or disposition of the property at issue would presumably be resolved in an action for declaratory and injunctive relief in municipal or circuit court.¹⁰ For reasons discussed above, however, determining the availability or propriety of any particular forum or remedy is a matter for determination by private legal counsel, not by this office. I will add only that a sheriff’s department in custody of such property, presumably in consultation with counsel acquainted with all of the facts, might potentially avoid litigation by classifying the property using the criteria discussed above and disposing of it accordingly.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

⁸ Again, this test was adopted and set out in detail in *Terry* and *Franks*, *supra*.

⁹ A.C.A. § 5-5-101(a) (Repl. 2013).

¹⁰ *See, e.g., Franks, supra* (affirming trial court ruling enjoining a city to return found money deemed “misaid” to hotel owner, rather than to hotel-guest finder of the money); *Terry, supra* (affirming trial court rulings enjoining appellee to interplead disputed found funds, declaring the funds “misaid” and awarding funds to appellee motel owner, as opposed to the motel guest who found the funds). In *Franks*, the police department counterclaimed, asserting an interest in the money, but subsequently withdrew its claim. 88 Ark. App. at 246.